

No. 11-1440

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

AMERICAN FIRESTOP SOLUTIONS, INC.

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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SUMMARY OF THE CASE

The Board seeks enforcement of its Order issued against American Firestop Solutions, Inc. (“the Company”). The only issue before the Court is whether the parties had a Section 9(a) relationship under the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 159(a)) (“the Act”), such that the Company had an obligation under Section 8(a)(5) of the Act to continue to recognize the International Association of Heath & Frost Insulators and Allied Workers, Local No. 74 (“the Union”) as the employees’ majority representative, negotiate a successor agreement, and bargain over changes to the terms and conditions of employment. The Board’s finding of a Section 9(a) relationship is well supported by the documentary and credited evidence, is fully consistent with law, and the Company’s arguments provide no basis to disturb the Board’s findings.

Given that the single issue before the Court involves the application of settled principles and the Board’s findings are well supported by the record evidence, the Board submits that oral argument is not necessary. If argument is scheduled, however, the Board requests that it be allowed to participate and submits that 10 minutes per side is sufficient for the parties to present their views.

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**BRIEF FOR
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**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce an order issued against American Firestop Solutions, Inc. (“the Company”) on January 5, 2011. The Board’s Decision and Order is reported at 356 NLRB No. 71 (2011). (A. 224-33.)¹

¹ “A.” refers to the pages of the Appendix that the Company filed. References preceding a semicolon are to the Board’s findings; those following are to the

The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Court has jurisdiction over this proceeding under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Board’s Order is final with respect to all parties. On February 25, 2011, the Board filed its application for enforcement, which was timely because the Act places no time limit on filing for enforcement of Board orders.

STATEMENT OF THE ISSUE

Whether the Board reasonably found that the Company and the Union had a Section 9(a) bargaining relationship, so that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to bargain with, the Union, and by unilaterally changing terms and conditions of employment.

Staunton Fuel & Material, Inc., 335 NLRB 717 (2001).

STATEMENT OF THE CASE

This case involves a collective-bargaining relationship between parties in the construction industry. As a general matter, construction-industry employers and unions enjoy different rights and responsibilities depending on whether their

supporting evidence. On the basis of representations from the Court clerk, the Board treats the Appendix as properly filed and accepted.

relationship is governed by Section 9(a)² or 8(f)³ of the Act (29 U.S.C. § 158(f) or § 159(e)). A construction-industry employer can have a Section 9(a) relationship with a union (absent an election) if the union requests recognition, the employer recognizes the union as the majority representative of its employees, and the employer based its recognition on the union having shown, or having offered to show, evidence of its majority status. *See Staunton Fuel & Material, Inc.*, 335 NLRB 717, 717, 719-20 (2001), and cases cited at pp. 17-18. An employer with a 9(a) relationship remains obligated to recognize and bargain with a union even in the absence of a collective-bargaining agreement, unless the employer can rebut the union's presumption of majority status.

In contrast, a construction-industry employer and union can execute a "pre-hire" agreement, which is governed by Section 8(f) and does not require a union's

² Section 9(a) provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a).

³ Section 8(f) provides an exception to 9(a) and permits employers engaged primarily in the building and construction industries to "enter into a bargaining agreement even though 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." 29 U.S.C. § 158(f).

showing of, or offer to show, majority support. Upon expiration, an 8(f) agreement imposes no enforceable duties under the Act.

Here, on the basis of an unfair labor practice charge filed by the International Association of Heat & Frost Insulators and Allied Workers, Local No. 74 (“the Union”), the Board’s General Counsel issued a complaint alleging that, based on its Section 9(a) relationship with the Union, the Company had violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by withdrawing recognition from the Union, failing and refusing to bargain in good faith with the Union, and implementing unilateral changes to the terms and conditions of employment. (A. 224-25.) After a one-day hearing, an administrative law judge issued a decision and recommended order finding that the Company violated the Act as alleged. (A. 193.)

On review, the Board issued its Decision and Order affirming, as modified, the judge’s findings. (A. 224.) In particular, the Board agreed with the judge that the language of the recognition clause of the parties’ collective-bargaining agreement sufficiently demonstrated a 9(a) relationship between the Company and the Union under the Board’s standard articulated in *Staunton Fuel*. In doing so, the Board also rejected the Company’s claimed defense that the Union had lacked the support of a majority of the Company’s employees at the time of recognition in 2003, a finding that the Company does not contest before the Court.

