

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

J & K MECHANICAL, Inc.¹

Employer/Petitioner

and

Case 07-RM-069501

**LOCAL 33, SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, AFL-CIO²**

Union

APPEARANCES:

Robert J. Finkel, Attorney of Farmington Hills, Michigan, for the Employer/Petitioner
Joseph M. D'Angelo, Attorney of Toledo, Ohio, for the Union

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record³ in this proceeding, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are affirmed.
2. The Employer/Petitioner, herein the Employer, is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

¹ The name of the Employer appears as amended at hearing.

² The name of the Union appears as amended at hearing.

³ Both parties filed timely briefs which were carefully considered.

Overview

The Union represents sheet metal workers in Michigan, Ohio and West Virginia. The Employer is engaged in the fabrication, sale and installation of heating and cooling products, primarily in the building and construction industry.⁴

The Union contends that it is the Section 9(a) collective bargaining representative of the Employer's sheet metal employees; that the Employer is bound by collective bargaining agreements between the Union and the Sheet Metal Contractors Association of Northwest Ohio (hereafter the Association)⁵ and "residential addendums" thereto; and that those agreements operate as a contract bar to any further processing of the instant petition. In the alternative, the Union maintains that if an election is directed, the appropriate unit is a multi-employer unit.

The Employer contends that there is no contract bar to the petition because its association with the Union was at all times an 8(f) relationship. The Employer further states that it is not part of a multi-employer association and is not bound by successor agreements between the Union and the Association and an election should be conducted in the petitioned for single-employer unit.

For the reasons set forth below, I conclude that there is no contract bar to the petition and that the appropriate unit is a single-employer unit.

Facts

On October 30, 2009, the Employer executed a multi-employer collective bargaining agreement between the Union and the Association effective from July 1, 2007 to June 30, 2011. On that same day, the Employer executed a "residential addendum" to the collective bargaining agreement effective from March 1, 2007 to February 28, 2011.

The collective bargaining agreement provides the following at Addendum K:

*Each Employer, in response to the Union's claim that it represents an uncoerced majority of each Employer's employees acknowledges and agrees that there is no good faith doubt that the Union has been authorized to and in fact, does represent such majority of employees. Therefore the Union is hereby recognized as the sole and exclusive collective bargaining representative for the employees now or hereafter employed in the bargaining unit with respect to wages, hours of work or other terms and conditions of employment.*⁶

⁴ The parties stipulated that the Employer and the employees in the bargaining unit are engaged in the building and construction industry.

⁵ The Association did not participate in the hearing, although the Region timely notified the Association in writing of the hearing.

⁶ The residential addendum includes an essentially identical clause at Article I, Section 6.

The Employer agrees if at any time the Union presents it with proof (as recognized by the NLRB) that a majority of its employees have authorized the Union to represent them for purposes of collective bargaining, any collective bargaining agreement then in effect will automatically be recognized as a Section 9(a) agreement. The Employer shall date and execute an acknowledgement of the Union's majority status upon request of the Union.

Article XIII of the collective bargaining agreement provides in pertinent part:

This Agreement ... shall continue in force from year to year thereafter, unless written notice of reopening is given not less than ninety (90) days prior to the expiration date.

* * *

Section 8: In the event any such contractor fails to advise the Union of its intent to negotiate separately within the time period set forth above, such contractor shall be deemed and presumed to agree to the terms and agreement arrived at in negotiations between the Union and the Association and to be bound by the Collective Bargaining Agreement resulting there from.

* * *

SIGNATURES

By execution of this Agreement, the Employer authorizes SMCANWO to act as its collective bargaining representative for all matters relating to this agreement. The parties agree that the Employer will hereafter be a member of the multi-employer bargaining unit represented by said Association unless this authorization is withdrawn by written notice to the Association and the Union at least one hundred and fifty (150) days prior to the then current expiration of this Agreement.⁷

In January 2010, the Union and the Employer met for the purpose of executing paperwork related to the collective bargaining agreement and residential addendum. At this meeting, a number of the Employer's employees executed cards ostensibly authorizing the Union to act as their collective bargaining agent.

On March 24, 2011, the Employer sent a letter to the Union stating that "[p]ursuant to Article XIII of the agreement" it was giving "notification of termination and its intent to reopen at the termination of the agreement on the 30th day of June 2011."

⁷ The residential addendum includes essentially identical clauses at Article XIII, Signature Page, Section 3 and 4, with one exception; there is no language similar to Article XIII, Section 8 in the residential addendum.

