

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

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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 ANSWERING BRIEF
TO RESPONDENT'S CROSS EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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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. STATEMENT OF THE CASE¹

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) rather than Section 9 (a) of the Act governs the relationship between the parties. The ALJ

¹ Reference to the Exhibits of the General Counsel and Respondent will be designated as "GCX" and "RX" respectively, with the appropriate number for those exhibits. The Joint Exhibits of General Counsel and Respondent will be designated as "J-1, P-# or A-F" with the P-# representing the appropriate paragraph number in Joint Exhibit 1 and A-F representing the appropriate attachment. Reference to the transcript and the ALJD will be designated as "Tr." and "ALJD," respectively. An Arabic numeral after "Tr." or "ALJD" is a spot cite to a particular page; 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, and ALJD 23, 43-45 is ALJD page 23 at lines 43-45.

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, Respondent filed Cross Exceptions to the Administrative Law Judge's Decision and a Brief in Support of Cross Exceptions. Therein, Respondent made eleven exceptions as noted below:

1. Respondent excepted to the ALJ's failure to find Respondent gave clear and unequivocal notice to the Union of intent to repudiate the collective bargaining agreement (Agreement) for Respondent's core employees in May 2009. (ALJD 23, 43-45; ALJD 24, 27-28, and ALJD 26, 5-6).

2. Respondent excepted to the ALJ's failure to find Respondent's refusal to apply the Agreement to its core employees constituted a repudiation of the Agreement for those employees. (ALJD 23, 45-46; ALJD 24, 1-3).

3. Respondent excepted to the ALJ's finding that Respondent did not unequivocally repudiate its obligations under the contract for its core employees because it continued to apply the contract to employees referred by the Union. (ALJD 23, 45-46; ALJD 24, 1).

4. Respondent excepted to the ALJ's failure to find the Union knew or should have known that Respondent repudiated the Agreement for Respondent's core employees.

5. Respondent excepted to the ALJ's failure to find the Union's late charge that Respondent made unilateral changes to the contract by refusing to apply the Agreement to its core employees was time-barred by Section 10(b) of the Act. (ALJD 26, 5-7).

6. Respondent excepted to the ALJ's finding that Respondent violated Section

8(a)(5) of the Act as alleged in paragraph 11 of the Compliant. (ALJD 22, 16-18).

7. Respondent excepted to the ALJ's Conclusion of Law that Respondent violated Section 8(a)(1) and (5) of the Act by failing to adhere to all the terms and conditions of the Agreement until its expiration on March 31, 2010. (ALJD 31, 1-3).

8. Respondent excepted to the ALJ's ordering Respondent to cease and desist from failing or refusing to continue in effect all the terms and conditions of the Agreement until March 31, 2010. (ALJD 32, 3-5).

9. Respondent excepted to the ALJ's ordering Respondent to make whole employees for losses they may have suffered as a result of Respondent's failure to continue in effect all the terms and conditions of the Agreement until March 31, 2010. (ALJD 32, 13-17).

10. Respondent excepted to the ALJ requiring Respondent to post a Notice. (ALJD 32, 25-29).

11. Respondent excepted to the ALJ's recommendation that the burden shifting scheme proposed by Counsels be adopted in the construction industry to determine the Section 8(f) or Section 9(a) status of a collective bargaining agreement, rather than recommending a totality of the circumstances analysis in which the burden remains upon the party asserting Section 9(a) status to prove the agreement was not intended to be a Section 8(f) agreement.

II. BACKGROUND FACTS AND ANALYSIS

A. Agreement at issue

The Union is a labor organization with a national office in Columbia, Maryland. (Tr. 235, 3-4). The Union divides its jurisdiction into districts; District 6 is comprised of the states of Louisiana and Arkansas. (Tr. 235, 5-12; Tr. 117, 23-25). At all relevant times, Tony Cacioppo (Cacioppo) and Donnie Irby (Irby) have been District 6's Business Agent and

Organizer, respectively. (Tr. 219, 9-10; Tr. 231, 19-20; Tr. 432, 12-17). At all relevant times, William Puhalla (Puhalla) has been the Assistant Business Manager for the Union's Southern Region, which includes the territory covered by District 6. (Tr. 112, 13-14; Tr. 118, 22-24.)

The National Fire Sprinkler Association (Association) is a group of contractors in the fire sprinkler industry that negotiate a national agreement with the Union. (Tr. 112, 16-20; ALJD 3, footnote 3). The Agreement at issue in this case has effective dates of April 1, 2007-March 31, 2010. (J-1, C).

B. First Agreement between Union and Respondent

Before 2007, Cacioppo and Irby had multiple contacts with Respondent's founder and owner, Russell Ritchie (Ritchie), in order to build a relationship with Respondent and to work toward having it sign with the Union as a signatory contractor. (Tr. 242, 11-12; Tr. 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, and although the work was of 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; ALJD 3, 20-23). As a result, the Union was contacted.

