

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

Advice Memorandum

DATE: November 16, 2010

TO: Stephen M. Glasser, Regional Director
Region 7

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

SUBJECT: Metro Electric Engineering Technologies, Inc.
Case 7-CA-53068
530-2075-6733-4050
530-3067-1500
530-4040-5050
590-7550
590-7563
590-7575-2500

The Region submitted this case for advice as to whether the Employer unlawfully refused to recognize the Union as a Section 9(a) representative pursuant to a prospective recognition clause in a Section 8(f) agreement, while an RM petition was pending.

We conclude that the Region should dismiss the instant charge because the Union did not make an adequate showing of majority support in conjunction with its demand for recognition as a Section 9(a) representative.

FACTS

Metro Electric Engineering Technologies, Inc. (the Employer) is an electrical contractor engaged in the construction industry in Michigan. Its workforce fluctuates seasonally from approximately 20 to 25 employees. In January 1998, the Employer agreed to recognize IBEW Local 58 as the Section 8(f) representative of its employees and signed a Letter of Assent agreeing to the terms of the inside collective-bargaining agreement between the Union and the Southeastern Michigan Chapter of the National Electrical Contractors Association (NECA).¹

The Letter of Assent included the following prospective recognition clause:

¹ The Employer also signed a Letter of Assent to the sound and communications agreement between the Union and NECA, but no employees have performed work under that agreement since 2003.

The Employer agrees that if a majority of its employees authorize the Local Union to represent them in collective bargaining, the Employer will recognize the Local Union as the NLRA Section 9(a) collective bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future jobsites.

The Letter of Assent rolled over automatically, and the parties' most recent agreement was effective from July 1, 2007 through June 26, 2010. By letter dated December 17, 2009, the Employer timely notified both the Union and NECA of its intent to repudiate the parties' bargaining relationship upon the expiration of the collective-bargaining agreement. The Employer also stated that NECA had no authority to act on its behalf.

On February 18, 2010,² Union business agents presented several signed authorization cards to the Employer's owner and president and demanded Section 9(a) recognition. The president told the Union that the cards did not represent a majority of his employees. He also said that he would get back to the Union after checking with his attorney. Two weeks later, the Employer advised the Union that it was not extending Section 9(a) recognition. The Union later misplaced those authorization cards and therefore no longer relies upon them as proof of majority status.

The Union made a second demand for Section 9(a) recognition by letter dated May 14. Instead of granting recognition, on May 26 the Employer filed an RM petition based upon the Union's demand. Then, on June 9, the Union faxed the Employer another demand for Section 9(a) recognition, accompanied by copies of thirteen signed authorization cards. The cards authorized the Union "to represent me, as my National Labor Relations Act (NLRA) Section 9(a) bargaining representative[.]" Although there is a dispute about the number of unit employees at that time, both parties agree that the thirteen cards represented a majority. The Union obtained nine of the cards in early 2008 during a general campaign to obtain cards from members, one was signed in April 2007, and three others were signed on June 7. The Employer did not look at the cards or grant the Union recognition. The parties' collective-bargaining agreement expired on June 26.

On July 19, the Employer was presented with a "Petition for Decertification (RD) - Removal of Representative[.]" The petition stated that the signatory employees "do not want to be represented by Local 58 of the IBEW[.]" Fifteen unit employees had signed the petition, between June 29 and July 19. Eight of those employees had also signed authorization cards back in 2007

² All dates are in 2010 unless otherwise noted.

and 2008. In addition, four of those employees and three others who signed the decertification petition sent letters to the Union revoking their membership as of July 1. The Union received those letters in late July and early August.

On July 26, the Employer asked to withdraw its RM petition on the ground that there was no longer a question concerning representation. Then, on July 30, the Union filed the instant charge, alleging that the Employer had violated Section 8(a)(5) on June 9 by repudiating the prospective Section 9(a) recognition clause in the parties' agreement.

ACTION

We conclude that the Region should dismiss the instant charge because the Union's showing of support was based upon stale authorization cards and did not adequately demonstrate majority status.