There is no evidence of any further communication relative to this matter between the parties until seven months later. On October 26, 2011, the Union sent a letter to the Employer advising it that the Union had reached agreement on a successor collective bargaining agreement with the Association.⁸ The Union's letter went on to acknowledge the Employer's March 24 letter "withdrawing your bargaining rights from the Sheet Metal Contractors Association of Northwest Ohio," and to request that the Employer provide the Union with dates and times to discuss negotiating a collective bargaining agreement with the Union.

In November 2011, the Union sent letters to the Employer demanding retroactive payment of wages and fringe benefits under the successor agreement between the Union and the Association. On or about November 22, 2011, the Union filed a grievance with the Local Joint Adjustment Board regarding the Employer's non-payment of retroactive wages and benefits under the successor agreement.

On November 28, 2011, the Employer responded to the Union through its counsel, denying responsibility for retroactive payment of wages and benefits under the successor agreement "in that J&K has not agreed to any new collective bargaining agreement [sic] your Local and has terminated the collective bargaining agreement which expired on June 30, 2011 via its March 24, 2011 correspondence to your Local." The Employer continued to make contributions to the Union's trust fund per the terms of the expired collective bargaining agreement.

Discussion and Conclusions

A. Legal Authority

Under Section 9(a) of the Act, employers are obligated to bargain only with unions that have been "designated or selected for the purposes of collective bargaining by the majority of employees in a unit for such purposes." However, Section 8(f) of the Act provides an exception to the majority support requirement in the construction industry. Specifically, Section 8(f) provides that an employer in the construction industry may sign a "prehire" agreement with a union, without regard to majority status.

Because an 8(f) prehire agreement is not based on a showing of majority support, there is no presumption of majority status for the signatory union. An 8(f) relationship may be lawfully terminated by either the union or the employer upon the expiration of their collective bargaining agreement. By contrast, a 9(a) relationship continues after contract expiration and until the union is shown to have lost majority support. The burden of proving the existence of a 9(a) relationship rests with the party asserting it. *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enfd. sub nom. Ironworkers Local 3 v. NLRB*, 842 F.2d 770 (3d Cir. 1988).

The Board has held that a recognition agreement or contract provision will be independently sufficient to establish a union's 9(a) representation status where the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a)

⁸ The successor agreement is effective from July 1, 2011 to June 30, 2015. A successor residential addendum effective March 1, 2011 to February 28, 2014, also was negotiated by the Union in 2011. The successor agreements include essentially identical clauses to those cited herein, with the exception noted above.

representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining 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 & Material d/b/a Central Illinois Construction*, 335 NLRB 717, 720 (2001).

More recently, the Board has held that in determining whether the presumption of 8(f) status has been rebutted, the Board will first consider whether the agreement, examined in its entirety, conclusively notifies the parties that a 9(a) relationship is intended. If so, the presumption of 8(f) status has been rebutted. If the agreement does not conclusively notify the parties that a 9(a) relationship is intended, the Board considers the parties' intent as to the nature of the relationship. *Madison Industries*, 349 NLRB 1306, 1308 (2007); *Donaldson Traditional Interiors*, 345 NLRB 1298, 1300 (2005).

It is well established that a collective bargaining agreement executed in the context of a 9(a) relationship will ordinarily bar an election in the unit covered by the agreement during its terms for a period not to exceed three years. *Appalachian Shale Products*, 121 NLRB 1160 (1958). However, as specified in the second proviso to Section 8(f), an agreement under that section does not bar petitions for elections, including elections conducted pursuant to an RM petition. *John Deklewa & Sons*, supra.

B. Whether the Agreements Established an 8(f) or a 9(a) Relationship

The Union maintains that the agreements indicate an unequivocal manifestation of intent to form a Section 9(a) relationship. As set forth above, in determining whether the presumption of 8(f) status has been rebutted, the Board first considers whether the agreement, examined in its entirety, and taking into consideration the *Central Illinois* factors, conclusively notifies the parties that a 9(a) relationship is intended. If the agreement does not conclusively notify the parties that a 9(a) relationship is intended, the Board then considers the parties' intent as to the nature of the relationship. *Madison Industries*, supra.

The first paragraph of Addendum K states that in response to the Union's claim that it represents a majority of the Employer's employees, the Employer acknowledges and agrees that there is no good faith doubt that the Union has been authorized to and in fact, does represent such majority of employees.

