No. 15-1014

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

AUSTIN FIRE EQUIPMENT, LLC

Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of the Road Sprinkler Fitters Local Union No. 669. U.A., AFL-CIO ("the Union") to review the Board's Order in *Austin Fire Equipment, LLC*, 361 NLRB No. 76, 2014 WL 5426984 (Oct. 24,

2014) (JA 116-17.)[1] The Union was the charging party before the Board. Austin Fire Equipment, LLC ("Austin Fire"), which has intervened on behalf of the Board, was the Respondent before the Board.

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act, as amended ("the Act," 29 U.S.C. § 151, 160(a)), which empowers the Board to prevent unfair labor practices. The Board's Order is final with respect to all parties. The Union filed its petition for review on October 27, 2014.[2] The petition is timely because the Act places no time limit on seeking review of a Board order. The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f), which provides for the filing of petitions for review in this Circuit.

STATEMENT OF ISSUE

Whether the Board reasonably found that the Union failed to meet its burden of establishing that its collective-bargaining relationship with Austin Fire was governed by Section 9(a) of the Act, rather than Section 8(f).

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[1] "JA" refers to the Joint Appendix. "SA" refers to the Supplemental Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Union's opening brief.

[2] The Union's petition sought review of two separate Board Orders. On January 20, 2015, the Court severed the petition for review in this case from *Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO v. NLRB*, Case No. 14-1211, and directed the clerk to calendar both cases for oral argument on the same day and before the same panel.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the Addendum to this brief.

STATEMENT OF THE CASE

This case involves a collective-bargaining relationship between parties in the construction industry. As a general matter, construction-industry employers and unions enjoy different rights and responsibilities depending on whether their relationship is governed by Section 9(a)[3] or Section 8(f)[4] of the Act, 29 U.S.C. § 159(a) or § 158(f). As discussed below, collective-bargaining agreements in the construction industry are presumed to be governed by Section 8(f), which does not require a union's showing of, or offer to show, majority support. Upon expiration of an 8(f) agreement, the Act imposes no further obligations on the parties. An employer and a union in the construction industry can establish a Section 9(a)

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[3] Section 9(a) 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." 29 U.S.C. § 159(a).

[4] Section 8(f) provides an exception to 9(a) and permits employers engaged primarily in the building and construction industries to "enter into a bargaining agreement even though 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." 29 U.S.C. § 158(f).

relationship, absent an election, if the union requests recognition, the employer recognizes the union as the majority representative of its employees, and the employer bases its recognition on the union having shown, or having offered to show, evidence of its majority status. *See Staunton Fuel & Material, Inc., d/b/a Cent. Ill. Constr.*, 335 NLRB 717, 719-20 (2001) ("*Staunton Fuel*"). These principles provide a framework for understanding the procedural history of this case, and the Board's findings of fact and conclusions, summarized below.

I. PROCEDURAL HISTORY

Acting on unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Union has been the exclusive collective-bargaining representative of a group of Austin Fire's employees, and that the parties' relationship was governed by Section 9(a) of the Act. (JA 45.) The complaint further alleged that Austin Fire violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by failing to continue in effect all terms and conditions of the parties' collective-bargaining agreement after February 4, 2010, failing to recognize and bargain with the Union after the contract expired on March 31, 2010, and withdrawing its recognition of the Union on or about July 13, 2010. (JA 45.) Finally, the complaint alleged that Austin Fire refused to furnish the Union with information relevant to its bargaining duties since about May 5, 2010. (JA 45.)

After conducting a hearing, an administrative law judge issued a decision finding that the parties' collective-bargaining relationship was governed by Section 8(f) of the Act, which as noted, permits a union and employer in the construction industry to enter into a "prehire" agreement that carries no presumption of majority status and thus can be unilaterally terminated upon the expiration of the agreement. (JA 51, 55.) The judge also found, however, that Austin Fire failed to continue in effect all terms and conditions of the parties' agreement between February 4, 2010, and March 31, 2010, when the agreement expired, and thus violated Section 8(a)(5) and (1) of the Act. (JA 44, 60.)

On September 28, 2012, in response to the Union's exceptions, the Board (Chairman Pearce and Members Griffin and Block) issued a Decision and Order affirming the administrative law judge's rulings, findings, and conclusions, and affirming the judge's remedy as modified, though it did so based on a different rationale. (JA 43-61.) The Union filed a motion seeking reconsideration, which the same panel of the Board denied. (JA 79-80.) After the Union petitioned this Court for review (D.C. Cir. Case No. 13-1057), the Court put that case into abeyance pending the Supreme Court's decision reviewing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550, holding that recess appointments to the Board in January

2012, including the appointments of Members Griffin and Block, were invalid. Subsequently, the Board set aside the Decision and Order and its order denying reconsideration and filed a motion to dismiss the case, which the Court granted. (JA 116.) On October 24, 2014, the Board (Chairman Pearce and Members Hirozawa and Johnson) issued the Decision and Order now before the Court. (JA 116-17.) Agreeing with the rationale set forth in its earlier Decision and Order and order denying reconsideration, the Board incorporated both by reference. (JA 116-17.)

