

J.T. Thorpe and Son, Inc. and Laborers' International Union of North America, Local 295. Cases 27-CA-21099, 27-CA-21196, and 27-CA-21212

March 17, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On February 26, 2010, Administrative Law judge William L. Schmidt issued the attached decision. The Respondent and the General Counsel each filed exceptions and supporting briefs. The Charging Party Union (the Union) filed cross-exceptions and a supporting brief. The General Counsel filed an answering brief and motion to strike, to which the Respondent filed a reply brief. The Respondent also filed an opposition brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions as modified, to modify his remedy,² and to adopt the recommended Order as modified.³

The central issue in this case is whether the bargaining relationship between the parties, initially established under Section 8(f) of the Act, was converted by the parties' actions in 2003 to a relationship under Section 9(a) of the Act, requiring the Respondent to continue to recognize the Union after contract expiration.

We agree with the judge that the parties had a 9(a) relationship in December 2008, when the Respondent withdrew recognition, refused to bargain with the Union,

¹ We find no need to pass on the General Counsel's motion to strike several attachments to the Respondent's brief. All but one of those documents are already part of the record in the case. The remaining attachment is a copy of the General Counsel's Advice Memoranda in *Morris Elec., Inc.*, Case 13-CA-44938, and we may take official notice of that document.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we modify the judge's remedy by requiring that backpay and/or other monetary awards shall be paid with interest compounded on a daily basis.

We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

and subsequently changed the affected unit's terms of employment. We therefore agree that the Respondent, by these actions, violated Section 8(a)(5), and also that it violated Section 8(a)(2) by recognizing a different union as the unit's bargaining representative shortly afterward. However, in finding that the parties had a 9(a) relationship, we rely on additional contractual evidence not relied upon by the judge.

I. BACKGROUND

The Respondent, a construction industry employer, recognized the Union as the bargaining representative for a unit of mason tenders and laborers at issue in a series of collective-bargaining agreements under Section 8(f).⁴ Section 8(f) permits unions and employers in the construction industry to enter into collective-bargaining agreements without a showing of majority support for the union in the affected unit, as is required under Section 9(a). However, at the expiration of an 8(f) contract, the employer can withdraw recognition from the union and is under no further obligation to bargain. By contrast, if the bargaining relationship exists under Section 9(a), the union retains its representative status after the expiration of the contract and the employer remains obligated to bargain, absent an affirmative showing that the union has lost its majority support.⁵

Beginning with the contract effective October 1, 1995, and continuing through the contract that expired on February 28, 2003, the relevant language in the recognition article of each agreement read as follows:

Section 1: The Employer understands the Union represents the majority of its employees and recognizes the Union as the sole and exclusive collective bargaining representative of all employees wherever and whenever employed by the Employer during the term of this Agreement. . . .

. . . .

Section 3: The Employer agrees that, upon the union's presentation of evidence of majority status among employees in the bargaining unit described herein, the Employer will (voluntarily) recognize the Union as exclusive bargaining agent pursuant to Section 9(a) of the [NLRA] for all employees within the bargaining unit

⁴ The Respondent negotiated with the Union along with several other employers, and the employers signed separate, identical contracts. The Union's bargaining relationships with the other employers are not at issue.

⁵ *Central Illinois Construction*, 335 NLRB 717 (2001); *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enfd.* sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. denied* 488 U.S. 889 (1988).

on all present and future job sites within the jurisdiction of the Union.

The judge found from the credited record testimony that the Union began to collect signed authorization cards from the unit employees in early 2003, and obtained cards from the majority of the employees in the unit. As the judge found, and discussed in greater detail, at a negotiating session for a new contract on February 24, 2003, the Union's business manager and chief negotiator, Ross Williams, requested 9(a) recognition from the Respondent, gave copies of a proposed modification of the recognition language to this effect to the Respondent's negotiators, and offered for inspection the authorization cards it had collected.⁶

The Respondent's chief negotiator, David Miller, asked what the proposed change would mean, and Williams explained that while the Respondent had no obligation to negotiate with the Union after an 8(f) agreement expired, under a 9(a) agreement it would be "bound to either negotiate a successor agreement, bargain to impasse or the employees could hold an election to vote us out." Williams added that the signed cards he was proffering came from "a vast majority" of the unit employees. He also said he was confident that the Union would win a Board election if one were held. The judge not only found that Williams was confident that he had signed authorization cards from the majority of the employees, but credited testimony that Williams told the employers the specific number of employees who had signed the authorization cards and that the Union prominently displayed "piles of authorization cards" to the employers' representatives. The employers then asked for a management caucus,⁷ and the union representatives left the room, leaving the cards on the table for inspection.

When the session resumed, Miller said he would consult the Respondent's counsel, and that the Respondent would agree to the conversion to a 9(a) relationship if the Union's explanation was accurate. Miller admitted at the hearing that he did subsequently discuss the proposal with counsel.

After the February 24 bargaining session, the Union sent the Respondent a draft for the proposed 2003–2005 contract, including new recognition language that read:

Section 3: The Employer agrees that, the union has a majority status among employees in the bargaining unit described herein, and the Employer recognizes the Union as exclusive bargaining agent pursuant to Section 9(a) of the National Labor Relations Act for all employees within the bargaining unit on all present and future job sites within the jurisdiction of the Union.

Several days later, Miller told Williams that the draft "was okay" without requesting any change, and that it should be printed for signature. Miller signed the draft a few days later. The Respondent subsequently signed two successor agreements running through December 5, 2008, containing the same recognition language.

In September 2008, the Respondent informed the Union that it would withdraw recognition when the current contract expired in December. The Union asserted that it had 9(a) status and that the Respondent was consequently required to continue recognizing it; the Union also filed a petition for a Board election. In December the Respondent withdrew recognition, recognized another union, and changed the unit employees' terms of employment.⁸ The Union then filed the charges leading to the complaint in this case.⁹

The General Counsel submitted and the judge correctly found that the original and revised recognition language in the parties' contracts did not satisfy the requirements of *Central Illinois*, supra, for basing a conversion of an 8(f) bargaining relationship to a 9(a) relationship solely on contract language. Specifically, as the judge noted, that language did not recite that the Union had proffered a showing of majority support. The judge therefore rejected the Union's argument (repeated on exception) that the contract language was independently sufficient to establish a 9(a) relationship and that the Respondent was therefore barred from attacking the Union's majority status under Section 10(b) of the Act.

However, relying on the recognition language in the 2000–2003 contract and its predecessors, the judge found that the Respondent had committed itself to recognizing the Union as a 9(a) representative if and when the Union made the required majority showing during the contract's term. He also found from the credited record that the Union met that condition by making the required showing on February 24, 2003, that as a matter of contract the

⁶ The judge also implicitly found that by the time of the 2009 hearing in this proceeding, the cards had been lost.

⁷ As noted earlier, the Union's bargaining relationships with the other employers are not at issue, and the above is the essence of the interaction between the Respondent and the Union at the February 24 session concerning recognition.