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company Invites the Union To Conduct an Informational Presentation to Employees; a Majority of Employees Sign Authorization Cards; Those Cards Are Submitted to the Company

The Company installs firestopping products and provides firestopping services. (A. 184; 55.) Firestopping is a fire containment process using sealants and mineral insulations to seal penetrations in various barriers. (A. 184; 55.) Mark and Dave Gilchrist started the Company in May 2001, and serve as president and vice president, respectively. (A. 184; 54.) In August 2009, the Company employed 12 bargaining unit employees. (A. 184; 56.)

Shortly after beginning operations, the Company began to weigh the potential benefits of union affiliation because other businesses and its competitors in the area were unionized. (A. 184; 57-58.) The company president, believing that affiliation could give the Company a competitive edge in bidding for larger contracts, contacted the Union's business representative, Charles Shull.⁴ (A. 184; 24, 58.) Shull informed the Company that the Union could serve as the hiring hall, assist in training employees, and "fight for" the Company's work. (A. 184; 58.)

At the Company's invitation, the Union made an on-site presentation to the employees to explain both the benefits of unionization and the process of unionizing. (A. 185; 64.) After that meeting, the Union obtained authorization

cards signed by a majority of the Company's employees and submitted them to the Company. (A. 185 n.7; 87.) The Company acknowledged that it had verified the cards and agreed that a majority of employees had selected the Union as their exclusive representative. (A. 185; 87.)

B. The 2003 Agreement

On October 23, 2003, the Company and the Union entered into a collective-bargaining agreement, entitled the Industrial/Commercial Insulator Working Agreement ("the 2003 Agreement"), with the Midwest Insulation Contractors Association ("MICA"). (A. 185; 57-58; 85-104.) The 2003 Agreement was effective retroactively from August 1, 2003, until July 31, 2006. (A. 185; 85.) The recognition clause provided as follows:

Pursuant to [the Union's] claim that it represents an uncoerced majority of the [Company's] full-time and regular part-time insulators, the [Company] has submitted to a "card check" and hereby acknowledges and agrees that a majority of the subject employees have, in fact, authorized [the Union] to represent them in collective bargaining. Therefore, [the Company] agrees to recognize and does hereby extend recognition [to the Union], its agents, representatives or successors, as the exclusive bargaining agent for all employees in the bargaining unit described below, as if [the Union] had been certified as exclusive representative pursuant to Section 9(a) of the National Labor Relations Act.

⁴ By the time of the hearing, Shull had passed away. (A. 184 n.6; 23.)

(A. 185; 87.) Under the 2003 Agreement, either party could terminate or propose modifications to the Agreement by written notice to the other party between 90 and 60 days prior to the Agreement's termination date. (A. 100.)

C. The 2006 Agreement

In August 2006, MICA, the Union, and the Company negotiated a one-year successor agreement ("the 2006 Agreement"), which contained a recognition clause that provided:

The [Company] agrees to recognize the Union, its agents, representatives or successors, as the exclusive bargaining agent for all employees in the bargaining unit described below, as if the Union had been certified as exclusive bargaining representative pursuant to Section 9(a) of [the Act].

(A. 186; 105-29.) The 2006 Agreement, due to expire on July 30, 2007, provided that the parties would "meet to discuss conditions in the market, and any adjustment that may be needed to the contract or the renewal for 2 (two) additional years."⁵ (A. 186; 126.) Its termination and modification provisions mirrored those in the 2003 Agreement. (A. 186; 100, 126.)

D. The 2007 Firestopping Addendum

As a local affiliate, the Union was a chartered branch of the International Association of Heat & Frost Insulators and Allied Workers ("the International"). In 2007, the Company and other union contractors began working with the

⁵ The Union and the Company apparently agreed to extend the agreement for an additional two years, or until July 30, 2009. (A. 190; 126.)

International to explore ways to promote firestopping services on the national market. (A. 186; 68.) The Company and the other contractors urged the International to consider a reduction in wages to distinguish firestopping from traditional insulation services. (A. 186; 68-69.) The International agreed that the rates for firestopping should be lowered to make firestopping contractors more competitive and directed its local affiliates, including the Union, to negotiate lower wages. (A. 186; 26-27, 68.)

