

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

Advice Memorandum

DATE: March 21, 2006

TO : Ralph Gomez, Acting Regional Director
Region 16

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

SUBJECT: Coastal Sprinkler Co., Inc. 530-8045-8700
Case No. 16-CA-24710 596-0440-7500

This case was submitted for advice as to whether this construction-industry Employer established a Section 9(a) relationship with the Union, and, if so, whether the Employer subsequently violated Section 8(a)(5) by refusing to provide the Union with relevant information during bargaining for a successor contract.

We conclude that the Region should issue complaint in order to argue, based on current Board law as set forth in Central Illinois Construction,¹ that the parties' relationship was governed by Section 9(a) rather than Section 8(f). Accordingly, the complaint should allege that the Employer violated Section 8(a)(5) by refusing to provide the Union with relevant information. However, the Region should further argue that the better view of the law would require the Board to overrule Central Illinois to the extent that that case would preclude the Board from reviewing the circumstances of the Employer's initial grant of recognition.

FACTS

Coastal Sprinkler Co., Inc. has been signatory with Charging Party Road Sprinkler Fitters Local No. 669 to successive collective-bargaining agreements covering its sprinkler fitter employees since July 6, 1987. On that date, the Employer entered into an agreement with the Union to be bound by the terms of the collective-bargaining agreement between the Union and the National Fire Sprinkler Association, Inc. ("NFSA"). The parties' agreement provided that, "the Union is the exclusive bargaining representative of such competent and skilled Journeymen, Apprentice and Pre-apprentice Sprinkler Fitters." The Employer, however, has never joined the NFSA.

¹ 335 NLRB 717 (2001).

The Union's former business agent stated that in 1987, in response to the Board's Deklewa decision, the Union mailed to the Employer (as well as many other signatory contractors) a document entitled "Acknowledgement of the Representative Status of Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO." The Acknowledgement, which the Union asserts the Employer signed and returned, provided that:

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 have designated, are members of, and are 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 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

Along with this Acknowledgement form, the business agent stated that it sent the Employer copies of Coastal's Fringe Benefit Reports for the last six months of 1987, which purported to establish that a majority of its employees were members of Local 669 during the relevant period.² There is no allegation or evidence that the Union attempted to establish its majority by any other means, such as through authorization cards.³

² The Benefit Reports list Coastal's employees for each month, their hours worked, and the assessed payments to three Union benefit funds. The Reports do not specifically indicate the Union membership status of each employee in so many words. However, in D & B Fire Protection, Inc., 21-CA-36915 (Advice memorandum dated December 9, 2005), another case involving a similar issue as the one here, the Union's counsel asserted that the employees' membership in Local 669 is indicated by the identification of Local 669 as the "Home Local" for each employee.

³ The Union's [FOIA Exemptions 6, 7(C) and (D)] that the Employer executed the 1987 Acknowledgement form. However, the Union was unable to provide the Region with a signed copy because all copies have been misplaced. The Employer has declined to take a

In 1990, 1993, 1997 and 2000, a Coastal agent signed agreements proffered by the Union entitled "Assent and Interim Agreement." Those agreement stated that,

The Employer hereby freely and unequivocally acknowledges that it has verified the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the National Labor Relations Act, as amended, for the purpose of establishing wages, hours, and working conditions for all journeymen sprinkler fitters, apprentices, and unindentured apprentice applicants in the Employ of the Employer.

At the time it signed the Interim Agreements, the Union did not provide Coastal with any independent evidence that supported its assertion of Section 9(a) status.

Prior to the expiration of the most recent agreement, the Employer timely notified the Union that it no longer wanted to sign an NFSA contract, but rather that it intended to bargain for a separate agreement. The parties began bargaining on about March 30, 2005.⁴ The Union struck the Employer upon expiration of the agreement two days later, after negotiations proved unsuccessful to that point.

Despite the strike, the parties continued bargaining over the course of nine more meetings between March 30 and September 21. On July 20 and August 29, the Union requested, among other things, all accident reports and Workers' Compensation claims for the previous five years. After the Employer refused to provide the information by claiming the information was not relevant to bargaining, the Union again requested the information on August 5 and September 30. Again, the Employer refused to provide the requested information. Although the Employer subsequently acknowledged to the Region that the requested information is relevant, it has refused to furnish it, asserting that the Employer has no legal obligation to do so. Thus, the Employer denies the parties ever converted the bargaining relationship from section 8(f) to Section 9(a). Rather, since it contends that the relationship was governed by Section 8(f), the Employer asserts that it has no

position on whether or not the Employer signed the 1987 Acknowledgment form.