On June 5, 2007, Respondent signed a One-Job-Project Agreement with the Union for the Meadowview job. (J-1, A; ALJD 3, 20-31). 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; 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 to the Union on

behalf of Kent and Thompson in accordance with the Agreement. (Tr. 229, 18-23). The sprinkler fitters referred by the Union worked without supervision and were responsible for their own work. (Tr. 300, 20-23). Ritchie testified that he was extremely satisfied with the results (Tr. 107, 2).

C. Respondent voluntarily agreed to become a Union contractor

In May 2008, Respondent was awarded a “million-dollar sprinkler job” at the Valero Refinery (Valero) in Krotz Springs, Louisiana to start in October 2008. Ritchie testified that he needed twelve sprinkler fitters to complete the job, so he contacted the Union to see about signing a contract. (Tr. 72, 7-11; Tr. 245, 8-16; ALJD 3, 38-39.) The parties agreed Respondent would become a Union contractor. Obviously, Respondent was impressed with the work performed by Kent and Thompson at the Meadowview job and wanted the Union to provide him with skilled sprinkler fitters for the Valero job and all future jobs. (Tr. 250, 7-21; ALJD 19, 26-28). Respondent and the Union agreed to execute the necessary documents on July 8, 2008.

Ritchie testified he only wanted a one-job agreement for the Valero job, but the Union would not allow him to sign a one job agreement. Ritchie testified he met with Union representatives prior to the signing of the Agreement to “discuss how we could get these 12 people” for the Valero job. (Tr. 246, 2). Ritchie further testified he “had to get people right away” because “the job needed to start already.” (Tr. 256, 13-16). Ritchie asserts he was forced to become a Union contractor.

Ritchie’s assertions are not supported by the facts. The Valero job did not start until October 2008. (J-1, P-4). Thus, Ritchie’s assertion that “the job needed to start already” was a

false statement. Ritchie did not offer any testimony about how the Union forced him to sign a contract on July 8, 2008, for a job that was not to start until October 2008.

The record shows Ritchie agreed to become a signatory contractor because Respondent needed highly skilled sprinkler fitters to perform the same type of construction work Respondent's sprinkler fitters performed before and after July 8, 2008 (ALJD 19, 26-28).

According to Joint Exhibit 1 and Respondent Exhibit 6, the Union referred the below named sprinkler fitters to Respondent in July 2008. The number of hours the sprinkler fitters referred by the Union worked before the start of the Valero job in October 2008 are listed below:

Name	July 2008	August 2008	September 2008
Angelo Arnone Jr.	120	146	128
Henry Fajardo	126	138	123
Bryan T. Harris	40	117	76
Brad L. Leppo	112	128	83
Christopher P. Longmire	72	136	114

Respondent did not present any evidence that the work performed by the union referred sprinkler fitters in the months noted above was different in any manner to the work performed by the 14 sprinkler fitters Respondent employed before and after July 8, 2008.

Ritchie also testified that before July 8, 2008, Respondent did not have a copy of the Agreement. (Tr. 104, 1-8; ALJD 4, 8-11). Again, Ritchie's testimony is not supported by the facts. As noted above, Respondent paid Kent and Thompson hourly wages according to the Agreement and made fringe benefit payments on their behalf in accordance with the Agreement. (GCX 19). The reasonable conclusion is that in order for Respondent to abide by

the terms and conditions of the Agreement in 2007, it had to have a copy of the Agreement before July 8, 2008.

Furthermore, the undisputed evidence is that before July 8, 2008, the parties agreed to exclude Respondent's Dow employees performing sprinkler fitter work at Dow facilities from the bargaining unit. (Tr. 424, 1-17; ALJD 5, 16-24). Cacioppo testified that before July 8, 2008, Ritchie had a copy of the Agreement, and he and Ritchie compared the Agreement with Respondent's Dow contract. (Tr. 425; 13-23). The reasonable conclusion is that in order for the parties to compare the contracts and agree to exclude employees performing sprinkler fitter work at Dow facilities from the Agreement, Ritchie must have had a copy of the Agreement before July 8, 2008.

D. On July 8, 2008, Respondent entered into the Agreement with the Union

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. Ritchie and J.R. Rodriguez, Respondent's estimator at the time, represented Respondent. Puhalla, Irby, and Cacioppo represented the Union. (Tr. 74, 10-17.) Respondent became a signatory contractor to the Agreement by signing the signatory page of 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; ALJD 4, 21-35). 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).

At the time Respondent signed the Acknowledgement, the Union did not present or offer to present evidence to Respondent that it represented a majority of Respondent's sprinkler fitters.

E. Before July 8, 2008, Respondent had 14 employees performing sprinkler fitter work at non-Dow facilities

At the date of the signing, Respondent had 25 employees working at DOW facilities, seven working in its fire extinguisher division, seven in its fire alarm division, one employee in fabrication, an unknown number of inspectors, and 14 sprinkler fitters (core employees). (J-1; Tr. 77, 7-9). The Parties stipulated the core employees employed by Respondent on July 8, 2008 were: James Aitken, Joshua Alvarez, Andy Anderman, Michael Bangs, Steven Barrett, Kelly Cotton, Lyle Forbes, Nathan Litton, Michael Mayeux, Randal Morris, Frank Polito, Shannon Rogers, Joel Scarbrough, and Aaron Tanner. (J-1, P-9).

