

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: March 30, 2009

TO : Joseph Barker, Regional Director
Region 13

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Morse Electric, Inc.
Case 13-CA-44938

530-6067-7000
530-6083-1000
530-8020-1200
530-8045-8700
530-8090-4100

This case was submitted for advice as to whether the parties had entered into a 9(a), rather than an 8(f), relationship, such that the Employer violated Section 8(a)(5) when it terminated the parties' collective-bargaining agreement and withdrew recognition from the Union.

We conclude that the Region should not issue complaint alleging that the Employer unlawfully terminated the parties' collective-bargaining agreement and withdrew recognition from the Union. Applying current Board law as set forth in Central Illinois Construction,¹ it is a close question whether the parties' contract recognition language unambiguously established a Section 9(a) relationship, and the extrinsic evidence does not demonstrate that the Union actually possessed majority support. Further, in view of the Union's lack of majority support, if a Section 8(a)(5) complaint issued, the Region would be instructed to urge the Board to dismiss the complaint based on the General Counsel's proposed rule as set out in Lambard, Inc.² Since under either scenario the complaint is likely to be

¹ Staunton Fuel & Material d/b/a Central Illinois Construction, 335 NLRB 717 (2001).

² Case 31-CA-27033 (July 7, 2005) (Significant Appeals Minute 05-13). See also D & B Fire Protection, Inc., Case 21-CA-36915 (Advice memorandum dated December 9, 2005).

dismissed, it would not effectuate the purposes of the Act to issue complaint in this case.³

FACTS

The Employer is an electrical contractor in the construction industry. In September 2000, the Employer and the Union signed a Memorandum of Agreement (MOA) that bound the Employer to the Union's Master Agreement with the Northern Illinois Building Contractors Association (NIBCA Agreement). The MOA states as follows:

The EMPLOYER recognizes the UNION as the sole and exclusive bargaining representative for and on behalf of the employees of the EMPLOYER within the territorial and occupational jurisdiction of the UNION. Prior to recognition, the EMPLOYER was presented and reviewed valid written evidence of the UNION's exclusive designation as bargaining representative by the majority of appropriate bargaining unit employees of EMPLOYER.

The MOA further states that a party wishing to amend or terminate it "must notify the other [party] in writing at least three (3) months prior to the expiration of the [NIBCA] Agreement." The Employer official who signed the MOA stated that he did not recall that the Union had either collected authorization cards or indicated that the agreement was intended to create a 9(a) relationship. He also stated that, if that had happened, he would have recalled it. Similarly, the Union official who signed the MOA acknowledged that he did not provide authorization cards to the Employer despite the MOA's statement that this had occurred.⁴

³ The Employer also argued that, even if the parties' bargaining relationship was governed by 9(a), it was entitled to withdraw recognition from the Union because it had, at most, a stable one-person unit. Because we conclude that the Region should not issue complaint, we need not address this alternative defense.

⁴ Among other reasons, the Union official stated that he did not present authorization cards because the employees in

The NIBCA Agreement was scheduled to expire on May 31, 2008.⁵ By letter of February 5, the Employer notified the Union that it intended to terminate the MOA at the end of the NIBCA Agreement's term. By letter of February 21, the Union stated its intention to enforce the Employer's compliance with the NIBCA Agreement so long as the Employer continued to hire employees who performed unit work. On February 28, the Employer wrote that its initial letter constituted notice that it was terminating the MOA at the end of its current term. Between April 2 and August 29, the Union made four requests to bargain over a new contract and over work assignments on an upcoming Employer project. The Employer initially scheduled an August 21 bargaining session. However, by letter of August 19, the Employer's counsel cancelled those negotiations and wrote that she was "now of the opinion that the [C]ompany does not have a duty to bargain with [the Union]" because the Employer had not employed any Union-represented employees since September 2006.

In mid September, the Union filed grievances alleging that the Employer, in violation of the MOA and NIBCA Agreement, allowed subcontractors not party to a contract with the Union to perform unit work on the Employer's upcoming project. The Employer demanded that the Union withdraw the grievances. Instead, on September 25, the Union filed the instant unfair labor practice charge.⁶ On September 29, the Employer filed a federal district court lawsuit seeking declaratory judgment that the Employer properly and effectively repudiated the MOA and that it was

question were employed by the Employer via the Union's hiring hall and were therefore represented by the Union.