II. THE BOARD'S FINDINGS OF FACT

A. Background

The Union is a national labor organization representing sprinkler fitters, who install and maintain automatic fire protection systems in residential, commercial, industrial, and office construction. Austin Fire, located in Prairieville, Louisiana, is a construction-industry employer engaged in the fire-protection industry. Russell Ritchie is the owner and president of Austin Fire. (JA 45; JA 26.)

In June 2007, Austin Fire was awarded a job in Minden, Louisiana, located 2-3 hours away. At that time, Austin Fire employed about 40 people, and only 3-4 sprinkler fitters. Austin Fire entered into a one-project agreement with the Union whereby the Union would provide Austin Fire with 2 qualified sprinkler fitters who could work at the Minden project. (JA 45-46; SA 1, 38-39, 45-46.)

B. The Parties' Enter Into a Second Collective-Bargaining Agreement, After Which Ritchie Has His Employees Join the Union

In May 2008, Austin Fire was awarded a large job at the Valero Refinery. (JA 46; SA 1, 32, 48.) Ritchie needed at least 12 skilled sprinkler fitters to complete the job, so he contacted the Union to ask about signing a new agreement. (JA 46, 54; SA 1, 48-50.) On July 8, Ritchie and his estimator met with union representatives Tony Cacioppo, Donnie Irby, and William Puhalla. The parties signed a two-page collective-bargaining agreement that would expire on March 31, 2010. (JA 46; JA 118-19, SA 2.) They also signed a document entitled "Acknowledgement of the Representative Status" of the Union, which stated that Austin Fire "has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ are members of, and represented by" the Union. It continues: "[Austin Fire] therefore unconditionally acknowledges and confirms that [the Union] is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act." (JA 46; SA 5.)

At the time that Ritchie signed the Acknowledgement on July 8, Austin Fire employed approximately 55 people, including 14 sprinkler fitters, none of whom were members of the Union. (JA 53; SA 2.) The Union did not present or offer to present to Austin Fire evidence that it represented a majority of Austin Fire's sprinkler fitters. (JA 46; SA 2.) It informed Ritchie that all of Austin Fire's

14 sprinkler fitters would need to be covered by the agreement. Thereafter, Ritchie informed his employees that they needed to join the Union if they wanted to remain employed. (JA 46; SA 33-34.) All 14 sprinkler fitters joined the Union between July 9 and July 23. (JA 53; SA 8-21.)

C. Austin Fire Fails To Continue In Effect the Terms of the Collective-Bargaining Agreement After February 4, 2010, and, After Attempting To Bargain a New Agreement, Terminates Negotiations

After signing the agreement, Austin Fire began paying the hourly wages, and making benefit contributions as required, and the Union referred employees to Austin Fire. (JA 47; SA 51-52.) At various times in 2009, Ritchie asked the Union to be released from his obligations under the contract. The Union refused. (JA 47-48; SA 22, 55-56.) By February 4, 2010, Austin Fire stopped complying with the terms and conditions of the agreement with respect to some of its employees. (JA 55; SA 3, 42-43.)

With the collective-bargaining agreement set to expire on March 31, 2010, the Union notified Austin Fire of its intent to terminate the agreement and negotiate a new agreement. (JA 49; SA 3.) Ritchie met with the Union several times after the agreement expired. (JA 49; SA 4, 6, 35.) He said that he would be interested in entering into additional project agreements, but the Union refused and informed Ritchie that it wanted to negotiate a new contract. (JA 49; SA 36-37.)

On June 29, Ritchie provided the Union with written notice of his desire to terminate the bargaining relationship. (JA 50; SA 7.) The parties last met on July 13, at which time Ritchie stated that he would no longer bargain with the Union. (JA 50; SA 4, 44.)

III. THE BOARD'S CONCLUSIONS AND ORDER

The Board found (JA 43) that the parties' collective-bargaining relationship was governed by Section 8(f) of the Act, rather than Section 9(a). Relying on the Acknowledgement, which was the only evidence that the Union relied on to support its assertion of 9(a) status, the Board found (JA 43) that it did not meet the three-part test set forth in *Staunton Fuel*, 335 NLRB at 719-20, to establish a 9(a) relationship based only on contractual language. Because Austin Fire was under no duty to negotiate a successor agreement, and was free to withdraw recognition after the agreement expired on March 31, 2010, the Board (JA 43, 57-58) dismissed allegations that Austin Fire violated the Act by refusing to bargain over a successor agreement, withdrawing recognition, and failing to furnish information that the Union requested after the contract expired. The Board found (JA 43, 55, 60), however, that Austin Fire violated Section 8(a)(5) and (1) by failing to continue in effect all the terms and conditions of the agreement from February 4, 2010, until the contract expired on March 31, 2010. To remedy this violation, it

ordered (JA 44) Austin Fire to make whole affected employees and post a remedial notice.[5]

