

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION SEVEN (*DETROIT*)

In the Matter of:

**ASSOCIATED GENERAL CONTRACTORS
OF MICHIGAN,**

Case No. 7-RC-64788

and

**ASSOCIATED CONCRETE CONTRACTORS
OF MICHIGAN,**

Case No. 7-RC-64796

and

CONSTRUCTION ASSOCIATION OF MICHIGAN,

Case No. 7-RC-64723

Employers,

and

**LOCAL 514, OPERATIVE PLASTERERS' AND
CEMENT MASONS' INTERNATIONAL
ASSOCIATION OF THE UNITED STATES AND
CANADA, AFL-CIO,**

Petitioner,

**LOCAL 1, INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED CRAFTWORKERS,
AFL-CIO,**

Intervenor.

**BROADCAST DESIGN & CONSTRUCTION
SERVICES, INC.,**

Case No. 7-RC-64603

Employer,

and

LOCAL 514, OPERATIVE PLASTERERS' AND

**CEMENT MASONS' INTERNATIONAL
ASSOCIATION OF THE UNITED STATES AND
CANADA, AFL-CIO,**

Petitioner,

and

**LOCAL 1, INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED CRAFTWORKERS,
AFL-CIO,**

Intervenor Local 1/Cross-Petitioner,

and

**INTERNATIONAL UNION OF BRICKLAYERS
AND ALLIED CRAFTWORKERS, AFL-CIO,**

Intervenor,

DEMARIA BUILDING COMPANY, INC.,

Case No. 7-RC-64870

Employer,

and

**LOCAL 514, OPERATIVE PLASTERERS' AND
CEMENT MASONS' INTERNATIONAL
ASSOCIATION OF THE UNITED STATES AND
CANADA, AFL-CIO,**

Petitioner,

and

**LOCAL 1, INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED CRAFTWORKERS,
AFL-CIO,**

Intervenor Local 1/Cross-Petitioner,

and

LOCAL 9, INTERNATIONAL UNION OF

**BRICKLAYERS AND ALLIED CRAFTWORKERS,
AFL-CIO,**

Intervenor Local 9,

AMALIO CORPORATION, INC.,

Case No. 7-RC-64611

and

E.L.S. CONSTRUCTION, INC.,

Case No. 7-RC-64787

Employer,

**LOCAL 514, OPERATIVE PLASTERERS' AND
CEMENT MASONS' INTERNATIONAL
ASSOCIATION OF THE UNITED STATES AND
CANADA, AFL-CIO,**

Petitioner,

and

**LOCAL 9, INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED CRAFTWORKERS,
AFL-CIO,**

Intervenor,

RONCELLI, INC.,

Case No. 7-RC-66599

and

BARTON MALOW COMPANY,

Case No. 7-RC-66611

and

ALBANELLI CEMENT CONTRACTORS, INC.,

Case No. 7-RC-66641

Employers,

and

**LOCAL 514, OPERATIVE PLASTERERS' AND
CEMENT MASONS' INTERNATIONAL**

**ASSOCIATION OF THE UNITED STATES AND
CANADA, AFL-CIO,**

Petitioner,

and

**LOCAL 1, INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED CRAFTWORKERS,
AFL-CIO,**

Intervenor Local 1/Cross-Petitioner,

and

**LOCAL 9, INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED CRAFTWORKERS,
AFL-CIO,**

Intervenor Local 9,

**LOCAL 514, OPERATIVE PLASTERERS' AND CEMENT MASONS'
INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA,
AFL-CIO'S RESPONSE IN OPPOSITION TO INTERVENOR BAC LOCAL 9 AND BAC
INTERNATIONAL UNION'S REQUEST FOR REVIEW**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

INDEX OF AUTHORITIES.....ii

I. INTRODUCTION.....1

II. ARGUMENT.....3

 A. Intervenor’s Request for Review Should Be Denied as to Barton, Roncelli, and E.L.S. Because Those Employers Did Not Have a 9(A) Agreement that Could Act as a Contract Bar to the Petitions.....3

 1. The MCE 9(a) recognition language does not act as a contract bar relating to Roncelli.....3

 B. Regardless of the Whether the MCE Agreement is Applicable and Constitutes a 9(A) Agreement Between Barton, Roncelli, E.L.S., and Local 9, Petitioner Requested a Residual Unit for Employees Explicitly Excluded by the MCE Agreement.....4

 C. The Regional Director Rightfully Found that the Statewide Heavy and Highway Agreement Did Not Bar the Petition Regarding Albanelli Cement.....8