⁸ The Respondent's actions concerning dues collection on behalf of the other union were the subject of separate unfair labor practice charges which have been settled.

⁹ The election was conducted by mail ballot and the ballot count was scheduled for January 5, 2009. The count was blocked on December 18, 2008, the date that the Union filed the unfair labor practice charge in Case 27–CA–21099, alleging that the Respondent refused to bargain and repudiated the Union's 9(a) status.

Respondent accordingly recognized the Union's 9(a) status, and that the Respondent confirmed such recognition by signing the 2003–2005 contract containing the revised recognition language.

The judge acknowledged that the First Circuit Court of Appeals had refused to enforce a bargaining order issued by the Board in similar circumstances in *NLRB v. Goodless Bros. Electric Co.*, 285 F.3d 102 (1st Cir. 2002), and *NLRB v. Goodless Electric*, 124 F.3d 322 (1st Cir. 1997).¹⁰ He noted, however, that the Board had reaffirmed in *Central Illinois*, supra, 335 NLRB at 719 fn. 8, that it would continue to rely on a combination of conditional contract language and extrinsic evidence to find that a 9(a) relationship was established.

Having found that the parties here had a 9(a) relationship when the Respondent withdrew recognition, the judge found that the Respondent violated Section 8(a)(5) by that action, by refusing to bargain with the Union and, by changing the unit's terms of employment. He also found that the Respondent violated Section 8(a)(2) by recognizing another union.

II. ANALYSIS

As established in *Deklewa* and *Central Illinois*, the parties to an 8(f) agreement can convert their relationship to 9(a) in any one of three ways. The union can obtain a majority vote in a Board election; an employer can make an “immediate” grant of 9(a) recognition when the union proffers a showing of majority support; or, as the judge noted, the parties can take what we have referred to as the “third option”¹¹—agree on contract recognition language committing the employer to recognize the union as 9(a) representative if and when the union proffers a showing of majority support during the contract's term, with the union subsequently making the required showing.

Although we agree with the judge's finding that the parties in this case established a 9(a) relationship through the third option,¹² we need not rely only on the pre-2003

contractual language and extrinsic evidence that supports that finding. In this case we also rely on credited testimony and the parties' revised recognition language in their 2003 and successor contracts. In those contracts the Respondent agreed that “the union has a majority status among employees in the bargaining unit” and that “the Employer recognizes the Union as exclusive bargaining agent pursuant to Section 9(a) of the [NLRA].” As the judge found, this language would not, by itself, establish a 9(a) relationship because it does not contain *Central Illinois'* required statement that the union proffered a showing of majority support. It does, however, corroborate the credited testimony that the Union requested 9(a) recognition and made a contemporaneous proffer of majority support at the February 24 bargaining session. The credited testimony also established that after the Respondent was informed of the legal distinction between 9(a) and 8(f) recognition, it consulted with legal counsel regarding the proposed change in the pertinent contract language, before signing the 2003 contract.¹³

disagreement with them. We note further that in the second of those decisions the court acknowledged that the Board, while bound by its holding in that case, was nonetheless authorized to “announc[e] that, henceforth, its new construction of the contemporaneity requirement would govern this area of labor law.” 285 F.3d at 111 (citing *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 859 (2d Cir.1966) (permitting the Board to “fashion for prospective application a principle along the general lines of that adopted here. . .”). We accordingly reaffirm that the “third option” for 8(f)–9(a) conversion, as recognized in our previous cited holdings, remains viable.

As stated below in fn. 13, Member Hayes does not join in reaffirming the *Goodless* doctrine.

¹³ The facts here are similar to those in *Donaldson Traditional Interiors*, 345 NLRB 1298 (2005). In that representation case the Board found that the intervenor established that the multiemployer association voluntarily recognized it as the 9(a) representative of a majority of employees employed by each association member. The Board based this finding on both extrinsic evidence and contract language. First, the association's president testified that the intervenor offered to show him authorization cards of the employees of each employer-member of the association and had segregated the cards into piles for each of the association members. The association's president testified that the association had recognized the intervenor as the majority representative of employees of each member of the association. Second, the Board stated that the contract contained a recognition clause that recognized the intervenor “as the employees' majority representative pursuant to Section 9(a) of the Act.” Id. at 1300.

Member Hayes concurs in affirming the judge's findings and conclusions on limited grounds that the credited extrinsic evidence of the parties' 2003 negotiations and their revised 2003 recognition language confirm that the parties' 8(f) relationship was converted to 9(a) status in 2003 based on a contemporaneous claim and proof of majority status. He finds no need to apply or pass on the *Goodless* theory of establishing a 9(a) bargaining relationship in the construction industry. He also agrees with the judge and his colleagues that the recognition language in the parties' contracts did not satisfy the requirements of *Central Illinois Construction* for basing a conversion of an 8(f) bargaining relationship to a 9(a) relationship solely on contract language. Conse-

¹⁰ In *Goodless*, the parties signed a letter of assent agreeing that, if a majority of employees authorized the union to represent them before the expiration of the letter, the employer would recognize the union as a 9(a) representative. The Board found that the parties established a 9(a) relationship when the union presented authorization cards signed by a majority of employees. *Goodless Electric Co.*, 321 NLRB 64 (1996). The court, however, found that the requirement of *Deklewa*, 282 NLRB 1375 (1987), that the demand for, and the grant of, recognition be based on a contemporaneous showing of majority support had not been satisfied, because the showing of majority support was presented well after the union had presented its demand for recognition, i.e., the letter of assent, to the employer.

¹¹ *J. Picini Flooring*, 355 NLRB 620, 625 (2010); *Central Illinois*, 335 NLRB at 719 fn. 8.

¹² While we treated the First Circuit's two decisions in *Goodless* as the law of that case, 337 NLRB 1259 (2002), we respectfully note our

In short, here the parties' pre-2003 contract language, the credited extrinsic evidence of their interaction at the 2003 negotiations, and their revised 2003 recognition language confirm that the parties' 8(f) relationship was converted to 9(a) status in 2003.¹⁴

Because the parties had a 9(a) bargaining relationship when the Respondent withdrew recognition, we adopt the judge's findings that that action, the Respondent's subsequent changes in the unit's terms of employment, and its subsequent recognition of another union were unlawful.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, J.T. Thorpe and Son, Inc., Salt Lake City, Utah, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(g).

“(g) Within 14 days after service by the Region, post at its facilities and jobsites in the State of Utah, copies of the attached notice marked ‘Appendix.’¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 5, 2008.”

quently, there is no need to address whether he agrees with the Board's holding in that case.

¹⁴ The Respondent contends, with no supporting authority, that the Union, by petitioning for a Board election after the Respondent first indicated its intent to withdraw recognition, admitted that it had only 8(f) bargaining status and was barred from filing a charge of unlawful refusal to bargain. This is incorrect as a matter of law. The Act does not preclude a union from simultaneously seeking Board certification as a 9(a) bargaining representative and asserting through an unfair labor practice charge that it has already obtained 9(a) status by alternative means.