SUMMARY OF ARGUMENT

The Board reasonably found that the Union failed to meet its burden of overcoming the presumption that its bargaining relationship with Austin Fire was governed by Section 8(f) of the Act, rather than Section 9(a). In asserting that it had a Section 9(a) relationship—which would have imposed the continuing obligation to bargain with the Union following expiration of the collective-bargaining agreement—the Union relied solely on the Acknowledgment signed by the parties. The language of the Acknowledgement, however, failed to establish that Austin Fire's recognition of the Union was based on the Union's showing, or offer to show, evidence that it enjoyed the majority support of the covered employees, as required by the Board's standard set forth in *Staunton Fuel*. Although the Acknowledgement stated that a majority of Austin Fire's sprinkler fitters were "members of, and . . . represented by" the Union, this does not establish majority support for a union under Section 9(a) because that language would apply equally to a bargaining relationship under Section 8(f) of the Act.

Finally, because the Union failed to meet its burden of establishing that it was the employees' Section 9(a) representative, there was no need for Austin Fire to

[5] Austin Fire has not sought review of that finding.

challenge or revoke that status. Accordingly, the Union's argument that the Board erred by permitting Austin Fire to do so beyond the applicable 6-month statute of limitations, drawn from Section 10(b) of the Act, 29 U.S.C. § 160(b), lacks merit.

STANDING

In the Court's January 20, 2014 Order severing cases (see above at p. 2 n.2), the Court directed the parties to address whether the Union has standing. The Board agrees with the Union's assertion (Br. 15-16) that it is a "person aggrieved" by a final Order of the Board under Section 10(f) of the NLRA, 29 U.S.C. § 160(f). A party that has suffered an "adverse effect in fact" is aggrieved under the Act and thus has standing to obtain review of a Board order. *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 1200, 1206 n.8 (D.C. Cir. 1981) (internal quotation marks omitted). Even when the Board rules in favor of a charging party, that party is aggrieved if the Board does not grant the relief sought. *See Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 694 F.2d 1289, 1294 (D.C. Cir. 1982) ("As long as a charging party . . . gets less than he requested, he is treated as a person aggrieved under section 10(f)." (internal quotation marks omitted)).

As discussed below, although the Union maintained that its collective-bargaining relationship with Austin Fire was governed by Section 9(a) of the Act, the Board found that the Union failed to meet its burden of proof. As a result, under Section 8(f) of the Act, Austin Fire had no continuing obligation to

recognize and bargain with the Union beyond the expiration of the agreement. Because this determination has an adverse effect on the Union, the Union is aggrieved within the meaning of Section 10(f) of the Act.

ARGUMENT

I. THE BOARD REASONABLY FOUND THAT THE PARTIES' COLLECTIVE-BARGAINING RELATIONSHIP IS GOVERNED BY SECTION 8(f) OF THE ACT

A. Applicable Principles and Standard of Review

As noted, Section 9(a) of the Act provides that "a labor organization designated or selected for the purposes of collective bargaining by a majority of the employees in an appropriate unit is the exclusive collective-bargaining representative of all of the unit employees." 29 U.S.C. § 159(a). A union can attain the status of a majority representative through either Board certification or voluntary recognition by an employer. *See Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 761 (D.C. Cir. 2012). Once a union has attained the status as a Section 9(a) bargaining representative, the union's majority status is conclusively presumed for a reasonable period or for the duration of a collective-bargaining contract. *NLRB v. Burns Int'l Sec. Servs, Inc.*, 406 U.S. 272, 290 n.12 (1972); *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996).

In the construction industry, as noted, not all bargaining relationships are based on the union's majority status. Section 8(f) of the Act, 29 U.S.C. § 158(f),

creates a limited exception to this general requirement by permitting a construction-industry employer and a union to enter into a collective-bargaining contract *before* the union has established its majority status or before the employer has even hired any employees on the project or projects to be covered by the contract.[6] Congress allowed these "pre-hire" agreements to serve the dual purposes of allowing construction companies to estimate labor costs before bidding on potential projects and to obtain a supply of skilled employees on short notice. *John Deklewa & Sons*, 282 NLRB 1375, 1380 (1987) ("*Deklewa*") (citing S. Rep. No. 187, and H. Rep. No. 741 (1959)), *enforced sub nom. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988); *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 348-49 (1978) ("*Iron Workers*"). Section 8(f) is also intended to alleviate the difficulty of organizing employees within an industry in which many employment relationships are sporadic, resulting in employees often working short-term projects for multiple employers. *Deklewa*,

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[6] Section 8(f) reads, in part:

> It 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 . . . because (1) the majority status of such labor organization has not been established under the provisions of [Section 9] of this title prior to the making of such agreement . . . .