⁴ All dates are in 2005 unless specified otherwise.

obligation to provide the Union with information after the collective-bargaining agreement had expired.

ACTION

We conclude that, based on current Board law as set forth in Central Illinois Construction,⁵ the parties' relationship was governed by Section 9(a) rather than Section 8(f). Accordingly, complaint should issue, absent withdrawal, alleging that the Employer violated Section 8(a)(5) by refusing to provide the Union with relevant bargaining information after the collective-bargaining agreement expired. However, the Region should further argue that the better view of the law would require the Board to overrule Central Illinois to the extent that that case would preclude the Board from reviewing the circumstances of the Employer's initial grant of recognition.

A. Under Current Board Law, the Employer's Relationship With the Union Was Governed By Section 9(a) Rather Than 8(f)

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.⁶ 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.⁷

In the construction industry, there is a rebuttable presumption that a bargaining relationship is governed by Section 8(f).⁸ Therefore, a party asserting the existence of a 9(a) relationship has the burden of proving it.⁹

⁵ 335 NLRB 717 (2001).

⁶ See, e.g., Central Illinois Construction, 335 NLRB at 718.

⁷ Id.

⁸ 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).

⁹ Central Illinois, 335 NLRB at 721.

In Central Illinois, the Board reaffirmed that contract language alone may establish a Section 9(a) relationship. Adopting the Tenth Circuit's three-part test to determine the sufficiency of the contract language,¹⁰ 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.¹¹ The agreement need not contain specific terms or "magic words;" however, the contract language should accurately describe events that would independently establish the creation of a 9(a) relationship.¹²

The recognition language of the 1987 agreement, in the form of an "Acknowledgement" of the Union's Section 9(a) status, satisfies each element of the Central Illinois test. In two pre-Central Illinois cases, the Board held that identical 1987 Acknowledgement Forms submitted by the Union created Section 9(a) relationships with signatory employers. The Board held that by proffering the Form the Union made an "unequivocal demand" for Section 9(a) recognition, which the employers "voluntarily and unequivocally granted."¹³ The Board thus concluded that,

¹⁰ See 335 NLRB at 719-20, 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).

¹¹ Central Illinois, 335 NLRB at 719-720.

¹² See, e.g., 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).

¹³ Triple A Fire Protection, 312 NLRB 1088 (1993), enfd. 136 F.3d 727 (11th Cir. 1998), cert. den. 525 U.S. 1067 (1999) (remanding to ALJ for determination of legality of unilateral changes; rejecting employer's 8(f) argument as untimely under Casale Industries, infra). See also MFP Fire Protection, 318 NLRB 840 (1995) (employer unlawfully repudiated 9(a) relationship; applying Casale Industries).

"[i]t is clear that the parties intended to establish a bargaining relationship under Section 9(a) of the Act."¹⁴

The parties' agreement also satisfies the final element of the Central Illinois test, requiring a statement that the Union made a contemporaneous offer to show or an actual showing of majority support. The 1987 Acknowledgement Form provides that the Employer "has, on the basis of objective and reliable information, confirmed that a clear majority of the [employees] ... are represented" by the Union. This language unequivocally states that the Union showed, and that the Employer, upon review of evidence, recognized that the Union had the support of a majority of unit employees.¹⁵ Accordingly, the Union's relationship was governed by Section 9(a), rather than Section 8(f). We therefore conclude that the Employer unlawfully withdrew recognition and failed to bargain with the Union in 2005.

