

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

AUSTIN FIRE EQUIPMENT, LLC

Respondent,

and

ROAD SPRINKLER FITTERS LOCAL
UNION NO. 669, U.A., AFL-CIO

Union.

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Case No. 15-CA-019697

**COUNSELS FOR THE ACTING GENERAL COUNSEL'S REPLY BRIEF
TO RESPONDENT'S ANSWERING BRIEF TO COUNSELS FOR THE ACTING
GENERAL COUNSEL'S CROSS EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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New Orleans, LA 70130

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COMES NOW Kevin McClue and Caitlin E. Bergo, Counsels for the Acting General Counsel (Counsels) in the above-styled matter and files this brief with the National Labor Relations Board (Board).

I. COUNSELS FOR THE ACTING GENERAL COUNSEL CROSS EXCEPTIONS¹

On November 29, 2011, Administrative Law Judge Margaret G. Brakebusch (ALJ) issued her Decision and Order (ALJD) in this matter in which she concluded that Section 8(f)

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.

rather than Section 9(a) of the Act governs the relationship between the parties. The ALJ found that Austin Fire Equipment, LLC (Respondent) violated Section 8(a)(1) and (5) of the Act as alleged in paragraph 11 of the Complaint and Notice of Hearing (Complaint) issued on January 31, 2011, and dismissed Complaint paragraphs 13, 14, 15, 16, and 17.

On February 7, 2012, the Counsels filed an Exception to the Administrative Law Judge's Decision and a Brief in Support of Exceptions. Therein, the Counsels excepted to the ALJ's failure to find that based on current Board law as set forth in *Central Illinois Construction*, 335 NLRB 717 (2001), the Parties' relationship was governed by Section 9(a) rather than Section 8(f) of the Act.

On February 20, 2012, Respondent filed an Answering Brief in Opposition to the Acting General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge (Respondent's Answering Brief to AGC's Cross Exceptions). In Respondent's Answering Brief to AGC's Cross Exceptions, Respondent referred to and incorporated by reference the arguments and authorities set forth in Respondent's Answering Brief in Opposition to Charging Party Exceptions (Respondent's Answering Brief to CP's Exceptions). In Respondent's Answering Brief to CP's Exceptions, Respondent basically asserts that the totality of the circumstances surrounding the formation of the relationship evidenced an intent to establish a Section 8(f) relationship and not a Section 9(a) relationship.

II. STATEMENT OF FACTS

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

Before 2007, Union representatives had multiple contacts with Respondent's owner, Russell Ritchie (Ritchie), in order to build a relationship with Respondent and have Respondent sign with the Union as a signatory contractor. (Tr. 242, 11-12; Tr. 101, 20-21).

In June 2007, Respondent was awarded a six-month 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; Tr. 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. (J-1, A; GCX 19).

Under the terms of the One-Job-Project Agreement, Respondent paid Kent and Thompson at the Agreement's hourly rates and made fringe benefit payments on behalf of Kent and Thompson in accordance with the Agreement. (Tr. 229, 18-23). Ritchie testified that he was extremely satisfied with the results. (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 about signing a contract. (Tr. 72, 7-11; Tr. 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 Agreement by signing the signatory page to the Agreement and the Acknowledgement of the Representative Status of Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (Acknowledgement). (J-1, C; GCX 4; Tr. 254, 21-23; Tr. 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. (GCX 4).

The ALJ found the "agreement" was comprised of three separate documents that, taken together, were ambiguous about the Parties intent to create a Section 9(a) relationship. She found the relationship was a Section 8(f) relationship rather than Section 9(a) relationship.

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) and *Central Illinois*.

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). 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 Respondent signed on July 8, 2008, standing 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 created 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). Moreover, the language of the Acknowledgement also satisfies the third requirement of the *Central Illinois* test because its language unambiguously 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

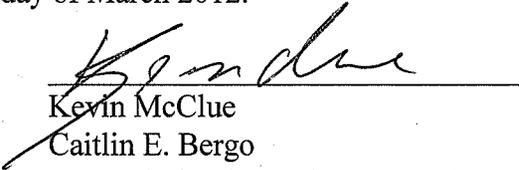
of evidence, recognized that the Union had the support of a majority of unit employees. Accordingly, the Parties' relationship was governed by Section 9(a), rather than Section 8(f). (See, e.g., *Saylor's, Inc.*, 338 NLRB 330 (2002)(finding contract language sufficient to establish a 9(a) relationship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

The fact the Union in this case did not make a showing of majority support to Respondent concurrent with the signing of the Agreement 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, and Counsels exception to that portion of the ALJD should be upheld. The Board should find that under current Board law, the Acknowledgement standing alone created a 9(a) relationship between the Parties.

Dated at New Orleans, Louisiana this 5th day of March 2012.


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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2012, I electronically filed a copy of the Counsels for the Acting General Counsel's Reply Brief to Respondent's Answering Brief to Counsels for the Acting General Counsel's Cross Exceptions to the Decision of the Administrative Law Judge in Case No. 15-CA-019697 to the National Labor Relations Board's Office of the Executive Secretary and forwarded a copy by electronic mail to the following:

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