IV. CONCLUSION.....9

INDEX OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>General Cable Corp.</i> , 139 NLRB 1123 (1962).....	8
<i>G.L. Milliken Plastering</i> , 340 NLRB 1169 (2003)	4, 5, 6
<i>Maramount Corp.</i> , 310 NLRB 508 (1993)	9
<i>Premier Plastering</i> , 342 NLRB 1072 (2004).....	4, 5, 6
<i>Royal Crown Cola</i> , 150 NLRB 1624, 1625 (1965).....	7, 8

NOW COMES Petitioner Local 514, Operative Plasterers' and Cement Masons' International Association of the United States, and Canada, AFL-CIO, by and through its attorneys, Miller Cohen, P.L.C., for its Response in Opposition to Intervenor BAC Local 9's Request for Review, and states as follows:

I. INTRODUCTION

Petitioner, Local 514, filed various petitions to represent the cement masons that are employed at various contractors. Local 514 filed petitions on the three multiemployer groups that it negotiates 8(f) agreements with and these include the Associated General Contractors of Michigan ("AGC"), the Construction Association of Michigan ("CAM"), and the Associated Concrete Contractors of Michigan ("ACCM").

Local 514 has also filed petitions to represent four contractors that it does not have any contractual relationship. The cement masons for these contractors are represented by BAC Local 1 and in some cases, BAC Local 9. Barton Malow is a member of AGC and has granted it power of attorney to negotiate with the BAC. It has a 9(a) relationship with Local 9. That contract specifically excludes the counties of Wayne, Oakland, Macomb, St. Clair and Monroe, as well as the Upper Peninsula. It also has agreements with out of state unions. Therefore, Local 514's petition only seeks to represent a unit consisting of Wayne, Oakland, Macomb, and St. Clair.

Roncelli is an independent signatory to the CAM agreement with Local 1, but has a 9(a) contract with Local 9. Therefore, Roncelli's petition does not seek any geographic area covered by the 9(a) agreement with Local 9.

Albennelli is an independent signatory to ACCM. It has a 9(a) contract with Local 9 that covers only heavy highway work. Therefore, Local 514's petition only covers the work performed under their 8(f) agreement—building and heavy construction.

Intervenor asserts that Barton, E.L.S., and Roncelli are all parties to 9(a) agreements that act as a bar to Petitioner's certification petitions. Yet, the MCE agreement explicitly excludes all counties in Michigan's Upper Peninsula and the counties of Wayne, Oakland, Macomb, Monroe, and St. Clair in Michigan's Lower Peninsula. Notably, Petitioner was only requesting a certification election for Oakland, Macomb, Wayne, and St. Clair counties for Barton, and Oakland, Macomb, Wayne, St. Clair counties as well as the Upper Peninsula counties for Roncelli. Consequently, the MCE agreement at issue with those employers does not apply to the work that Petitioner is requesting a certification election over.

Intervenor also wrongly asserts that E.L.S. signed the MCE agreement in 2005. Petitioner contested this issue because the record indicates that Intervenor did not have a single member who was employed by E.L.S. In fact, no one on Intervenor's behalf could even testify that they signed the putative 9(a) MCE agreement. Hence, the Regional Director held that there was no contract bar.

Finally, as for Albanelli, Intervenor rests its argument on the March 20, 2009 to July 1, 2013 Michigan Heavy and Highway Agreement. However, that agreement only applied to outside work—a fact that Albanelli is mindful of because outside cement masons under the Agreement have a lower pay rate. Once again, Intervenor ignores the clear language of the petition, which only requests an election as to “building and heavy construction”—a term defined by the Heavy and Highway Agreement to mean outside work.

II. ARGUMENT

A. **Intervenor's Request for Review Should Be Denied as to Barton, Roncelli, and E.L.S. Because Those Employers Did Not Have a 9(A) Agreement that Could Act as a Contract Bar to the Petitions.**

1. The MCE 9(a) recognition language does not act as a contract bar relating to Roncelli.

Intervenor spends a large portion of its Brief arguing that the 2007-2009 MCE Agreement, if applicable, establishes a 9(a) relationship without going into further factual detail as to whether the MCE Agreement is actually applicable to the above-mentioned employers. Petitioner does not dispute that the MCE Agreement is applicable to Barton and constitutes a 9(a) agreement for all of Michigan except Michigan's Upper Peninsula and the counties of Wayne, Oakland, Macomb, Monroe, and St. Clair in Michigan's Lower Peninsula. Petitioner also does not dispute the 9(a) bargaining relationship of Roncelli as it pertains to Local 9.

However, Intervenor claims to have a 9(a) relationship with E.L.S.. Yet, for many years, E.L.S. has been an independent signatory of Local 514. Most recently, it signed an agreement in 2007 binding it to the CAM – Local 514 agreement. (P. Ext. 7) E.L.S. only uses Local 514 cement masons in the State of Michigan. (Tr. 455) Even Donald Yee, E.L.S.' Assistant Estimator, testified that they have never had a cement mason in the State of Michigan that was not a Local 514 member. (*Id.*)

Intervenor asserts that E.L.S. signed the MCE agreement in 2005. (J. Ext. 10) However, Local 514 asserts that there was never an Local 9 member in this bargaining unit. In fact, no official on behalf of the Intervenor was able to testify that they offered the showing of majority support. In fact, without any of Intervenor's members, it would have been impossible to make such a showing. Accordingly, it was impossible for the union to show majority support.