F. Bargaining unit employees performed two types of construction industry work

At least 95% of the sprinkler fitter work performed by Respondent is building and construction work. (GCX 20). The work includes sprinkler fitter work on existing facilities and on new facilities that were under construction.

G. Under the Agreement, Respondent could obtain new employees for bargaining unit work through referral from the union and through direct hire "Off the Street"

In order to hire new employees, Respondent could either use employees referred to it by the Union or hire employees directly "off the street." (Tr. 394, 11-20; ALJD 5, 29-32).

Respondent was required to notify the Union when someone was hired “off the street” to perform bargaining unit work. Cacioppo testified Respondent’s office personnel would periodically contact him to tell him when Respondent hired a new employee. (Tr. 394, 17-23; ALJD 5, 31-32).

H. Although not required by the Agreement, by the end of July 2008, a majority of Respondent’s core employees joined the Union

The ALJ noted Cacioppo testified without contradiction that Respondent’s employees were not required to be union members. (ALJD 25, 35-36). Nevertheless, by the end of July 2008, 13 of Respondent’s 14 core employees joined the Union (GCX 23; Tr. 77, 18-25; Tr. 78, 1-11) The July 2008 benefits report submitted by Respondent to the National Automatic Sprinkler Industry Fringe Benefit Fund (Fund) shows that Respondent made fringe benefit payments for all 14 of its core employees, as well as the five sprinkler fitters noted above who were referred by the Union in July 2008. (RX 6).

III. EXCEPTIONS 1, 2, and 4

Respondent excepted to the ALJ’s failure to find that Respondent gave clear and unequivocal notice to the Union of intent to repudiate the Agreement; that Respondent’s refusal to apply the Agreement to its core employees constituted a repudiation of the Agreement for those employees; and that the Union knew or should have known that Respondent had repudiated the Agreement for Respondent’s core employees.

However, the record shows and the ALJ correctly found that Respondent failed to show that it repudiated the Agreement. Assuming for the sake of argument, Respondent stopped following the Agreement for its core employees, Respondent failed to show that its core employees, except for Shannon Rogers (Rogers), performed bargaining unit work in the months

that followed the May 5, 2009, meeting at Chili's. Furthermore, Respondent failed to show that the Union had knowledge that any of its core employees, except Shannon Rogers, performed bargaining unit work in the months that followed the May 5, 2009, meeting. As noted below, Rogers performed bargaining unit work for several months following May 2009; Respondent made monthly payments on behalf of Rogers in the months following May 2009 until Rogers was transferred to a nonbargaining unit position.

A. May 5, 2009, meeting at Chili's

On May 5, 2009, Ritchie and his wife Karen Ritchie met with Irby and Cacioppo at the Chili's Restaurant in Baton Rouge, Louisiana. (Tr. 270, 4-13; ALJD 7, 7-8). Cacioppo and Irby sat on one side of the table, and on the other side Karen Ritchie sat across from Cacioppo and Ritchie sat across from Irby. (Tr. 386, 13-16; ALJD 7, 8-9).

Ritchie claims that at the meeting the Union agreed to "look the other way" while Respondent stopped paying its core employees performing sprinkler fitter work in accordance with the Agreement. (Tr. 272, 1-24; ALJD 7, 16-17). Karen Ritchie claims Ritchie told Irby and Cacioppo that he was going to remove some of its employees from the Agreement, and they were complacent in response. (Tr. 326, 2-8; ALJD 7, 20-21).

In contrast, Cacioppo testified he specifically told Ritchie that not abiding by the Agreement for some employees who were doing sprinkler fitter work was not an option, and the Union could not let him out of the contract. (Tr. 386, 18-25; Tr. 387, 1-7; ALJD 7, 27-28; ALJD 25, 10-12). Cacioppo testified he told Ritchie there was "no way to let him out of the contract." (Tr. 387, 3-7; ALJD 25, 10-12). Cacioppo also told Karen Ritchie they could not allow Respondent to remove certain employees from the Agreement because it would be unfair to all the signatory contractors. (Tr. 386, 18-25; ALJD 7, 28-30).

Irby also denied the Union agreed to let Ritchie out of the terms of the Agreement. Irby testified Ritchie asked him to help him get out of the Agreement because he was in financial trouble. (Tr. 433, 19-25). Irby further testified he reminded Ritchie that if he did not have people working, he did not have to pay into the fringe benefit funds for those employees. (Tr. 434, 10-19; ALJD 7, 34-36). Irby testified no one told Ritchie the Union would “look the other way” or “do what you got to do.” (Tr. 434, 20-23; ALJD 25, 10-12).