Nancy S. Brandt, Esq., for the General Counsel.
Jeffery R. Price and Daniel R. Widdison, Esqs. (Bostwick & Price), of Salt Lake City, Utah, for the Respondent.
Russell T. Monahan, Esq. (Cook & Monahan, P.C.), of Salt Lake City, Utah, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this case at Salt Lake City, Utah, on August 26 and 27, 2009. The portion of the General Counsel's June 24, 2009 consolidated complaint left to be decided here alleges that J.T. Thorpe and Son, Inc. (Thorpe, Company, or Respondent) withdrew recognition of Laborers' International Union of North America, Local 295 (Local 295, Union, or Charging Party), ceased giving effect to the parties' expired collective bargaining agreement, recognized entered into a labor agreement with another labor organization, and made certain unilateral changes to its terms of employment in violation of Section 8(a)(1) and (5) of the Act.¹ The outcome of this labor dispute turns on whether Thorpe recognized Local 295 as the 9(a) representative of its mason tender employees in 2003 as claimed by the General Counsel and Local 295.

On the entire record, including my observation of the demeanor of the witnesses, and after carefully considering the arguments in the briefs filed by the General Counsel, Thorpe, and Local 295, I conclude that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from Local 295, a 9(a) representative, and by changing the existing terms of employment in the most recent collective bargaining-agreement based on the following²

FINDINGS OF FACT

I. RELEVANT FACTS

Thorpe, a construction industry employer incorporated in California, supplies and installs refractory, acid resistant, and

¹ Originally the consolidated complaint included other allegations arising from the Local 295's charge in Case 27-CB-5129 that pertained to the recognition of the International Union of Public and Industrial Workers (IUPIW) as the exclusive representative of the unit employees involved here. Prior to the hearing, the regional director approved a settlement agreement in that case that resolved and severed the issues presented in para. 10(a), (b), and (c) of the consolidated complaint. Following the hearing, I approved an all-party, partial settlement agreement in Case 27-CA-21196, that resolved and withdrew the allegations contained in paras. 9(c) through (f), and paras. 11(a) and (b) of the consolidated complaint.

² The findings here incorporate the credibility resolutions I have made. My credibility conclusions have been informed by the following factors: the witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; witness bias; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence; if any; the inherent probabilities; reasonable inferences available from the record as a whole; the weight of the evidence; and witness demeanor or while testifying. More detailed discussions of specific credibility resolutions appear below in those situations that I perceived to be of particular significance.

fireproofing materials.³ Thorpe maintains an office and place of business at Salt Lake City, Utah, the only facility involved in this proceeding, where it annually purchases and receives goods, supplies, and materials valued in excess of \$50,000 directly from points located outside the State of Utah.

From at least the 1990s onward, Thorpe and two other area contractors, Western Refractory (Western) and Judd Jones (Jones), negotiated a series of successive collective-bargaining agreements with Local 295 known as the Mason Tender & Refractory Agreements (MTA or mason tender agreements).⁴ These agreements established the wages, hours, and other terms and conditions of employment for their mason tenders in this appropriate unit:

All employees wherever and whenever employed by the Employer as Mason Tenders and any other classifications of employees employed to do work within the work jurisdiction of Local No. 295 as determined by the Laborers' International Union of North America concerning work jurisdiction.

Local 295's geographical "work jurisdiction" in Utah is statewide. Throughout its bargaining relationship with these contractors, Local 295 referred numerous employees from its hiring hall, many of whom admittedly belonged to Local 295, for employment with the three signatory MTA contractors.

The most recent collective-bargaining agreement between Thorpe and Local 295 expired by its terms on December 5, 2008. (Jt. Exh. 1.) By letter dated September 4, 2008, Local 295's business manager, Michael Madrid, notified Thorpe that the union wanted to negotiate a new agreement. (Jt. Exh. 7.) In a letter dated September 26, Ryan Davis, Thorpe's regional manager, notified Local 295 that the company intended to terminate "all Collective Bargaining agreements" and "affiliations" with Local 295 when the existing MTA expired. (Jt. Exh. 8.)

On October 2, 2008, Madrid responded to Davis' termination notice by claiming that Thorpe was bound to an agreement under Section 9(a) of the National Labor Relations Act and warned him against making any unilateral changes without affording Local 295 with an opportunity to bargain. (Jt. Exh. 9.) In a letter dated October 17, Thorpe's labor counsel disputed Madrid's assertion that the 2006-2008 MTA was Section 9(a) agreement. Thorpe's counsel went on to assert that the existing agreement "is presumed to be a pre-hire agreement arising under Section 8(f) because "there has never been any showing, or any offer of a showing by the Union of support by a majority of employees in an appropriate bargaining unit as required under Section 9 of the Act." Counsel's letter promised to make no unilateral changes during the remaining term of the MTA but reiterated Davis' earlier message that Thorpe "has no intent or desire to continue in a bargaining relationship with your Union after the expiration of the (existing mason tender agreement)." (Jt. Exh. 10.) Thorpe's counsel and Local 295

president, Georg Erichson, exchanged further correspondence arguing about the statutory character of the existing agreement. Erichson asserted that Local 295 became the 9(a) representative in the course of the 2003 negotiations. Thorpe's counsel continued to argue that Local 295 had never demonstrated its majority standing by any means. (Jt. Exh. 11, 12, and 13.)

On November 19, Local 295 filed a petition for an election in 27-RC-8545. (Jt. Exh. 14.) An election was conducted pursuant to that petition but the ballots have been impounded pending the outcome of this matter. Thorpe admits that as of December 5, it withdrew recognition of Local 295 as the representative of the mason tenders unit and since that date it had not continued in effect the terms of the mason tenders' agreement including the health and welfare, pension, training, and vacation benefits. (GC Exh. 1(z), para 8.) In addition, Thorpe admits that after December 5, it granted wage increases to some of its mason tender employees. (Jt. Exh. 23, p. 1.) Thorpe also admits that after December 5, it recognized the International Union of Public and Industrial Workers (IUPIW) as the representative of its mason tenders and entered into a collective bargaining agreement with that union covering those employees. (GC Exh. 1(z), par. 9(a) and (b).) The union filed the charge in 27-CA-21099 on December 18 alleging that the Thorpe refused to bargain with Local 295 upon expiration of the 2005-2008 MTA and repudiated Local 295's status as the Section 9(a) representative. The charges in 27-CA-21196 and -21212 were filed on April 8 and April 17, 2009, respectively. Those charges allege that Thorpe pressured and intimidated employees to becoming members of the IUPIW.

Based on the foregoing, the principal issue in this case is whether, as claimed by the General Counsel and the Union, Thorpe recognized Local 295 as the 9(a) representative commencing in 2003.