Under existing Board law, the Employer also would be precluded from now asserting that the Union lacked majority support at the time of the recognition. In Casale Industries,¹⁶ the Board refused to permit an RC petitioner to challenge the incumbent union's majority status where the challenge was based on events at the time of recognition made approximately six years earlier, and the employer at that time had expressed its intent to enter into a 9(a) relationship with the union. The Board noted that in non-construction industries, if an employer grants Section 9(a) recognition to a union and more than six months elapse, the Board would not entertain a claim that majority status was lacking at the time of recognition. The Board found that unions in the construction industry should not be treated less favorably than those in non-construction industries. Accordingly, the Board concluded that "if a construction industry employer extends 9(a) recognition to a union, and six months elapse without a

¹⁴ Triple A Fire Protection, 312 NLRB at 1088-89. See NLRB v. Oklahoma Installation, 219 F.3d at 1164 ("critical question" is whether contract language establishes that "parties intended to be governed by § 9(a) rather than § 8(f).")

¹⁵ See, e.g., Saylor's, Inc., 338 NLRB at 330 (contract language sufficient to establish 9(a) relationship where it stated that union "submitted to the [e]mployer evidence of majority support").

¹⁶ 311 NLRB 951, 953 (1993).

charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition."¹⁷ While the Board has subsequently raised questions about Casale,¹⁸ the case remains Board law.

In the case before us, the 1987 Acknowledgement Form clearly expressed the Employer's intent to enter into a 9(a) relationship with the Union, the parties signed the Form in 1987, and the challenge to the Union's majority status occurred more than six months (in fact, more than 18 years) afterwards. Thus, under current Board law, the Employer's challenge to the Union's majority status at the time of recognition is time-barred under Section 10(b).

B. The Region should ask the Board to modify its decision in Central Illinois that contract language, standing alone, is sufficient to establish a Section 9(a) relationship.

Although the Region should issue complaint, absent withdrawal, the Region should further argue, as the General

¹⁷ Ibid.

¹⁸ In Central Illinois, the Board indicated that where the recognition language is couched in terms of the union's "offer to show" majority support, an employer may challenge the union's majority support, but that any such challenge must be made within six months after the written recognition was given as required by Section 10(b) of the Act. 335 NLRB at 720 n.14. By contrast, the Board specifically left open the issue of "whether an employer would be permitted to make a similar challenge within the 10(b) period [emphasis added] where the language it agreed to unequivocally stated that the union did make (as opposed to "offered to" make) a showing of majority support." Ibid. Consistent with Central Illinois' questioning whether employers would be permitted to challenge their own contractual acknowledgment of majority status (even within the 10(b) period), the Board in Nova Plumbing, 336 NLRB 633, 634-36 (2001), enf. den. 330 F.3d 531 (D.C. Cir. 2003), did not rely on 10(b) in finding a 9(a) relationship based on contract language. However, although raising questions about the status of the Board's prior 10(b) policy, neither Nova nor Central Illinois overruled Casale, an R case.

Counsel directed in Lambard, Inc.¹⁹ and D & B Fire Protection, Inc.,²⁰ that 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.

In Nova Plumbing, Inc. v. NLRB,²¹ the D.C. Circuit rejected the Board's determination that contract language alone can establish a Section 9(a) relationship between a union and a construction industry employer, "at least where, as [there], the record contains strong indications that the parties had only a Section 8(f) relationship."²² The D.C. Circuit found that the Board's reliance on contract language, standing alone, to establish a 9(a) relationship "runs rough shod" over the principles established in International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altman).²³ The D.C. Circuit explained:

The Board's ruling that contract language alone can establish the existence of a section 9(a) relationship - and thus trigger the three-year "contract bar" against election petitions by the employees and other parties - creates an opportunity for construction companies and unions to circumvent both section 8(f) protections and [Bernhard-Altman's] holding by colluding at the expense of employees and rival unions. By focusing exclusively on employer and union intent, the Board has neglected its fundamental

¹⁹ Case 31-CA-27033 (July 7, 2005) (Significant Appeals Minute 05-13).

²⁰ Case 21-CA-36915 (Advice memorandum dated December 9, 2005).

²¹ 330 F.3d 531 (D.C. Cir. 2003).

²² Id. at 537.