As noted above, Cacioppo’s and Irby’s testimonies contradict those of Ritchie and Karen regarding the conversation at Chili’s. It appears Respondent introduced Ritchie’s testimony regarding the Chili’s meeting in attempt to show that the parties agreed to a mid-contract modification on May 5, 2009. However, Respondent did not produce any documentation memorializing the alleged agreement. It is not credible the Union agreed to a mid-contract modification and Respondent did not memorialize it by sending the Union an email and/or making a note in Respondent’s files memorializing the conversation, the terms of the agreement, and/or the date the agreement was reached. This is especially true considering Ritchie’s testimony that the meeting was very important to him. (Tr. 300, 25; Tr. 301, 1-2; Tr. 304, 5-8).

The inconsequentiality of the May 5, 2009 meeting at Chili’s is evident by Respondent’s inability to recall the date it occurred. Ritchie, until the date of trial, did not remember the date or month he met with Cacioppo and Irby at Chili’s. In the affidavit Ritchie provided to the Board on October 6, 2010, he testified that the meeting occurred in July 2009. (Tr. 302, 2-25; Tr. 303, 11-25; Tr. 304, 12-14). Likewise, in the letter he wrote to Congressman David Vitter (GCX 26) dated April 27, 2011, Ritchie stated the meeting was in July/August 2009. It was not until the date of trial when the Union, in response to Respondent’s subpoena, presented

Respondent with a Chili's receipt dated May 5, 2009, that Ritchie remembered the date of the meeting as May 5, 2009. (Tr. 300, 25; Tr. 301, 1-2; Tr. 304, 5-8). It is not believable the Union agreed to allow Respondent to remove its core employees from the terms and conditions of the Agreement and Ritchie did not remember the day and month of the event until he was showed a document at trial.

Based on the above, the ALJ properly found that it was not realistic that the Union representatives specifically agreed to allow Respondent to abandon the contract. (ALJD 25, 20-24). The ALJ also properly credited Cacioppo and Irby's testimony regarding the May 5, 2009, meeting at Chili's. (ALJD 25, 24). Respondent did not except to the ALJ's crediting the testimony of Cacioppo and Irby.

B. Status of Respondent's core employees after May 2009

The evidence indicates that 10 (A. Anderman, M. Bangs, Barrett, K. Cotton, N. Litton, M. Mayeux, R. Morris, F. Polito, Shannon Rogers, and A. Tanner) of Respondent's core employees were employed by Respondent as of April 30, 2009. (RX 6 – see April 2009 monthly benefit report). Ritchie testified that after he reached an agreement with the Union on May 5, 2009, Respondent stopped making fringe benefits payments on behalf of all 10 of Respondent's core employees. (ALJD 8, 4-9; ALJD 24, 29-32). He testified Respondent also raised the salary of the above-named 10 sprinkler fitters in order to compensate them for an increase in their out-of-pocket insurance costs. (Tr. 300, 1-15; ALJD 8, 4-9; ALJD 24, 29-32). To support its position, Respondent introduced Respondent Exhibit 6 to show that in the months following May 2009, Respondent did not make any fringe benefits payments on behalf of its core employees. However, Respondent's Exhibit 6 actually contradicted Ritchie's testimony.

Shannon Rogers (Rogers) was one of Respondent's core employees. (Tr. 393, 10-12). Until Rogers was transferred to the nonbargaining unit position of inspector in September 2009 (GX 25; ALJD 8, 29-30), he was a sprinkler fitter performing bargaining unit work and was paid wages and benefits according to the Agreement. (RX 6 – see monthly benefits reports for July 2008 to September 2009; ALJD 27-30).

Respondent's failure to make fringe benefits on behalf of nine of the 10 core employees does not demonstrate that it had repudiated the Agreement.

First, the monthly benefit reports preceding May 2009 (R-6), clearly indicate Respondent often released employees. It is not uncommon in the construction industry for employers to hire, release, and rehire employees as needed. As previously noted, Irby told Ritchie at the May 5, 2009, meeting that Respondent only had to pay for the people who actually worked. As the ALJ properly noted, many of the monthly fringe benefits reports after May 2009, indicated that the core employees worked zero ("0") hours. (RX 6; ALJD 8, 24-27).

As previously noted above, Ritchie was impressed with the work performed by the two employees the Union referred to work at the Meadowview job. He was so impressed the sprinkler fitters referred by the Union worked without supervision and were responsible for their own work. (Tr. 300, 20-23). The fact that Respondent was extremely impressed with the quality of the Union work is also demonstrated by the fact that although the Valero job did not start until October 2008 the Union referred and Respondent hired five sprinkler fitters to work alongside Respondent's core sprinkler fitters in the months prior to the start of the Valero job.