II. THE 2003 NEGOTIATIONS

Beginning with the MTA effective October 1, 1995 and continuing until the MTA effective March 1, 2003, the relevant contractual recognition language (Article III) accorded Local 295 recognition pursuant to Section 8(f) of the Act. The relevant language read as follows:

Section 1. The Employer understands the Union represents the majority of its employees and recognizes the Union as the sole and exclusive collective bargaining representative of all employees wherever and whenever employed by the Employer during the term of this Agreement as Mason Tenders and any other classifications of employees employed to do work within the work jurisdiction of Local No. 295 as determined by the Laborers' International Union of North America concerning work jurisdiction.

. . . .

Section 3. The Employer agrees that, upon the union's presentation of evidence of majority status among employees in the bargaining unit described herein, the Employer will (voluntarily) recognize the Union as exclusive bargaining agent pursuant to Section 9(a) of the National Labor Relations Act for all employees within the bargain-

³ Thorpe is a subsidiary of Terra Millennium Corporation.

⁴ Although the three contractors negotiated together, no multi-employer agreement or organization exists. At the conclusion of the negotiations for a successor MTA, each signed a separate contract with Local 295 apparently containing identical terms.

ing unit on all present and future job sites within the jurisdiction of the Union.

See Joint Exhibits 4, 5, and 6.

Beginning with the 2003–2005 MTA, executed by Thorpe’s representative on or about March 6, 2003, and continuing with the two successive agreements, the recognition language in the Article III, Section 3, changed to the following:

Section 3: The Employer agrees that, the union has a majority status among employees in the bargaining unit described herein, and the Employer recognizes the Union as exclusive bargaining agent pursuant to Section 9(a) of the National Labor Relations Act for all employees within the bargaining unit on all present and future job sites within the jurisdiction of the Union.

See Exhs. 1, 2, and 3.

The parties began negotiating for a successor agreement near the end of the 2000–2003 MTRA. They concluded an agreement after three face-to-face bargaining sessions on February 5, 17, and 24. The task of preparing the final agreement for signature fell to Local 295.

As in past years, Thorpe, Western, and Jones bargained jointly with Local 295. The contractors selected David Miller, Thorpe’s territorial manager in 2003, as their informal spokesman. Maynard Anderson, Thorpe’s manpower, safety, and warehouse manager at the time, also attended all three sessions.⁵ Richard Altenreid, manager of Western’s Salt Lake City office, and Judd Jones on behalf of his own company also attended all three sessions. Walt Jones, formerly a salesman for Western, joined Altenreid for the session on February 24. Ross Williams, Local 295’s business manager at the time served as the union’s spokesman. Mike Madrid, at the time a Union field agent, attended all three sessions, and Georg Erickson, at the time a Union field agent and organizer, attended the last two sessions.⁶

All agree that the economic issues dominated the negotiations. At the end of the February 5 meeting, the parties agreed to postpone further meetings until the contractors concluded their concurrent negotiations with the bricklayers. Direct negotiations commenced again on February 17 but no agreement was reached. Williams and Miller met separately on February 18 to haggle further over the economic issues. Williams sought to have the contractors increase their economic offer from 35 cents to 40 cents per hour. By the end of their meeting Miller

⁵ As Thorpe’s territorial manager, Miller oversaw the operations of that firm’s two regional offices in Salt Lake City, and Arizona. Anderson position in 2003 involved a degree of human resources management. Although Anderson did not administer union contracts for Thorpe, he “review[ed] contracts and ke[pt] an archive of contracts for the various unions and groups across the country.” Tr. 433–434. No other participant on the contractor’s side of the table professed any specialized knowledge or experience in human resources or labor relations management; instead, they all essentially oversaw the operational functions, including Judd Jones, who owned his own firm.

⁶ My findings as to those in attendance at the face-to-face bargaining sessions rests primarily on Madrid’s contemporaneous notes prepared at the bargaining sessions. See GC Exhs. 10–12.

agreed to discuss the union’s proposal with the other contractors and get back to Williams. The following day Miller telephoned Williams with the news that the contractors would not increase their proposal. That evening Williams met with some of the employees from Thorpe and Western who authorized him to accept the contractors’ offer. The following day Williams contacted Anderson about arranging another bargaining session. Eventually, arrangements were made to meet on February 24 at the Union’s office.

The vast majority of the time at the February 24 session was consumed with getting the details of the economic issues ironed out. After that, Williams proposed that the contractors recognize Local 295 as the 9(a) representative of the contractor’s mason tenders. Estimates by the contractors’ witnesses indicate that this discussion probably consumed no more than two minutes out of a two hour meeting. Anderson recalled that the union representatives distributed a written copy of their proposal to modify the existing article III, section 3, language to the contractors when they arrived at the union’s office for the meeting.

Two factors motivated Williams’ proposal to change the recognition language. First, for some time officials of Local 295’s parent organization had been pressuring the local unions to pursue 9(a) in response to the Board’s *Deklewa* decision.⁷ In addition, Williams had become concerned that Thorpe might be phased out after another Terra Millennium subsidiary, Brahama Group, Inc., began operating from Thorpe’s Salt Lake City office during this period.

In anticipation of making the 9(a) proposal, Williams and the Local 295 field agents Madrid and Erichson began collecting signed authorization cards from the Thorpe and Western Refractory employees during their regular job site visits in late January and early February. They also obtained signed authorizations at the meeting William held with the unit employees on February 19. Williams readily acknowledged that the Local 295 agents never obtained authorizations from any Judd Jones’ employees because that contractor had no work underway in Utah at that time.

During the 4-month period from December 2002 through March 2003, Thorpe’s reports to the union’s trust funds show that the company employed a range of unit employees from a high of 44 in December 2002 to a low of 32 in February 2003. Thorpe reported 42 unit employees in March 2003 when the 2003–2005 MTA was executed. Twenty-six Thorpe employees appear on the reports for all four months. Williams, Madrid, and Erichson claim that virtually all of the laborers they solicited signed Local 295’s authorizations but by the time of this hearing, the authorization cards executed during this period could not be located.⁸

All of the 2003 bargaining participants agree that Williams proposed that the contractors recognize Local 295 as the 9(a)

⁷ *John Deklewa & Sons*, 282 NLRB 1375 (1987).

⁸ Williams said that he left his 2003 MTA bargaining notes and the authorizations cards in the business manager’s office files when he retired in 2004. Rod Ewell succeeded Williams and remodeled the business manager’s office after taking over. In the process, he discarded some of the office files. Ewell did not testify. Madrid succeeded Ewell when he retired in April 2008.

representative. Judd Jones vaguely remembered the discussion but could not remember during which meeting it occurred. Miller, Anderson, and Altenreid all recalled, in agreement with the union representatives, that Williams made this proposal at the February 24 meeting. Anderson recalled that the Local 295 agents distributed written copies of the proposed revision of Article III, Section 3, to the contractors when they arrived for the February 24 session.⁹

Williams, whose testimony on this score I credit, said he brought the authorization cards that the Local 295 agents had recently solicited from the Thorpe and Western employees in to the meeting in anticipation of making the 9(a) proposal. Williams recalled that he had them separated by contractor and bound together with a rubber band. Union agents Madrid and Erichson corroborate Williams' claim about the presence of the authorization cards at the February 24 meeting. The various contractor representatives vacillated between claims that they could not recall seeing any authorization cards and claims couched in tones of certainty that they never saw any authorization cards at the February 24 meeting.¹⁰

After the parties resolved their outstanding economic issues, Williams requested that the contractors agree to his proposed revision of Article III, Section 3. Miller asked Williams to explain what the proposed change meant.¹¹ He told them that they were "currently . . . under an 8(f) agreement" and he was proposing a change to a 9(a) agreement. Williams recalled one of the contractor representatives then asked for an explanation of the difference. In response, he told

⁹ None of the Local 295 witnesses mention the distribution of a written recognition proposal at the February 24 meeting. Williams recalled that the proposal was initially made verbally but he also said that the contractors had the written copy of the final agreement containing the new art. III, sec. 3 recognition language for several days before they signed it. Tr. 53.

