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November 30, 2012

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001
Headquarters information: 202-273-1000

Re: *Austin Fire Equipment, LLC*, Case No. 15-CA-19697 & *USA Fire Protection*, Case No. 10-CA-38074

Dear Executive Secretary Heltzer:

Charging Party Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, submits the following corrected version of its Motion for Reconsideration in the above-referenced matter. The original Motion was timely filed on November 9, 2012.

This Motion is being re-submitted merely to correct minor typos on page four and does not make any substantive changes to Charging Party's original Motion.

Very truly yours,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

G & L ASSOCIATED, INC.,
d/b/a USA FIRE PROTECTION,

Respondent,

358 NLRB No. 162 (2012)
Case No. 10-CA-38074

and

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

Charging Party.

AUSTIN FIRE EQUIPMENT, LLC,

Respondent,

359 NLRB No. 3 (2012)
Case No. 15-CA-19697

and

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

Charging Party.

MOTION FOR RECONSIDERATION (CORRECTED)

Charging Party Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO ("Local 669" or "the Union") submits this motion for reconsideration of the decisions in *G&L Associated, Inc. d/b/a USA Fire Protection*, 358 NLRB No. 162 (2012), and *Austin Fire Equipment, LLC*, 359 NLRB No. 3 (2012), pursuant to Section 102.48(d)(1) of the NLRB Rules and Regulations.

In *USA Fire Protection* and *Austin Fire*, decided the same day, the Board concluded that the language of the Union's "Acknowledgment of the Representative

Status of Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO" agreement no longer satisfied the NLRB standard for establishing that the parties intended a Section 9(a) relationship. *USA Fire Protection*, slip op. at 1; *Austin Fire*, slip op. at 1. The Union's recognition agreement provides that:

> 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 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.*

Attachments 1, 2 (emphasis added).

Although there have been minor variations in a prefatory sentence to the Union's Section 9(a) agreement over time, the Board has repeatedly confirmed the validity of the operative terms of that agreement to establish Section 9(a) recognition consistently over a period of twenty (20) years. *E.g.*, *Triple A Fire Protection*, 312 NLRB 1088, 1088-1089 (1993), *enf'd*. 136 F.3d 727 (11th Cir. 1998), *cert. denied* 544 U.S. 948 (2005); *MFP Fire Protection*, 318 NLRB 840, 842 (1995), *enf'd* 101 F.3d 1341 (10th Cir. 1996). *Cf. American Automatic Sprinkler Systems, Inc.*, 323 NLRB 920, 920-921 (1997), *enf'ment denied in part*, 163 F.3d 209 (4th Cir. 1998), *cert. denied*, 528 U.S. 821 (1999).

The Board ruled that the language of the Union recognition agreement in *USA Fire Protection* and *Austin Fire* was insufficient to establish that the parties intended to form a Section 9(a) relationship citing a reference in the prefatory sentence that

bargaining unit employees are "members of and represented by" the Union, *USA Fire Protection*, slip op. at 1, and the omission of two words ("have designated") from an earlier version of that prefatory sentence that the Board had repeatedly approved. *Austin Fire*, slip op. at 1 and fns. 4, 5. [1] Solely on this basis, the Board concluded that the recognition agreement did not notify the parties that they were entering into Section 9(a) relationships in *USA Fire Protection* and *Austin Fire*, that their relationships were governed by Section 8(f), and that the Respondent Employers were therefore free to retroactively repudiate their Section 9(a) recognition agreements years after the fact and well beyond the NLRA Section 10(b) period which precludes an employer's challenge to Section 9(a) recognition after six months.

The Board's rulings that the explicit Section 9(a) language in the Union's recognition agreements in *USA Fire Protection* and *Austin Fire* did not on its face demonstrate that the parties intended to form a Section 9(a) relationship were *sua sponte*, and had never been adopted or asserted by either Respondent in either case, to the Administrative Law Judge or to the Board, nor has the Board's reading of the language been advanced in any of the earlier cases involving the Union's Section 9(a) recognition

[1] In a third decision, issued the day before these, the Board declined, without explanation, to determine whether or not the Employer's execution of the Union's Section 9(a) recognition form -- word-for-word as approved by the Board for twenty years -- established a Section 9(a) relationship. *King's Fire Protection, Inc.*, 358 NLRB No. 156 (2012), slip op. at 1, n. 1. The Board's refusal to recognize the validity of the Union's Section 9(a) recognition form in *King's Fire* did not however affect the outcome of that case because the Board found that language in a subsequent collective bargaining agreement signed by the parties *was* sufficient for purposes of Section 9(a) recognition and Section 10(b) limitation. *Id.* at 4, n.3.

agreement. Thus, neither the General Counsel nor the Charging Party have had an opportunity to address the Board's views in these cases on whether the explicit Section 9(a) language in the recognition agreement is sufficient to demonstrate that the parties intended to and did enter into a Section 9(a) relationship.