In accordance with the International's directive, on October 26, 2007, the Union and the Company executed a contract addendum that reset the wages for firestopping work ("the 2007 Firestopping Addendum"). (A. 186; 68; 130-34.) The 2007 Firestopping Addendum, which ran from October 1, 2007, to August 1, 2008, contained a recognition clause that provided as follows:

The [Company] recognizes the Union as the sole and exclusive bargaining representative for all its employees (excluding professional employees, office clericals and other supervisors, as defined by the [Act]), in the employment of the [Company] with respect to wages, hours, and other terms and conditions of employment on any and all work described in Article II of this Addendum and carried out on all projects performed by the [Company].

(A. 187; 130.)

E. The Company Withdraws Recognition from, and Refuses To Bargain With, the Union and Makes Unilateral Changes

On May 29, 2009, the Company notified the Union that it intended to terminate their collective-bargaining relationship on August 1, 2009. The

Company claimed that the collective-bargaining agreement and the 2007 Firestopping Addendum had expired and were “of no force and effect.” (A. 187; 135.) The Union’s business representative at that time, Ted Watson, contacted the Company to discuss the matter, but never received a response. (A. 188; 31.)

By letter dated July 27, 2009, the Union notified the Company that it believed Section 9(a) of the Act governed the parties’ relationship and that the Company was thus obligated to negotiate any changes or modifications to the contract. (A. 188; 136.) The Company responded that it disagreed and asserted that Section 8(f) of the Act governed. (A. 188; 137.) The Company therefore claimed that “no further meetings or negotiations [were] required,” and that “[p]ursuant to the previous notice given, the Agreement terminates effective at 12:01 AM on August 1, 2009.” (A. 188; 137.)

On August 1, 2009, the Company withdrew recognition of the Union and later stipulated that it based its withdrawal on the absence of a 9(a) relationship. (A. 188; 138.) After August 1, the Company ceased all contributions to the Union’s fringe benefits funds, including the pension and health and welfare funds. (A. 188; 77-88; 139.) The Company also acknowledged that it made other changes to the terms and conditions of employment. (A. 188; 76.) At all times between August 2003 and July 2009, the Company adhered to all of the terms and

provisions of the parties' collective-bargaining agreements and the 2007 Firestopping Addendum. (A. 187; Tr. 76.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing, the Board (Chairman Liebman and Members Becker and Hayes) determined, in agreement with the administrative law judge, that the Company had violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to recognize the Union as the exclusive collective-bargaining representative, refusing to bargain with the Union over a successor agreement after August 1, 2009, and making changes to employees' wages, benefits, and other terms and conditions of employment without first notifying and bargaining in good faith with the Union. (A. 224.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found. (A. 224.) Further, the Order directs the Company to recognize and bargain, upon request, with the Union as the exclusive representative of its employees. (A. 224.) It also requires the Company to rescind, upon request, any changes to employees' terms and conditions of employment made on or after August 1, 2009, to restore retroactively the terms and conditions of employment to what they were prior to August 1, 2009, and to make the employees whole to the extent they suffered any losses in pay and benefits as a result of the Company's

unlawful conduct. (A. 225.) The Order also requires that the Company to post a notice. (A. 225.)

SUMMARY OF ARGUMENT

The Board is entitled to enforcement of its Order that the Company violated the Act by withdrawing recognition from, and refusing to bargain with, the Union, and by implementing unilateral changes. The only contested issue before this Court is a narrow one—whether the Board reasonably found, on the basis of the explicit provisions of the recognition clause, that the Union was a 9(a) representative of the Company’s employees. The recognition clause clearly contains each of the necessary elements that the Board requires for 9(a) status under *Staunton Fuel & Material, Inc.*, 335 NLRB 717 (2001), and the parties’ pattern of conduct before and after execution of the 2003 Agreement is consistent with the finding of a 9(a) relationship. These findings are reasonable and supported by substantial evidence.

Moreover, the Company’s challenges to the Board’s application of *Staunton Fuel* are unavailing. Similarly, the Company’s confused challenges to the Board’s credibility determinations and evidentiary findings are wholly without merit and amount to little more than a complaint that the Board did not accept the Company’s different view of the facts. Accordingly, the Company has presented no basis to disturb the Board’s findings.