Based on the facts above, the Union, in viewing the monthly benefit reports after May 2009, could reasonably believe the nine core employees, if they were still employed by the Respondent, simply did not perform bargaining unit work. This reasonable inference by the

Union is supported by the fact that Respondent made monthly benefit payments on behalf of core employee Rogers until Rogers was transferred to the non-bargaining unit position of inspector. It is also supported by the fact that prior to the May 5, 2009, meeting, Ritchie told Cacioppo and Irby that he was not going to bid any more construction work. (ALJD 6, 37-39). Since Respondent was not going to bid any more construction work, it was reasonable for the Union to infer that the number of sprinkler fitters performing construction work, as reported to the Union in the monthly reports, would be reduced.

Second, except for Rogers, Respondent did not call any of the other core employees to testify at the trial. Respondent did not introduce any testimony from any of the other nine core employees that they were employed by Respondent in the months after the May 5, 2009, meeting, and if employed, that they performed bargaining unit work. Likewise, Respondent did not produce any documents to show that the other nine core employees were employed by Respondent after the May 5, 2009, meeting, and if employed, that they performed bargaining unit. The Respondent also did not produce any documentation showing that Respondent increased the pay of the other nine core employees after the May 5, 2009, meeting (ALJD 24, 29-40).

Third, although Ritchie testified he thought all the employees performing bargaining unit work had to be union members, the ALJ properly found the Respondent's employees were not required to be union members. (J-1, C; ALJD 5, 10-13; ALJD 25, 35-36). In addition, the ALJ properly found that although employees may have discussed not maintaining their union membership and the fact that other specific employees and positions were excluded from the bargaining unit did not establish notice of contract repudiation by Respondent. (ALJD 25, 35-

43). Respondent did not except to the ALJ's findings that the above noted circumstances did not establish notice of contract repudiation.

Based on the above, the ALJ properly found Respondent did not meet its burden of showing it repudiated the Agreement and that it clearly and unequivocally gave notice to the Union's of its alleged repudiation of the Agreement. Therefore, the Board should affirm the ALJ's findings and reject Exceptions 1, 2, and 4.

IV. EXCEPTION 3

Respondent excepted to the ALJ's finding that Respondent did not unequivocally repudiate its obligations under the Agreement to its core employees because it continued to apply the contract to employees referred by the Union.

Before the start of the Valero job in October 2008, the sprinkler fitters referred by the Union performed the same type of sprinkler work as Respondent's core employees. (ALJD 5, 10-12). The Valero job lasted six months. (Tr. 72, 246-247). Thus, by the May 5, 2009, meeting, the Valero job had ended. After the Valero job ended and after May 5, 2009, Respondent continued to employ sprinkler fitters referred by the Union and continued to apply the contract to these employees. (ALJD 8, 13-14).

As previously noted, except for Rogers, Respondent did not present any of the other 10 core employees who were employed by Respondent in May 2009 to testify at the trial. Respondent also did not present any documentation to show that the other nine core employees were employed by Respondent in the months following the May 5, 2009, meeting, and if employed, that they performed bargaining unit work. In addition, the evidence shows Respondent noted on the monthly benefit reports following May 2009, that its core employees, except for Rogers, performed zero ("0") hours of bargaining unit work. (ALJD 8, 24-27).

The Union referred sprinkler fitters employed by Respondent subsequent to May 5, 2009, performed the same type of bargaining unit sprinkler work that was performed by Rogers. Thus, the employees referred by the Union were in the same classification as Respondent's core employees who performed bargaining unit work.

Based on the above, the ALJ properly found Respondent did not unequivocally repudiate its obligations under the Agreement to its core employees because it continued to apply the contract to employees referred by the Union. Even assuming for the sake of argument that Respondent's core employees performed bargaining unit work in the months following May 2009, the ALJ properly noted that because Respondent misrepresented the number of hours the employees worked on the monthly benefit reports, the evidence shows that Respondent did not clearly and unequivocally notify the Union that it had repudiated the Agreement. (RX 6; ALJD 8, 24-27).

V. EXCEPTION 5

Respondent excepted to the ALJ's finding that the charge filed by the Union was not time-barred by Section 10 (b) of the Act.

For all the foregoing reasons and all the other reasons articulated by the ALJ in the ALJD, Respondent failed to show that it continued to employ the core employees, except Rogers, in the months following the May 5, 2009, meeting. In addition, Respondent failed to show that the core employees, except Rogers, performed bargaining unit work in the months following the May 5, 2009, meeting. Thus, Respondent failed to show it actually repudiated the Agreement by not paying and making benefit payments on behalf of the nine core employees in accordance with the Agreement in the months that followed May 2009.

Respondent also failed to show that it gave the Union clear and unequivocal notice of the alleged repudiation on May 5, 2009. As previously noted, the ALJ credited the testimony of Cacioppo and Irby regarding the May 5, 2009, meeting. (ALJD 25, 24). Respondent did not except to the ALJ crediting the testimony of Cacioppo and Irby.

Furthermore, the monthly benefit reports failed to give the Union clear and unequivocal notice that Respondent had repudiated the Agreement. As previously noted, in the months following May 2009, Respondent indicated on the monthly benefit reports that the core employees did not perform any bargaining unit work. (RX 6; ALJD 8, 24-27).