²³ Ibid, citing 366 U.S. 731 (1961). In Bernhard-Altman, the Supreme Court found that a Section 9(a) collective-bargaining agreement that recognizes a union as an exclusive bargaining representative must fail in its entirety where, at the time the agreement was signed, only a minority of the employees actually authorized the union to represent them.

obligation to protect employee section 7 rights, opening the door to even more egregious violations than the good faith mistake issue in [Bernhard-Altman].²⁴

In the instant case, while the recognition clause clearly states that the Employer recognized the Union based on the Union's contemporaneous showing of evidence of its majority support, the Union's proffered evidence consisted exclusively of fringe benefit reports. At best, these reports only indicate that the Respondent's employees were members of the Union. In Deklewa, the Board noted that it is well established that union membership is not always an accurate barometer of union support.²⁵ For this reason, in Central Illinois,²⁶ the Board rejected the use of employee membership in a union to establish majority support, stating that it was overruling any post-Deklewa case that may be read to imply that an agreement indicating that a union has a majority of members in a unit, without more, is sufficient to establish 9(a) status. Accordingly, the evidence here fails to establish that the Union actually demonstrated majority support at the time the Employer granted it Section 9(a) recognition.²⁷

As the D.C. Circuit noted, allowing contract language alone to create a 9(a) relationship creates an opportunity for construction industry companies and unions to collude at the expense of employees, who would be precluded from filing an R-case petition during the term of a 9(a) contract under contract bar rules.²⁸ The employees' rights

²⁴ Id. at 537.

²⁵ 282 NLRB at 1375.

²⁶ 335 NLRB at 720.

²⁷ The Board should be urged to overrule Triple A Fire Protection and MFP Fire Protection, its prior decisions addressing the 1987 Acknowledgement Form, to the extent that in those cases it applied Casale Industries to shield from inquiry whether the claims in the Acknowledgement Form were accurate.

²⁸ Other cases also illustrate that same point. In Triple C Maintenance, 327 NLRB 42 n.2, 44-45 (1998), enfd. on other grounds, 219 F.3d 1147 (10th Cir. 2000), for instance, the employer and the union executed a collective-bargaining agreement that included language stating that recognition

under Sections 7 to reject an 8(f) relationship should not be defeated without some evidence to support the words drafted by highly interested parties. These rights would be better served by a rule that would bind the Employer and the Union to their bargain, unless either party²⁹ comes forward with evidence that the Union lacked majority support at the time of recognition, while permitting employees to challenge that Union's 9(a) status at any time through an RD petition. If an employee files an RD petition, or if an employer presents evidence that the union did not have majority support at the time of recognition, a test like that often used in voluntary recognition and contract bar cases in non-construction industries would better protect employee rights. That test emphasizes that "[t]he essence of voluntary recognition is the 'commitment of the employer to bargain upon some demonstrable showing of majority [status].'"³⁰ The Board has used a similar test in declining to find a recognition bar to an election where it does not "affirmatively appear" that an employer extended recognition in good faith "on the basis of a previously demonstrated showing of majority."³¹

was based on a "clear showing of majority support" even though the employer had no statutory employees at the time of recognition. Similarly, in Oklahoma Installation Company, 325 NLRB 741 (1998), enf. denied on other grounds, 219 F.3d 1160 (10th Cir. 2000), the parties' agreement indicated that the union represented a majority of employees although there were no employees working within the jurisdiction of the union at the time of recognition.

²⁹ While the same rule would apply to a union as to an employer, henceforth we will refer only to the Employer as it is the Employer who is challenging the 9(a) relationship in this case.

³⁰ NLRB v Lyon & Ryan Food, Inc., 647 F.2d 745, 751 (7th Cir. 1981), cert. den. 454 U.S. 894 (1981), quoting Jerr-Dan Corp., 237 NLRB 302, 303 (1978), enf. 601 F.2d 575 (3rd Cir. 1979). Accord, Brown & Connolly, 593 F.2d 1373, 1374 (1st Cir. 1979).

³¹ Sound Contractors Assoc., 162 NLRB 364, 365 (1966); Jack Williams, D.D.S., 231 NLRB 845, 846 (1977).

The Board formerly had just such a test in the construction industry.³² And as the Tenth Circuit noted in Triple C Maintenance, in its original form the Board's test required extrinsic evidence of a contemporaneous showing of majority support and not, as in later cases, a bare recitation of that fact in a contract. That later development was a permissible one.³³ However, in view of the criticism that the Central Illinois standard invites abuse,³⁴ the Board's former extrinsic evidence test would better serve the interests of the parties and the public where employees are challenging the union's 9(a) status or where the employer has presented evidence that the union did not in fact enjoy majority status at the time of the 9(a) recognition. For these reasons, it was determined that this case should be presented to the Board with a request that it modify its holding in Central Illinois that contract language alone is sufficient to establish 9(a) majority status.