⁵ All subsequent dates are in 2008 unless otherwise stated.

⁶ The charge also alleged that the Employer failed to notify the Federal Mediation and Conciliation Service in accordance with 8(d)(3), as required where the parties' bargaining relationship is governed by 9(a).

not obligated to participate in the NIBCA Agreement's grievance and arbitration process.⁷

ACTION

We conclude that the Region should not issue complaint alleging that the Employer unlawfully terminated the parties' collective-bargaining agreement and withdrew recognition from the Union. Applying current Board law, it is a close question whether the recognition language unambiguously demonstrated that the parties' relationship was governed by Section 9(a), and the extrinsic evidence does not demonstrate that the Union actually possessed majority support. Further, given the Union's lack of majority support, if a Section 8(a)(5) complaint issued the Region would be instructed to urge the Board to dismiss the 8(a)(5) complaint based on the General Counsel's proposed rule as set out in Lambard, Inc.⁸ Accordingly, it would not effectuate the purposes of the Act to issue complaint in this case.

There is a significant difference between a union's representative status in the construction industry under Section 8(f) and under Section 9(a) of the Act. Under Section 8(f), an employer may terminate the bargaining relationship upon expiration of the agreement.⁹ Under Section 9(a), an employer must continue to recognize and bargain with the union after the agreement expires, unless and until the union is shown to have lost majority support.¹⁰ In the construction industry, there is also a rebuttable presumption that a bargaining relationship is governed by Section 8(f).¹¹ Therefore, a party asserting

⁷ Based on information from the Region, the district court case is on hold pending the outcome of the instant charge.

⁸ Case 31-CA-27033 (Significant Appeals Minute 05-13), discussed below.

⁹ See, e.g., Central Illinois, 335 NLRB at 718.

¹⁰ Id.

¹¹ John Deklewa & Sons, 282 NLRB 1375, 1385 n.41 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

the existence of a 9(a) relationship has the burden of proving it.¹²

In Central Illinois, the Board reaffirmed that contract language alone may establish a Section 9(a) relationship.¹³ Adopting the Tenth Circuit's three-part test to determine the sufficiency of the contract language, the Board held that Section 9(a) status is established with contract language that unequivocally indicates (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.¹⁴ Absent other language demonstrating that a 9(a) relationship was intended, language providing that the employer recognizes the union as the employees' exclusive bargaining representative does not satisfy the Central Illinois test.¹⁵ This is so because, as the Board held in Deklewa, an 8(f) union is also an exclusive bargaining representative during the term of its collective-bargaining agreement.¹⁶

¹² Central Illinois, 335 NLRB at 721.

¹³ Id. at 719-720.

¹⁴ Id. at 719-720 (citing NLRB v. Triple C Maintenance, Inc., 219 F.3d 1147, 1155 (10th Cir. 2000), and NLRB v. Oklahoma Installation Co., 219 F.3d 1160, 1164 (10th Cir. 2000)).

¹⁵ See Northwest Industrial Contractors, Case 36-CA-9446-1 and Integrity Plus Plumbing, Case 36-CA-9353-1 (Advice memorandum dated January 30, 2004). See also NLRB v. Oklahoma Installation Co., 219 F.3d at 1164-1165 (contractual language alone will not create a Section 9(a) relationship where the language merely "state[s] that an employer 'recognizes' a union as an exclusive collective bargaining agent without other language showing that the recognition is based on [Section] 9(a)").

¹⁶ John Deklewa & Sons, 282 NLRB 1375 (1987).