STANDARD OF REVIEW

The Court's deferential standard of review of Board decisions is well-established. The Court "affords great deference to the Board's affirmation of the [administrative law judge's] findings" and "enforce[s] the [Board's] order as long as long as the Board has correctly applied the law and its factual findings are supported by substantial evidence on the record as a whole." *Cintas Corp. v. NLRB*, 589 F.3d 905, 912 (8th Cir. 2009) (internal citations omitted). Substantial evidence includes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *NLRB v. La-Z-Boy Midwest*, 309 F.3d 1054, 1058 (8th Cir. 2004). The Board's application of the law to the facts is reviewed under the substantial evidence standard. *NLRB v. United. Ins. Co.*, 390 U.S. 254, 260 (1968).

Further, the Court recognizes that the Board's construction of the Act is "entitled to considerable deference" and the Court will uphold it "if it is reasonable and consistent with the policies of the Act." *St. John's Mercy Health Sys. v. NLRB*, 436 F.3d 843, 846 (8th Cir. 2006) (internal citations omitted). This Court also affords the Board "great deference" with respect to its credibility assessments. *JHP & Assocs. v. NLRB*, 360 F.3d 904, 910-11 (8th Cir. 2004).

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM, AND REFUSING TO BARGAIN WITH, THE UNION, AND BY UNILATERALLY CHANGING THE TERMS AND CONDITIONS OF EMPLOYMENT

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representative[] of [its] employees” when it has a Section 9(a) relationship with its employees’ exclusive bargaining representative.⁶ Accordingly, an employer that has a 9(a) relationship with a union violates Section 8(a)(5) if it withdraws recognition from, and refuses to bargain with, the union, or makes unilateral changes in mandatory subjects of bargaining. *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1980); *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962); *NLRB v. Whitesell Corp.*, 638 F.3d 883, 890 (8th Cir. 2011); *NLRB v. Cornerstone Builders, Inc.*, 963 F.2d 1075, 1078 (8th Cir. 1992).

⁶ An employer that violates Section 8(a)(5) of the Act also commits a “derivative” violation of Section 8(a)(1) of the Act, which makes it unlawful for an employer to “interfere with, restrain, or coerce employees” in the exercise of rights guaranteed in Section 7 of the Act. 29 U.S.C. § 158(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004). Section 7 of the Act (29 U.S.C. § 157) grants employees “the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid and protection”

Here, the Company does not dispute that it has withdrawn recognition from, and refused to bargain with, the Union. Nor does it contest that it made unilateral changes to the employees' terms and conditions of employment. Rather, the Company defends its actions by claiming that it was free to repudiate its collective-bargaining relationship with the Union because it merely had a Section 8(f) relationship with the Union. As we show below, the Company's claim lacks merit, and the Board reasonably found that the Company and the Union had a 9(a) relationship.

A. Applicable Principles

1. General Principles Governing Section 9(a) Collective-Bargaining Relationships

As noted previously (pp. 2-3), under Section 9(a) of the Act, when a “majority of the employees in a unit” have “designated or selected” a union for the purposes of collective bargaining, that union becomes the exclusive representative “of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.” 29 U.S.C. § 159(a). An employer can lawfully incur a 9(a) bargaining obligation, i.e., a bargaining obligation with a majority union, in different ways. For example, an employer becomes obligated to recognize and bargain with a union that has won a Board-conducted election. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596 (1969). The employer may also waive the right to

insist on a Board-conducted election and voluntarily recognize a union that bases its claim to representative status on the possession of authorization cards signed by a majority of employees. *Id.* at 579, 597.

Once a union has achieved 9(a) status as a bargaining representative, it enjoys a presumption of majority status. *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996). That presumption is ordinarily irrebuttable for one year following recognition or during the term of a collective-bargaining agreement of three years or fewer; thereafter, the presumption becomes rebuttable. *Id.* An employer in a 9(a) relationship can rebut the presumption of majority status—and thereby lawfully withdraw recognition from the union—by showing that the union does not, in fact, enjoy majority support. *See Levitz Furniture Co.*, 333 NLRB 717, 717 (2001). Absent such a showing, an employer violates Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to bargain with, the exclusive representative or by making unilateral changes. *See Curtin Matheson Scientific*, 494 U.S. at 778, 785.

