

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

# Advice Memorandum

DATE: March 30, 2006

TO : Rik D. Lineback, Regional Director  
Region 25

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

SUBJECT: Nies Eggert Waterproofing Co. 347-4010-9000  
Case 25-CA-29777 530-4000  
and 530-4025-2500  
Bricklayers, Local 4 (Nies Eggert) 530-4025-5000  
Case 25-CB-8949 530-6001-2500  
530-8031  
530-8045-8300

The Region submitted these cases for advice as to whether the Employer violated Section 8(a)(1) and (5) by withdrawing recognition from and repudiating its 9(a) collective-bargaining agreement with the incumbent union, and violated Section 8(a)(2) by recognizing a rival union as the collective-bargaining representative of unit employees. The Region also seeks advice as to whether the second union violated Section 8(b)(1)(A) by accepting the Employer's unlawful assistance and recognition.

We conclude that the Employer violated the Act as alleged. The Employer has an 8(f) contract with the incumbent union that automatically renewed pursuant to an "evergreen" provision because neither the Employer nor the incumbent gave notice of its intention to terminate the agreement. Since the contract did not expire, the Employer was not privileged under Deklewa<sup>1</sup> to withdraw recognition from or repudiate its collective-bargaining agreement with the incumbent. We likewise conclude that the rival union violated the Act by accepting the Employer's recognition.<sup>2</sup>

### FACTS

Nies Eggert Waterproofing Co. (the Employer) is an Indianapolis, Indiana waterproofing contractor operating within the construction industry. The Employer employs

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<sup>1</sup> John Deklewa & Sons, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

<sup>2</sup> Section 6(A) of the Employer's contract with the rival union contains a union security clause, and the rival's maintenance and enforcement of that clause could violate Section 8(b)(2) of the Act. To date, no charge has been filed alleging such a violation.

approximately 48 employees, and assigns them to various jobsites in and around Indianapolis.

At some time in 1999 the Employer took over a contract to install chemical-resistant linings and coatings to starch tanks (tank work). The Employer hired employees represented by Plasterers Local 692 (Cement Masons), primarily because they had been performing the work before the Employer took over the contract.

The Employer has subsequently executed successive collective-bargaining agreements with the Cement Masons. The recognition clause in the current contract contains the following language:

The Union having demonstrated to the Employer's satisfaction that a majority of the bargaining unit employees covered by this collective bargaining agreement has designated the Union to serve as their collective bargaining representative, and are desirous of maintaining such representation, the Employer hereby agrees voluntarily to recognize the Union as the exclusive collective bargaining representative of all such employees per Section 9(a) of the National Labor Relations Act for all employees within the contractual bargaining unit.

The most recent agreement was initially effective from June 1, 2002, through May 31, 2005. That contract contains an automatic renewal or "evergreen" clause that extends the contract by twelve months if neither party provides the other with written notice of its intent to amend or terminate the contract at least sixty (60) days prior to the scheduled expiration, i.e., around April 1.

In addition to the unit employees, for over 50 years the Employer has employed a separate unit of employees who are covered by a collective-bargaining agreement between the Employer and Bricklayers Local 4 (Bricklayers). The most recent contract between the Employer and the Bricklayers is effective by its terms from May 31, 2004, to June 1, 2007.

In October 2004, the Employer lost the tank work contract. Rather than terminate the unit employees, the Employer deployed them to various job sites where they worked with the employees covered by the Bricklayers contract. The unit employees applied epoxy coatings to various surfaces while the employees in the Bricklayers unit performed other tasks. The two groups of employees

worked side by side, and the Employer continued to apply the Cement Masons contract to the unit employees.

Some time in late-April or mid-May 2005,<sup>3</sup> the Cement Masons allegedly changed the way it deducted dues from employees' paychecks, which some unit employees perceived to be a near doubling of their monthly dues. One of the unit employees (herein, "the lead employee") told the Employer that he was unhappy with the increased dues and that he believed the unit employees would be better off under the Bricklayers contract. The Employer responded only that it would consider his suggestion.