As we show below, the Board should reconsider and reverse these two decisions.

1. The determinative legal issue in these cases is simply "whether the [Union's Section 9(a) recognition form], examined in its entirety, 'conclusively notifies the parties that a 9(a) relationship is intended.'" *Madison Industries, Inc.*, 349 NLRB 1306, 1308 (quoting *NLRB v. Oklahoma Installation Co., Inc.*, 219 F.3d 1160, 1165 (10th Cir. 2000)); *Allied Mechanical Services*, 351 NLRB 79, 83 (2007), *enf'd*, 668 F.3d 758 (D.C. Cir. 2011).

In contrast to cases where the parties' recognition agreement does not *explicitly* state that the parties *do* intend to establish a Section 9(a) relationship, the terms of the Union's recognition agreements in these two cases could not be clearer or more explicit: "… the Employer … *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.*" Such plain and explicit Section 9(a) recognition language was *not* present in the recognition agreements in *Staunton Fuel & Material (Central Illinois)*, *Madison Industries* or *Allied Mechanical*. *Staunton Fuel & Material (Central Illinois)*, 335 NLRB 717 (2001); *Madison Industries, Inc.*, 349 NLRB at 1306; *Allied Mechanical Services*, 351 NLRB at 82.

As the Board held in *Staunton Fuel*, such an explicit reference to Section 9(a) in an employer's voluntary grant of recognition is sufficient under Board precedent to establish that the parties intended to establish Section 9(a) recognition and did so:

> although it would not be necessary for a contract provision to refer explicitly to Section 9(a) in order to establish that the union has requested and been given 9(a) recognition, *such a reference would indicate that the parties intended to establish a majority rather than an 8(f) relationship.*

Staunton Fuel, 335 NLRB at 720 (emphasis added).

The Board has simply ignored the plain and explicit Section 9(a) language in the Union recognition agreement in the *USA Fire Protection* and *Austin Fire* cases and, without a word of explanation, dispensed with twenty years of consistent NLRB and Circuit Court case law upholding the materially indistinguishable language of the Union's agreement as sufficient to establish Section 9(a) recognition. *E.g.*, *Triple A Fire Protection*, *supra*; *MFP Fire Protection*, *supra*. *Cf. American Automatic Sprinkler Systems, Inc.*, *supra*.

The Board's decisions in *USA Fire Protection* and *Austin Fire* also represent a rejection of the Tenth Circuit's decisions in *Oklahoma Installation* and *Triple C Maintenance*, adopted by the Board in *Staunton Fuel* as setting the standard for determining whether the relevant language of a recognition agreement "indicate[s] that the parties intended to establish a [9(a)] … relationship." *Staunton Fuel*, 335 NLRB at 720. The operative language of the Union's recognition agreements in *Triple A*, *MFP* and *American Automatic*, as repeated in *USA Fire Protection* and *Austin Fire* -- that the executing employer certifies that "on the basis of objective and reliable information …

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" -- was specifically endorsed by the Tenth Circuit in both *Oklahoma Installation* and *Triple C Maintenance*. *Oklahoma Installation*, 219 F.3d at 1165 (quoting the language from the Union's Section 9(a) recognition form in *MFP Fire Protection*, 318 NLRB at 841); *NLRB v. Triple C Maintenance*, 219 F.3d 1147, 1154 (10th Cir. 2000) (same).

2. The Board premised its conclusions in *USA Fire Protection* and *Austin Fire*, that the operative language of the Union's Section 9(a) recognition is not sufficient to demonstrate that the parties intended to enter into a Section 9(a) relationship, on language in the prefatory sentence to that form stating that bargaining unit employees are "members of and represented by" the Union, *USA Fire Protection*, slip op. at 1, and because two words ("have designated") had been omitted from the preamble to an earlier version of an otherwise identical recognition agreement. *Austin Fire*, slip op. at 1 and fns. 4, 5.

