UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

* *

AUSTIN FIRE EQUIPMENT, LLC	*	
Respondent,	*	Case No. 15-CA-019697
and	*	
ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO	*	
Union.	*	

* *

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AUSTIN FIRE EQUIPMENT, LLC	*	
Respondent	*	
	*	
and	*	
	*	**Case No. 15-CA-19697**
ROAD SPRINKLER FITTERS LOCAL UNION	*	
NO. 669, U.A., AFL-CIO	*	
Union	*	

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

COMES NOW Kevin McClue and Caitlin E. Bergo, Counsels for the Acting General Counsel (Counsels) and files this Memorandum in Support of Cross-Exceptions to the Administrative Law Judge's (ALJ) Decision and Order (ALJD) in the above-captioned case.

I. STATEMENT OF THE CASE[1]

The Union is a labor organization with a national office in Columbia, Maryland. (Tr. at 235, 3-4). The National Fire Sprinkler Association (Association) is a group of contractors in the fire sprinkler industry that negotiate a national agreement (CBA) with the Union. (Tr. at 112, 16-20). The CBA at issue in this case has effective dates of April 1, 2007-March 31, 2010. (J-1, C).

The facts of the case are essentially undisputed.

Before 2007, Union representatives had multiple contacts with Austin Fire Equipment, LLC's (Respondent) founder and owner, Russell Ritchie (Ritchie), in order to build a

[1] Reference to the Exhibits of the General Counsel and Respondent will be designated as "GCX" and "RX" respectively, with the appropriate number or numbers for those exhibits. The Joint Exhibits of General Counsel and Respondent will be designated as "JX". Reference to the transcript and the ALJD in this matter will be designated as "Tr." and "ALJD" respectively. An Arabic numeral(s) after "Tr." or "ALJD" is a spot cite to a particular page of the transcript or the ALJD; and an Arabic numeral(s) following a page spot cite references specific lines of the page cited. E.g. Tr. 15, 13-16 is transcript page 15 at lines 13-16.

relationship with Respondent and to work toward having Respondent sign with the Union as a signatory contractor. (Tr. 242, 11-12; 101, 20-21).

In June 2007, Respondent was awarded a job at the Meadowview Health & Rehab Facility (Meadowview) in Minden, Louisiana. Ritchie testified the job was approximately two to three hours away from Respondent's office in Prairieville, Louisiana, and although the work was the type performed by his regular sprinkler fitters, he did not want to send any of them that far away from their families. (Tr. 242, 9-19; at 243, 19-21). As a result, Respondent contacted the Union.

On June 5, 2007, Respondent signed a One-Job-Project Agreement with the Union for the Meadowview job. (J-1, A). The Union referred two sprinkler fitters with the last names Kent and Thompson to work at the Meadowview job. The Meadowview job lasted six months. (J-1, A; GC-19 - monthly benefits reports for Meadowview showing contributions for sprinkler fitters Kent and Thompson).

Under the terms of the One-Job-Project Agreement, Respondent paid Kent and Thompson at the CBA's hourly rates and made fringe benefit payments to the Union on behalf of Kent and Thompson in accordance with the CBA. (Tr. 229, 18-23). Ritchie testified that he was extremely satisfied with the results produced by the One-Job-Project Agreement. (Tr. 107, 2).

In May 2008, Respondent was awarded a "million-dollar sprinkler job" at the Valero Refinery (Valero) in Krotz Springs, Louisiana. Ritchie testified that he needed twelve sprinkler fitters to complete the job, and he contacted the Union to see about signing a contract. (Tr. 72, 7-11; 245, 8-16.) The Parties agreed that Respondent would become a Union contractor. Respondent and the Union agreed to execute the necessary documents on July 8, 2008.

On July 8, 2008, representatives of the Respondent and the Union met at Respondent's office in Prairieville, Louisiana for the purpose of entering into a collective bargaining agreement. Respondent became a signatory contractor to the CBA by signing the signatory page to the CBA and the Acknowledgement of the Representative Status of Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (Acknowledgement). (J-1, C; GC-4; Tr. 254, 21-23; 257, 1-19). The Acknowledgement reads as follows:

> 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. (GC-4).

The Complaint and Notice of Hearing in the matter issued on January 31, 2011. Respondent's Answer was filed on February 14, 2011. The case was heard by the ALJ on June 22 and 23, 2011.

In its defense, the Respondent argued that, even under *Central Illinois Construction,* 335 NLRB 717 (2001), the Acknowledgement would not establish a 9(a) relationship because it was part of an agreement comprised of three documents and should be considered together with the two other documents. The Respondent further argued the three documents together created an ambiguity regarding the Parties' recognitional intentions; therefore, the ALJ should look at extrinsic evidence that would show the Union did not have majority support from the Respondent's employees at the time it signed the agreement.

In the ALJD dated November 29, 2011, the ALJ found merit to the Respondent's defense. She found the "agreement" was comprised of three separate documents that, taken together, were ambiguous as to whether the Parties intended to create a Section 9(a)

relationship. She therefore looked to extrinsic evidence, which consisted of testimony that the Union did not have the support of a majority of the Respondent's employees until after the parties entered into the agreement. Based on that evidence, the ALJ concluded the Parties' relationship was governed by Section 8(f), and it was not unlawful for the Respondent to withdraw recognition from the Union when the Parties' contract expired.