Assuming for the sake of argument that the core employees continued to perform bargaining unit work and that the monthly benefit reports notified the Union of the Respondent's failure to pay the employees according to the Agreement, the Union, under Board law, was still not clearly and unequivocally notified that Respondent had repudiated the Agreement. Respondent cites *St. Barnabas Medical Center*, 343 NLRB 1125 (2004), as a case that supports its position that Respondent clearly and unequivocally notified the Union that it repudiated the Agreement. (See page 16 of Respondent's Brief in Support of its Cross-Exceptions). In *St. Barnabas Medical Center*, the employer specifically notified the union that it was not recognizing the union as the bargaining representative for an entire specific classification of employees. In this case, the Union did not represent all the sprinkler fitters but only those sprinkler fitters who were not working at a Dow facility. The core employees were simply those sprinkler fitters who were not working at a Dow facility and employed by Respondent before July 8, 2008. The core employees were the same classification of sprinkler fitters as the sprinkler fitters the Union referred to Respondent and/or the sprinkler fitters Respondent hired "off the street." The ALJ corrected applied *St. Barnabas Medical Center* and

decided that if Respondent failed to apply one or more of the Agreement's provisions to core employees that those instances would be treated as successive breach of contract terms and not as a repudiation of the Agreement. (ALJD 23, 45-46; ALJD 24, 1-11).

In Respondent's Brief in Support of its Cross Exceptions (see page 10), Respondent appears to argue that the Union's complaint regarding Respondent's hiring of Brendan Clements (Clements) supports its position that it repudiated the Agreement. Respondent's argument is misplaced. On June 3, 2009, Respondent hired Clements without notifying the Union. (ALJD 8, 36-37). Sometime thereafter in September 2009, Irby heard rumors that Respondent had hired Clements "off the street" and was not paying him in accordance with the Agreement. (ALJD 8, 37-39). Cacioppo decided to investigate the matter. (Tr. 388, 1-4, Tr. 388, 14-24). When Cacioppo and Irby approached Ritchie in September 2009 regarding Clement, Cacioppo told Ritchie that as long as Clements was working he had to be paid according to the Agreement. (Tr. 389, 7-19). The Union basically told Ritchie to pay Clements according to the Agreement or do not have him perform bargaining unit work. Ritchie elected to discharge Clements and told Cacioppo and Irby that he was laying off Clements. (ALJD 8, 42-43). Clements last day of work was September 27, 2009. (ALJD 9, 2-3). Therefore, based on Ritchie's representations that the failure to pay Clements in accordance with Agreement was being remedied by Clements layoff, the Union did not pursue any other action regarding Clements. The circumstances surrounding Clements demonstrates the Union's willingness to enforce the Agreement.

Based on the foregoing, the ALJ properly found that the overall record does not support a finding that Respondent provided the Union with a clear and unequivocal notice of contract repudiation outside the Section 10(b) period. (ALJD 26, 5-7).

VI. EXCEPTIONS 6 and 7

Respondent excepted to the ALJ's findings Respondent violated Section 8(a)(1) and (5) of the Act as alleged in paragraph 11 of the Complaint and to the conclusion of law that Respondent failed to adhere to all the terms and conditions of the Agreement until its expiration on March 31, 2010.

The ALJ properly noted the parties stipulated that since February 2010, Respondent changed the wage rate of some of its sprinkler fitter employees without bargaining with the Union prior to making such changes (ALJD 22, 1-3). The evidence indicates the Agreement was effective until March 31, 2010 (J-1, C).

Based on the foregoing, the ALJ properly concluded that Respondent failed to follow the terms and conditions of the Agreement until its expiration and violated paragraph 11 of the Complaint. Counsels request the Board affirm the ALJ's findings and reject Exceptions 6 and 7.

VII. EXCEPTIONS 8 -10

Respondent excepts to Cease and Desist Order issued by the ALJ, the requirement that Respondent make whole employees for losses they may suffered as a result of Respondent's failure to follow the Agreement until its expiration, and requiring Respondent to post a Notice.

Respondent does not except to any specific wording of the Cease and Desist Order, the requirement to make employees whole, or the Notice. Respondent's exceptions are based on its assertion that the ALJ should not have found that Respondent violated paragraph 11 of the Complaint.

Based on the ALJ's proper finding that Respondent violated paragraph 11 of the Complaint, the Cease and Desist Order, the Notice posting requirement, and the requirement that Respondent make its employees whole for losses are proper. Counsels request the Board affirms the ALJ's findings and reject Exceptions 8, 9, and 10.

VIII. EXCEPTION 11

Respondent excepted to the ALJ recommending that the burden shifting scheme proposed by the Counsels be adopted in the construction industry to determine the Section 8(f) or Section 9(a) status of a collective bargaining agreement.

