UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

FRESCO PLASTER FINISHING, INC.,

Employer

and **Case 13-RC-108950**

NATIONAL ALLIED WORKERS LOCAL 831,

Petitioner

and

ADMINISTRATIVE DISTRICT COUNCIL 1,
ILLINOIS INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED CRAFTWORKERS,

Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on July 25, 2013, before a hearing officer of the National Labor Relations Board to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.[1]

I. Issues

National Allied Workers Local 831 (herein the Petitioner) seeks an election within a unit comprised of all full-time and regular part-time plaster and finisher employees employed by

[1] Upon the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
c. The labor organization involved claims to represent certain employees of the Employer.
d. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

Fresco Plaster Finishing, Inc. (herein the Employer) at its facility currently located in Barrington, Illinois.[2]

Administrative District Council 1, Illinois International Union of Bricklayers and Allied Craft Work (herein the Intervenor) contends that it is the Section 9(a) collective-bargaining representative of the petitioned for unit based upon an alleged Section 9(a) collective-bargaining agreement between the Employer and the Intervenor; that the agreement operates as a contract bar to any further processing of the instant petition; and that Section 8(f) allows for a 9(a) agreement in the construction industry to contain a union security that otherwise is unlawful because 8(f) states that only pre-hire clauses cannot serve as a bar to a petition.

II. Decision

Based on the entire record in this proceeding and for the reasons set forth below, I find that 1) the Intervenor is the Section 9(a) collective-bargaining representative of the Employer's plaster and finisher employees; and 2) the collective-bargaining agreement between the Intervenor and Employer contains a lawful union security clause. Given these findings, I conclude that the contract between the Intervenor and Employer acts as a bar to the processing of the petition filed by Petitioner, and the instant petition is dismissed.

III. Statement of Facts

The Intervenor represents journeymen plasterers and apprentices employed by the Employer and it represents employees exclusively in the building and construction industry. The Employer is engaged in the business of providing plaster finishing in the construction industry and the employees in the bargaining unit are engaged in the building and contracting industry.

On September 4, 2012, the Employer and Intervenor executed a Memorandum of Understanding[3], binding the Employer by the terms and conditions of employment covering the type of work and the locations where the work is performed as set forth in the association agreement and amendments entered into between the Intervenor, Intervenor Locals No. 56 and No. 74 and Midwest Wall and Ceiling Contractors, NFP (herein the Association)[4].

The Memorandum of Understanding provides the following at Paragraph 1:

> The Contractor recognizes the Union as the sole and exclusive bargaining representative for the employees now or hereafter employed in the bargaining unit for the purpose of collective bargaining as to wages, hours, and other terms and conditions of employment. The Union has requested recognition from the Contractor as the majority representative of the bargaining unit employees in

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[2] The bargaining unit as stipulated to by the parties is: All regular and part-time employees employed as Plasterers at Fresco Plastering, Inc., performing work directed out of its facility currently located in Barrington, Illinois, but excluding all other employees, office, clerical, professional, technical, mechanics, confidential sales, supervisors, and guards as defined by the Act.

[3] The parties stipulated that this agreement was fully executed as of September 4, 2012.

[4] The "2007-2011" Agreement identified the Association as GDCNI/CAWCC which has since changed its name to Midwest Wall and Ceiling Contractors, NFP.

accord with Section 9(a) of the National Labor Relations Act, the Contractor has recognized the Union as the majority bargaining representative in accord with Section 9(a) was based on the Union having shown, or having offered to show, proof of its majority support and the Contractor's determination that the Union does represent a majority of bargaining unit employees.

The Memorandum of Understanding provides the following at Paragraph 3 in pertinent part:

> If, as of the day following expiration of the then existing Association Agreement ("Commencement Date"), the Association Agreement is not in effect, the terms and conditions, other than those relating to duration and termination, of the Association Agreement expiring immediately prior to the Commencement Date shall establish the terms and conditions of employment for the employees for a period of 60 days beginning with the Commencement Date, or until a new Association Agreement is effective, whichever occurs first, following which the terms and conditions set forth in the new Association Agreement, if any, shall be in full force and effect.
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> If a new Association Agreement has not become effective within 60 days of the Commencement Date, the Union, at its sole option, may extend this Memorandum of Understanding and the continuation provisions of this paragraph for one or more additional 60 day periods, may extend this Memorandum of Understanding for one year from the Commencement Date based on the terms of the Association Agreement that was in effect immediately before the Commencement Date, or may terminate this Memorandum of Understanding entirely, with the Union notifying the Contractor of its election by written notice.

