

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

Advice Memorandum

DATE: August 20, 1999

TO : James S. Scott, Regional Director
Region 32

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

SUBJECT: PCL Construction Services, Inc.
32-CA-17434

590-7575

590-7575-2500

This case was submitted for advice as to whether this construction industry Employer and the Union established a Section 9(a) relationship through language in the parties' collective bargaining agreement.

PCL Construction Services (the Employer) was signatory, through its multi-employer bargaining representative Construction Employers Association (CEA), to a collective bargaining agreement with the Northern California District Council of Laborers (the Union) which expired on June 30, 1999.¹ In April, during the termination notice period, the Employer provided notice that it had revoked CEA's authority to represent it in collective bargaining, and stated that it would not be bound by the next master agreement and would not negotiate its own successor agreement with the Union.

The recognition clause of the now-expired master agreement did not contain Section 9(a) recognition language, but stated only that:

The Employer and the Individual Employers covered hereby recognize and acknowledge the Northern California District Council of Laborers of the Laborers' International Union of North America, AFL-CIO as the collective bargaining representative for the employees in the area aforementioned covering the jurisdiction of the Union.

However, Section 11 of the agreement, entitled "Subcontractors," which was a proviso-protected Section 8(e) clause requiring contractors doing work at the jobsite to apply the contract, stated in pertinent part that:

¹ All dates hereafter are in 1999 unless noted otherwise.

The Individual Employer has the primary obligation for performance of all conditions of this Agreement . . . Said primary obligation shall be deemed conclusive evidence of the Union's majority status for the purpose of establishing the obligation of the Individual Employer to bargain collectively, pursuant to Section 8(a)(5) of the National Labor Relations Act, as amended, with the Union upon the expiration of this agreement, but for no other purpose, statute or law.

Although requested to do so by the Region, neither the Union, the Employer, nor CEA have been able to present bargaining notes or other extrinsic evidence regarding the meaning of that clause or the intentions of the parties in including it in their agreement.

Absent evidence to the contrary, we conclude that the language of Section 11 of the agreement can reasonably be read to establish a Section 9(a) relationship, and that the Employer violated Section 8(a)(5) by refusing to bargain with the Union for a successor agreement.

In Deklewa, the Board held that in the construction industry, as elsewhere, an employer may enter into a Section 9(a) relationship by voluntarily recognizing the union based on a showing of majority support among the employees.² The Board also stated that the party asserting the existence of a Section 9(a) relationship has the burden of proving it.³ In J & R Tile,⁴ the Board held that to establish voluntary Section 9(a) recognition in the construction industry, there must be evidence that the union unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such based on a contemporaneous showing of union support among a majority of the employees in an appropriate unit.⁵ However, any challenge based on insufficient evidence of majority status under J & R Tile must be raised within a reasonable period after an employer grants recognition under Section 9(a). After 6 months

² John Deklewa & Sons, 282 NLRB 1375, 1385 n.53 (1987).

³ Id. at 1387 n.41.

⁴ J & R Tile, 291 NLRB 1034, 1036 (1988).

⁵ Id.

without the filing of a charge or petition, the Board will not entertain a claim that majority status was lacking at the time of recognition.⁶

Here, the language of the agreement demonstrates that the Union demanded, and the Employer accepted, 9(a) recognition based upon the Union's majority support. Thus, while Section 11 is not a "recognition clause" per se, and the parties did not state expressly that the Employer was recognizing the Union as the "9(a) representative," it is clear that the Employer was agreeing to bargain with the Union on a 9(a) basis when it agreed to "bargain collectively, pursuant to Section 8(a)(5) . . . upon the expiration of this agreement."⁷ Concededly, the "majority support" language is awkwardly phrased, and could indicate that the parties agreed to presume majority status without any demonstration of majority support by the Union. However, in the absence of any bargaining history or other evidence of intent this language can be read as a legitimate acknowledgment by the Employer that the Union enjoyed majority support. The fact that the language was included in a lawful Section 8(e) clause in which the Employer agreed to be liable for a breach of the collective bargaining agreement by its subcontractor lends further support to that interpretation, in that an employer would more likely agree to the obligations imposed by such a clause where the union enjoyed majority status.

In any event, the language expressly acknowledges majority status and any challenge to the validity of the recognition based on insufficient evidence of majority status is now untimely.⁸

⁶ Triple A Fire Protection, 312 NLRB 1088, 1089 (1993); Casale Industries, 311 NLRB 951, 953 (1993).

⁷ See Oklahoma Installation Co., 325 NLRB No. 40 (1998) (9(a) recognition found based on recognition of union as "majority representative," without specific reference to Section 9(a), because the parties would not have acknowledged union's majority status if they had intended only a Section 8(f) relationship).

⁸ See Casale Industries, 311 NLRB at 953. See also Oklahoma Installation Co., 325 NLRB No. 140, slip op. at 2 (rejecting argument that union had to prove it affirmatively demonstrated its majority status to the employer before the employer contractually acknowledged that status). Indeed, in American Automatic Sprinkler

Accordingly, the Region should issue a Section 8(a)(5) complaint, absent settlement.

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Systems, 323 NLRB No. 160 (1997), the Board found that the parties had effectively created a Section 9(a) relationship, despite the absence of any "majority status" language in the agreement, where there was a clear grant of recognition under Section 9(a) and, under Casale, it was no longer appropriate to consider whether the union had majority status at the time that recognition was granted. See also Accurate Glass and Mirror Company, 9-CA-34783, Advice Memorandum dated August 21, 1997.