The lead employee subsequently met with each of the unit employees about switching from the Cement Masons to the Bricklayers. After meeting among themselves, and later with a Bricklayers representative, the unit employees decided to join the Bricklayers.

At some subsequent time in late May, the lead employee advised the Employer of the employees' now unanimous desire to have the Bricklayers represent them rather than the Cement Masons. The Employer responded that it wanted a few days to consider the employees' decision. A few days later, the Employer told the lead employee that it could not do anything about the change in representative and would not be involved; the Employer told the lead employee that if the employees wanted to change, it was up to them.

The unit employees decided to wait until after May 31 to join the Bricklayers, believing that the Employer's contract with the Cement Masons would expire on that date.<sup>4</sup> After work on June 1, at least seven unit employees went to the Bricklayers hall; there they met with a Bricklayers representative and ultimately joined the Bricklayers union.

It is unclear precisely when the employees advised the Employer that they had in fact become members of the Bricklayers. The employees did not sign a petition or submit to the Employer or the Cement Masons anything in writing that would have expressed their desire to abandon the Cement Masons in favor of the Bricklayers. At some point, the Employer ceased submitting dues and making

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<sup>3</sup> All dates are in 2005 unless noted otherwise.

<sup>4</sup> It is undisputed that at no time has either the Employer or the Cement Masons provided the other with any notice that it intended to terminate or amend their collective-bargaining agreement.

payments to the Cement Masons' trust and benefit fund with a dues report marked "final" in July.<sup>5</sup>

The Cement Masons learned of the Employer's decision to pay the unit employees under the Bricklayers contract some time in September 2005, when a unit employee mentioned it to a representative during a visit to the Cement Masons' office. After the representative independently confirmed the employee's information, the Cement Masons advised the Employer that the parties' collective-bargaining agreement automatically renewed on June 1 and, therefore, the Employer could not withdraw recognition from the Cement Masons. The Employer defended its actions by claiming that its employees, not the Employer, decided that they should be represented by the Bricklayers.

After the charges were filed, the Employer took the position that it has not repudiated its agreement with the Cement Masons. Rather, it claims that the unit employees are no longer performing work covered by the Cement Masons contract. The Employer concedes, however, that both the Cement Masons contract and its agreement with the Bricklayers include the application of epoxy coatings and waterproofing work within their contractual jurisdictions, and opines the dispute might best be resolved in a Section 10(k) hearing.

#### ACTION

We first conclude that the Employer violated Section 8(a)(5) of the Act when it withdrew recognition from and repudiated its agreement with the Cement Masons. We determined that under established Board principles, the parties had a Section 8(f) contract that automatically renewed on June 1, because neither the Employer nor the Cement Masons acted to forestall the operation of the contract's evergreen clause. Since the contract did not expire, the Employer has at no relevant time been free to unilaterally withdraw recognition from or otherwise repudiate its agreement with the incumbent union. We further conclude that the Employer violated Section 8(a)(2) by recognizing the rival union as the exclusive collective-bargaining representative of the unit employees, and that the rival violated Section 8(b)(1)(A) by accepting the Employer's recognition. The Region should therefore issue a consolidated complaint, absent settlement.

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<sup>5</sup> The Employer has likewise not applied any aspect of the Cement Masons contract to any of its employees since about June 2005.