The ALJ properly found that contract language should not preclude a review of whether a union actually enjoys majority support at the time the employer purported to grant it Section 9(a) recognition (ALJD 29, 10-13).

Although Counsels agree with the Union that the plain language of the Acknowledgment was sufficient to unambiguously establish the Parties' intent to establish a Section 9(a) relationship, the Counsels assert that a better view of the law would require the Board to overrule *Central Illinois Construction*, 335 NLRB 717 (2001) to the extent that case precludes the Board from reviewing whether a union actually enjoyed majority support at the time the employer purported to grant it Section 9(a) recognition.

In *Nova Plumbing, Inc.*,² the D.C. Circuit rejected the Board’s determination that contract language alone can establish a Section 9(a) relationship between a union and a construction industry employer, “at least where, as [there], the record contains strong indications that the parties had only a Section 8(f) relationship.”³ The D.C. Circuit found that the Board’s reliance on contract language, standing alone, to establish a 9(a) relationship “runs rough shod” over the principles established in *International Ladies’ Garment Workers’ Union v. NLRB (Bernhard-Altmann)*, 366 U.S. 731 (1961).⁴ The D.C. Circuit explained:

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 the employees and other parties – creates an opportunity for construction companies and unions to circumvent both section 8(f) protections and [*Bernhard-Altmann*’s] holding by colluding at the expense of employees and rival unions. By focusing exclusively on employer and union intent, the Board has neglected its fundamental obligation to protect employee section 7 rights, opening the door to even more egregious violations than the good faith mistake issue in [*Bernhard-Altmann*].⁵

In the instant case, while the Acknowledgement form clearly states the Respondent recognized the Union based on the Union’s contemporaneous showing of evidence of its

² 330 F.3d 531 (D.C. Cir 2003).

³ *Id.* at 537.

⁴ *Id.*, citing 366 U.S. 731 (1961). In *Bernhard-Altmann*, the Supreme Court found that a Section 9(a) collective bargaining agreement that recognizes a union as an exclusive bargaining representative must fail in its entirety where, at the time the agreement was signed, only a minority of the employees actually authorized the union to represent them.

⁵ *Id.* at 537.

majority support, the statement is illusory in light of the absence of any evidence, or even assertion, that the Union ever made or offered to make such a showing. Accordingly, despite contract language, the Union did not demonstrate majority support at the time the Respondent granted it Section 9(a) recognition. Indeed, the fact the unit employees signed Union membership forms in the days and weeks following execution of the Acknowledgement suggests the Union did not have their support at the time of its execution.

As the D.C. Circuit noted, allowing contract language alone to create a Section 9(a) relationship creates an opportunity for construction industry companies and unions to collude at the expense of employees, who would be precluded from filing an R-case petition during the term of a 9(a) contract under contract bar rules.⁶

⁶ Other cases also illustrate that same point. In *Triple C Maintenance*, 327 NLRB 42 n.2, 44-45 (1998), enfd. on other grounds, 219 F.3d 1147 (10th Cir. 2000), for instance, the employer and the union executed a collective-bargaining agreement that included language stating that recognition was based on a “clear showing of majority support” even though the employer had no statutory employees at the time of recognition. Similarly, in *Oklahoma Installation Company*, 325 NLRB 741 (1998), enf. denied on other grounds, 219 F.3d 1160 (10th Cir. 2000), the parties’ agreement indicated that the union represented a majority of employees although there were no employees working within the jurisdiction of the union at the time of recognition.

The employees' rights under Sections 7 to reject an 8(f) relationship should not be defeated without some evidence to support the words drafted by highly interested parties. These rights would be better served by a rule that would bind the employer and the union to their bargain, unless either party comes forward with evidence the union lacked majority support at the time of recognition, while permitting employees to challenge that union's 9(a) status at any time with an RD petition. If an employee files an RD petition, or if an employer presents evidence that the union did not have majority support at the time of recognition, a test like that often used in voluntary recognition and contract bar cases in non-construction industries would better protect employee rights. That test emphasizes that "[t]he essence of voluntary recognition is the 'commitment of the employer to bargain upon some demonstrable showing of majority [status].'"⁷ The Board has used a similar test in declining to find a recognition bar to an election where it does not "affirmatively appear" that an employer extended recognition in good faith "on the basis of a previously demonstrated showing of majority."⁸

⁷ *NLRB v Lyon & Ryan Food, Inc.*, 647 F.2d 745, 751 (7th Cir. 1981), cert. den. 454 U.S. 894 (1981), quoting *Jerr-Dan Corp.*, 237 NLRB 302, 303 (1978), enf. 601 F.2d 575 (3rd Cir. 1979). Accord, *Brown & Connolly*, 593 F.2d 1373, 1374 (1st Cir. 1979).

⁸ *Sound Contractors Assoc.*, 162 NLRB 364, 365 (1966); *Jack Williams, D.D.S.*, 231 NLRB 845, 846 (1977).