282 NLRB at 1380; *Iron Workers*, 434 U.S. at 349 (internal citation omitted).

A bargaining relationship in the construction industry is presumed to be established under Section 8(f). *Deklewa*, 282 NLRB at 1386; *see also Allied Mech. Servs., Inc.*, 668 F.3d 758, 766 (D.C. Cir. 2012). Despite this presumption, the Board has determined that unions do not have "less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry." *Deklewa*, 282 NLRB at 1387 n.53. Accordingly, under Section 8(f), a construction union can achieve 9(a) status either through a Board certification proceeding or "from voluntary recognition accorded . . . by the employer of a stable work force where that recognition is based on a clear showing of majority support among the union employees." *Id*. A party seeking to overcome this 8(f) presumption and establish that a bargaining relationship is governed by Section 9(a) bears the burden of proof. *Id.* at 1385 n.41; *Allied Mech. Servs.*, 668 F.3d at 766.

The distinction between a Section 8(f) and 9(a) bargaining relationship is significant. *Staunton Fuel*, 335 NLRB at 718. An 8(f) relationship may be terminated by either party following expiration of a collective-bargaining agreement. *Id.*; *Allied Mech. Servs., Inc.*, 668 F.3d at 768. Under 9(a), by contrast, a union enjoys a continuing presumption of majority support even after contract expiration, which obligates an employer to recognize and bargain with the union

unless and until it has been shown to have lost majority support. *Id*.; *Deklewa*, 282 NLRB at 1387 n.53. Moreover, under 8(f), an employee or other party may, at any time, file a petition seeking to change or decertify the union, whereas under 9(a) such petitions are barred during the term of an existing agreement. *Staunton Fuel*, 335 NLRB at 718. Congress thus "sought to assure that the rights and privileges accorded employers and unions in the body of Section 8(f) would not operate to thwart or undermine construction industry employees' representational desires." *Deklewa*, 282 NLRB at 1381. Under either 8(f) or 9(a), however, an employer violates Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by failing to adhere to the terms of an existing collective-bargaining agreement. *Id*. at 1387; *Int'l Union of Painters & Allied Trades, Local Unions No. 970 & 1144 v. NLRB*, 309 F.3d 1, 5 (D.C. Cir. 2002).

Significantly for purposes of this case, in *Staunton Fuel*, the Board established that a union can establish 9(a) status solely on the basis of a written agreement if certain minimum requirements are met. 335 NLRB at 719. Relying on two Tenth Circuit decisions, the Board found that, for contract language to sufficiently establish a 9(a) relationship, it must "unequivocally" show that: (1) the union requested recognition as the majority or 9(a) representative; (2) the employer recognized the union as such; and (3) the employer's recognition was based on the union's showing, or offer to show, evidence that a majority of employees support

the union. *Id*. (citing *NLRB v. Triple C Maint., Inc.*, 219 F.3d 1147, 1155 (10th Cir. 2000); *NLRB v. Okla. Installation Co.*, 219 F.3d 1160, 1164 (10th Cir. 2000)). If the agreement meets these requirements, and thus "conclusively notifies the parties that a 9(a) relationship is intended," the 8(f) presumption has been rebutted. When it does not, the Board considers extrinsic evidence that bears on the parties' intent as to the nature of their relationship.[7] *See Madison Indus., Inc.*, 349 NLRB 1306, 1308 (2007).

The Court upholds the Board's decision of whether a Section 8(f) or 9(a) relationship exists provided that it is reasonable. *Allied Mech. Servs.*, 668 F.3d at 772 (citing *Raymond F. Kravis Ctr. for the Performing Arts, Inc. v. NLRB*, 550 F.3d 1183, 1189 (D.C. Cir. 2008) (deferring to Board's finding of Section 9(a) status)). The Court, however, does not afford deference to the Board's interpretation of a collective-bargaining agreement, but applies general principles of contract interpretation. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 203

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[7] In *Nova Plumbing, Inc. v. NLRB*, this Court held that contract language, standing alone, is insufficient to establish a 9(a) relationship in the construction industry and stated that the Board must consider whether there is evidence that independently verifies employee support. 330 F.3d 531, 536-38 (D.C. Cir. 2003). Here, however, as the Board found, the Union relied only on the Acknowledgement to carry its burden of establishing its claim of 9(a) status, and "d[id] not contend that any other evidence substantiate[d] its position." (JA 43.) Accordingly, Board Member Johnson noted (JA 116 n.3), the result in this case would be the same under either the *Staunton Fuel* test or the standard articulated by the Court in *Nova Plumbing*.