Since Yee testified that all cement masons employed in the State of Michigan are Local 514, the veracity of the alleged 9(a) agreement is in dispute. No one with ELS testified that they signed the agreement. No one on behalf of Intervenor testified that they signed the agreement. The agreement is a complete mystery. Therefore, the Regional Director rightfully found that there was no contract bar precluding a certification election.

B. Regardless of the Whether the MCE Agreement is Applicable and Constitutes a 9(A) Agreement Between Barton, Roncelli, E.L.S., and Local 9, Petitioner Requested a Residual Unit for Employees Explicitly Excluded by the MCE Agreement.

Petitioners are seeking a geographic scope consisting of all areas that are not covered in the 9(a) agreement with Local 9. That includes all of the cement masons working for Barton and Roncelli excluding all counties in the state of Michigan except, the petition includes the counties of Macomb, Oakland, Wayne, St. Clair, and Monroe and the Upper Peninsula (Roncelli only). Also, Petitioner limited its requested unit for E.L.S. cement mason to exclude Monroe County—the only known 9(a) agreement involving E.L.S. is with an OPCMIA Local in Toledo covering Monroe County.

Normally the proper unit for a craft unit in the construction industry “is one without geographic limitation.” *Premier Plastering*, 342 NLRB 1072, 1073 (2004). However, while historical limitations on bargaining are a factor to consider, they are not conclusive. *Id.* Instead, the Board held that a residual unit can be appropriate “if it includes all unrepresented employees of the type covered by the petition.” *G.L. Milliken Plastering*, 340 NLRB 1169 (2003). In that case, BAC Local 9 sought a unit consisting of all plasterers of the employer, without geographic limitation. OPCMIA Local 16 had a 9(a) contract with the employer covering the Lansing and Jackson area. Local 9 carved that geographical area out of the petitioned for unit. The Board

held that the residual unit was appropriate, but remanded to the Regional Director to determine the effect, if any, of the traveler provisions of the Local 16 agreement.

G.L. Milliken is informative in this Petition because it provides that it is appropriate to carve out 9(a) agreements that are of limited geography. The remaining geography will constitute an appropriate unit. For example, the AGC bargaining unit has been modified to avoid any 9(a) issues with other unions. Sorenson Gross has a 9(a) certification and agreement with OPCMIA Local 16 that covers the entire State of Michigan. (see P. Ext 12 and 18) Similarly Fessler Bowman has a 9(a) certification and contract with Local 16. (see P. Ext. 5 and 17) The contract there is not state-wide, instead, the contract between Fessler Bowman and Local 16 does not cover the counties of Wayne, Oakland, Macomb, Lenawee, and Hillsdale. (P. Ext. 17, pg. 1)

Similarly, in *Premier Plastering, Inc.*, 342 NLRB 1072 (2004), the Board addressed the appropriate geography for a trade unit. Again, not surprisingly, the case involved a BAC Local and OPCMIA Local. The petition sought a unit of all plasterers of the employer within a five county area. The employer and the petitioning union, OPCMIA Local 80, had an 8(f) agreement that covered one county. However, the employer often extended that contract across the five county area that was petitioned for. The employer also had other agreements with other OPCMIA locals for plasterer work in Ohio. It had an 8(f) agreement with OPCMIA Local 109 and a 9(a) agreement with OPCMIA Local 179, each for several Ohio counties. BAC Local 16 intervened because it had a 9(a) contract with the employer for bricklayers and cement masons.

BAC Local 16 argued that the 9(a) agreement with Local 179 for plasterers barred the petition in whole. It also argued that the geography must be limited to the one county jurisdiction of the Local 80 8(f) agreement. The Board found that the petitioned for five county area was not appropriate. *Id.* at 1073. It also found that the one county proposed unit was not

appropriate. *Id.* The board found that the only appropriate unit was one without geographic limitation, except the geography covered in the Local 179 9(a) agreement. *Id.* The Board also rejected BAC Local 16's argument that a 9(a) agreement of limited geography blocks an election in all geographies. *Id.*

Premier Plastering and *G.L. Milliken* are the most applicable cases. Local 9 has a 9(a) agreement with Barton covering all of the counties of the Lower Peninsula, except for Wayne, Oakland, Macomb, St. Clair, and Monroe as well as an agreement with Roncelli covering all counties except Wayne, Oakland, Macomb, St. Clair, Monroe, and the Upper Peninsula. (J. Ext. 8, pg. 2) Therefore, the Petition covers the area in Michigan where work is performed by the described core groups of cement masons, but is unrepresented-- Macomb, Oakland, Wayne, St. Clair, Monroe (not Barton), and the Upper Peninsula (Roncelli only). This also happens to be the area excluded in the Local 9 agreement.

