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

Advice Memorandum

DATE: July 30, 2008

TO : Daniel L. Hubbel, Regional Director
Region 17

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

SUBJECT: William J. Zickel Co.
Case 17-CA-24172 530-8045-8700
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 withdrawing recognition after expiration of a collective bargaining agreement in reliance on the Union's asserted 8(f) status. We conclude that the Region should issue complaint consistent with Central Illinois Construction,[1] that the parties' relationship was governed by Section 9(a) rather than Section 8(f).

FACTS

Respondent William J. Zickel Co. is a flooring and tile contractor with an office in Springfield, Missouri. Zickel has had a relationship with Missouri-Kansas Bricklayers and Allied Craftworkers Local Union No. 15 since 2001. The 2001-04 collective bargaining agreement contained the following jurisdiction clause:

1. The Union has submitted to the Employer evidence of majority support, and the Employer is satisfied that the Union represents a majority of the Employer's employees …
2. The Employer therefore voluntarily agrees to recognize the Union as the exclusive bargaining representative of all Employees in the contractually described bargaining unit …
3. The Employer and the Union acknowledge that they have a 9(a) relationship …

The Employer did not ask and the Union did not show the Employer evidence of majority support at this time.

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[1] 335 NLRB 717 (2001).

However, the Union collected authorization cards from a majority of the five unit employees at the time the parties entered into the agreement; it collected cards from the final employees shortly afterwards. On two occasions during the negotiation of the 2001 contract, a Union business agent directed the Employer to read over the Union's proposal carefully, stressing that a Section 9(a) relationship will be created, which will change the parties' relationship. The Employer representatives, however had few questions or comments; according to the Union representative, they mainly were concerned about economic issues.

The parties entered into a successor contractor effective from April 1, 2004 through March 31, 2008. The parties modified the contractual jurisdiction clause to read:

> Inasmuch as (1) the Union has requested recognition as the majority, Section 9(a) representative of the Employees in the bargaining unit described herein and (2) has submitted or offered to show proof of its majority support by those Employees, and (3) the Employer is satisfied that the Union represents a majority of the bargaining unit Employees, the Employer recognized the Union, pursuant to Section 9(a) …

As in 2001, the Union did not offer and the Employer did not ask to see the cards. In March 2008, shortly before the expiration of this agreement, the Union collected signed authorization cards from each of the ten unit employees.

The Employer withdrew recognition from the Union shortly after the 2004-08 agreement expired, claiming that the parties' relationship was governed by Section 8(f), not 9(a). The Employer points to two contractual provisions, which it claims renders the recognition clause ambiguous: an eight-day union security clause and a clause granting to the Union the right to deny the use of the contract to other contractors, both of which it asserts are typical of an 8(f) contract.[2] After the contract expired, the Union offered to show the Employer the signed authorization cards from a majority of bargaining unit employees; the Employer declined.

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[2] The Region has concluded that the Employer has likened the second clause, above, to a form of an assent agreement, common in the construction industry.

ACTION

We conclude that, based on the test set forth in Central Illinois Construction,[3] the parties' relationship is 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 withdrawing recognition after expiration of the collective bargaining agreement.

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.[4] 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.[5] In the construction industry, there is a rebuttable presumption that a bargaining relationship is governed by Section 8(f).[6] Therefore, a party asserting the existence of a 9(a) relationship has the burden of proving it.[7]

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,[8] 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

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[3] 335 NLRB 717 (2001).

[4] See id. at 718.

[5] Id.

[6] 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).

[7] Central Illinois, 335 NLRB at 721.

[8] 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).

based on the union having shown, or having offered to show, that it had the support of a majority of unit employees.[9] 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.[10]

We conclude that the parties intended to create a Section 9(a) relationship, insofar as the recognition language of both the 2001 and 2004 agreements satisfy each element of the Central Illinois test. In the 2001 agreement, factors one and two were met where the Union clearly demanded recognition as the Section 9(a) representative and the Employer clearly assented. The third Central Illinois factor also is satisfied. In Saylor's,[11] the Board held that language identical to the 2001 contractual jurisdiction clause (proffered in that case by Local 9 of the Bricklayers Union) created a Section 9(a) relationship with a signatory employer. The contractual language creating the 9(a) relationship (both in the reported case and this matter) contemplated that the union "submitted" to the employer "evidence" of its majority status. The emphasis on submission of evidence distinguishes this language from a bald "submission," or assertion, of majority status, without an accompanying reference to evidence, which generally does not meet the Central Illinois test.[12] For all of the above reasons, the parties' 2004 agreement similarly satisfies the Board's requirement that the parties intend to establish a bargaining relationship under Section 9(a) of the Act.

In the circumstances of this case, the Employer's failure to ask to see the authorization cards and the Union's failure to make a specific offer to show them does not affect our analysis. In discussions over the 2001 agreement, the Union repeatedly directed the Employer to read over the recognition language. The Union stressed that this language contemplated the creation of a Section 9(a)

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[9] Central Illinois, 335 NLRB at 719-20.

[10] 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).

[11] 338 NLRB 330 (2002).

[12] Compare Saylor's, supra, with NLRB v. Oklahoma Installation, 219 F.3d at 1165 (use of word "submitted" meant "asserted," not submission of proof of majority).

relationship, which would change the parties' relationship. The Employer, thus, was well aware of the Union's forthcoming 9(a) status based on its assertion of majority support, which, in fact, existed at that time in the form of authorization cards from a majority of the unit.

The Employer argues that two contract clauses introduce ambiguity into the parties' otherwise clear intent to create a Section 9(a) relationship. Although an eight-day union security clause, as here, is commonly found in Section 8(f) agreements, it may be included (though not enforced) in a 9(a) contract as well.[13] In fact, in a recent case, the Board did not rely on the inclusion of an eight-day union security clause as a factor in finding Section 8(f) status.[14] Further, the Employer apparently contends that the recently expired contract is similar to a traditional Section 8(f) assent agreement, whereby a non-member of an association may "assent" to adopt the terms of a union's contract with an association. This similarity to a form of Section 8(f) contract, standing alone, is insufficient to contradict the clear, unambiguous language of recognition clauses in successive contracts creating a 9(a) relationship.

Accordingly, complaint should issue, absent withdrawal, alleging that the Employer withdrew recognition from the Union after expiration of the contract.

B.J.K.

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[13] See Howard Immel, Inc., 317 NLRB 1162, 1166 (1995) (7-day union security clause does not warrant ignoring express term of 9(a) recognition clause), enfd. 102 F.3d 948 (7th Cir. 1996).

[14] Madison Industries, 349 NLRB No. 114, slip op. at 5 (2007) (existence of waiver of employer's right to file election during contract term was factor leading to 8(f) finding).