(1991); *accord Local Unions No. 970 & 1144 v. NLRB*, 309 F.3d at 3. Nevertheless, courts have noted that they are "mindful of the Board's considerable experience in interpreting collective bargaining agreements." *Bonnell/Tredegar Indus., Inc. v. NLRB*, 46 F.3d 339, 343 (4th Cir. 1995) (quoting *Jones Dairy Farm v. NLRB*, 909 F.2d 1021, 1028 (7th Cir.1990)).

B. The Parties' Collective-Bargaining Agreement Did Not Unequivocally Establish that Recognition Was Based on the Union's Showing, Or Offer To Show, Evidence of Majority Support

The Board reasonably found that the Acknowledgement fails to unequivocally establish the third element of the *Staunton Fuel* standard: that "the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support." *Staunton Fuel*, 335 NLRB at 720. As a result, the Union failed to prove that the parties had established a 9(a) relationship. The Board rejected the Union's argument that the Acknowledgement's reference to union membership and representation was sufficient to demonstrate majority support, finding that this language would apply equally to an 8(f) relationship. (JA 79.) Likewise, the Board rejected the Union's argument that an express reference to Section 9(a) in the Acknowledgment was sufficient to establish such a relationship. Accordingly, because the Union failed to rebut the presumption that the parties established an 8(f) agreement, the Board found that although Austin

Fire violated the Act by failing to abide by the 8(f) agreement until it expired, the employer did not have a continuing obligation to bargain with the Union.

1. The language concerning membership and representation in the Acknowledgement is consistent with an 8(f) agreement and is insufficient to establish majority support for the Union

The Acknowledgement does not state either that the Union enjoyed the majority support of bargaining-unit employees or that the Union showed or offered to show evidence of majority support to Austin Fire. The Acknowledgement merely states (JA 46, 78) that a majority of unit employees "are members of, and are represented by" the Union. Adhering to guidance it provided in *Staunton Fuel*, the Board reasonably found that this language does not establish the parties' intent to form a 9(a) relationship because such language is also consistent with Section 8(f). (JA 43 (citing *G&L Associated, Inc. d/b/a USA Fire Prot.*, 361 NLRB No. 58, 2014 WL 5338902 (2014).

In *Staunton Fuel*, the Board explained that there is a "significant difference" between contractual language stating that a union "represents" a majority of employees, which would be accurate under either 8(f) or 9(a), and language stating that a union "has the support" or "has the authorization" of a majority of employees to represent them, which would only apply in the context of a 9(a) relationship. 335 NLRB at 720. Likewise, because a provision stating that employees are "members of" or "represented by" a union would be consistent with

either 8(f) or 9(a), this is not evidence of an intent to form a 9(a) relationship. *Id*. The Board has found that mere assertion of membership by a majority of employees is insufficient to demonstrate majority support to satisfy the statutory requirements of Section 9(a). *See, e.g.*, *Deklewa* at 282 NLRB at 1383-84; *James Julian, Inc.*, 310 NLRB 1247, 1253 (1993) (union membership alone, even in the absence of a union-security obligation[8] is not dispositive of whether a bargaining relationship is governed by 8(f) or 9(a)). Having established this bright-line requirement, the Board expressly overruled any post-*Deklewa* cases suggesting that this language—"represents a majority" or that employees "are members" of the union—without more, is independently sufficient to establish 9(a) status. *Id*.

The Union's suggestion (Br. 25) that majority support can, under the *Staunton Fuel* test, be established through the simple assertion that employees are members of or represented by the Union ignores the Board's explanation in *John Deklewa* that this type of evidence—including membership rolls, enforced union-

[8] The Act specifies that parties to a collective-bargaining agreement may include a union-security provision requiring employees to become union members as a condition of employment. 29 U.S.C. § 158(a)(3). The Supreme Court has interpreted the membership requirement as obligating employees only to pay union fees and dues. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963) ("'Membership' as a condition of employment is whittled down to its financial core."); *accord Commc'n Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988). An employee thus satisfies the membership requirement simply by paying the dues and fees that lawfully may be required, even if she refuses to join the union. *Local Union No. 749, Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers v. NLRB*, 466 F.2d 343, 344 n.1 (D.C. Cir. 1972) (per curiam).

security clauses, exclusive hiring hall referrals, and union fringe-benefit contribution records—are unreliable. 282 NLRB at 1383-84. It was due to this and other practical problems that led the Board in *John Deklewa* to significantly modify its Section 8(f) law in order to "better serve the statutory policies of protecting labor relations stability and employee free choice in the construction industry." *Id*. at 1378. It would be anomalous to once again rely on this type of evidence, or the offer to show such evidence, to establish majority support.