Though not submitted for advice, we first addressed the issue of whether the Employer's contract with the Cement Masons is governed by Section 8(f) or 9(a) of the Act, given the significant differences between a union's representative status in the construction industry under the two sections. Under Section 8(f), an employer may terminate the bargaining relationship upon an effective expiration of the agreement or pursuant to an election held during the term of the agreement.<sup>6</sup> 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 actually lost majority support.<sup>7</sup>

In the construction industry, there is a rebuttable presumption that a bargaining relationship is a Section 8(f) relationship;<sup>8</sup> therefore, a party asserting the existence of a 9(a) relationship has the burden of proving it.<sup>9</sup> The Board has held that it is possible for a party to meet its burden through contract language alone.<sup>10</sup>

In Central Illinois,<sup>11</sup> the Board adopted the Tenth Circuit's three-part test to determine whether contract language alone was sufficient to establish a Section 9(a) relationship.<sup>12</sup> Thus, to overcome the presumption that a bargaining relationship in the construction industry is governed by Section 8(f), the Board requires contract language that unequivocally indicates (1) that the union requested recognition as the majority or 9(a)

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<sup>6</sup> See, e.g., Central Illinois Construction, 335 NLRB 717, 718 (2001).

<sup>7</sup> Id. See also Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 785-786 (1996) and Levitz, above, 333 NLRB at 717.

<sup>8</sup> John Deklewa & Sons, above, 282 NLRB at 1385 n. 41.

<sup>9</sup> Central Illinois, 335 NLRB at 721.

<sup>10</sup> Id., 335 NLRB at 717. But see Nova Plumbing, Inc. v. NLRB, 330 F.3d 531, 536-538 (D.C. Cir. 2003), denying enf. of 336 NLRB 633 (2001) (contract language alone did not establish a Section 9(a) relationship where evidence showed unit employees resisted union representation).

<sup>11</sup> 335 NLRB at 719-720.

<sup>12</sup> See NLRB v. Triple C Maintenance, Inc., 219 F.3d 1147, 1155 (10th Cir. 2000), enforcing 327 NLRB 42 (1998), and NLRB v. Oklahoma Installation Co., 219 F.3d 1160, 1164 (10th Cir. 2000), denying enf. of 325 NLRB 741 (1998).

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 the union had the support of a majority of unit employees.<sup>13</sup> The agreement need not contain specific terms or "magic words," but the contract language should accurately describe events that would independently establish the creation of a 9(a) relationship.<sup>14</sup> Where the contract language is not "independently dispositive," the Board will "consider relevant extrinsic evidence" to determine whether a relationship is governed by Section 8(f) or 9(a).<sup>15</sup>

Assuming, *arguendo*, that the recognition language here satisfies the first two elements of the Central Illinois test, it does not satisfy the third element. That language, even if it accurately describes an exchange between the Employer and the Cement Masons, does not unequivocally state that the Cement Masons showed, or offered to show the Employer any evidence that would prove that a majority of unit employees supported the Cement Masons. On the contrary, the agreement merely asserts that the Cement Masons "demonstrated to the Employer's satisfaction that a majority of the bargaining unit employees . . . designated the Union to serve as their collective bargaining representative[.]"<sup>16</sup> That language

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<sup>13</sup> Central Illinois, 335 NLRB at 719-720.

<sup>14</sup> See, e.g., Pontiac Ceiling and Partition Co., 337 NLRB 120, 121 (2001) (contract language established 9(a) relationship where it reflected Union's presentation of signed authorization cards that supported the union's claim of majority support), and Saylor's, Inc., 338 NLRB 330, 330 (2002) (contract language sufficient to establish 9(a) relationship where it stated that union "submitted to the [e]mployer evidence of majority support"). But see, CAB Associates, 340 NLRB 1391, 1396-97, fn. 5 & 6 (2003) (contract provision was insufficient to establish a 9(a) relationship where it stated that union merely "claimed," and the employer "acknowledged and agreed" that the union had the support of a majority of employees).

<sup>15</sup> Central Illinois, 335 NLRB at 720, fn. 15.

<sup>16</sup> See, e.g., NLRB v. Oklahoma Installation Co., 219 F.3d 1160, 1165 -1166 (10<sup>th</sup> Cir. 2000) (contractual language stating that the union "submitted" and that the Employer was "satisfied" that the union represented a majority of employees was too ambiguous to establish creation of 9(a)

could mean no more than the Employer was satisfied with an assertion, without proof or an offer of proof, by the Cement Masons that it had the support of a majority of unit employees.<sup>17</sup> Since this language is therefore too ambiguous to independently establish that the parties created a Section 9(a) relationship, it is necessary to consider relevant extrinsic evidence.