The agreement need not contain specific terms or "magic words."¹⁷ Thus, the parties' failure to specifically refer to Section 9(a) in the recognition clause is not necessarily fatal to finding a 9(a) relationship provided that the rest of the agreement conclusively notifies the parties that a 9(a) relationship is intended.¹⁸ Where the contract language is not "independently dispositive," the Board will "consider relevant extrinsic evidence" demonstrating the parties' intent.¹⁹

For example, in Central Illinois, the Board held that language providing that the employer recognized the union "as the Majority Representative" of the unit employees and the "sole and exclusive bargaining agent" of those employees did not unequivocally show that the parties intended to create a 9(a) relationship because it did not state that the employer's recognition was based on a contemporaneous showing, or offer by the union to show, that the union had majority support.²⁰

¹⁷ See Nova Plumbing, Inc., 336 NLRB 633, 635 fn. 4 (2001), enf. denied 330 F.3d 531 (D.C. Cir. 2003). See also Saylor's, Inc., 338 NLRB 330, 334 (2002) (contract language need not specifically state language in compliance with Central Illinois standard where there is a clear intent to satisfy each element of Board test).

¹⁸ Madison Industries, 349 NLRB 1306, 1309 (2007) (citing NLRB v. Triple C Maintenance, 219 F.3d at 1155 and NLRB v. Oklahoma Installation Co., 219 F.3d at 1165). See also Central Illinois, 335 NLRB at 720 (in many cases, the union's required request for recognition can be fairly implied from the contract language stating that the employer grants the required recognition; however, the employer's grant of recognition must be express and unconditional).

¹⁹ See Madison Industries, 349 NLRB at 1309; Central Illinois, 335 NLRB at 720, fn. 15.

²⁰ See also Madison Industries, 349 NLRB at 1308-1309 (language providing that the employer voluntarily recognized the union as the majority collective-bargaining representative of all employees of the employer did not unequivocally show that the parties intended to create a

By contrast, in Nova Plumbing,²¹ the Board held that the following language unequivocally created a 9(a) relationship:

Based upon evidence presented to the Contractor by the Union, which evidence demonstrates that the Union represents an uncoerced majority of the employees of the Contractor, and which has been independently verified by a Certified Public Accounting firm satisfactory to the Contractor, the Contractor hereby recognizes the Unions who are signatory hereto as the sole and exclusive collective bargaining representative of all employees of the Contractor performing Plumbing and Piping work as defined in this Agreement.²²

The Board explained that, although the language did not specifically state that the union requested recognition, it clearly indicated that the union requested recognition by stating that the employer granted recognition *based on* evidence submitted by the union. The Board also explained that the language clearly stated that the employer recognized the union as the majority representative, and that the recognition was based on evidence the union presented to the employer demonstrating that the union represented a majority of employees.²³ The Board further noted that language indicating that the union demonstrated or offered to demonstrate majority support through cards

9(a) relationship because another contractual provision waiving the union's right to file a petition for an election with the Board during the term of the contract created ambiguity; such a provision would be unnecessary if it were a 9(a) agreement, since a 9(a) agreement bars an employer from filing a petition for an election during its term).

²¹ 336 NLRB 633 (2001), enf. denied 330 F.3d 531 (D.C. Cir. 2003).

²² Id. at 634.

²³ Id. at 634-635.

would be meaningless if the parties did not intend to create a 9(a) relationship. Thus, the Board in effect found that the language as a whole created a link between the union's demonstration of majority status and the employer's grant of recognition that necessarily implied a demand for 9(a) recognition.

Here, as in Nova Plumbing, the language provides that the Employer recognized the Union as the sole and exclusive bargaining representative and that prior to recognition, the Employer was presented and reviewed valid written evidence of the Union's exclusive designation as bargaining representative by the majority of appropriate bargaining unit employees. As the Board noted in Nova Plumbing, language indicating that the Union demonstrated or offered to demonstrate majority support through cards would be meaningless if the parties did not intend a 9(a) relationship. Thus, the Employer's recognition of the Union as sole and exclusive representative pursuant to a showing of majority support can be read as a statement that the Employer recognized the Union as the majority representative.²⁴ Applying this reasoning, the instant recognition provision viewed as a whole can arguably be construed to mean that the parties clearly intended to create a 9(a) relationship.