The Union also argues (Br. 22) that the Acknowledgement's reference to membership and representation are sufficient because the Board has accepted membership applications as a valid show of support for initial 9(a) recognition in nonconstruction-industry cases. But in the cited cases, the Board found a 9(a) relationship existed based on evidence that the union showed to the employer about that support, as well as other evidence of majority support. For instance, in *Lebanon Steel Foundry v. NLRB*, the court affirmed the Board's decision that majority support existed based on the union's offer to show union checkoff cards, and there was uncontradicted evidence concerning usage and custom in the area establishing that these cards were accepted as proof of the employee's intent to be represented. 130 F.2d 404, 408 (D.C. Cir. 1942). And in *Grey's Colonial Acres Boarding Home*, the Board found that checkoff cards constituted evidence of employee support based on testimony that employees were told that by signing the

cards, the union would bargain for and represent them. 287 NLRB 877, 877 (1987). The other cases cited by the Union relied on membership applications to establish majority support, but in *Staunton Fuel*, 335 NLRB at 720, the Board expressly overruled cases that exclusively relied on membership as evidence of majority support to establish a 9(a) relationship in the construction industry. *See Raley's, Inc*., 227 NLRB 670, 670 n.1 (1976) (majority support based on membership applications), *enforced sub nom. NLRB v. Retail Clerks Local 88*, 587 F.2d 984 (9th Cir. 1978); *Ace-Alkire Freight Lines, Inc. v. NLRB*, 431 F.2d 280, 283 (8th Cir. 1970) (same). As discussed, because the same membership language is used to establish an 8(f) relationship, it is insufficient to establish a 9(a) relationship.

As the Board explained in denying the Union's motion for reconsideration (JA 79), the distinction between being a member of and/or represented by a union on the one hand, and affirmatively expressing support for a union was made stark in the two Tenth Circuit cases that the Board relied on in establishing the *Staunton Fuel* test. In *NLRB v. Triple C Maintenance, Inc.*, the court agreed with the Board that the agreement established a 9(a) relationship because it specifically stated that the employer recognized the union as the employees' 9(a) representative, and further found that, "[s]ignificantly," the agreement also established that the employer's recognition was based on "a clear showing of majority support."

219 F.3d 1147, 1155 (10th Cir. 2000). By contrast, in *Oklahoma Installation Co.*, the court disagreed with the Board's 9(a) finding. 219 F.3d at 1162. The court found that the agreement did not specifically reference 9(a) or otherwise notify the parties that a 9(a) relationship was intended, and further, did not assert that the union had proof of majority support, but instead merely stated that the union "represents a majority of its employees." *Id*. at 1164-65; *see also Staunton Fuel*, 335 NLRB at 719 & n.11 (explaining that contrast between *Triple C* with *Oklahoma Installation* provide "convenient illustration" of Board's "bright-line requirements").

The Acknowledgement contains no language that meets the statutory language of Section 9(a), which states that a labor organization "*designated* or selected for the purposes of collective bargaining by a majority of the employees . . . shall be the exclusive representatives . . . ." 29 U.S.C. § 159(a) (emphasis added). In fact, the Union previously included, in similar acknowledgements, language stating that "a clear majority of sprinkler fitters in its employ <u>have designated</u>, are members of, and are represented by [the union] for purposes of collective bargaining." *See Triple A Fire Prot., Inc.*, 312 NLRB 1088, 1088-89 (1993) *enforced* 136 F.3d 727, 736-37 (11th Cir. 1998); *MFP Fire Prot.*,

Inc., 318 NLRB 840, 842 (1995).[9] There is no indication in the record why this phrase was not included here. This is not, as the Union suggests (Br. 27), a "meaningless ground" on which to distinguish this case. Instead, as the Board found (JA 80), it is a "material revis[ion]" that cannot be ignored.

The importance of the "have designated" language was emphasized in *MFP Fire Protection,* where the Board found that the burden of establishing majority support was satisfied when the employer "formally acknowledged . . . that the [u]nion was *designated* by a majority of its bargaining unit employees as . . . the exclusive representative of those employees within the meaning of Section 9(a)." 318 NLRB at 842. (emphasis added). In seeking to deflect attention away from the absence of the "have designated" language here, the Union claims (Br. 22 n.9) that the Board in *MFP Fire* approved a similar acknowledgement of representative status because it was "premised, in material part, on the same basis: that 'the sprinkler fitters in its employ . . . are *members* . . . of Local 669." (Ellipses in original). But, as discussed above, in *MFP* Fire, the Board did not rely on mere membership. In short, "[i]f words are to have any meaning," as the Union correctly insists that they must (Br. 21), the absence of this critical language

[9] *See also Am. Automatic Sprinkler Sys., Inc.*, 323 NLRB 920, 920-21 (1997), *enforcement denied in part*, 163 F.3d 209 (4th Cir. 1998); *Excel Fire Prot. Co*, 308 NLRB 241, 343 (1992).

provided the Board with reasonable grounds on which to distinguish those prior decisions.[10] (JA 43 n.5).