2. A Construction-Industry Employer Can Either Have a 9(a) Relationship With a Union that Enjoys Majority Support or Enter into a Pre-Hire Agreement with a Union that Does Not Enjoy Majority Status

A union and construction-industry employer may also have a 9(a) relationship and enter into a 9(a) collective-bargaining agreement. *See, e.g., NLRB v. Triple C Maint., Inc.*, 219 F.3d 1147, 1152-56 (10th Cir. 2000). This is because

unions do not have less favored status with respect to construction-industry employers than they possess with respect to employers outside the construction industry. *John Deklewa & Sons*, 282 NLRB 1375, 1387 n.53 (1987), *enforced sub. nom.*, *Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3*, 843 F.2d 770 (3d Cir. 1988).

However, because of the construction industry's unique nature, Congress granted construction-industry employers and unions a right not enjoyed by their nonconstruction-industry counterparts. Under Section 8(f), a construction-industry employer may, but is not required to, execute a "pre-hire" agreement with a union regardless of whether the union has shown majority status. 29 U.S.C. § 158(f); *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266 (1983). This narrow exception is designed to address the specific and unique needs of the construction industry where it is common to have employees working for multiple employers for short periods of time. *Jim McNeff*, 461 U.S. at 266.

While an 8(f) collective-bargaining agreement, or "pre-hire" agreement, is enforceable during its term, a construction-industry employer incurs *limited* Section 8(a)(5) obligations by entering into an 8(f) agreement. *Deklewa*, 282 NLRB at 1377-78, 1385, 1387. Because it is not an unfair labor practice for a construction-industry employer to enter into a collective-bargaining agreement with a minority union, a union enjoys *no* presumption of majority status once its

8(f) agreement expires. *Id.* at 1377-78, 1386-87. Accordingly, as soon as the 8(f) agreement expires, an 8(f) employer may withdraw recognition from, and refuse to bargain with, the union. *Id.* Moreover, because an 8(f) union does not enjoy a presumption of majority status even during the term of an 8(f) agreement, employees may vote to oust the union even during the term of an 8(f) agreement, thereby voiding the agreement and the bargaining relationship. *Id.* at 1377, 1385-87. In sum, absent a current collective-bargaining agreement between the parties, an 8(f) employer is free to withdraw recognition from and refuse to bargain with the union, whereas a 9(a) employer remains obligated to recognize and bargain with the union, unless the 9(a) employer rebuts the presumption of majority status. *Id.* at 1386 n.48, 1387; *Triple C Maint.*, 219 F.3d at 1152.

A bargaining relationship in the construction industry is presumed to be an 8(f) relationship, and the party asserting the existence of a 9(a) relationship has the burden of proving it. *Deklewa*, 282 NLRB at 1385 n.41. To establish that a construction-industry employer has recognized a union as the 9(a) representative of its employees, the Board examines a recognition agreement or contract provision. The Board, in adopting the approach articulated by the Tenth Circuit in *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147 (10th Cir. 2000), and *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160 (10th Cir. 2000), held that it will deem a

recognition agreement or contract provision independently sufficient to establish a union's 9(a) representation status where:

[T]he language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support.

Staunton Fuel, 335 NLRB at 717, 719-20. *See also Sheet Metal Workers Int'l*

Ass'n Local 19 v. Herre Bros., Inc., 201 F.3d 231, 241-42 (3d Cir. 1999);

Decorative Floors, Inc., 315 NLRB 188, 188-89 (1994). The Board does not

require that a union show actual objective proof or extrinsic evidence (such as

authorization cards or an employer-conducted poll) to overcome the 8(f)

presumption; a union can rely exclusively on unequivocal contract language that

indicates that an employer acknowledged that the union enjoyed majority support

at the time it demanded recognition. *Staunton Fuel*, 335 NLRB at 717, 719-20;

Diponio Const. Co., 357 NLRB No. 99, 2011 WL 4732849 (2011); *Golden West*

Elec., 307 NLRB 1494, 1495 (1992).

B. The Board Reasonably Found that the Company Had a Section 9(a) Relationship with the Union

The Board reasonably found (A. 224; 190-91) that the Company and the Union had a 9(a) relationship on the basis of the clear and unequivocal language of the recognition clause contained in the 2003 Agreement. Specifically, the Board

determined (A. 224) that the recognition clause set forth each of the necessary elements to establish a 9(a) relationship under extant Board law. Moreover, the Board's findings are fully supported by the documentary and credited evidence and are consistent with law.