This language fails to satisfy the requirements of *Central Illinois* for basing a conversion of an 8(f) bargaining relationship to a 9(a) relationship solely on contract language. Specifically, the language does not recite that the Union proffered a showing of majority support. The language in the residential agreements at Article I, Section 6 fails the Central Illinois test for the same reason. *J.T. Thorpe & Son, Inc.*, 356 NLRB No. 112, slip op. at 3 (2011).⁹

⁹ It should be noted that there is no evidence that prior to or contemporaneous with the Employer's execution of the agreements in 2009, the Union proffered a showing of majority support, or otherwise claimed that it represented a majority of the Employer's employees, or that the Employer acknowledged that the Union represented a majority of the employees.

The second paragraph of Addendum K states if at any time the Union presents the Employer with proof (as recognized by the NLRB) that a majority of its employees have authorized the Union to represent them for purposes of collective bargaining, any collective bargaining agreement then in effect will automatically be recognized as a Section 9(a) agreement.

This language also fails to satisfy the requirements for converting an 8(f) relationship to a 9(a) relationship solely on contract language. In *Central Illinois*, the Board held that “a recognition provision stating that the employer ‘will’ recognize the union as the majority or 9(a) bargaining representative ‘if’ the union presents evidence that a majority of its employees have authorized the union to represent them in collective bargaining, is not independently sufficient to establish a 9(a) relationship, due to its conditional nature.” Id at 720.

Thus, the contract language is not independently dispositive of whether the presumption of 8(f) status has been rebutted. The inquiry does not end there, however. As noted by the Board in *Central Illinois*, if the union makes the required showing of majority status within the terms of the agreement (the second paragraph of Addendum K in the instant matter) it will have achieved 9(a) status.

Therefore, the question is whether the Employer’s employees signing authorization cards at the meeting of January 14, 2010, qualifies as a showing of majority support sufficient to establish a 9(a) relationship between the parties within the terms of the second paragraph of Addendum K. For the following reasons, I find that it does not.

The record evidence shows that the employees attended the January 14 meeting accompanied by the Employer’s co-owner for the asserted purpose of completing paperwork necessary to implement the agreements. The Union’s business representative, John Russell, testified that during the meeting the employees were presented with a “pile of paperwork,” including the authorization cards. There is no evidence that Russell or any other Union official asked the employees whether they wished to be represented by the Union prior to presenting them with the cards to sign. There is insufficient evidence that Russell or any other Union official advised the employees or the Employer that the purpose of signing the cards was to convert the parties’ 8(f) relationship to a 9(a) relationship.¹⁰ There is no evidence the Union made any claim at the January 14 meeting that it represented a majority of the Employer’s employees. Indeed, there is no evidence of any discussion whatsoever of the Union’s asserted majority status or any acknowledgment, written or oral, by the Employer of the Union’s asserted majority status after January 14.

¹⁰ Regarding the January 14 meeting, the hearing officer asked Union agent John Russell if the Union asked the Employer to recognize the Union as the majority representative of the employees. Russell responded that another union agent “had talk [sic] to them in regards to that these are the authorization cards saying that Local 33 is the Union that would be representing their members.” There is no other evidence that the Union advised the employees or the Employer that the purpose of signing the cards was to convert the parties’ 8(f) relationship to a 9(a) relationship.

As such, and there being no other persuasive extrinsic evidence bearing on the parties' intent as to the nature of their relationship, the presumption of Section 8(f) status has not been rebutted. Cf. *Donaldson Traditional Interiors*, supra.

C. Whether the Employer Delegated its Bargaining Authority to the Association, and Thereby Bound Itself to the Successor Agreements

The Union further maintains that the Employer, by executing the agreements in 2009, delegated its bargaining authority to the multi-employer association, and thus bound itself to the successor agreements negotiated by the Union in 2011, which it says serve as a bar to an election pursuant to the instant petition.

Pursuant to the terms of Article XIII of the 2007 – 2011 collective bargaining agreement and Article XIII, Section 4 of the 2007 – 2011 residential agreement, the Employer authorized the Association to act as its collective bargaining representative for all matters relating to the agreements and agreed to membership in the multi-employer bargaining unit represented by the Association. It is undisputed that the Employer did not withdraw this authorization by written notice to the Association and the Union at least 150 days prior to the expiration of the agreements. As noted above, by letter dated March 24, 2011, the Employer did give the Union timely notice of its intent to reopen at the termination of the agreements. The Union's October 26 response to the Employer acknowledged the Employer's "withdrawing your bargaining rights from the Sheet Metal Contractors Association."¹¹ Moreover, Article XIII, Section 8 states if a contractor fails to provide the 90-day notice it shall be "deemed and presumed to agree to the terms and agreement negotiated between the Union and the Association and be bound by the Collective Bargaining Agreement resulting there from."

However, under Section 8(f), an employer is not automatically bound to a successor collective bargaining agreement, nor is it obligated to negotiate with the union upon contract expiration. The Board has held that "mere inaction during multi-employer negotiations will not bind an employer to a successor contract reached through those negotiations." *James Luterbach Construction Co.*, 315 NLRB 976, 979 (1994). Rather, the Board applies a two-part test to determine whether a Section 8(f) employer has obligated itself to be bound by the results of multi-employer bargaining: (1) was the employer part of the multi-employer unit prior to the dispute giving rise to the case, and if so, (2) has the employer by a distinct affirmative action, recommitted to the union that it will be bound by the upcoming or current multi-employer negotiations. *Id.* at 979-980.

Applying the two-part *Luterbach* test to the instant matter, I find that based on the plain language of the 2007 – 2011 agreements, the Employer authorized the Association to act as its collective bargaining representative during the terms of those agreements. Therefore, the Employer was part of the multi-employer unit prior to the dispute giving rise to this case.

Turning to the second part of the *Luterbach* test, the Union argues that the Employer recommitted that it would be bound by the Association's negotiations for the successor

¹¹ The undersigned does not make any finding with respect to the Union's characterization of the Employer's timely notice as set forth in this letter.

agreements by continuing to file wage and fringe contribution reports with the Union following expiration of the agreements in 2011. The Union also asserts that the Employer recommitted itself by its presence at a meeting with the Association prior to the negotiation of the successor agreement.

Neither of these arguments is persuasive. As to the contribution reports, it is undisputed that the Employer continued to file reports consistent with the terms of the 2007 – 2011 agreements. According to the Employer’s witness, it continued to file the reports based on a good faith doubt as to its obligation under the expired agreements.

As to the Employer’s attendance at a meeting with the Association prior to negotiation of the successor agreement, the record does not show any meaningful participation by the Employer at this meeting. Significantly, there is no evidence showing when the Union learned of the Employer’s attendance at the meeting. As such, it is impossible to determine whether this recommitted to the Union that the Employer would be bound by the negotiations for the successor agreements.

Based on the foregoing, the Employer’s mere inaction during multi-employer negotiations (i.e., failing to withdraw its authorization) does not bind it to the successor contract reached through those negotiations. Moreover, there is insufficient evidence of a distinct affirmative act by the Employer that would reasonably lead the Union to believe that the Employer intended to be bound by the multi-party negotiations for the successor agreements.

In sum, the parties’ agreements did not establish a 9(a) relationship. Further, the Employer’s delegation of authority to the Association did not survive expiration of the parties’ agreements, and the evidence does not support a finding that the Employer is bound by the successor agreements. There is no contract bar.

Finally, as to the Union’s argument that the appropriate unit is a multi-employer unit, it is well established that in cases involving employers governed by Section 8(f) of the Act, the Board does not merge into a multi-employer unit the employees of a single employer who joins a multi-employer association for the purposes of collective bargaining. Rather, the appropriate unit normally will be the single employer’s employees covered by the agreement. *John Deklewa & Sons*, supra at fn. 42 (noting that employees of a single employer should not be precluded from expressing their representational desires simply because their employer has joined a multi-employer association).

D. *Daniel/Steiny* Formula for Voter Eligibility

The parties did not stipulate not to use the construction industry eligibility formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961) as modified in 167 NLRB 1078 (1967), and *Steiny & Co.*, 308 NLRB 1323 (1992). Absent a stipulation not to use the *Daniel/Steiny* eligibility formula, the formula applies to all construction industry elections. *Signet Testing Laboratories*, 330 NLRB 1 (1999), citing *Steiny & Co.* Thus, the *Daniel/Steiny* eligibility formula will apply, as noted in the attached Direction of Election.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All full time and regular part-time journeymen, trainees, utility employees and service technicians employed by the Employer at or from its facility located at 7505 Blue Bush Road, Maybee, Michigan; but excluding clerical employees and guards and supervisors as defined in the National Labor Relations Act, and all other employees.

Dated at Detroit, Michigan, this 9th day of January 2012.

(SEAL)

/s/ Raymond Kassab

Raymond Kassab, Acting Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **LOCAL 33, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO**. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees who have been employed for 30 working days or more within the 12 months preceding the eligibility date or if they have had some employment in those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **January 17, 2012**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, www.nlr.gov,¹² by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).]

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

¹² To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Regional Office**, and follow the detailed instructions.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **January 23, 2012**. The request may be filed electronically through the Board's website at **www.nlr.gov**,¹³ but may **not** be filed by facsimile.

¹³ To file a Request for Review electronically, go to the Agency's website at **www.nlr.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.