II. EXCEPTIONS

The Counsels except to the ALJ's failure to find that based on current Board law as set forth in *Central Illinois* the Parties' relationship was governed by Section 9(a) rather than Section 8(f) of the Act. 335 NLRB 717 (2001). Specifically, the Acknowledgement signed by the Parties was not ambiguous; therefore, should not have been considered with any other documents, and thus did not entitle the ALJ to consider extrinsic evidence regarding the Employer's grant of recognition.

III. LEGAL ANALYSIS

In the construction industry, the difference between a Section 8(f) and Section 9(a) relationship is of great importance in determining whether the parties engaged in unlawful conduct under the Act. An 8(f) relationship allows for a construction industry employer to recognize a union for the duration of a contract and then terminate the bargaining relationship upon the expiration of the contract in contrast to a 9(a) relationship which requires the employer to bargain with the union over a new agreement unless the union is shown to have lost majority support. See generally *John Deklewa & Sons*, 282 NLRB 1375 (1987); *Central Illinois Construction*, 335 NLRB 717 (2001).

In *Central Illinois*, the Board held that contract language alone is sufficient to create a 9(a) relationship with a construction industry employer instead of the presumptive 8(f). (See

Deklewa (finding an 8(f) relationship between a construction industry employer and union will be presumed unless rebutted by evidence of majority support). The Board established a three-part test to determine the sufficiency of contract language to establish a 9(a) relationship: 1) that the union requested recognition as the majority or 9(a) representative of the unit employees, 2) that the employer recognized the union as the majority or 9(a) bargaining representative, and 3) that the employer's recognition was based on the union having shown, or having offered to show that it had the support of a majority of unit employees. *Central Illinois,* supra at 719-20. The three factor test in *Central Illinois* was adopted by the Board from the Tenth Circuit's decisions in *NLRB v. Triple C. Maintenance, Inc.*, 219 F.3d 1147 (10th Cir. 2000), and *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160 (10th Cir. 2000). The Board considers whether the agreement between the parties, examined in its entirety, "conclusively notifies the parties that a 9(a) relationship is intended." *Oklahoma Installation*, supra at 1165.

The Acknowledgement that Respondent signed on July 8, 2008, alone satisfies each element of the test set forth by the Board in *Central Illinois*. In fact, in two pre-*Central Illinois* cases the Board found the exact Acknowledgement in this case to create a 9(a) relationship with the signatory employers, and by proffering the Acknowledgement to Respondent, the Union made an "unequivocal demand" for 9(a) recognition that Respondent "voluntarily and unequivocally granted" and that "[i]t is clear that the parties intended to establish a bargaining relationship under Section 9(a) of the Act." See *Triple A Fire Protection*, 312 NLRB 1088 (1993); *MFP Fire Protection*, 318 NLRB 840 (1995). The language of the Acknowledgement further satisfies the third requirement of the *Central Illinois* test because in its language it states that Respondent "has, on the basis of objective and reliable information, confirmed that a clear majority of [employees]...are represented" by the Union. This language unequivocally states that

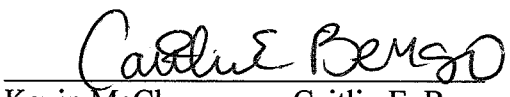
the Union showed, and that the Employer, upon review of evidence, recognized that the Union had the support of a majority of unit employees. Accordingly, the Parties' relationship was governed by Section 9(a), rather than Section 8(f). (See, e.g., *Saylor's, Inc.,* 338 NLRB 330 (2002)(finding contract language sufficient to establish a 9(a) relationship where the language stated that the union had submitted evidence of majority support).

The fact that the Union in this case did not make a showing of majority support to Respondent concurrent with the signing of the CBA does not preclude a finding that the Respondent and Union entered into a 9(a) relationship. Where the recognition language is found to be "unequivocal," as it is in this case, it is irrelevant whether or not the Union actually presented the Employer with evidence of its majority status at the time of recognition. (See *H.Y. Floors & Gameline Painting,* 331 NLRB 304 (2000).

IV. CONCLUSION

Counsels submit the Acknowledgement was unambiguous, thus the ALJ erred by considering it in the light of any other documents, which, read together, potentially created the ambiguity the ALJ relied upon to consider testimonial evidence. Therefore, Counsels except to this portion of the ALJD and submit that the ALJ should have found that under current Board law, the Acknowledgement alone created a 9(a) relationship between the Parties.

Dated at New Orleans, Louisiana this 7th February of 2012.



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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2012, I electronically filed a copy of the foregoing Acting General Counsel's Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge with the Executive Secretary of the National Labor Relations Board and forwarded a copy by electronic mail to the following:

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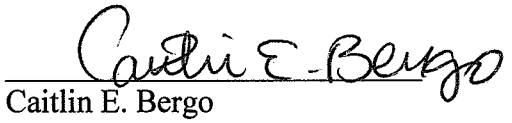

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