¹⁰ I have credited Williams' testimony about the authorizations cards at the February 24 meeting because it struck me as free of exaggeration, authentic, and quite probable. The recollection from some of the witnesses on the contractors' side of the table that Williams made some mention of "voting" reinforces Williams' testimony about his claim that Local 295 would win handily if he petitioned for an election. I find it improbable that such an assertion would have occurred had Williams not been confident that he had signed authorizations from a "vast majority" of the employees as he asserted. And the fact that Miller later conferred with the company's attorney about the 9(a) recognition proposal raised at the February 24 meeting and then signed the new contract containing the revised recognition language without challenging Local 295 to prove its majority status lends credence, in my judgment, to the claim by the Local 295 witnesses that the piles of authorization cards present at the February 24 meeting were prominently displayed to the contractors' representatives and Williams' assertion that he told the contractors the specific number of employees who had signed the authorizations.

¹¹ Williams was less than certain that Miller requested an explanation for the MTA Section 3 revision. Anderson claimed that he read over the written proposal, pointed out the 9(a) language to Miller, and suggested that Miller ask for an explanation which Miller did. Anderson said the reference to 9(a) attracted his attention because he had not seen that reference before. In fact, art. III, sec. 3, always contained a reference to 9(a). None of the agreements in evidence contain any reference to Section 8(f).

the contractors that they had no obligation to negotiate further once an 8(f) agreement expired but under a 9(a) agreement, they would be "bound to either negotiate a successor agreement, bargain to impasse or the employees could hold an election to vote us out." He told the contractors that Local 295 had signed authorizations from "a vast majority" of employees and he offered to show them the cards he brought to the meeting. Williams recalled that he told the contractors how many of their employees had signed authorization card but by the time of the hearing he could not recall the specific numbers. He also told the contractors that he was confident Local 295 would win an election if they filed a NLRB petition.

Union agents Madrid and Erichson provided substantial corroboration for Williams' account. They remembered that Williams discussed the cards in the course talking about the 9(a) proposal at the bargaining table. Madrid recalled that Williams picked the cards up and set them down and stated that Local 295 could file for an election. Erichson remembered that Williams offered the authorization cards to the contractors but he could not recall that the contractors ever looked at them.

Following the proposal, the contractors' side asked for a caucus and the union agents left the room. Williams said that he left the cards on the table in front of his other documents. After the caucus, Williams said that Miller told the union negotiators that the contractors needed a few days to check out whether William's explanation about the difference between 8(f) and 9(a) was true and, if so, they would go along with his proposal. Madrid and Erichson also asserted that Miller agreed to the 9(a) language change if Williams' explanation checked out. Madrid's 2003 bargaining notes concerning the February 24 meeting (General Counsel Exhibit 12) state:

Union—Ross proposed take the .35 per year for 2 years and change the Agreement to a 9-A

Co.—Dave Miller said ok to the proposal. They asked for a few days to check out the status from 8-F to 9-A.

Erichson remembered that Williams raised the 9(a) issue toward the end of the meeting and that there was neither an agreement nor a disagreement at the time but a contingent understanding about the proposal. Following the meeting, Erichson e-mailed Anderson a copy of Sections 8(f) and 9(a) language that he obtained from the NLRB's web site.

After the February 24 bargaining session, Williams and an office assistant prepared a final draft of the new agreement and sent it to the contractors for review. On March 3, Williams spoke with Miller about the draft. Without discussing any particular change, Miller told Williams that the draft was okay and that the contract should be printed for signature. Miller acknowledged that he spoke with the company's attorney about the 9(a) recognition proposal following the February 24 meeting but he had no recollection that he spoke to William after the February 24 meeting.¹² However, on March 6, Miller executed

¹² I found Miller's recollection about the events that transpired through this period of 2003 particularly unreliable and easily the worst of all of the contractor witnesses. By way of example, Miller at one point testified that he could not recall if the economic package amounted to "35 cents or \$3.50" (Tr. 492) even though the other contractor

the 2003–2005 MTA on Thorpe’s behalf that contained the revised language in Article III, Section 3. His predecessors signed two more agreements on Thorpe’s behalf containing the same Article III, Section 3 provision that first appeared in the 2003–2005 MTA.

III. FURTHER FINDINGS, ARGUMENT, AND CONCLUSIONS

The portion of Section 8(f) of the Act relevant here provides that “(i)t shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) . . .) because (1) 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. . . .” The relevant portion of Section 9(a) of the Act 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. . . .” As will be seen from the discussion of the case law below, once a labor organization becomes a 9(a) representative by demonstrating its majority status in an appropriate unit, it enjoys a rebuttable presumption that its majority standing continues. One effect of this presumption is that an employer remains obliged to bargain with that labor organization following the expiration of a collective bargaining agreement.

In *Deklewa*, the Board sought to address the “serious shortcomings” that emerged from various prior decisions interpreting and applying Section 8(f). Beginning with *Deklewa*, the Board presumed that a relationship between a union and a construction industry employer was governed by Section 8(f) and that a party asserting the existence of a 9(a) relationship had the burden of proving it. 282 NLRB 1385 fn. 41. The Board said in *Deklewa* that a union had two options for overcoming the 8(f) presumption and proving that a 9(a) relationship existed: (1) a statutory certification following a Board conducted election under Section 9 (282 NLRB 1385–1386); or (2) voluntary recognition by the employer based on proof, such as valid authorization cards, that it represented a majority of the unit employees (282 NLRB 1387 fn.53). *Deklewa* and its progeny required a union to show three things to prove its 9(a) status by way of the voluntary recognition option: (1) the union’s unequivocal demand for recognition as the 9(a) representative; (2) the employer’s unequivocal and voluntary grant of such recognition; and (3) a contemporaneous showing of majority support. See *Triple C Maintenance, Inc.*, 219 F.3d 1147, 1152–1153 (10th Cir. 2000).