The only extrinsic evidence relating to whether the Cement Masons and the Employer had a bona fide 9(a) relationship, i.e. unit employees supported the Cement Masons prior to the formation of the most recent contract, are photocopies of authorization cards from three of the at least seven unit employees. There is no showing that the Cement Masons had other evidence of majority employee support, or that it showed or offered to show that evidence to the Employer. In these circumstances, the Union has failed to overcome the presumption that its relationship with the Employer was governed by Section 8(f).<sup>18</sup>

Second, we addressed the legality of the Employer's unilateral abrogation of its bargaining relationship with the Cement Masons. Parties to 8(f) agreements are required, by virtue of Section 8(a)(5) and Section 8(b)(3), to comply with the terms of their agreements unless the employees vote, in a Board-conducted election, to reject or change their bargaining representative.<sup>19</sup> Either party is free to repudiate the collective-bargaining relationship once an 8(f) contract expires by its terms.<sup>20</sup> However, the Board has consistently given effect to an 8(f) agreement's

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relationship). See also, Classical Stairways, Inc., Case 32-CA-21531, Advice Memorandum dated November 18, 2004.

<sup>17</sup> See CAB Associates, above, 340 NLRB at 1396-97, fn. 5 & 6 (language that employer "acknowledged and agreed to" majority status does not reflect proof or offer of proof by union).

<sup>18</sup> See, e.g., San Antonio Control Systems, Inc., 290 NLRB 786, 786 fn. 1 (1988) (no 9(a) relationship where there was insufficient evidence that a majority of unit employees supported the union at the time of alleged recognition). See also, the Advice Memorandum in Classical Stairways, above.

<sup>19</sup> John Deklewa & Sons, 282 NLRB 1375, 1385 (1987), enfd. sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988), cert. denied 107 S.Ct. 222 (1988).

<sup>20</sup> Deklewa, 282 NLRB at 1385.

automatic renewal clause, which operates to bind the parties to a continuation of the agreement.<sup>21</sup> When an employer repudiates a collective-bargaining agreement during its term, it violates Section 8(a)(5) of the Act.<sup>22</sup>

The Employer's withdrawal of recognition from and repudiation of its agreement with the Cement Masons was unlawful because it occurred during the term of a valid contract. The Employer could have withdrawn recognition from the Cement Masons if the contract had expired, but it is undisputed that the contract automatically renewed by operation of the evergreen clause. Neither party did anything to forestall the operation of the evergreen clause, and the contract automatically renewed on June 1. The automatic renewal precluded the Employer from unilaterally terminating its collective bargaining relationship with the Cement Masons.<sup>23</sup>

Even if the parties' collective-bargaining relationship were governed by Section 9(a), the Employer's conduct would be unlawful for the same reason, i.e., the contract had automatically renewed and was in full force and effect when the Employer withdrew recognition. Under Section 9(a), unions enjoy an irrebuttable presumption of majority status during the term of its collective-bargaining agreement, up to three years.<sup>24</sup> Levitz allows an employer, during a period when a 9(a) union's presumption of majority support is rebuttable, to withdraw recognition from its employees' representative if it has evidence that the union has, in fact, lost majority support.<sup>25</sup>

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<sup>21</sup> Cedar Valley Corp., 302 NLRB 823 (1991), enfd. 977 F.2d 1211 (8th Cir. 1992), cert. denied 508 U.S. 907 (1993); Fortney & Weygandt, 298 NLRB 863 (1990); and GEM Management Co., 339 NLRB 489, 496 (2003).

<sup>22</sup> See Deklewa, above, 282 NLRB at 1385; GEM Management, above, 339 NLRB at 496.

