UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AUSTIN FIRE EQUIPMENT, LLC	*	**359 NLRB No. 3 (9/28/12)**
Respondent	*	
and	*	**JD (ATL) – 32-11 (11/29/11)**
	*	
ROAD SPRINKLER FITTERS LOCAL	*	**Case No. 15-CA-19697**
UNION NO. 669, U.A., AFL-CIO	*	
Union	*	
	*	
* *		

RESPONDENT AUSTIN FIRE'S MEMORANDUM IN
OPPOSITION TO UNION'S MOTION FOR RECONSIDERATION

Respondent, Austin Fire Equipment, LLC ("Austin Fire" or "Respondent") submits this Memorandum in Opposition to Motion for Reconsideration filed by Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO ("Union").

The Union relies on the construction industry parties' Acknowledgement in this case which stated:

> 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 the 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.

Despite the fact that the recitals in the first paragraph were false, and were known to be false at the time the Acknowledgement was given to Respondent to sign,[1] the Union contended (and still contends) that this Acknowledgement language is sufficient to prove the creation of a Section

[1] *Austin Fire Equipment, LLC*, 359 NLRB No. 3 at pp. 4, 11-13.

9(a) relationship under *Staunton Fuel & Material, Inc. (Central Illinois),* 335 NLRB 717 (2001). The Board rejected the Union's contention, and ruled that the Acknowledgement language, standing alone, does not meet the three-prong test set forth in *Staunton Fuel*.[2] Absent any evidence to the contrary, the Board determined that the parties' relationship was governed by Section 8(f) from which decision the Union has requested reconsideration.

The Board Correctly Ruled that the Acknowledgment Language Fails to Satisfy *Staunton Fuel.*

Under Board law, there is a presumption that bargaining relationships in the construction industry are governed by Section 8(f). *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enf'd sub nom, Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir 1988), *cert. denied*, 488 U.S. 889 (1988). To overcome this presumption of a Section 8(f) relationship, a construction industry union can achieve Section 9(a) status "from voluntary recognition accorded to the union by the employer of a stable work force where that recognition is based on a clear showing of majority support among unit employees." 282 NLRB at 1387, n. 53.

In *Staunton Fuel*, the Board established that such voluntary recognition under Section 9(a) could be established in the construction industry by a written agreement. However, the language must *unequivocally* establish that (1) the union requested recognition as the majority or 9(a) representative of the unit; (2) the employer granted such recognition; and (3) the employer's recognition was based on the union's showing, or offer to show, evidence of majority support. *Staunton Fuel, supra* at 1155-56. Here, the Board correctly determined that the Acknowledgement relied upon by the Union fails to satisfy the third prong of the *Staunton Fuel* three-part test, *i.e.*, that it could demonstratively prove that it enjoyed majority support at the

[2] In a case decided the same day, *USA Fire Protection*, 358 NLRB No. 162, the Board similarly found that the same Acknowledgement was insufficient to satisfy the *Staunton Fuel* test.

time it requested recognition. The Acknowledgement is *devoid* of any language demonstrating that the Union had shown, or offered to show evidence of majority support.

The Union argues that the "majority support" prong was satisfied by the language reciting that a majority of employees are "members of" and "represented by" the Union. The Board's decision *correctly* points out that neither membership nor representation prove majority support of the unit employees. In fact, *Staunton Fuel* expressly makes this point:

> To the extent that any post-*Deklewa* cases may be read to imply that an agreement indicating that the Union "represents a majority" or has a majority of "members" in the Unit, without more, is independently sufficient to establish 9(a) status, these cases are overruled.

335 NLRB at 720.

The Board's Decision Is Not Inconsistent With Prior Precedent.

The Union *incorrectly* argues that the Board's decision represents a rejection of the Tenth Circuit's decisions in *Oklahoma Installation* and *Triple C Maintenance*.

In *NLRB v. Triple C Maintenance, Inc*., 219 F.3d. 1147 (10th Cir. 2000), the agreement that the Court found sufficient to establish a Section 9(a) relationship contained language establishing that the Employer's recognition was "predicated on a clear showing of majority support for [the Union] indicated by bargaining unit employees." 219 F.2d at 1155. The absence of such a representation in the Acknowledgement in this case is precisely why the Board found that it fails to satisfy the third prong of *Staunton Fuel*.

In *NLRB v. Oklahoma Installation Co*., 219 F.2d 1160 (10th Cir. 2000), the Court rejected the Board's finding that the recognition agreement was sufficient to establish a Section 9(a) relationship. In doing so, among other reasons, the court stated that unlike *Triple C Maintenance*, "the agreement here does not recite that the Union submitted proof of majority

status or that the employer acknowledged the proof of majority support as the basis for its 9(a) recognition of the Union." 219 F.3d. at 1165. Thus, the Board's decision in this case is entirely consistent with the court's decision in *Oklahoma Installation*.

Other cases cited by the Union likewise are *not* inconsistent with the Board's decision in this case. *See MFP Fire Protection, Inc*., 318 NLRB 840 (1995) (recognition clause contained "have designated" language absent here); *Triple A Fire Protection, Inc*., 312 NLRB 1098 (1993) (recognition clause contained "have designated" language absent here); and *American Automatic Sprinkler Systems, Inc.*, 323 NLRB 920 (1997) (recognition language expressly stated that it was based upon "[m]embers that have given written authorization").

Mere Reference to Section 9(a) in the Acknowledgement is Insufficient to Satisfy Third Prong of *Staunton Fuel* Test.

Contrary to the Union's argument, the reference to Section 9(a) in the second paragraph of the Acknowledgement does *not* overcome the fundamental deficiency found by the Board, *i.e.*, the failure to establish that recognition was based upon the Union's showing, or offering to show, evidence of majority support. While the reference to Section 9(a) in the second paragraph may be relevant in satisfying the first and second prongs of the *Staunton Fuel* test,[3] it is not a substitute for satisfying the third prong. Given that the Acknowledgement and the record as a whole are totally devoid of any evidence that the Union was supported by a majority of unit employees at any time,[4] the mere recitation of Section 9(a) in the Acknowledgement was insufficient to meet the Union's burden.

Accordingly, the Union's Motion for Reconsideration should be denied.

[3] The overwhelming evidence in the record established that notwithstanding the Acknowledgement, Austin Fire did not intend on entering into a Section 9(a) relationship, as found by the ALJ. *Austin Fire Equipment, LLC*, 359 NLRB No. 3 at p. 13.

[4] *Austin Fire Equipment, LLC*, 359 NLRB No. 3 at pp. 4, 11-13.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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