However, unlike in Nova Plumbing, the instant recognition clause does not specifically state that the Employer's recognition was "based on" the Union's submission of evidence that it represented a majority of the employees; it states only that the submission of evidence occurred "prior to" the recognition. Thus, the MOA states a temporal, but not a causal, link between the Union's submission of evidence of majority representation

²⁴ And see Kelly Construction of Davenport, Cases 33-RM-364 and 33-RD-807 (Regional Director's Decision and Direction of Election dated January 17, 2003), in which the Regional Director relied on Nova Plumbing in concluding that the recognition provision at issue here sufficed to establish a 9(a) relationship. However, a Regional Director's Decision in a separate representation case is not binding precedent in the absence of Board review.

and the Employer's recognition.²⁵ Accordingly, there is some doubt as to whether the recognition clause meets the Central Illinois requirements that the language unequivocally indicates that the Union requested recognition as *majority representative* and that the Employer recognized the Union as *majority representative*.²⁶

Because the MOA's language is arguably too ambiguous to independently establish that the parties created a Section 9(a) relationship, it is necessary to consider relevant extrinsic evidence.²⁷ Here, however, there is no extrinsic evidence establishing that the Union had the majority support necessary to create a 9(a) relationship. The Employer official signing the MOA did not recall receiving authorization cards, and the Union official admittedly did not present any cards.²⁸ Thus, the

²⁵ 336 NLRB at 634-635. See also Central Illinois, 335 NLRB at 717, 719-720 (repeatedly stating test as requiring that recognition be "based on" union's showing (or offering to show) evidence of majority support).

²⁶ See id. See also Madison Industries, 349 NLRB at 1308-1309 (contract language external to the recognition provision created ambiguity as to the type of recognition at issue).

²⁷ See Madison Industries, 349 NLRB at 1309 (finding construction-industry presumption of 8(f) status not rebutted where no extrinsic evidence existed to clarify ambiguous agreement); Central Illinois, 335 NLRB at 720, fn. 15 (same).

²⁸ As mentioned above, the Union official stated that the employees in question were employed by the Employer via the Union's hiring hall and were therefore represented by the Union. To the extent that the Union might rely on the employees' Union membership or use of its hiring hall as a proxy for majority support, such evidence is inadequate. See Central Illinois, 335 NLRB at 720 (reliance on union membership or representation is insufficient to establish majority support); John Deklewa & Sons, 282 NLRB at 1375 (union membership is not always an accurate barometer of union support).

extrinsic evidence here does not demonstrate that the parties' intent was to create a 9(a) relationship.²⁹

Finally, in Lambard, Inc.³⁰ the General Counsel proposed that, even where current law dictates finding that a 9(a) relationship existed, the better view would require the Board to overrule Central Illinois to the extent that it precludes the Board from reviewing whether the union actually enjoyed majority support at the time the employer purported to grant it Section 9(a) recognition. Under the General Counsel's proposed standard, contractual language that meets the standards set forth in Central Illinois will be sufficient to establish a rebuttable presumption of 9(a) status as to the employer who is a party to the contract. The employer may rebut the presumption of 9(a) status at any time 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.

Applying the proposed standard, the MOA's recognition language at best created a rebuttable presumption of 9(a) status. As discussed above, since the evidence here indicates that the Union did not possess majority support when the parties entered into their collective-bargaining

²⁹ We note that the evidence demonstrating an absence of support for the Union presents precisely the situation that troubled the D.C. Circuit Court in Nova Plumbing v. NLRB, supra, 330 F.3d at 537. Compare M&M Backhoe Service v. NLRB, 469 F.3d 1047 (D.C. Cir. 2006) (adopting Board's finding of 9(a) relationship where authorization cards demonstrated union's actual majority support at time of agreement, even though cards were not shown to employer at that time).

³⁰ Case 31-CA-27033 (Significant Appeals Minute 05-13). See also Banta Tile & Marble Co., Case 4-CA-34569 (Advice memorandum dated November 7, 2006); Coastal Sprinkler Co., Case 16-CA-24710 (Advice memorandum dated March 21, 2006); D & B Fire Protection, Inc., Case 21-CA-36915 (Advice memorandum dated December 9, 2005).

agreement, the Employer has met its burden of establishing that the parties did not enter into a 9(a) relationship.

In sum, in order to place the Lambard issue before the Board in this case it would be necessary to reach a difficult issue of statutory construction under Central Illinois. Since the case would likely be dismissed applying either Central Illinois or Lambard, we conclude that it would not effectuate the purposes of the Act to issue complaint in this case.

/s/

B.J.K.