Additionally, the Acknowledgement fails to demonstrate that the Union showed or offered to show Austin Fire evidence establishing its majority support. The Union's failure to offer to present evidence of majority support to Austin Fire stands in stark contrast to other post-*Staunton Fuel* cases in which the Board found contract language, standing alone, established a 9(a) relationship. For instance, the Board has found a 9(a) relationship based on language stating that "[t]he Union *has submitted* to the Employer *evidence of majority support*." *DiPonio Constr. Co.*, 357 NLRB No. 99, 2011 WL 4732849, at *4 (2011) (emphasis added); *see also Saylor's Inc.*, 338 NLRB 330, 330, 334 (2002) (same); *Verkler, Inc.*, 337 NLRB 128, 129 (2001) (same); *Reichenbach Ceiling & Partition Co.*, 337 NLRB 125, 126 (2001) (same). In other cases, the Board has found a 9(a) relationship based on contractual language stating that the employer's recognition was based on the union's offer to produce authorization cards voluntarily executed by the employer's eligible employees. *See Pontiac Ceiling & Partition Co.*, 337 NLRB 120, 123 (2001) (finding employer acknowledged majority support after reviewing authorization cards provided by union); *see also One Stop Kosher Supermarket,*

[10] Moreover, because the cases that employed the "have designated" language (Br. 26 n.10), each predate *Staunton Fuel*, it is unclear whether the Board would find that language sufficient today.

Inc., 355 NLRB 1237, 1238 (2010) (employer voluntarily recognized union after "having determined that authorization cards were executed by a majority of its employees"). The Union has not cited to a single post-*Staunton Fuel* case establishing that an explicit reference to Section 9(a), coupled with the mere statement that employees are members of or represented by a union, without any expression of a showing or offer of proof of majority status, establishes a 9(a) relationship.

Because the Acknowledgement fails to sufficiently demonstrate that Austin Fire's recognition of the Union was based on the Union's showing, or offer to show, evidence that it enjoyed the majority support of the sprinkler fitters, the Board reasonably found (JA 43) that the Union failed to overcome the presumption that their bargaining relationship was governed by Section 8(f) of the Act.

2. An express reference to Section 9(a), without more, is insufficient to demonstrate that the parties intended a 9(a) relationship

In challenging the Board's findings, the Union argues at length (Br. 18-20), that the Acknowledgement's explicit reference to Section 9(a) satisfied the first two *Staunton Fuel* elements: whether the Union requested recognition as the majority representative and whether Austin Fire recognized it as such. But the

Board, having found that the Acknowledgement did not establish the third *Staunton Fuel* element, did not reach that inquiry.[11]

Moreover, this explicit reference does not, as the Union seems to insist (Br. 23), somehow alter the standard for determining what language is sufficient to establish majority support. The Union argues that, in *Staunton Fuel*, the Board only explained that language stating employees are "represented by" or "members of" a union was insufficient because of the absence of an explicit reference to 9(a), and posits that the Board would find this language sufficient when an explicit reference to 9(a) is included. But the Board drew no such distinction. Instead, it broadly stated that, with respect to the union's claim of majority support, such general language is insufficient, and overruled prior decisions to the contrary. *Staunton Fuel*, 335 NLRB at 720. Indeed, as the Board explained here (JA 79) in denying the Union's motion for reconsideration, "*Staunton* does not suggest that the inclusion of such a reference [to 9(a)] is conclusive and obviates the need to

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[11] The Union misrepresents *M & M Backhoe Service, Inc. v. NLRB*, 469 F.3d 1047 (D.C. Cir. 2006), when it asserts (Br. 19) that the case supports its claim that express reference to Section 9(a) is controlling in determining the parties' intent. As discussed above, here the Board found that because there was no substantiation of majority support, it was unnecessary to address the parties' intent. Moreover, in *M & M Backhoe*, the Court did not find a 9(a) relationship based on a recognition agreement, as the Union suggests. Rather, it accepted the Board's finding that the parties' relationship converted from 8(f) to 9(a) after finding that the union had actual proof—authorization cards expressing support for the union—signed by a majority of employees.

apply the three-part test." Here, because the Union failed to demonstrate majority support, the reference to Section 9(a) does not suffice to establish the relationship.

In sum, the Acknowledgement contains no assertion unequivocally establishing that the Union had "shown, or [ ] offered to show, evidence of its majority support." *Staunton Fuel*, 335 NLRB at 720. It was therefore reasonable for the Board to find that the Union failed to establish that the Acknowledgement, standing alone, established a 9(a) relationship and instead established an 8(f) construction-industry relationship.

C. The Board Properly Refused To Apply Section 10(b)

Because the Union failed to meet its burden of overcoming the presumption that its relationship with Austin Fire was governed by Section 8(f), Austin Fire did not have an obligation to bargain with the Union after the contract expired. Accordingly, the 6-month statute of limitations that bars an employer from later challenging a union's majority support at initial recognition was not implicated.