The Memorandum of Understanding provides the following at Paragraph 4:

> This Memorandum of Understanding shall remain in effect and shall be governed by Association Agreements entered into in the future and covering future time periods unless and until it has been terminated by either party giving it written notice of termination to the other not less than 60 and not more than 90 days prior to the termination date of the then applicable Association Agreement, in which event this Memorandum of Understanding shall terminate on the last day of the then applicable Association Agreement. In the event that no such timely notice is given, this Memorandum of Understanding shall remain in effect until terminated in accordance with its terms.

The association agreement between the Intervenor, Intervenor Locals No. 56 and No. 74 and the Association is currently in effect via a Contract Extension effected as of June 7, 2012, through June 30, 2015, in the form of 1) a 2011-2013 Memorandum of Agreement effective July 1, 2011, through June 30, 2012, incorporating portions of what is identified in that Memorandum

of Agreement as the "2007-2011 Agreement" and including 2) the Side Letter to that Memorandum of Agreement that became effective December 1, 2011, and 3) Amendment No. 1 to that Memorandum of Agreement that became effective December 15, 2011.

This association agreement contains multiple provisions addressing the working hours and pay of employees, such as wage rates including starting pay and yearly pay increases. Another provision calls for employees to receive employer fringe benefit contributions towards a health and welfare fund and a local pension fund. Finally, the agreement contains the following union security clause in pertinent part:

> A. It shall be a condition of employment that all employees of the Employer covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement shall remain members in good standing and those who are not members on the effective date of this Agreement shall, on the eighth day following the effective date of this Agreement, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after its effective date, shall, on the eighth day following the beginning of such employment become and remain members in good standing in the Union.
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> B. Union Membership Status: Employees who do not become members of the Union as required above, or whose membership is terminated by the Union by reason of the failure of the employee to tender or pay initiation fees and periodic dues uniformly required as a condition of acquiring or retaining membership, shall not be continued in the employ of any Employer under this Agreement.

IV. Analysis

A. Introduction

Under the Board's contract bar doctrine, a collective-bargaining agreement entered into pursuant to Section 9(a) of the Act will 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, collective-bargaining agreements in the construction industry signed pursuant to Section 8(f) will not act as a bar. *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Ironworkers Local 3 v. NLRB,* 842 F.2d 770 (3d Cir. 1988); *S.S. Buford, Inc.*, 130 NLRB 1641, 1642 (1961). Further, collective-bargaining agreements containing unlawful union security agreements also are ineffective as contract bars. *Paragon Products Corp*. 134 NLRB 662, 666 (1962). Accordingly, I will examine first whether the Memorandum of Understanding between the Intervenor and the Employer is a 9(a) or 8(f) agreement, and then determine whether the union security clause in the association agreement is unlawful.

B. Whether the Memorandum of Understanding Established an 8(f) or a 9(a) Relationship

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) 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. *Central Illinois Construction*, 335 NLRB 717, 720 (2001).

The Intervenor maintains that the Memorandum of Understating indisputably contains language to form a Section 9(a) relationship. The first paragraph of the Memorandum of Understanding contains language that, on its face, meets the requirements of *Central Illinois* for basing a majority support 9(a) relationship solely on contract language. The recognition language in the Memorandum of Understanding closely, if not exactly, tracks the conditions adopted by the Board in *Central Illinois*. The language unequivocally indicates that the Intervenor requested recognition as majority representative, the Employer recognized the Intervenor as majority representative and the Employer's recognition was based on the Intervenor having shown, or having offered to show, an evidentiary basis of its majority support.

Thus, the contract language at hand is independently dispositive of whether the presumption of 8(f) status has been rebutted. The agreement between Intervenor and the Employer not only shows the establishment of a 9(a) relationship.