A recognition clause alone, as shown, will provide independent evidence of a 9(a) relationship where it "unequivocally" provides that the union requested recognition as the majority representative and that the employer acknowledged the union as the majority representative of its employees on the basis of the union's having shown, or having offered to show, evidence of its majority support. *See Staunton Fuel*, 335 NLRB at 717, 719-20, and cases cited at pp. 17-18. The recognition clause in the 2003 Agreement unambiguously establishes each of these elements.⁷ The 2003 Agreement, which the parties agreed to and executed, plainly states that the Union claimed that it represented "an uncoerced majority" of the Company's employees and that the Company "submitted to a card check" and "acknowledge[d] and agree[d] that a majority of the subject employees, in fact, authorized [the Union] to represent them in collective bargaining." (A. 87.)

⁷ Inasmuch as the Company assigns (Br. 13-14) significance to its assertion that there were two different 2003 Agreements of varying durations and some "alteration of the contracts" (Br. 14), the Board properly found that any alleged discrepancy is irrelevant as to whether Section 9(a) governed the parties' relationship. The two documents (A. 87; 150) contain *identical* recognition clauses. (A. 224 n.1.)

Accord M & M Backhoe Serv., 345 NLRB 462, 465 (2005) (finding a 9(a) relationship on the basis of similar contract language, which provided: “The Union claims, and the Employer acknowledges and agrees, based on a showing of signed authorization cards, that a majority of its employees have authorized the Union to represent them in collective bargaining.”), *enforced*, 469 F.3d 1047 (D.C. Cir. 2006).

While the 2003 Agreement alone sufficiently establishes the Union’s 9(a) representative status, the Board also noted (A. 224 n.1) that the credited testimony of the President Mark Gilchrist “provides extrinsic evidence that the parties had entered into a 9(a) relationship.” For instance, he testified (A. 58, 63, 76) that the Company negotiated and signed the 2003 Agreement containing the explicit recognition clause, that the Company negotiated subsequent agreements with the Union covering the employees’ terms and conditions of employment, and, for six years, adhered to all of the terms of those agreements. Gilchrist also testified (A. 76) that the Company did not contest the Union’s majority status for six years. Further, the Board found that Gilchrist’s “about-face decision” to refuse to negotiate with the Union after six years, and only after “reviewing the contracts” and “[contacting] counsel for advice,” also supported the finding of a 9(a) relationship. (A. 187 n.17.) Specifically, as the Board explained, “[t]his action strongly suggests a belief on Gilchrist’s part that the Company was enmeshed in a

collective-bargaining relationship and, 6 years after it began, was looking for a way out.” (A. 187 n.17.)

Moreover, as shown at pp. 5-9, additional credited evidence bolsters the Board’s finding in this case. For instance, the evidence establishes that the Company contacted the Union and expressed a desire to enter into a relationship with the Union so as to increase its competitiveness in the market. The Company then invited the Union to make a pitch to the Company’s employees and to underscore the benefits of union representation. Further, the documentary evidence unequivocally establishes that, after that session, the Union obtained majority support of the Company’s employees, and the Company acknowledged that fact. Accordingly, the Board’s finding that the Company agreed to recognize the Union as the 9(a) representative of its employees is fully supported by the documentary and credited evidence.

The credited evidence also establishes a pattern of conduct between the parties that is entirely consistent with the Board’s finding of a 9(a) relationship. Between 2003 and 2009, the parties negotiated both a successor agreement and the 2007 Firestopping Addendum that covered the terms and conditions of the employees.⁸ During those six years, the Company and the Union fully abided by

⁸ As the Board and the administrative law judge found, it is of no moment that the successor agreement and the 2007 Firestopping Addendum contained different recognition clauses that, “standing alone, would be insufficient to establish a 9(a)

all of the terms and conditions of the collective-bargaining agreements. Thus, as the Board noted (A. 190), in those six years, “the Company neither contested the Union’s status as the employees’ labor representative nor sought to terminate any of the aforementioned agreements.” Moreover, as the Board emphasized, the Company offered no explanation “as to why [it] agreed to the specific representations in the 2003 Agreement—the ‘claim’ by the Union, submitting to a ‘card check’ and acknowledgement of ‘majority’ representation—if they were not true.” (A. 185 n.3.) There is simply no credited evidence in the record to support any conclusion contrary to the Board’s finding of 9(a) status.