In this case, the parties have fashioned various arguments concerning the outcome from the Board’s more recent decision

representatives described the monetary package as the overwhelmingly dominant aspect of the 2003 negotiations.

in *Staunton Fuel & Material, Inc. (a/k/a Central Illinois Construction)*, 335 NLRB 717 (2001) (*Staunton Fuel*), a case in which the Board set forth minimum requirements of a written recognition agreement in order for a union to be recognized as the 9(a) representative without resort to extrinsic evidence. The General Counsel and Local 295 claim that the parties established a 9(a) relationship in February and March 2003 when they negotiated and executed the 2003–2005 MTA.

However, Local 295 argues that the recognition language used in the MTA contract executed in 2003 “established, at least facially, a 9(a) relationship” and that Thorpe “should be barred from attacking the relationship based on a lack of majority status.” The General Counsel argues that the recognition language from 2003 onward is not sufficient by itself to meet the *Staunton* requirements but, when that MTA recognition language is considered together with the extrinsic evidence surrounding the 2003 negotiations, the parties’ intent to establish a 9(a) relationship in the 2003–2005 MTRA is clear. Alternatively, Local 295 would join the General Counsel’s argument.

By contrast, Respondent argues that the recognition language in the 2003–2005 MTA fails to meet the *Staunton Fuel* requirements, and that the “General Counsel’s resort to extrinsic evidence of matters not related to *Staunton Fuel*’s three-prong test is inappropriate and inadmissible to prove such a conversion occurred.”

Although I agree that *Staunton Fuel* is important to the outcome here I do not share the parties’ views that it amounts to the controlling precedent in this case.

The employer and the union in *Staunton Fuel* executed a three-year collective-bargaining agreement that carried over language from prior agreements recognizing the union “as the sole and exclusive collective bargaining agent.” The newly executed agreement also provided that the employer recognized the union “as the Majority Representative of all employees (in the appropriate bargaining unit).” When that contract expired, the employer withdrew further recognition of the union and made a number of unilateral changes. Subsequently, the General Counsel issued a complaint based on the union’s charge alleging that the employer’s conduct violated Section 8(a)(5). The administrative law judge reasoned in her decision that the contractual recognition language and existing Board precedent supported a conclusion that the union had become a Section 9(a) representative when the new three-year agreement was executed. The judge also concluded that the employer was time barred under Section 10(b) from challenging the union’s 9(a) status.

The employer filed exceptions to the judge’s determinations with the Board. The Board, acknowledging that its recent decisions on this subject had not always been enforced by the courts, addressed the difficulties presented by post-*Deklewa* cases in determining from contract language “what constitutes voluntary ‘recognition’ by an employer ‘based on a clear showing of majority support among the union employees’” within the meaning of *Deklewa*. As noted before, the Board’s *Staunton Fuel* decision sought to define “the *minimum* requirements for what must be stated in a written recognition agreement or contract clause in order for a union to attain 9(a) status solely

on the basis of such an agreement.” (Emphasis mine) Those minimum requirements, the Board said, will be met where the contract 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.”

Based on these requirements, I find that the contractual language in the 2003–2005 MTA fails to satisfy the requirements of *Staunton Fuel* because article III, section 3, does not provide that the 9(a) recognition was based on “the union’s having shown, or having offered to show, evidence of its majority support” or something approximating that type of language. For that, the General Counsel offered extrinsic evidence from the February 24, 2003 bargaining session to establish this missing *Staunton Fuel* element. Although resort to extrinsic evidence is always permitted to establish the existence of a Section 9(a) relationship (335 NLRB 720 fn. 15), where, as here, that becomes necessary, the case ceases to be governed by *Staunton Fuel* because the existence of the 9(a) status cannot be discerned solely from contractual language.

Local 295’s contention that the contractual language suffices in this case, rests largely on the rationale of the Tenth Circuit in the *Triple C Maintenance* case. There, the employer executed a series of successive short-term agreements stating that it recognized the union “as the sole and exclusive bargaining agent for employees in a unit appropriate for bargaining within the meaning of 9(a)” and “this recognition [was] predicated on a clear showing of majority support for [the Union] indicated by [the] bargaining unit employees.” *Triple C Maintenance*, 219 F.3d 1150. Although it is possible to infer in this case by comparing the pre-2003 Section 3 recognition language with the Section 3 language in 2003 MTA and its successors that Local 295 must have presented Thorpe with “evidence of (its) majority status among employees in the bargaining unit” (Local 295’s Br., p. 3), no explicit statement to that effect is ever made in an MTA purporting to grant recognition pursuant to Section 9(a).

Moreover, I find good reason here to reject any suggestion that Local 295’s 9(a) status should be determined solely on the basis of the contractual language under any rationale. Under *Deklewa*, the appropriate unit for determining majority status in the 8(f) situation is normally a single employer unit even in those situations where a single employer unit may have been merged into a multiemployer unit. 282 NLRB 1385. The evidence here infers that in March 2003 Thorpe, Western, and Jones, consistent with their past practice, executed separate but identical agreements. If so, Local 295’s admission that it had no authorization cards from Jones’ employees effectively nullifies the contractual recognition language in the 2003–2005 MTA at least as to Judd. In these circumstances, I find that reliance solely on the MTA’s contractual recognition language to establish a 9(a) relationship would be inappropriate.

However, I find in this case that the extrinsic evidence adduced by the General Counsel establishes that Local 295 satisfied the agreed-upon condition in the parties’ pre-2003 MTAs and, therefore, I recommend that the Board give effect to the 9(a) recognition language in the mason tender agreements be-

tween Thorpe and Local 295 from 2003 onward. The factual situation here is analogous to that found in *Goodless Electric Co.*, 321 NLRB 64 (1996) (*Goodless I*), where the employer signed a letter of assent in July 1992 agreeing to follow a multiemployer agreement. But, as I will summarize below, the *Goodless* case has a long, problematic history that at first blush might lead some to conclude that it lacks viability as controlling Board precedent. However, I have concluded that the framework ultimately established by the Board in the *Goodless* litigation, together with the Board’s reference to that framework in *Staunton Fuel* represents binding Board precedent even though a court of appeals twice refused to enforce the Board’s order in that litigation.

The letter of assent in *Goodless* contained recognition language providing “that if a majority of its employees authorize the Local Union to represent them in collective bargaining, the Employer will recognize the Local Union as the NLRA Section 9(a) (representative).” Near the end of the contract term, the employer told the union on more than one occasion that it planned to terminate its relationship with the union when the contract expired on June 30, 1993. Six days prior to the contractual expiration date, the employer’s entire work force signed authorization cards designating the union as their collective bargaining representative. The following day the union asserted that the employees wanted to union to continue representing them and presented the cards to the employer to prove that claim. The employer examined the cards and independently verified them. Subsequently, the parties extended their agreement for six months. Just prior to the expiration of the extension, around the time when the employer again began to threaten the withdrawal of recognition, all but one of the employees signed and submitted a union form letter inviting the employer to contact their union agent if it wanted to discuss any matters concerning their wages or terms and conditions of employment because they intended to continue their union membership and they expected the employer to continue to comply with the union contract. Despite all of this, the employer withdrew recognition at the end of the extension period, and made several unilateral changes.