Under the proposed rule, 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. However, the employer may rebut the presumption of 9(a) status 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

³² See Golden West, 307 NLRB 1494, 1495 (1992); Id. at 1495 n.5, 1496 (opinions of Member Stephens and Member Oviatt); J&R Tile, Inc., 291 NLRB 1034, 1036 & n.11 (1988). See also Island Construction, 135 NLRB 13 (1962) (finding contract bar under these principles).

³³ 219 F.3d at 1155.

³⁴ See Nova Plumbing, 330 F.3d at 536-37, discussed above. See also American Automatic Sprinkler Systems, Inc. v. NLRB, 163 F.3d 209, 222 (4th Cir. 1998) ("[T]o credit the employer's voluntary recognition absent any contemporaneous showing of majority support would reduce this time-honored alternative to Board-certified election to a hollow form which, though providing the contracting parties stability and repose, would offer scant protection of the employees free choice that is a central aim of the Act."), cert. denied 528 U.S. 821 (1999); Saylor's, Inc., 338 NLRB at 330-33 (Member Cowen, dissenting) (quoting American Automatic Sprinkler Sys. Inc., 163 F.3d at 222).

evidence, the union then has the burden to present sufficient evidence to establish that it did in fact have majority support at that time. If the union is unable to rebut the employer's contention that it lacked majority support, the employer has successfully established that the parties do not have a 9(a) relationship.

In regards to employee challenges, however, the contractual language will not create a rebuttable presumption of 9(a) status since the employees are not parties to the recognition clause. Rather, the union will be presumed to be an 8(f) representative. Under Deklewa, employees will be free to file an appropriate representation petition during the term of contract. Upon filing such a petition, the burden of introducing evidence supporting the claim that the union did, in fact, have majority support at the time of recognition would be on the party alleging that a 9(a) relationship exists. If that party is unable to meet this burden, the contractual language, standing alone, would be insufficient to establish such a relationship and the contract would not block the election.³⁵

This proposed rule is consistent with the Board's holding in H.Y. Floors and Gameline Painting, Inc.³⁶ In H.Y. Floors, an RD case, the Board held that while the employer and the union had a collective bargaining agreement that constituted a 9(a) contract vis-à-vis each other, the decertification petitioner was not a party to the agreement and was not estopped from timely challenging the 9(a) recognition.³⁷ The Board remanded the case to the Regional

³⁵ The General Counsel noted that the proposed rule could create a scenario in which a union could file a meritorious 8(a)(5) charge against an employer at the same time that an employee filed a representational petition with the Board. In such a case, the Board should exercise its discretion to determine whether an election would effectuate the policies of the Act. See Panda Terminals, Inc., 161 NLRB 1215, 1223-24 (1966). Since the union's unfair labor practice charge alleges conduct related to the unresolved question of representation in the employees' petition, the General Counsel would argue that the employees R-case petition should proceed first, while the union's unfair labor practice charge is held in abeyance.

³⁶ 331 NLRB 304 (2000).

³⁷ Id. at 304-05.

Director to reopen the record with respect to the union's evidentiary burden of showing it represented a majority of employees at the time that the employer extended 9(a) recognition.³⁸

In this case, the employees are not challenging the Union's 9(a) status. Rather, it is the Employer who contends that, despite contract language to the contrary, there is no evidence that the Union had majority support in 1987 at the time the Employer purportedly granted 9(a) recognition. Accordingly, under the proposed rule, there would be a rebuttable presumption of 9(a) status, and the Employer would have the burden of establishing that the Union did not enjoy majority support at the time of the agreement. Here, the investigation revealed that in 1987 the Union never provided the Employer with any relevant evidence of its purported majority status. Rather, the Union's claim was founded on fringe benefit reports showing union membership, which, by law, are insufficient to establish that it represented a majority of unit employees.³⁹ Therefore, the evidence is sufficient to rebut the presumption of 9(a) status created by the contract language.