Not only does Local 9's attempt to make an argument unsupported by Board precedent, Local 9 attempts to argue that its 9(a) agreement of limited geographic scope extinguishes the right of self-determination for all of Roncelli and Barton's cement masons everywhere. It argued at the hearing that its contract was a contract bar for the all of Roncelli and Barton's cement masons. By this reasoning, only the employer, through 8(f) agreements can then decide who is the exclusive bargaining representative for cement masons outside of the geographic scope of the 9(a) agreement or if they have a union at all. That runs directly counter to the Act's purpose of allowing employees to freely choose their bargaining representative.

Moreover, this anti-free choice argument was specifically rejected when BAC Local 16 made this argument in *Premier Plastering, Inc., supra*. As stated above, BAC Local 16 intervened and argued that a 9(a) contract of limited geographic scope barred an election

throughout the State of Ohio. The Board specifically rejected this argument and found that the appropriate unit was one that carved out the geography of the 9(a) agreement.

Intervenor then attempts to argue that the traveler clause in the Barton and Roncelli MCE agreements expand the scope of the 9(a) units to include the counties that the MCE agreements explicitly exclude. Yet, similar to the ICE agreement that the Regional Director found did not contain sufficient terms and conditions of employment to constitute a bar, the traveler's clause in the MCE agreement also borrows the terms and conditions of employment from the local agreement. (DDOE 26) The Regional Director found that "The clause in Article X, Section 15 provides that "[w]hen the employer has any work covered by this agreement to be performed in Michigan, Ohio or Indiana he shall become signatory to the respective [BAC] local agreement or will be bound to the full terms of condition to this agreement." (DDOE 27) In other words, the traveler's clause operates like the ICE agreement, and for the same reason described in the DDOE, the traveler's clause cannot operate as a contract bar.

Regardless of the dubious substance of this argument, the Regional Director rejected the application of the traveler clause because the decision was decided within ninety days prior to the expiration of the MCE agreements. *Royal Crown Cola*, 150 NLRB 1624, 1625 (1965). It is the Board's position that: "A petition will not be dismissed, even though prematurely filed, if a hearing is directed despite the prematurity of the petition and the Board's decision issues on or after the 90th day preceding the expiration date of the contract." *Id.* In this case, the Regional Director noted that the Decision was May 8, 2012 and the MCE agreement expires by its own terms July 31, 2012.

In its Request for Review, Local 9 does not challenge this finding. This finding was the dispositive ruling. Therefore the request for review must fail. Consequently, the petitioned unit is appropriate, and Intervenor's request for review should be denied.

C. The Regional Director Rightfully Found that the Statewide Heavy and Highway Agreement Did Not Bar the Petition Regarding Albanelli Cement.

Albanelli is a signatory to the Heavy and Highway Agreement with the BAC Locals 1 and 9. (J. Ext. 13) This agreement is a 9(a) agreement for "outside" work, including highway and airport construction. This is a 9(a) contract that splits the craft into two units—"inside" work is any cement mason work inside building or five feet away from buildings while "outside" work past five feet. Intervenor attempts to argue that the 2008-2013 Heavy and Highway Agreement acts as a contract bar in regards to Albanelli, even though that agreement only applies to employees performing highway and airport construction exclusive of buildings. (JE13) When it works "inside" it used the 8(f) multiemployer ACCM agreement with Local 1. When it works "outside", it uses the same employees, but pays wages and benefits under the Heavy and Highway Agreement. Yet, the Petitioner is only seeking an election as to "building and heavy construction"—inside work performed by cement masons. Therefore, the Intervenor's argument is outside the scope of the filed petition.

Furthermore, the date that the petition was filed is irrelevant. The Intervenor is unwittingly arguing Petitioner's case. It is true that under *General Cable Corp.*, 139 NLRB 1123 (1962), an agreement with a duration longer than three years only acts as a contract bar for three years. Consequently, under *General Cable*, the contract bar would expire on March 20, 2012. However, the Intervenor completely ignores other applicable Board precedent cited to by the Regional Director— *Royal Crown Cola*, 150 NLRB 1624, 1625 (1965). In that case, the

Board held that a petition will not be dismissed if the decision is issued on or after ninety days prior to the expiration of a contract. *Id*; see also, *Maramount Corp.*, 310 NLRB 508, 512 (1993).

IV. CONCLUSION

The Intervenor's Request for Review should be denied because the Regional Director rightfully decided that the petitions at issue in this case only requested residual units outside existing 9(a) units—a practice that is well accepted under Board law.

Respectfully submitted,
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