On these facts, the Board found in *Goodless I* that the employer violated Section 8(a)(5) by withdrawing recognition and implementing new employment terms at the end of the six-month extension period.¹³ It concluded that the letter of assent recognition language constituted, for the remainder of its term, both a continuing request for recognition and a continuing, enforceable promise by the employer to grant voluntary 9(a) recognition if the union demonstrated majority support. Viewing the recognition language in this manner, the Board found that the union “has proved that it met all of the Board’s requirements for establishment of a 9(a) relationship” as of June 25, 1993, when the union presented the employer with signed authorization cards from all of the unit employees. The Board found that the union enjoyed a rebuttable presumption of majority status as the 9(a) representative when the contract expired. Because the employer failed to rebut that presumption,

¹³ *Goodless* also involved constructive discharge issues not relevant here.

the Board held that it could not lawfully alter the terms and conditions of employment unilaterally.

A court of appeals panel denied enforcement of the Board's order. *NLRB v. Goodless Electric Co.*, 124 F.3d 322 (1st Cir. 1997) (*Goodless II*). The court rejected the Board's conclusion that the recognition language constituted a continuing demand for recognition and a continuing, enforceable promise to grant voluntary recognition if the union demonstrated majority support. *Ibid.* at 330. Without that essential construction of the contract language, the court held that the Board had failed to explain why it departed from its own post-*Deklewa* precedent requiring that, in voluntary recognition cases, the demand and the recognition "must be based on a contemporaneous showing that the union enjoys majority support of the employers' workforce" *Ibid.* at 328–329. The court reversed and remanded the case to the Board "for further proceedings in accordance with (its) opinion."

On remand, the Board acknowledged that the court's opinion constituted the law of the case but used the occasion to "provide the explanation" the court found missing from its *Goodless I* decision for not following its post-*Deklewa* precedent relating to voluntary recognition. *Goodless Electric Co.*, 332 NLRB 1035, 1037 (2000) (*Goodless III*). In *Goodless III*, the Board said:

[I]n the construction industry, as in other industries, agreements for future 9(a) recognition are permissible and do not depend for their validity on showing of majority status at the time of the execution of the agreement. . . . [W]here, as here, the parties' agreement so specifies, the union's providing the employer with reliable evidence of its majority status during the term of the 8(f) agreement is sufficient to trigger the employer's contractual obligation to grant 9(a) recognition to the union.

The Board analogized this situation to its long-standing practice of enforcing so-called "after-acquired store" clauses in the retail industry that require an employer to recognize the union as the 9(a) representative of employees at stores acquired or opened after the parties sign a contract if the union later demonstrates that it represents a majority of the employees at the after-acquired location. In support, the Board cited its decisions in *Snow & Sons*, 134 NLRB 709 (1961), *enfd.* 308 F.2d 687 (9th Cir. 1962), and *Kroger Co.*, 219 NLRB 388, 389 (1975). In addition, the Board pointed to the conclusion in *Hotel Employees Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992), that endorsed *Kroger* and enforced a pre-hire agreement whereby the employer agreed "to accept the results of a card check in lieu of an NLRB election" because the court found the agreement to be consistent with national labor policy. Based on its clarification, the Board adhered to its original decision in *Goodless I*.

In *NLRB v. Goodless Bros. Electric Co.*, 285 F.3d 102 (1st Cir. 2002) (*Goodless IV*), the court disagreed assumption made by the Board in *Goodless III* that it could provide added rationale and reach the same conclusion after accepting the remand from *Goodless II*. Accordingly, the court reversed the Board's decision in *Goodless III* and remanded the case to the Board again with a specific direction to dismiss the case against

that particular employer. However, in doing so, the court observed that the Board could have dismissed the complaint as to that particular employer in *Goodless III*, but announced that henceforth "its new construction of the contemporaneity requirement would govern this area of the law." 285 F.3d 111. On remand from *Goodless IV*, a substantially new Board panel dismissed the complaint as instructed by the court. *Goodless Electric Co.*, 337 NLRB 1259 (2002) (*Goodless V*). The two new members of the Board panel used the occasion to announce in a footnote that they had not participated in the prior Board decisions and expressed no view as to those decisions.

However, in *Staunton Fuel*, the Board, independent of the *Goodless* litigation, confirmed its adoption of the principle it announced in *Goodless III*, which the court in *Goodless IV* said the Board would be at liberty to do despite its refusal to enforce the Board's *Goodless III* order as to that particular employer. Thus, in *Staunton Fuel*, which issued between *Goodless III* and *Goodless IV*, the Board stated:

Recently, in *Goodless Electric Co.*, 332 NLRB 1035 (2000), on remand from 124 F.3d 322 (1st Cir. 1977), we found that where the parties' contract language commits the employer to recognizing the union's majority representative status in the future if the union demonstrates that it has majority support, 9(a) recognition will be established if and when the union subsequently meets that condition within the term of the agreement.⁸

⁸ We have referred to this procedure as the "third option" for a union to obtain 9(a) status, in addition to the earlier recognized options of (1) winning a Board-certified election, and (2) obtaining the employer's immediate voluntary recognition. *Goodless Electric Co.*, 332 NLRB 719, fn.10. See also *NLRB v. Goodless Electric Co.*, 124 F.3d at 328–329.

Staunton Fuel, 335 NLRB 719. Based on this Board declaration approving a so-called "third option," I find *Goodless III* to be controlling precedent in situations, such as this, that involve a collective bargaining agreement, initially executed under Section 8(f), containing a prospective 9(a) recognition clause later satisfied by a showing of the union's majority status.

Based on the *Goodless III* principle, I conclude that Thorpe and Local 295 were bound to agreements from 1995 to 2003 that contained a prospective recognition clause at article III, section 3. Therefore, when Williams claimed that Local 295 represented the vast majority of Thorpe's employees at the February 24 meeting and held up the authorization cards in support of that claim, Thorpe was contractually required to recognize Local 295 then and there as the 9(a) representative. And in fact, Miller complied with that contractual requirement on behalf of Thorpe two weeks later when he signed the 2003–2005 MTA.

The fact that the Thorpe representatives failed to inspect the authorization card to verify Local 295's majority claim or take any other steps to verify that claim before Miller executed the new agreement on March 6 is of no moment where, as here, the agreement he executed acknowledged Local 295's majority standing among its mason tenders and recognized that union as their Section 9(a) representative. See *Staunton Fuel*, 335 NLRB 719, fn. 10, and the cases cited there. Likewise, the fact

that the parties may have mutually agreed on February 24 to defer actual recognition for the time being while Miller educated himself as to the difference between 8(f) and 9(a) has no significance since he executed the 2003–2005 MTA recognizing Local 295 as the 9(a) representative without qualification and his successors signed two additional MTAs containing the same recognition language.