While current Board law would preclude the Employer from actually challenging the Union's 9(a) status because more than six months had passed before it refused to respond to the Union's information request, the Region should also urge the Board to reconsider its policy under Casale of treating voluntary 9(a) recognition in the construction industry under the same set of 10(b) rules that apply to employers outside of that industry, as established in Machinists Local 1424 v. NLRB (Bryan Mfg., Co.).⁴⁰ This is not to say that the 10(b)-based policy the

³⁸ Id.

³⁹ See supra at p. 9.

⁴⁰ 362 U.S. 411 (1960). Bryan Mfg. involved an 8(b)(1)(A) charge filed by an employer alleging that the union did not have majority support at the time of recognition, which occurred 10 months prior to the filing of the charge. The Supreme Court found that the charge was time-barred under 10(b) for the entire foundation of the unfair labor practice was the union's time-barred lack of majority status when the original collective bargaining agreement was signed. 362 U.S. at 418. However, the Court stated that 10(b) does not prevent all use of evidence relating to

Board approved in Casale Industries is unreasonable. As explained by the Tenth Circuit in Triple C Maintenance, the Board's Casale policy furthers the policy of the Act to achieve uniformity and stabilize bargaining relationships.⁴¹ Additionally, there are practical reasons for the Board's policy under Casale, such as concerns about stale evidence, the availability of witnesses, and fairness to unions that are not on notice of the need to preserve evidence of majority support.

Nevertheless, for both legal and policy reasons, the Board's Casale policy should be modified. Casale's premise is that parties in the construction industry who clearly intend a 9(a) relationship are entitled to the benefit of the same six-month rule that protects parties outside the construction industry from belated claims that majority status was lacking at the time of recognition.⁴² That policy of parity, while abstractly fair and reasonable, does not fully take account of the legal and practical differences that warrant different treatment for the construction industry.

Outside the construction industry, a six-month rule is firmly anchored in the text and policy of the NLRA, as well as the practical realities of the workplace. Legally, premature recognition of a union that has not been selected by a majority of the bargaining unit constitutes a form of unlawful support or assistance to that union and is an interference with the free choice of the employees.⁴³ Practically, the question whether a stranger union purporting to be the employees' representative is lawfully acting as exclusive representative is starkly presented to both the employer and the affected employees, who under

events transpiring more than six months prior to the charge. Rather, in situations where occurrences in the 10(b) period in and of themselves may constitute, as a substantive matter, unfair labor practices, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period. Id. at 416.

⁴¹ 219 F.3d. at 1159.

⁴² 311 NLRB at 953.

⁴³ See Bernhard-Altman, 366 U.S. at 736-38.

Section 10(b) are given six months to file charges alleging the illegality of the bargaining relationship.⁴⁴

Within the construction industry, by contrast, a six-month rule has neither a practical nor a compelling legal basis. Practically, even in the absence of any affirmative showing of majority support, construction unions, under the Board's Deklewa policy, are lawfully entitled to function exactly like a 9(a) representative during the term of a contract, with the single exception that the contract is not a bar to the conduct of a decertification election during its term.⁴⁵ Because of Deklewa, a 9(a) contract does not have the same immediate consequences for employers and employees as would a 9(a) contract in other industries. Construction employers and employees therefore lack the same practical incentives to file unfair labor practice charges within six months, since their doing so ordinarily would have no effect on their day-to-day relations under the contract.⁴⁶ Moreover, given the patterns of transient employment and pre-hire bargaining in the construction industry, employees employed on a project may have no information about whether or not the bargaining relationship was originally based on an affirmative showing of majority support.

Legally, because of Section 8(f), construction employers and employees are also not similarly situated with those in other industries insofar as a six-month rule for challenging 9(a) recognition is concerned. The plain language of Section 8(f) states that, in the construction industry, recognition of a union that has not been selected

⁴⁴ Bryan Mfg. Co., 362 U.S. at 418.

⁴⁵ Deklewa, 282 NLRB at 1387.