The Board has upheld prospective voluntary recognition clauses in Section 8(f) agreements.³ In Goodless Electric Co., the Board enforced the NECA prospective recognition clause at issue here. The Board held that a union's provision of reliable evidence of majority status during the term of a Section 8(f) agreement triggers the employer's contractual obligation to grant the union Section 9(a) recognition.⁴ In reaching this conclusion, the Board expressly found that the rationale of its "Kroger doctrine" is equally applicable in the construction industry.⁵ In its Kroger decision, the Board interpreted a prospective voluntary recognition clause as "a waiver by [the employer] of its right to demand an election" and declared that this is "the only reasonable interpretation which saves these clauses from meaninglessness[.]"⁶

³ See Goodless Electric Co., 332 NLRB 1035, 1037-40 (2000), enf. denied 285 F.3d 102 (2002) (employer violated Section 8(a)(5) by refusing to recognize the union as the Section 9(a) representative and repudiating the bargaining relationship after expiration of the contract).

⁴ Id. at 1038.

⁵ Ibid. See also FSI, 355 NLRB No. 123, slip op. at 6-7 (2010) (employer violated Section 8(a)(5) by refusing to honor results of card check and recognize and bargain with union as Section 9(a) representative pursuant to prospective recognition clause in Section 8(f) agreement).

⁶ Houston Div. of the Kroger Co., 219 NLRB 388, 389 (1975) (employer violated Section 8(a)(5) by refusing to honor its

However, the employer's contractual obligation to grant Section 9(a) recognition is premised upon the union's provision of "reliable evidence of its majority status[.]"⁷ Here, the Union proffered thirteen authorization cards; nine of those cards were obtained in early 2008 and one was signed in April 2007. In evaluating whether authorization cards are too "stale" to be counted, the Board looks to surrounding circumstances to determine whether the signer's designation of the union continued to be effective, and, in particular, whether the signer's statements or conduct were consistent with continued union support.⁸

Here, fifteen employees, out of the 20-25 persons in the unit, signed a decertification petition stating that they did not want to be represented by the Union. Eight of the employees who signed cards in 2007 and 2008 signed the decertification petition in late June or early July. Their recent disaffection, less than a month after the Union's request for recognition, makes their old cards an unreliable indicator of their support for the Union.⁹ And if the cards signed by these

commitment to voluntarily recognize the union pursuant to an "additional store clause").

⁷ Goodless Electric, 332 NLRB at 1038; see also Kroger Co., 291 NLRB at 389.

⁸ Compare Lowery Trucking Co., 177 NLRB 13, 20 (1969), enfd. 431 F.2d 280 (8th Cir. 1970) (card over one year old and signed during previous, abandoned organizing campaign considered valid because it was reaffirmed orally by the employee at a recent union meeting), and Blade-Tribune Publishing Co., 162 NLRB 1512, 1513 (1966) (union membership application over a year old deemed valid indication of union support where organizing campaign was interrupted by employer's ULPs and the employee completed the requirements for union membership approximately six months after union's request for recognition), with The Grand Union Company, 122 NLRB 589, 590 (1958), enfd. sub nom. NLRB v. Local 294, International Brotherhood of Teamsters, 279 F.2d 83 (2d Cir. 1960) (rejecting cards that were more than a year old and obtained in a prior unsuccessful organizing campaign where the signers testified that during the subsequent campaign, they did not want the union to represent them). See also HQM of Bayside, LLC, 348 NLRB 787, 788 (2006), enfd. 518 F.3d 256 (4th Cir. 2008) and cases cited therein (in attempting to show actual loss of union's majority status, employer cannot rely upon signatures of employees on disaffection petition who subsequently demonstrated their union support).

⁹ For this reason, although employees in the construction industry tend to maintain their union affiliation over the long

eight employees are discounted, the Union's June 9 showing of support represented only a small minority of the unit.

Because the Union did not produce reliable evidence of majority support, it would not effectuate the purposes or policies of the Act to proceed to complaint on the theory that the Employer unlawfully repudiated the prospective voluntary recognition clause in the parties' agreement.¹⁰ Accordingly, the Region should dismiss the instant charge, absent withdrawal.

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term, we cannot accord these employees' cards continued validity. See Haas Electric, Inc., Case 1-CA-30745, Advice Memorandum dated April 29, 1997 at 4 (construction employee cards found valid despite the passage of time where all of the signers were dues-paying union members when the union claimed majority support).

¹⁰ We therefore find it unnecessary to decide whether the Employer's filing of an RM petition prior to the Union's June 9 demonstration of support excused its compliance with the prospective recognition clause (see Abe Rice Electrical/Amfil Electric, Case 26-CA-20194, Advice Memorandum dated August 6, 2001) or whether that clause constitutes a waiver of the Employer's right to insist upon an election. See Kroger Co., 219 NLRB at 389.