The Union's Section 9(a) recognition forms, as approved by the Board in *Triple A Fire Protection*, *MFP Fire Protection*, and *American Automatic Sprinkler Systems, Inc.*, and by the Tenth Circuit in *Oklahoma Installation* and *Triple C Maintenance*, all recited that bargaining unit employees are "members of and represented by" the Union, word for word the same as the prefatory sentence in the forms at issue in *USA Fire Protection* and *Austin Fire*. The two words "have designated" omitted from the prefatory sentences in *USA Fire Protection* and *Austin Fire* have never been remarked upon, much less given

any independent weight by the Board or the Circuit Courts in any of the preceding cases. *Triple A Fire Protection*, 312 NLRB at 1088-1089; *MFP Fire Protection*, 318 NLRB at 842; *American Automatic Sprinkler Systems, Inc.*, 323 NLRB at 920-921; *Oklahoma Installation*, 219 F.3d at 1165; *Triple C Maintenance*, 219 F.3d at 1148.

3. With all deference, the Board's rationale in *USA Fire Protection* and *Austin Fire* is based on a complete misunderstanding of the point and purpose of the prefatory sentence to the Union's Section 9(a) recognition agreement and on a misreading of *Staunton Fuel*. *USA Fire Protection*, slip op. at 1; *Austin Fire*, slip op. at 1.

The prefatory sentence to the Union's Section 9(a) recognition form is not in any way addressed to the question of what kind of relationship the parties intend; that question is addressed in the terms of the second and operative paragraph of the recognition form in terms that make clear beyond any argument that the parties do intend and do enter into a Section 9(a) relationship -- that "the Employer … *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*." Attachments 1, 2, 3.

The prefatory sentence simply identifies the Union's support for its request for Section 9(a) recognition. And in that regard, a showing to the employer that bargaining unit employees "are members of and represented by" Local 669 is a legally sufficient showing. As the Board held in *Oklahoma Installation*:

> [A] union … is not required to show the employer any evidence of majority status unless the employer requests to see the evidence … If an employer voluntarily recognizes the

> union based solely on that union's assertion of majority status, without verification, an employer is not free to repudiate the contractual relationship that it has with the union outside the 10(b) period, *i.e.*, beyond the 6 months after initial recognition, on the ground the union did not represent a majority when the employer recognized the union … Moreover, where an employer outside the construction industry expressly recognizes a union as the 9(a) representative, the union becomes the 9(a) representative of the unit employees, unless the employer timely produces affirmative evidence of the union's lack of majority at the time of recognition, i.e., within the 10(b) period …

Oklahoma Installation Company, 325 NLRB 741, 742 (1998), *enf'ment denied*, 219 F.3d 1160 (10th Cir. 2000) (quoting *Hayman Electric*, 314 NLRB 879, 887 fn.8 (1994)) (citations omitted).

On the second point, contrary to what the Board suggests in *USA Fire Protection* and *Austin Fire*, *Staunton Fuel* does not provide any basis for finding that the Union's recognition agreement is insufficient to establish Section 9(a) recognition. Indeed, *Staunton Fuel* only confirms the validity of the Union's form as proof of the parties' intent to establish Section 9(a) recognition:

> although it would not be necessary for a contract provision to refer explicitly to Section 9(a) in order to establish that the union has requested and been given 9(a) recognition, *such a reference would indicate that the parties intended to establish a majority rather than an 8(f) relationship.*

335 NLRB at 720 (citing *NLRB v. Triple C Maintenance, supra*) (emphasis added).

Of course, the Board did offer additional guidance in *Staunton Fuel* for resolving ambiguous contractual language for use in cases like *Staunton Fuel*, *Madison Industries* and *Allied Mechanical* where there was no *explicit* and *unconditional* reference to

Section 9(a) in the body of the parties' recognition agreement, in stark contrast to *USA Fire Protection* and *Austin Fire.* In such cases, the Board noted that, in the absence of an *explicit* reference to Section 9(a) in the body of the parties' agreement, Section 9(a) recognition cannot be "fairly *implied* from the contract language," where that contractual language -- "without more" -- merely recites that the employees are "members" of, or "represented" by the union. *Staunton Fuel*, 335 NLRB at 720 (emphasis added).