<sup>23</sup> Neosho Construction Co., 305 NLRB 100, 102 (1991); Cedar Valley Corp., 302 NLRB at 823; Fortney & Weygandt, 298 NLRB at 863; and GEM Management, 339 NLRB at 496.

<sup>24</sup> See, e.g., Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 785-786 (1996) (citing NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272, 290 n.12 (1972)). See also, Supreme Equipment & Systems Corp., 235 NLRB 244, 251 (1978) (employer was not free during waning months of a valid collective-bargaining agreement to resolve question concerning representation by its own determination).

<sup>25</sup> Levitz, 333 NLRB at 725.

Significantly, in Levitz the withdrawal occurred after the contract had expired and before any new collective-bargaining agreement was reached; therefore, the irrefutable contract term presumption had changed upon contract expiration to a rebuttable presumption.<sup>26</sup> By contrast, here the parties' agreement automatically renewed, i.e., another one-year contract had been formed, so there was no opportunity for the Employer to rebut the Cement Masons' majority status.

Dura-Art Stone, Inc.,<sup>27</sup> is distinguishable. In that case the employer learned that the union had lost the support of a majority of unit employees about one month before the parties had reached a successor agreement. Although the employer could not have immediately withdrawn recognition, it clearly could not attempt to form a new contract with a minority union.<sup>28</sup> The concept of rebuttable presumptions, while seemingly analogous, plays no analytical role in a case like Dura-Art. The employer violated the Act by ignoring its employees' rejection of the union, and continuing to negotiate and ultimately execute a collective-bargaining agreement with a de facto minority union.

The Employer's unlawful unilateral action also was unnecessary to safeguard unit employees' free choice and, given the options available to employees, disfavored by the Board.<sup>29</sup> Instead, the unit employees could have exercised their Section 7 rights by using the Board's election processes. The burden on exercising these rights is particularly slight in the circumstances here, because 8(f) contracts cannot bar representation petitions pursuant to Section 9(c) or (e), the employees could have filed a decertification petition, and may still do so at any time.<sup>30</sup>

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<sup>26</sup> Id., at 730.

<sup>27</sup> 346 NLRB No. 14, slip op. at 1 n.2, 2, 4 (2005).

<sup>28</sup> Ladies' Garment Workers Union [Bernhard-Altmann] v. NLRB, 366 U.S. 731 (1962).

<sup>29</sup> Levitz, 333 NLRB at 723, 727. See Auciello, 317 NLRB at 374; Supreme Equipment & Systems Corp., 235 NLRB at 251.

<sup>30</sup> Deklewa, above, 282 NLRB at 1377-1378; Hope Elec. Corp., 339 NLRB 933, 940 (2003).

Even if this case were governed by 9(a), employees would still have the opportunity to file a decertification petition during a 30-day period near the end of the contract.

Moreover, while it was too late to do so in June 2005, the Employer can lawfully forestall any further automatic renewal of the contract by giving timely notice of its intent to terminate the agreement in 2006, terminating its relationship with the Cement Masons.

Third, we conclude that because the Employer was obligated to recognize and bargain with the Cement Masons as the unit employees' collective bargaining representative, it violated Section 8(a)(2) by recognizing the Bricklayers as the unit employees' representative. Additionally, the Bricklayers' acceptance of recognition from the Employer as the collective-bargaining representative of unit employees who were already represented by the incumbent union, and covered by the terms of a Section 8(f) agreement, violated Section 8(b)(1)(A) of the Act.<sup>31</sup>

B.J.K.

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<sup>31</sup> Builders, Woodworkers, & Millwrights Local 1 (Glen Falls Contractors Assn.), 341 NLRB 448, 454 (2004), citing Stockton Door Co., 218 NLRB 1053, 1055 (1975), *enfd.* 547 F.2d 489 (9th Cir. 1976), *cert denied* 434 U.S. 834 (1977).