In light of the breadth of this credited evidence, which is consistent with a 9(a) relationship, the Board noted (A. 224 n.1) that “the result here would have be the same under the [District of Columbia] Circuit’s decision in *Nova Plumbing Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003).” In *Nova Plumbing*, the court held that, despite clear contract language, there was no 9(a) relationship because the “the record contains *strong* indications that the parties had only a [S]ection 8(f) relationship” and the union in that case did not have majority support. *Id.* at 537 (emphasis added). Here, there is no such evidence, and the Board properly decided

relationship.” (A. 191.) Because the Union established a 9(a) relationship through the 2003 Agreement and its explicit recognition clause, “the Union was not required to request and demonstrate majority support every time the parties renewed or modified the original agreement.” (A. 191.)

the issue on the agreement's unequivocal language. *See M & M Backhoe Serv.*, 345 NLRB at 462; *Diponio Const. Co.*, 357 NLRB No. 99, 2011 WL 4732849, at *1 (finding 9(a) relationship on the basis of clear contract language and in the absence of any indication that the parties had an 8(f) relationship). Thus, unlike the record in *Nova Plumbing*, here there is no "strong showing" of an intent to establish only an 8(f) relationship. *See M&M Backhoe Serv. Inc. v. NLRB*, 469 F.3d 1047, 1050-51 (D.C. Cir. 2006) (distinguishing *Nova Plumbing* where the evidence supported the union's majority status).

C. The Company's Arguments Are Without Merit

As a preliminary matter, the Company's principal defense before the Board was that the Union lacked majority support at the time of recognition in 2003. The Board, however, rejected this claim, finding that the Company had waived its right to challenge the Union's majority status by failing to raise the issue within the six-month period specified in Section 10(b) of the Act (29 U.S.C. § 160(b)).⁹ With Supreme Court approval, the Board will apply Section 10(b) to prevent an

⁹ Section 10(b) provides in relevant part that: "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board"

employer from asserting lack of majority status if more than six months has elapsed since it extended Section 9(a) recognition. *See Bryan Mfg. Co. v. NLRB*, 362 U.S. 411, 425 (1960). Here, the Company had failed to contest the Union's majority status for six years. Accordingly, the Board rightly held (A. 192) that Section 10(b) proscribed the Company's claim that the Union lacked majority support at the time of recognition. In any event, the Company has waived any challenge to that Board finding by failing to raise the issue in its opening brief. *See NLRB v. Carmichael Constr. Co.*, 728 F.2d 1137, 1140 n.1 (8th Cir. 1984) ("In their brief to this Court, the Companies did not present either of their first two arguments [that they raised to the Board] Since they failed to raise the other arguments, their reliance thereon is waived.") (citations omitted.)

The Company's claim (Br. 10-12) that the Board misapplied *Staunton Fuel* is baseless. In this regard, the Company attempts to resurrect its argument (Br. 10) that the use of the phrase "as if" in the recognition clause somehow shows that the Company did not recognize the Union's majority support. The Company claims that it "only" agreed "to recognize [the Union] . . . as the exclusive bargaining agent . . . as if [the Union] had been certified as exclusive representative pursuant to Section 9(a)," but not as the actual majority representative. The Board reasonably rejected this argument, noting that "[t]he phrase 'as if' simply reflects the fact that there was no Section 9(a) certification proceeding and that the parties

entered into a 9(a) relationship through the other avenue available—voluntary recognition.” (A. 191.)

The Company’s further claim (Br. 10) that the Board found a similar recognition clause to be insufficient in *Staunton Fuel* is utterly mistaken. In *Staunton Fuel*, the recognition clause stated, “[the employer] recognizes [the union] as the Majority Representative of all employees in Operating Engineers classifications employed by [it] and the sole and exclusive bargaining agent of such employees.” *Staunton Fuel*, 335 NLRB at 717. As the Board explained in that case, that clause was insufficient because—unlike the clause in this case—it did not state that “recognition was based on a contemporaneous showing . . . that the Union had majority support.” *Id.* at 720. Thus, the recognition clause in *Staunton Fuel* is entirely dissimilar to the one the parties agreed to and executed in this case.