Because Thorpe erroneously treated the 2006–2008 MTA as an 8(f) agreement, it made no effort here to rebut the presumption that Local 295's majority standing continued after December 5, 2008. Accordingly, I find Respondent violated Section 8(a)(1) and (5), as alleged, by refusing to recognize and bargain with Local 295 after December 5, 2008. Further, it follows that by recognizing and entering into a collective bargaining agreement with the IUPIW as the representative of its mason tender employees at a time when it was legally obliged to recognize Local 295, Thorpe violated Section 8(a)(1) and (2) as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 295, a labor organization within the meaning of Section 2(5) of the Act, is the exclusive collective bargaining representative of the following appropriate union of employees within the meaning of Section 9(a) of the Act:

All employees wherever and whenever employed by the Employer as Mason Tenders and any other classifications of employees employed to do work within the work jurisdiction of Local No. 295 as determined by the Laborers' International Union of North America concerning work jurisdiction.

3. By recognizing and entering into a collective bargaining agreement with the International Union of Public and Industrial Workers, a labor organization within the meaning of Section 2(5) of the Act, applicable to the employees in unit described in paragraph 2, above, Respondent violated Section 8(a)(1) and (2) of the Act.

4. By withdrawing recognition from Laborers' Local 295, effective December 5, 2008; by failing to continue in effect the terms of the 2006–2008 MTA after December 5, 2008; by unilaterally granting wage increases to unit employees after December 5, 2008; and by failing to make trust fund payments required under the 2006–2008 MTA after December 5, 2008, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), and Section 2(6) and (7) of the Act.

REMEDY

Having found that Thorpe engaged in certain unfair labor practices, my recommended order will require that it be ordered to cease and desist from its unlawful conduct and to take certain affirmative action designed to effectuate the policies of the Act.

Affirmatively, my recommended order requires Thorpe to withdraw and withhold recognition of the IUPIW as the representative of the employees already represented by Local 295, unless and until the IUPIW becomes duly certified by the Board as the collective-bargaining representative of such employees. In addition, Thorpe is required to cease giving any

effect to the collective-bargaining agreement that it entered into with the IUPIW after December 5, 2008.

In addition, the recommended order requires Thorpe to recognize and bargain with Local 295 as the representative of its mason tender employees. Thorpe is also required to give effect to the 2006–2008 MTA agreement until a new agreement is negotiated or an impasse is reached in the negotiations for a new agreement. If requested by Local 295, Thorpe must also rescind any wage increases unilaterally given to unit employees after December 5, 2008. Finally, Thorpe must make whole employees and the various benefit trust funds provided for under the 2006–2008 MTA for any losses suffered as the result of its failure to give effect to that collective-bargaining agreement after December 5, 2008, as provided in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980); *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest, where appropriate, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The Respondent, J.T. Thorpe & Son, Inc., Salt Lake City, Utah, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Laborers' International Union of North America, Local 295, as the exclusive collective bargaining representative of its employees under Section 9(a) of the National Labor Relations Act, as amended, in the following appropriate unit:

All employees wherever and whenever employed by the Employer as Mason Tenders and any other classifications of employees employed to do work within the work jurisdiction of Local No. 295 as determined by the Laborers' International Union of North America concerning work jurisdiction.

(b) Refusing to give effect to the terms and conditions of employment for the employees in the above appropriate unit as set forth in the 2006–2008 Mason Tender & Refractory Agreement until a successor agreement has been negotiated or an impasse has been reached in negotiations.

(c) Granting employees in the above appropriate unit increased pay rates without giving Laborers' International Union of North America, Local 295, prior notice and an opportunity to bargain concerning any proposed pay rate increases.

(d) Recognizing and entering into a collective bargaining agreement with the International Union of Public and Industrial Workers as the collective-bargaining representative the employees in the above appropriate unit at a time when it was lawfully required to recognize and bargain with Laborers' International Union of North America, Local 295, as the exclusive representative of the employees in that unit.

¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withhold recognition of International Union of Public and Industrial Workers as the representative of its mason tender employees until that labor organization becomes certified by the National Labor Relations Board as their exclusive collective-bargaining representative.

(b) Cease giving effect to the collective-bargaining agreement entered into with International Union of Public and Industrial Workers applicable to the employees in the above appropriate unit.

(c) On request, bargain with the Laborers' International Union of North America, Local 295, as the exclusive representative of the employees in the above appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(d) If requested by Laborers' International Union of North America, Local 295, rescind any pay rate increases unilaterally given to the unit employees after December 5, 2008.

(e) Apply the terms and conditions of employment for the employees in the above appropriate unit as set forth in the 2006–2008 Mason Tender & Refractory Agreement until a successor agreement has been negotiated or an impasse has been reached in negotiations.

(f) Make whole employees and the benefit trust funds provided for under the 2006–2008 Mason Tender & Refractory Agreement for any losses suffered as the result of its failure to give effect to that collective bargaining agreement after December 5, 2008, in the manner set forth in the remedy section of this decision together with interest as provided by law.

(g) Within 14 days after service by the Region, post at its facilities and job sites in the State of Utah, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 5, 2008.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with Laborers' International Union of North America, Local 295, as the exclusive collective bargaining representative of our employees under Section 9(a) of the National Labor Relations Act, as amended, in this appropriate unit:

All employees wherever and whenever employed by the Employer as Mason Tenders and any other classifications of employees employed to do work within the work jurisdiction of Local No. 295 as determined by the Laborers' International Union of North America concerning work jurisdiction.

WE WILL NOT refuse to give effect to the terms and conditions of employment for our employees in the above appropriate unit as set forth in the 2006–2008 Mason Tender & Refractory Agreement until a successor agreement has been negotiated or an impasse has been reached in negotiations.

WE WILL NOT grant employees in the above appropriate unit increased pay rates without giving Laborers' International Union of North America, Local 295, prior notice and an opportunity to bargain concerning any proposed pay rate increases.

WE WILL NOT recognize and enter into a collective bargaining agreement with the International Union of Public and Industrial Workers as the collective-bargaining representative the employees in the above appropriate unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL withhold recognition of International Union of Public and Industrial Workers as the representative of our mason tender employees until that labor organization becomes certified by the National Labor Relations Board as their exclusive collective-bargaining representative.

WE WILL cease giving effect to the collective-bargaining agreement entered into with International Union of Public and Industrial Workers applicable to our mason tender employees.

WE WILL, on request, bargain with the Laborers' International Union of North America, Local 295, as the exclusive representative of our mason tender employees concerning terms and

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, if requested by Laborers' International Union of North America, Local 295, rescind any pay rate increases unilaterally given to our mason tender employees after December 5, 2008.

WE WILL apply the terms and conditions of employment for our mason tender employees as set forth in the 2006–2008 Mason Tender & Refractory Agreement until a successor agree-

ment has been negotiated or an impasse has been reached in negotiations.

WE WILL make whole our employees and the benefit trust funds provided for under the 2006–2008 Mason Tender & Refractory Agreement for any losses suffered as the result of our failure to give effect to that collective-bargaining agreement after December 5, 2008, together with interest as provided by law.

J.T. THORPE & SON, INC.