

**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.

**THE UNION’S REPLY TO THE OPPOSITION TO
ITS MOTION FOR RECONSIDERATION**

This memorandum is respectfully submitted by Charging Party Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (“Local 669” or “the Union”) in reply to Austin Fire Protection’s Opposition to its Motion for Reconsideration.

The Acting General Counsel has not opposed the Union’s motion seeking the Board’s reconsideration of its 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), presumably because the legal arguments advanced by the Union in support of the motion are the same legal arguments that the Acting General Counsel made to the Administrative Law Judge and to the National Labor Relations Board in those cases. *E.g.*, G.C. Post-Hearing Brief to ALJ in *Austin Fire* at 22-23; G.C. Post-Hearing Brief to ALJ in *USA Fire* at 3-4; G.C. Answering Brief to Board in *Austin Fire* at 4.

To restate the basis for the Union’s motion, the legal standard for determining whether contractual language is sufficient on its face to establish Section 9(a) recognition was -- until now -- 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 (2007) (quoting *NLRB v. Oklahoma Installation Co., Inc.*, 219 F.3d 1160, 1165 (10th Cir. 2000)); *Staunton Fuel & Material (Central Illinois)*, 335 NLRB 717, 720 (2001) (“[A]lthough it would not be necessary for a contract provision to refer explicitly to Section 9(a) ... such a reference would indicate that the parties intended to establish a majority rather than an 8(f) relationship.”).

The Board’s decisions in *USA Fire Protection* and *Austin Fire*, holding that the recognition agreements at issue here do not establish Section 9(a) recognition, cannot be squared with the Board’s own rulings that, in order to establish Section 9(a) recognition, the contractual language must simply “notif[y] the parties that a 9(a) relationship [was] intended.” *Madison Industries*, 349 NLRB at 1308. The language in the recognition agreements at issue here presents the clearest imaginable notification that the parties *did* intend to establish a Section 9(a) relationship:

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*.

(Emphasis added). See Attachments 1-3 to the Motion for Reconsideration.

The assertions by Austin Fire, the only party to file an opposition to the Union's motion, are baseless:

1. Austin Fire's *post hoc* parroting of the Board's misreading of *Staunton Fuel* is no more persuasive than the Board's decision itself. Austin Fire Br. at 2-3. As noted, *Staunton Fuel* squarely holds that "although it would not be necessary for a contract provision to refer *explicitly* to Section 9(a) ... such a reference *would* indicate *that the parties intended to establish a majority* rather than an 8(f) relationship." 335 NLRB at 720 (emphasis added). Thus, there is simply no basis for the Board's decisions in *USA Fire Protection* and *Austin Fire* to ignore the clearest possible expression of the parties' intentions in the plain language of their Section 9(a) recognition agreements. *Quality Building Contractors, Inc.*, 342 NLRB 429, 430 (2004); *Dutchess Overhead Doors, Inc.*, 337 NLRB 162, 166 (2001).

The Board further explained in *Staunton Fuel* that, in the absence of such clear and *express* language, Section 9(a) recognition might in some cases be "fairly implied from the contract language," but not where the contractual language -- "without more" -- merely recites that the employees are "members" of, or "represented" by the union. *Id.*

This *dicta* is irrelevant to this case where the parties have affirmatively, explicitly and unconditionally agreed that it was their intention to enter into a Section 9(a) recognition agreement.

2. The claim that the Board's decision in *Austin Fire* is "not inconsistent with" the decisions of the Tenth Circuit in *Triple C Maintenance* and *Oklahoma Installation* (Austin Fire Br. at 3) is easily disproven. The operative terms of the recognition agreements at issue in *USA Fire Protection* and *Austin Fire* were quoted and expressly approved by the Circuit Court as examples of contract language recognized by the Board as sufficient to establish Section 9(a) recognition. *Oklahoma Installation Co., Inc.*, 219 F.3d at 1165; *NLRB v. Triple C Maintenance Co.*, 219 F.3d 1147, 1154 (10th Cir. 2000). Thereafter, the Board adopted these same Tenth Circuit decisions. *See Madison Industries*, 349 NLRB at 1308; *Staunton Fuel & Material*, 335 NLRB at 720.

The corollary claim that the Board's decision in *Austin Fire* is "not inconsistent with" the Board's decisions in *Triple A*, *MFP* and *American Automatic* (Austin Fire Br. at 5) is likewise spurious. The Board has repeatedly upheld precisely the same explicit and unconditional language at issue here -- "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" -- as conclusive proof that the parties *did intend* to establish, and *did* establish Section 9(a) recognition. *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);

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's refusal in the recent *King's Fire* decision to reaffirm precisely the same contractual language presented in *Triple A*, *MFP Fire* and *American Automatic* as sufficient to establish Section 9(a) recognition only further underscores that the Board's decisions in *USA Fire Protection* and *Austin Fire* signal an unstated and incomprehensible rejection of twenty years of NLRB and Circuit Court decisions. *King's Fire Protection, Inc.*, 358 NLRB No. 156 (2012), slip op. at 1, n. 1.

3. Austin Fire's remaining contention -- that Section 9(a) recognition was not established here because of the lack of "evidence that the Union was supported by a majority of unit employees" (Austin Fire Br. at 4-5) -- is irrelevant to the Union's motion for reconsideration which is entirely directed to the issue of whether the contractual language in question, standing alone and "examined in its entirety, 'conclusively notifies the parties that a 9(a) relationship is intended.'" *Madison Industries, Inc.*, 349 NLRB at 1308.

Austin Fire's argument is also unavailing as a matter of law because it is barred by Section 10(b) of the NLRA. Austin Fire's defense that its voluntary grant of Section 9(a) recognition was not properly based on a contemporaneous showing of majority support among unit employees was not raised until long after the six month statute of limitations for raising such a claim. *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 n.8 (1994)) (citations omitted); *Casale Industries*, 311 NLRB 951, 953 (1993);

Triple A Fire Protection, 312 NLRB at 1088; *MFP Fire Protection*, 318 NLRB at 842; *American Automatic Sprinkler Systems*, 323 NLRB at 920. See *Local Lodge 1424 v. NLRB (Bryan Mfg.)*, 362 U.S. 411, 419 (1960).

Wherefore, for the reasons stated above and in the Union's Motion, the Board should reconsider and reverse its decisions in *USA Fire Protection* and *Austin Fire* and reaffirm that the plain, explicit and unconditional Section 9(a) language in the Union's recognition agreements, as approved by the Board and the Courts for twenty (20) years, and as "examined in its entirety, 'conclusively notifies the parties that a 9(a) relationship is intended.'" *Madison Industries*, 349 NLRB at 1308.

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 Reply to the Opposition to its Motion for Reconsideration 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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