The Company does not further its position (Br. 11-12) by citing to Board internal documents that are neither Board law nor binding precedent. *See Geske & Sons Inc.*, 317 NLRB 28, 56 (1995) (advice memoranda do not constitute Board law), *enforced*, 103 F.3d 1366 (7th Cir. 1997); *South Jersey Regional Council of Carpenters, Local 623*, 335 NLRB 586, 591 n.10 (2001) (advice memoranda not binding on the Board), *enforced sub nom., Spectacor Mgmt. Group v. NLRB*, 320 F.3d 385 (3d Cir. 2003). Therefore, to the extent that the Company alleges that

there is any difference between any statement of law in the advice memoranda and Board law itself, Board law controls. *See Chelsea Indus, Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) (rejecting the suggestion that the Board’s decision was unreasonable because it conflicted with an advice memorandum).

The Company also challenges (Br. 12-16) various credibility findings made by the administrative law judge and adopted by the Board. Specifically, the Company assails the Board’s discrediting of Gilchrist’s testimony that the Union did not show him authorization cards in 2003. The Company’s argument is meritless. The administrative law judge explicitly identified (A. 185 n.7) several reasons why he found Gilchrist’s testimony on that point incredible. In addition to being contrary to the documentary evidence of the contract itself, among other reasons, the judge primarily noted that Gilchrist “provided no credible explanation as to why the Company agreed to the specific representations in the 2003 Agreement . . . if they were not true.” (A. 185 n.7.) The judge also considered Gilchrist’s testimony incredible when viewed in the context of the parties’ entire relationship—where, over the course of six years, the Company negotiated several agreements with the Union, never contested the Union’s majority status, and fully adhered to all terms and conditions of the collective-bargaining agreements. (A. 224 n.1; 185 n.3, 190-91.) The Board “carefully examined the record and [found] no basis for reversing” those credibility findings, and adopted them. (A. 224 n.1.)

Before the Court, the Company has failed to show—as it must—that the judge’s credibility determinations, which the Board reviewed and adopted, were in any way not worthy of “the great deference” to which they are owed on review. *See NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 969 (8th Cir. 2005).

The Company mistakenly asserts (Br. 8-9) that the Board’s unfair labor practices are unsustainable because its actions “were not motivated by an anti-union animus.” What the Company fails to recognize is that its violations of its duty to bargain—both its refusal to recognize and bargain with the Union and its subsequent unilateral changes—do not require a showing of an unlawful motive, and thus its subjective good faith is no defense. As the Supreme Court long ago explained, the duty to bargain “may be violated without a general failure of subjective good faith” where, as here, the party has engaged in “a flat refusal” to bargain or a similar “circumvention of the duty to negotiate” by making unilateral changes without bargaining. *Katz*, 369 U.S. at 738-39, 742-43 (reversing the court of appeals’ holding that “subjective bad faith” must be shown for such Section 8(a)(5) violations). *Accord NLRB v. Hosp. San Rafael, Inc.*, 42 F.3d 45, 52-53 (1st Cir. 1994) (“Good faith is not generally a defense to such [failure to bargain] charges.”); *Sturdevant Sheet Metal & Roofing Co. v. NLRB*, 636 F.2d 271, 275 (10th Cir. 1980) (“In situations involving a unilateral change . . . good or bad faith is not a relevant consideration.”).

Lastly, the Company's false contention (Br. 16) that it has complied with the Board's Order and "kept the employee benefits at the same level or an improved level than they were prior to August 1, 2009," is directly contrary to the company president's own testimony. Gilchrist testified that the Company had not made *any* contributions to the fringe benefit funds, including health and pension, since August 1, 2009. (A. 76.) Gilchrist also testified that the Company had made "other changes to employee terms and conditions of employment" (A. 76), but did not testify that it had restored those terms, as the Board's Order requires. (*See* A. 225.) In light of Gilchrist's uncontroverted testimony, the Company cannot credibly argue before this Court that it has complied in any way with the Board's Order. In any event, a party's compliance with a Board order does not affect the Board's entitlement to enforcement of its order. *See NLRB v. Mexia Textile Mills*, 339 U.S. 563, 567 (1950) ("[T]he employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court.") (footnote omitted). Accordingly, the Company has presented the Court with no basis to disturb the Board's findings, and its Order is entitled to enforcement.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that judgment should enter enforcing the Board's Order in full.

Respectfully submitted,

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Dated at Washington, DC
this 17th day of October, 2011

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*
	*
Petitioner	* No. 11-1440
	*
v.	*
	* Board Case No.
AMERICAN FIRESTOP SOLUTIONS, INC.	* 18-CA-19133
	*
Respondent	*

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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