C. Whether a Construction Industry Majority Support Contract Acts as a Bar to an Election given the Contract's Eight-Day Union Security Clause.

Having determined that the Memorandum of Understanding is a 9(a) agreement, it is necessary to examine the union security clause to determine whether it is unlawful. Under *Paragon Products Corp.*, supra,

> A clearly unlawful union-security provision for this purpose is one which by its express terms clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a)(3) of the Act… Such unlawful provisions include … those which specifically withhold from incumbent nonmembers and/or new employees the statutory 30-day grace period.

Paragon Products, 134 NLRB at 666. Accordingly, at first blush, *Paragon Products* would seem to dictate a finding that the union security clause in the association agreement which requires membership on the eighth day, prevents that agreement from serving as a contract bar. However, this case arises in the construction industry, mandating that Section 8(f) of the Act, which explicitly allows membership after the seventh day of employment, be considered.

The Intervenor contends that the Board has addressed the question specifically at issue here in *Progressive Construction Corp.*, 218 NLRB 1368 (1975), and resolved it by finding that

the construction industry majority support contract may legally contain an 8-day union security provision. I agree. In *Progressive Construction*, the Board dismissed the General Counsel's complaint finding no merit in the contention that a 7-day union security agreement entered into between parties with a 9(a) bargaining relationship was unlawful. *Id.* at 1369. In so finding that Section 8(f) provides for a lawful 7-day union security clause in a construction industry majority support contract, the Board examined Section 8(f) and found that the plain language of the section is written and to be read in the disjunctive. *Id.* at 1368-1369. Moreover, the Board found further support for their decision by examining the legislative history surrounding the construction of Section 8(f), "[T]he purposes which Congress intended to achieve by Section 8(f)(1) and (2) are not the same. The first clause (the prehire provision) was enacted in recognition of the needs of construction industry employers to know their labor costs before they can bid on jobs, while the second clause (allowing for a 7-day union security) recognizes the relatively short duration of most construction job." *Id.* at 1369. Finally, the Board reasoned that to hold otherwise would accord greater rights to construction trade unions before they represent any employees than to unions who represent a majority of an employer's employees and such a result would be incongruous and deny the purposes which Congress intended by Section 8(f) of the Act. *Id.* Section 8(f) accords the construction industry permissible contract terms, to include a 7-day union security clause, regardless of whether the parties maintain a Section 8(f)(1) or 9(a) relationship.

V. Conclusions and Findings

Based on the entire record in this proceeding, the undersigned finds and concludes as follows:

1. The parties stipulated that Fresco Plaster Finishing, Inc. is an Illinois corporation, is engaged in the business of providing plaster finishing in the construction industry. The parties further stipulated that during the past calendar year, a representative period, the Employer purchased and received at its Barrington, Illinois facility, goods products and materials valued in excess of $50,000 directly from points located outside the State of Illinois.

Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act and is subject to the jurisdiction of the National Labor Relations Board.

2. The parties stipulated and I find that Petitioner and Intervenor are labor organizations within the meaning of the Act.

3. The parties stipulated and I find that the Memorandum of Understanding between Intervenor and Employer was fully executed as of September 4, 2012.

4. The parties stipulated and I find that the appropriate bargaining unit include: All regular and part-time employees employed as Plasterers at Fresco Plastering, Inc., performing work directed out of its facility currently located in Barrington, Illinois, but excluding all other employees, office, clerical, professional, technical, mechanics, confidential sales, supervisors, and guards as defined by the Act.

5. I find and conclude that the Intervenor and Employer maintain a Section 9(a) relationship.

6. I find and conclude that the agreement between the Intervenor and Employer serves as a bar to the instant petition.

V. Order

The petition in this matter is dismissed.

VI. 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 **August 27, 2013**. The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[5] but may not be filed by facsimile.

DATED at Chicago, Illinois this 13th day August, 2013.

/s/ Peter Sung Ohr
Peter Sung Ohr, Regional Director
National Labor Relations Board
Region 13
209 South LaSalle Street, Suite 900
Chicago, Illinois 60604

[5] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.