Nothing in *Staunton Fuel* remotely supports the Board's rulings in *USA Fire Protection* and *Austin Fire* that the unconditional and explicit statement in the Union's recognition agreement -- that "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" -- could be trumped by an earlier reference in a prefatory sentence to unit employees as "members" of and/or "represented" by the Union. The Board's conclusion to that effect is contrary to its earlier holding in *Staunton Fuel* that an *explicit* "reference" to Section 9(a) "would indicate that the parties *intended* to establish a majority rather than an 8(f) relationship." 335 NLRB at 720 (emphasis added).

There is no ambiguity in the Section 9(a) recognition language in *USA Fire Protection* and *Austin Fire* and therefore no need to divine what might be meant by a unit employee's being a "member of" or "represented" by the Union, or by the omission of "have designated" from the preamble. The explicit language of the form itself states in plain English that the parties intended to and did enter into a Section 9(a) relationship just as the Board has repeatedly ruled in *Triple A*, *MFP Fire* and *American Automatic*, and as

reflected in the Tenth Circuit decisions in *Triple C Maintenance* and *Oklahoma Installation.*

4. The Board's nitpicking the plain language of the prefatory sentence in the Union's Section 9(a) recognition agreements in *USA Fire Protection* and *Austin Fire* is also contrary to its rulings that the same rules of law are applicable to voluntary Section 9(a) recognition in the construction industry as are applicable outside the construction industry. *Casale Industries*, 311 NLRB 951, 953 (1993) (citing *John Deklewa & Sons*, 282 NLRB 1375, 1387 n. 53 (1987), *enf'd.* 843 F.2d 770 (3d Cir. 1988), *cert. denied*, 488 U.S. 889). *See also Reichenbach Ceiling and Partition Co.*, 337 NLRB 125, 125 (2001) (Chairman Hurtgen concurring) ("A contrary view would mean that stable relationships, assertedly based on Section 9(a), would be vulnerable to attack based on stale evidence. That is not permitted with respect to unions in nonconstruction industries.") (citations omitted).

Under these principles, an employer will be found to have granted NLRA Section 9(a) recognition -- and by whatever phraseology -- where, as here, there is a clear and unequivocal agreement by the employer to recognize the union based on proof of majority status. *Terracon, Inc.*, 339 NLRB 221, 223 (2003) (citing authorities).

> '[A] valid request for recognition need not be made in any particular form, or in *haec verba*, so long as the request clearly indicates a desire to negotiate and bargain on behalf of employees in the appropriate unit concerning wages, hours and the terms and conditions of employment.'

Eldorado, Inc., 335 NLRB 952, 953-54 (2001) (quoting *Marysville Travelodge*, 233 NLRB 527, 532 (1977)) (quoting *Al Landers Dump Truck, Inc.*, 192 NLRB 207, 208

(1971), *enf'd sub nom, NLRB v. Confer*, 631 F.2d 1309 (9th Cir. 1981)). No magic words or prescribed language are required to evidence the grant of Section 9(a) recognition as the NLRA is not a "statute of frauds or an act prescribing the formalities of conveyancing. No seal or writing is required by its terms. Nor is any special formula or form of words." *Joy Silk Mills v. NLRB*, 185 F.2d 732, 741 (D.C. Cir. 1950), *cert. denied* 341 U.S. 914 (1951) (quoting *Lebanon Steel Foundry v. NLRB*, 130 F.2d 404, 407 (1942)).

The Board's decisions in *USA Fire Protection* and *Austin Fire*, that the plain Section 9(a) language in the recognition agreements in those cases does not establish the parties' Section 9(a) intentions, and those agreements are therefore not protected by Section 10(b) from untimely attack years after the fact, are contrary to the approval of that plain language by the Board and Circuit Courts over a period of twenty years and leave "stable relationships, assertedly based on Section 9(a) … vulnerable to attack based on stale evidence. That is not permitted with respect to unions in nonconstruction industries." *Reichenbach Ceiling and Partition Co.*, 337 NLRB at 125 (Chairman Hurtgen concurring).

We respectfully request that the Board reconsider and reverse its decisions in *USA Fire Protection* and *Austin Fire* with respect to its conclusions regarding the parties' Section 9(a) agreement.

Dated: November 30, 2012

Respectfully submitted,

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Certificate of Service

I hereby certify that on November 30, 2012, I electronically filed Local 669's Motion for Reconsideration (Corrected) with the Executive Secretary of the National Labor Relations Board via the e-filing portal on the NLRB's website, and also forwarded a copy by electronic mail to the Parties as listed below:

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