The Board formerly had just such a test in the construction industry.⁹ And as the Tenth Circuit noted in *Triple C Maintenance*, in its original form the Board's test required extrinsic evidence of a contemporaneous showing of majority support and not, as in later cases, a bare recitation of that fact in a contract. That later development was a permissible one.¹⁰ However, in view of the criticism that the *Central Illinois* standard invites abuse,¹¹ the Board's former extrinsic evidence test would better serve the interests of the parties and the public where employees are challenging a union's Section 9(a) status or where the employer has presented evidence a union did not in fact enjoy majority status at the time of the Section 9(a) recognition.

Under the proposed rule, contractual language that meets the standards set forth in *Central Illinois* will be sufficient to establish a rebuttable presumption of Section 9(a) status for the employer who is a party to the contract. The employer may rebut the presumption of Section 9(a) status by presenting evidence that the union did not actually enjoy majority support at the time of the purported 9(a) recognition. If the employer presents such evidence, the union then has the burden to present sufficient evidence to establish that it did in fact have majority support at that time. If the union is unable to rebut the employer's contention that it lacked majority support, the employer has successfully established that the parties do not have a Section 9(a) relationship.

⁹ See *Golden West*, 307 NLRB 1494, 1495 (1992); *Id.* at 1495 n.5, 1496 (opinions of Member Stephens and Member Oviatt); *J&R Tile, Inc.*, 291 NLRB 1034, 1036 & n.11 (1988). See also *Island Construction*, 135 NLRB 13 (1962) (finding contract bar under these principles).

¹⁰ 219 F.3d at 1155.

¹¹ See *Nova Plumbing*, 330 F.3d at 536-37, discussed above. See also *American Automatic Sprinkler Systems, Inc. v. NLRB*, 163 F.3d 209, 222 (4th Cir. 1998) (“[T]o credit the employer’s voluntary recognition absent any contemporaneous showing of majority support would reduce this time-honored alternative to Board-certified election to a hollow form which, though providing the contracting parties stability and repose, would offer scant protection of the employees free choice that is a central aim of the Act.”), cert. denied 528 U.S. 821 (1999);

Regarding employee challenges, however, the contractual language will not create a rebuttable presumption of Section 9(a) status since the employees are not party to the recognition clause. Rather, the union will be presumed to be a Section 8(f) representative. Under *John Deklewa & Sons*, 282 NLRB 1375 (1987), employees will be free to file an appropriate representation petition during the term of contract. Upon filing such a petition, the burden of introducing evidence supporting the claim that the union did, in fact, have majority support at the time of recognition would be on the party alleging that a 9(a) relationship exists. If that party is unable to meet this burden, the contractual language, standing alone, would be insufficient to establish such a relationship and the contract would not block the election.

This proposed rule is consistent with the Board's holding in *H.Y. Floors and Gameline Painting, Inc.*, 331 NLRB 304 (2000). In *H.Y. Floors*, an RD case, the Board held that while the employer and the union had a collective bargaining agreement that constituted a Section 9(a) contract vis-à-vis each other, the decertification petitioner was not a party to the agreement and was not estopped from timely challenging the Section 9(a) recognition.¹² The Board remanded the case to the Regional Director to reopen the record with respect to the union's evidentiary burden of showing it represented a majority of employees at the time that the employer extended Section 9(a) recognition.¹³

In this case, the employees are not challenging the Union's 9(a) status. Rather, it is the Respondent that contends that, despite the language of the Acknowledgement form, there is no evidence the Union showed or offered to show majority support at the time the Respondent

Saylor's, Inc., 338 NLRB at 330-33 (Member Cowen, dissenting)(quoting *American Automatic Sprinkler Sys. Inc.*, 163 F.3d at 222).

¹² Id. at 304-05.

purportedly granted 9(a) recognition. Accordingly, under the proposed rule, there would be a rebuttable presumption of Section 9(a) status, and the Respondent would have the burden of establishing the Union did not enjoy majority support at the time of the agreement.

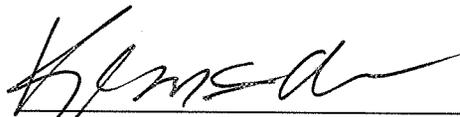
Here, the record demonstrates that on the date the Employer entered into the collective bargaining agreement with the Union, the Union never showed or offered to show the Respondent evidence that it represented a majority of its unit employees. Therefore, the evidence is sufficient to rebut the presumption of 9(a) status created by the contract language.

Based on the proposed rule and not the one suggested by Respondent, the ALJ should have found the Parties enjoyed a Section 8(f) relationship and not a Section 9(a) relationship.

IX. CONCLUSION

Counsels respectfully submit, for the reasons detailed above, the Board should not grant the Respondent's exceptions.

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



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¹³ Id.

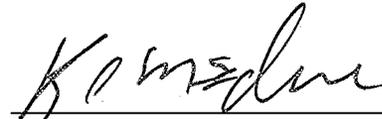
CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2012, I electronically filed a copy of the Counsels for the Acting General Counsel's Answering Brief to Respondent'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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