Section 10(b) of the Act, 29 U.S.C. § 160(b), requires that a party file challenges to unfair labor practices within 6 months.[12] *See Local Lodge No. 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 419 (1960). Likewise, it precludes a party

[12] Section 10(b) reads in pertinent part: "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."

from asserting a defense to an unfair labor practice that is based exclusively on conduct which occurred outside of the 10(b) period. *See Raymond F. Kravis Ctr. for the Performing Arts, Inc. v. NLRB*, 550 F.3d 1183, 1189-90 (D.C. Cir. 2008) (rejecting defense based on the impropriety of union's original majority status because more than 6 months had passed since initial recognition); *S. Power Co. v. NLRB*, 664 F.3d 946, 949 (D.C. Cir. 2012) (per curiam) (same); *Triple C Maint.*, 219 F.3d at 1156-57.

In *Bryan Manufacturing*, a nonconstruction-industry case, the Supreme Court held that Section 10(b) barred an employer from challenging a union's majority status more than 6 months after the parties signed a collective-bargaining agreement. 362 U.S. at 416-17. Because unions in the construction industry are not to be afforded a less-favored status than unions in nonconstruction industries (*John Deklewa*, 282 NLRB at 1387 n.53; *Allied Mech. Servs.*, 668 F.3d at 766), 10(b) likewise bars an employer from challenging the majority status of a union with whom it shares a 9(a) relationship. *See MFP Fire Prot.*, 101 F.3d at 1342.

If, however, a union fails to overcome the 8(f) presumption, an employer does not commit an unfair labor practice by withdrawing recognition at the expiration of an agreement, so there is no need to assert a defense that the union lacked majority support, and 10(b) is not implicated. *See Brannan Sand & Gravel Co.*, 289 NLRB 977, 981 (1988). Put another away, as this Court explained in

Nova Plumbing, Inc. v. NLRB, the argument that an employer cannot challenge a 9(a) relationship more than 6 months after recognition "begs the question." 330 F.3d 531, 539 (D.C. Cir. 2003). Only if a 9(a) relationship exists does an employer violate the Act by withdrawing recognition and thereby trigger the 6-month time limit in which to challenge the union's majority support. *Id*. *See also Triple A Fire Prot.*, 312 NLRB at 1088-89 (after determining that acknowledgement established a Section 9(a) relationship, rejecting as untimely employer's argument that union lacked majority support at time of recognition), *enforced* 136 F.3d 727, 736-37 (11th Cir. 1998); *see also MFP Fire Prot.*, 318 NLRB at 842 (same), *enforced* 101 F.3d 1341, 1343-44 (10th Cir. 1996); *Sheet Metal Workers' Int'l Ass'n Local 19 v. Herre Bros.*, 201 F.3d 231, 241-42 (3d Cir. 1999).

Ignoring this standard, including the Court's guidance in *Nova Plumbing*, the Union argues (Br. 28) that the Board erred "by permitting Austin Fire to challenge and revoke its Section 9(a) recognition of the Union" more than 6 months after the parties entered into the Acknowledgement on July 8, 2008. If correct, this would have precluded Austin Fire from asserting, as a defense to the refusal-to-bargain charge filed in July 2010 (JA 44), that it had no duty to bargain because the parties' relationship was governed by Section 8(f). This argument, however, wrongly presupposes that a Section 9(a) relationship existed.

As the Board reasonably found, the Union did not meet its burden of establishing that it ever had a Section 9(a) relationship with Austin Fire, but instead had a traditional 8(f) relationship common in the construction industry. As a result, it was unnecessary for Austin Fire to challenge whether the Union had majority support, and the 6-month limitations period was not implicated. *See Okla. Installation Co.*, 219 F.3d at 1166 ("As a result of our determination that the contractual language in this case was not sufficient to rebut the presumption of an 8(f) relationship and establish a 9(a) relationship, we do not address whether § 10(b) or a similar period of limitations bars an employer from defending itself against the Union's claim of a 9(a) relationship.)

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board
June 2015

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO	)	
Petitioner	)	No. 15-1014
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent	)	Board Case No. 15-CA-019697
and	)	
AUSTIN FIRE EQUIPMENT, LLC	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,241 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

s/ Linda Dreeben

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Dated at Washington, DC
this 11th day of June, 2015

UNITED STATES COURT OF APPEALS
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Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Dated at Washington, DC
this 11th day of June, 2015

STATUTORY ADDENDUM

UNITED STATES COURT OF APPEALS
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Intervenor	)	

STATUTORY ADDENDUM

The following provisions of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 151, et. seq., are excerpted below pursuant to FRAP 28(f) and Circuit Rule 28(a)(5):

Section 1 of the Act (29 U.S.C. § 151): Findings and Policies.

* * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 8 of the Act (29 U.S.C. § 158): Unfair Labor Practices.

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section 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 subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the

agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

Section 9 of the Act (29 U.S.C. § 159): Representatives and Elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives 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: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Section 10 of the Act (29 U.S.C. § 160): Prevention of Unfair Labor Practices.

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .