

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

Advice Memorandum

DATE: April 15, 2013

TO: Olivia Garcia, Regional Director
Region 21

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

SUBJECT: American Scaffold
Case 21-CA-090764

530-6067-7000
530-6083-1000
530-8045-8700
590-7587

This case was submitted for advice as to whether the parties had entered into a Section 9(a) or Section 8(f) relationship. As the agreements between the parties are ambiguous as to the parties' intent, and the Union has produced no extrinsic evidence establishing a Section 9(a) relationship, we conclude that the Union has failed to rebut the construction-industry presumption that the parties' relationship is governed by Section 8(f).

FACTS

American Scaffold, Inc. ("Employer") is a scaffolding subcontractor in the building and construction industry based in San Diego. The Employer's original owner states that, prior to founding the company, he spoke with several scaffolding workers about working for him if he started his own company. He states that those individuals replied that they were Carpenters union members and would only work for him if he were signed to an agreement with the Carpenters. On December 23, 2002, before the Employer had obtained any work or hired any employees, the Employer and the Southwest Regional Council of Carpenters ("Union") signed two documents: 1) the nineteen-page "Carpenters Memorandum Agreement for Scaffold Contractors 2002-2006," ("Scaffolding Agreement"), and 2) the four-page "Carpenters Memorandum Agreement 2002-2006" ("Short-Form Agreement").

The Scaffolding Agreement contained various terms and set out detailed compensation and benefit schemes for specific classifications of workers. The recognition provision stated that the Employer "recognizes the Union as the sole and exclusive collective bargaining representative" of all employees performing covered

work.¹ It also contained a provision waiving the Employer's right to file a Board petition seeking to terminate the contract during the contract term, as well as an eight-day union security clause provision. It also bound the parties to the Master Labor Agreement ("MLA")—a collective-bargaining agreement between the Union and the United General Contractors, Inc. (UGC)—and all renewals of the MLA.²

The Short-Form Agreement contained the following language related to the relationship established between the parties:

The Contractor and the Carpenters Union expressly acknowledge that on the Contractor's current jobsite work, the Carpenters Union has the support of a majority of the employees performing work covered by this Agreement. The Union has demanded and the Contractor has recognized the Carpenters Union as the majority representative of its employees performing work covered by this Agreement. It is also acknowledged that the Union has provided, or has offered to provide, evidence of its status as the majority representative of the Contractor's employees. By this acknowledgment the parties intend to and are establishing a collective bargaining relationship under Section 9 of the National Labor Relations Act of 1947, as amended.³

The Short-Form Agreement also contained a provision stating that it would renew each time the MLA was renewed and a petition-bar provision.

The MLA, among its myriad provisions, contained an eight-day union security clause, as well as a hiring hall provision instructing member contractors to first attempt to secure employees through the Union.

In early 2003, shortly after executing those documents, the owner obtained work for the first time and hired some of the individuals who had previously told him they

¹ The Scaffolding Agreement contained no Section 9(a) recognitional language and no language indicating that the Union had provided or offered to provide evidence of its status as majority bargaining representative.

² The Employer was not a member of UGC.

³ There is no evidence, nor does the Union contend, that it actually provided or offered to provide evidence of its status as the majority bargaining representative of the Employer's employees.

would only work for him if his company was a Union signatory. Ownership of the Employer subsequently changed hands, however, and the Employer states that no one currently affiliated with the Employer is familiar with the Short Form Agreement. It does not deny that the individual who executed the Short-Form Agreement (the former Secretary-Treasurer) was authorized to bind the Employer.

Through a series of contract modifications and extensions, the parties extended the agreements through June 30, 2012.⁴ On April 27, the Employer sent timely notice of its intent to terminate the Scaffolding Agreement (and MLA) upon its expiration. The parties met several times in June and July to discuss a successor agreement, but the Employer ultimately terminated negotiations and stated that it did not have a 9(a) relationship with the Union.

ACTION

Because the parties' agreement is ambiguous as to whether the parties intended a Section 9(a) or Section 8(f) relationship, and the Union has produced no extrinsic evidence demonstrating a Section 9(a) relationship, we conclude that the parties' relationship was governed by Section 8(f). Thus, the Employer lawfully repudiated its bargaining relationship with the Union post-contract expiration. The Region should dismiss the charge, absent withdrawal.

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), a collective-bargaining agreement does not bar representation petitions and an employer may terminate the bargaining relationship upon expiration of the contract.⁵ Under Section 9(a), a collective-bargaining agreement bars representation petitions and 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.⁶ In the construction industry, a rebuttable presumption exists that a bargaining relationship is governed by Section 8(f).⁷ Therefore, a party asserting the existence of a 9(a) relationship has the burden of proving it.⁸

⁴ All remaining dates are in 2012, unless otherwise noted.

⁵ *Staunton Fuel & Material* ("Central Illinois"), 335 NLRB 717, 718 (2001).

⁶ *Id.*

⁷ *John Deklewa & Sons*, 282 NLRB 1375, 1385 FN 41 (1987), enforced 843 F.2d 770 (3d Cir. 1988), certiorari denied 488 U.S. 889 (1988).

⁸ *Central Illinois*, 335 NLRB at 720.

Under current Board law, contract language alone may establish a Section 9(a) relationship if the language satisfies a three-part test: 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) bargaining representative; and 3) the employer's recognition was based on the union having shown, or having offered to show, evidence of its majority support.⁹ However, a collective-bargaining agreement must be examined in its entirety to determine if the Section 8(f) presumption has been rebutted; when the agreement is ambiguous, the Board will look to extrinsic evidence to determine the parties' intent.¹⁰

In *Madison Industries*, one section of a collective-bargaining agreement contained language arguably satisfying the three-part *Central Illinois* test for Section 9(a) status, but other provisions suggested that the parties intended an 8(f) relationship.¹¹ Specifically, the Board found that a petition-bar provision was strong evidence that the parties did not intend a 9(a) relationship, because an agreement governed by Section 9(a) already bars an employer from filing a petition for an election during its term. Thus, the Board reasoned that such a provision would only have value in an 8(f) relationship.¹² Viewing the agreement in its entirety, the Board concluded that the agreement was ambiguous as to whether the parties had intended an 8(f) or 9(a) relationship. And, because no extrinsic evidence bearing on the nature of the

⁹ *Id.* The General Counsel has urged the Board to reconsider its holding in *Central Illinois* that contract language alone can establish Section 9(a) status, and its holding in *Casale Industries*, 311 NLRB 951, 953 (1993), that employers may not challenge 9(a) recognition outside of a six-month window. *Lambard, Inc.*, Case 31-CA-27033 (July 7, 2005) (Significant Appeals Minute 05-13); *D & B Fire Protection, Inc.*, Case 21-CA-36915, Advice Memorandum dated December 9, 2005; *Austin Fire Equipment, LLC*, Case 15-CA-19697, Advice Memorandum dated December 23, 2010.

¹⁰ *Madison Industries*, 349 NLRB 1306, 1308 (2007). *See also Central Illinois*, 335 NLRB at 720, n.15 (“[W]e will continue to consider relevant extrinsic evidence bearing on the parties’ intent in any case where we find that the contract’s language is not independently dispositive.”).

¹¹ 349 NLRB at 1309.

¹² *Id.* Member Schaumber also expressed the opinion, not adopted by the majority, that an eight-day union security clause and restrictive hiring hall “also suggest[ed] that the parties contemplated an 8(f) relationship.” *Id.* at 1309 n.4.

bargaining relationship existed, the Board concluded that the General Counsel had failed to rebut the 8(f) presumption.¹³

Here, the 9(a) recognition language contained in the parties' Short-Form Agreement clearly satisfies the three-part *Central Illinois* test. The language indicates that the Union requested majority representative status; that the Employer granted such status; that the Union provided, or offered to provide, evidence of its majority support; and that the parties intended to establish a relationship under Section 9(a). However, that provision must be considered in context. The Scaffolding Agreement, which was executed at the same time, does not contain Section 9(a) recognition or majority status language. And, both the Short-Form Agreement and the Scaffolding Agreement contain petition-bar language similar to that in *Madison Industries*. Given these ambiguities, we conclude that it is unclear what type of relationship the parties intended to form. The Union cites, as extrinsic evidence bearing on the parties' intent, the original owner's declaration that the prospective employees he ultimately hired informed him before he founded the company that they were union members and would only work for him if he were signed to an agreement with the Union. In the construction industry, however, an employer can be a union signatory under either Section 9(a) or 8(f). Moreover, the fact that the Employer signed the Agreements at a time when it did not yet employ any employees is extrinsic evidence that suggests the parties intended an 8(f) relationship.¹⁴ Accordingly, we conclude that the Union has not rebutted the construction-industry presumption of an 8(f) relationship.

¹³ *Id.* at 1309. The Board suggested that extrinsic evidence in the form of signed authorization cards or other documents designating the Union as the employees' exclusive bargaining representative might have been sufficient to rebut the presumption. *See id.* at 1309 & n.12 (distinguishing *M&M Backhoe Service*, 345 NLRB 462, 465 (2005), enforced 469 F.3d 1047 (D.C. Cir. 2006) (in addition to contractual language satisfying the three-part *Central Illinois* test, the union secured authorization cards from a majority of employees after informing the employees that the cards would be used to support filing an election petition)). *See also Morse Electric, Inc.*, Case 13-CA-44938, Advice Memorandum dated March 30, 2009 (where the contract was ambiguous as to whether parties intended 8(f) or 9(a) relationship, and extrinsic evidence did not clarify parties' intent, complaint not warranted over employer's post-expiration refusal to bargain).

¹⁴ *Ladies Garment Workers' Union (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731 (1961) (an employer violates Sections 8(a)(1) and 8(a)(2) by extending 9(a) recognition to a union, and a union violates Section 8(b)(1)(A) by accepting such recognition, when the union does not actually represent a majority of employees).

For the foregoing reasons, the Region should dismiss the charge, absent withdrawal.¹⁵

/s/
B.J.K.

¹⁵ We also conclude that complaint should not issue over the Employer's refusal to provide information in response to the Union's pre-expiration and post-expiration information requests. Before the Scaffolding Agreement and MLA expired, the Union requested a list of employee names, contact information, and job details. The Union renewed its information request in writing after the expiration of the contracts, on July 11 and 12, stating that it needed the information for "[c]ollective [b]argaining purposes" and because the Union did not believe the Employer had been properly dispatching employees through the hiring hall, which "inhibit[ed] [the Union's] ability to communicate with the entire bargaining unit." Although a request for employee names, addresses, etc. is presumptively relevant during the term of an 8(f) contract, *A-Plus Roofing, Inc.*, 295 NLRB 967, 970 (1989), enforced 147 L.R.R.M. 2662 (9th Cir. 1990), and an employer has an obligation to provide information after the expiration of a contract related to a suspected pre-expiration grievance, *Jervis B. Webb Co.*, 302 NLRB 316, 318 (1991), enforced 979 F.2d 855 (9th Cir. 1992), it would not effectuate the purposes and policies of the Act to issue complaint where the Union did not specifically seek the information for purposes of pursuing a pre-expiration grievance and the Union no longer represents the employees.