⁴⁶ These practical realities may go far to explain why, in the nearly 20 years since Deklewa was decided, we have been unable to uncover a case finding an 8(a)(2) violation on the basis that a construction employer granted full 9(a) recognition to a construction union that lacked the support of a majority. Indeed, there appear to be only two construction cases where complaint was issued in circumstances that would invite the Board to adopt such a theory. Hovey Electric, 328 NLRB 273 (1999); Valley Crest Landscape Development, 2004 WL 2138583 (ALJD), adopted pro forma, in the absence of exceptions, by Board order dated January 31, 2005.

by a majority of the bargaining unit "shall not be an unfair labor practice."⁴⁷ This statutory language presents a formidable obstacle to the Board's ever finding an unfair labor practice where a construction industry employer grants 9(a) recognition to a construction union that in fact lacks majority support.⁴⁸ And absent an unfair labor

⁴⁷ In relevant part, Section 8(f) provides (emphasis supplied):

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement

Note that we deal here only with *uncoerced* 9(a) recognition where the sole issue, as in Bernhard-Altman, is whether the union granted recognition had the support of a numerical majority. Coerced support for a construction union is in no way privileged by 8(f). To the contrary, by its express terms, Section 8(f) affords no protection if the union signatory to the agreement is "assisted by an action defined in section 8(a) of this Act as an unfair labor practice..." 29 U.S.C. 158(f). See, e.g., Precision Carpet, 223 NLRB 329, 340 (1976) (threatening employees with discharge for refusing to join the union).

⁴⁸ Accord, Nova Plumbing, 330 F.3d at 538-39; American Automatic Sprinkler Sys. v. NLRB, 163 F.3d at 218 n.6. See also Triple A Fire Protection, 312 NLRB at 1089 n.3 (Member Devaney, concurring) (relying solely on "the parties clear expression of their intent" to find a 9(a) relationship and declining to rely on 10(b) in construction industry cases because in that industry "there is no statutory prohibition on minority recognition").

practice, the six month statute of limitations in Section 10(b) for filing unfair labor practice charges with the Board has no application.

Considerations similar to these led the Board to conclude in Brannan Sand & Gravel Co.,⁴⁹ that nothing in the Supreme Court's construction of Section 10(b) in Bryan Mfg. Co. "precludes inquiry into the establishment of construction industry bargaining relationships outside the 10(b) period." As Brannan explained:

Going back to the beginning of the parties' relationship here simply seeks to determine the majority or nonmajority based nature of the current relationship and does not involve a determination that any conduct was unlawful, either within or outside the 10(b) period.⁵⁰

The Board in Casale sought to distinguish Brannan on the ground that it did not address cases where "the parties intended a 9(a) relationship."⁵¹ Casale's suggested distinction, however, does not find compelling support in the text of Section 8(f), which on its face privileges nonmajority contracts in the construction industry without qualification.

For these reasons, it was concluded that the Region should ask the Board to reconsider Casale's rationale for engrafting a six-month rule for challenging 9(a) recognition in the construction industry. Casale is vulnerable to the criticism that it attempts to grant a 9(a) protected status to bargaining relationships in the construction industry in circumstances where the language of 8(f) suggests that a different treatment would better accord with Congress' intent. A better rule, more tailored to the legal and practical realities of construction industry bargaining, is not a rule of parity like that announced in Casale, but the rule under Brannan Sand & Gravel. That rule allows claims of full 9(a) status to be appropriately challenged by employers and employees beyond the 10(b) period. Moreover, because 8(f) privileges nonmajority bargaining relations in the construction industry, a rule allowing the Board to examine whether a union had majority support at the time of recognition does

⁴⁹ 289 NLRB 977, 982 (1988).

⁵⁰ Id. at 982.

⁵¹ 311 NLRB at 953 n.18.

not involve any determination concerning whether the recognition was an unfair labor practice.⁵²

In sum, because Casale's six month time limit neither has a functional relationship to the critical differences between a 9(a) relationship and an 8(f) relationship nor has a firm legal basis in view of 8(f)'s privileging nonmajority bargaining in the construction industry, the Region should urge the Board to adopt a rule that would allow the Board to look beyond the 10(b) period to determine whether a union actually had majority support at the time it was recognized as a 9(a) representative.

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⁵² The Region, however, should not ask the Board to overrule Casale in its entirety. That matter was presented to the Board in the guise of an R case, in which the Board was not asked to go beyond Section 10(b) to find legal culpability. Moreover, as set forth above, in the R-case setting, Casale is premised on reasonable evidentiary factors and notions of fairness. The Region should merely ask the Board to reconsider its application of Casale in the setting of a complaint alleging a Section 8(a)(5) refusal to provide information.