

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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BUILDING CONTRACTORS ASSOCIATION, INC.,

Employer

and

Case No. 02-RC-154031

THE NEW YORK CITY AND VICINITY DISTRICT  
COUNCIL OF CARPENTERS,

Petitioner  
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**PETITIONER'S RESPONSE IN OPPOSITION TO  
EMPLOYER'S REQUEST FOR REVIEW**

Petitioner New York City and Vicinity District Council of Carpenters (District Council or Union) submits this response in opposition to the Building Contractors Association, Inc.'s (BCA) Request for Review.

This case involves the District Council's RC Petition, which seeks an election in a multi-employer unit consisting of all employees who perform bargaining unit work employed by the BCA's member-employers. The operative facts are set forth in the Regional Director's well-reasoned Decision and Direction of Election (DDE) and Supplemental Decision and Direction of Election (SDDE).

Preliminarily, this case presents issues similar to those addressed in *The Cement League*, 02-RC-154016, which involved a petition filed by the District Council seeking an election in a multi-employer unit consisting of all employees who perform bargaining unit work employed by the Cement League's member-employers. In that case, on February 3, 2016, the Board denied the Cement League's request for review because it "raise[d] no substantial issues warranting review." As discussed more fully below, the Board should dismiss the BCA's request for review

for the same reason.

The BCA, which is a multi-employer bargaining association, consists of 172 member contractors who perform construction work mostly in New York City. DDE at 2. As described more fully in the DDE, one of the BCA's primary purposes is to negotiate and administer collective bargaining agreements with approximately thirteen building trades unions on behalf of its member-employers. *Id.*

It is undisputed that in 2012, the BCA amended its by-laws to alter the way in which its member-employers authorize the Association to enter into collective-bargaining agreements on their behalf. DDE at 2. Pursuant to the 2012 amendments, which make no reference to 9(a) or 8(f) relationships and agreements, member-employers must designate the BCA as their bargaining agent for at least one of the unions with whom the Association has a collective bargaining relationship. *Id.* As the DDE notes:

The Association sent three documents to its member-employees concerning the amendments to the by-laws: a Notice of Proposed Amendments, a Designation of Bargaining Rights form, an updated Application for Membership form. The Notice summarized the proposed amended by-laws and outlined the differences between 9(a) and 8(f) agreements. Although the Notice indicated that the Association has "mostly 8(f) agreements" and some 9(a) agreements, it does not limit the Association's bargaining authority based on the type of agreement. In the section defining an 8(f) agreement, the Notice restated current Board law and provided that "a union can convert an 8(f) relationship and agreement to a 9(a) relationship and agreement by demonstrating its majority status at any time during the term of the agreement." There is no language elsewhere in the Notice identifying any other conditions precedent required to convert an 8(f) relationship and agreement to a 9(a) relationship and agreement, such as consent from member-employers or a showing of majority support at each individual member-employer.

*Id.* See also *id.* at 2 ("Of the thirteen unions that the [BCA] has bargaining relationships with, the record reflects that three of them—Mason Tenders District Council, General Building Laborers' Local 6, and Bricklayers Local 1 – have attained Section 9(a) status."); *id.* at 3-4 ("The [BCA]

now requires that all member-employers must Adopt the 9(a) agreements with the Mason Tenders District Council and the General Building Laborers Local 66.”).

Moreover, “[t]he Designation of Bargaining Rights form provides member-employers the freedom to designate the Association to bargain on behalf of the member-employers for one or more of the unions.” DDE at 3 (“The form is titled ‘Designation of Building Contractors Association, Inc., As Collective Bargaining Representative’ and states, ‘The undersigned contractor hereby designates the Building Contractors Association (hereinafter ‘BCA’) as its sole and exclusive bargaining representative with respect to the following labor organization(s).’”).

The bottom of the form states:

This designation authorizes the BCA to negotiate and agree to terms of collective bargaining agreements with each of the labor organizations designated above, and for BCA to act on your behalf with respect to grievances and other matters related to such collective bargaining agreements, and to bind you with respect to its actions on your behalf.

DDE at 3.

The authorizations, which “remain in full force and effect as to all designated unions” unless a member-employer provides timely notice of termination, “does not differentiate between authorizing the Association to negotiate Section 8(f) and 9(a) labor agreements.” DDE at 3. *See also id.* at 7 (“[T]here is no evidence that the three alleged 9(a) agreements are negotiated pursuant to some other authorization by the member-employers. The same designation form is used for the unions that have 8(f) agreements with the Association.”).

As the Regional Director noted, the amendments were adopted in December 2012, and “[a]ll member-employers were then given the option to fill out a Designation of Bargaining Rights form. Any member-employer who did not fill out the new form continued to be bound by all of the agreements that the Association negotiated.” *Id.*

### *The BCA's Member-Employers Consented to Multi-Employer Bargaining*

The Regional Director's finding that the BCA's member-employers consented to multi-employer bargaining is based upon well-established Board law and undisputed record evidence. In *Arbor Construction Personnel, Inc.*, which the Regional Director cites, the Board held that a multi-employer bargaining unit is appropriate where "the employers involved have evidenced a clear intent to participate in multi-employer bargaining and to be bound by the actions of the bargaining agent." 343 NLRB 257, 257 (2004) (quoting *Hunts Point Recycling Corp.*, 301 NLRB 751, 752 (1991)). *See also* DDE at 4.

The undisputed facts demonstrate the requisite intent on the part of the BCA's member-employers to be bound by the BCA's actions at the bargaining table:

Here, 145 member-employers of the Association have demonstrated an intent to participate and be bound by group or joint bargaining with the Petitioner. Most importantly, a large number of those member-employers signed a Designation of Bargaining Rights form that states "the designation authorizes the BCA to negotiate and agree to terms of collective bargaining agreements with each of the labor organizations designated above and to bind you with respect to its actions on your behalf." Notably, the designation forms, along with all the other membership materials including the application forms, do not make any distinction or limit the Association's authority based on whether the contract is an 8(f) and 9(a) agreement. Similarly, under the Association's by-laws, the Labor Relations Committee is authorized to act on behalf of the member-employers for all dealings with the unions selected via the designation forms and does not differentiate between 8(f) and 9(a) agreements. Additionally, there is no evidence that the three alleged 9(a) agreements are negotiated pursuant to some other authorization by the member-employers. The same designation form is used for the unions that have 8(f) agreements with the Association. Thus, contrary to the Association's claim, neither the designation form nor the Association's past practice provides a basis for limiting its authority to negotiate agreements with the Petitioner on behalf of its member-employers on an 8(f) basis. Moreover, evidence of intent to be bound to the multiemployer agreement is also established because the member-employers are not allowed to either approve or reject the final negotiated agreement between the Association and the Petitioner.

DDE at 6-7.

Moreover, as the Regional Director noted, the parties' lengthy bargaining history – which

spans more than 30 years – further establishes “that the [BCA’s] member-employers have demonstrated an intent to continually participate in group bargaining.” *Id.* at 7.

The Regional Director correctly rejected the BCA’s misplaced reliance on *Comtel Systems Technology*, 305 NLRB 287 (1991). According to the BCA, *Comtel* stands for the principle that a union must demonstrate majority support with respect to every individual employer within a multi-employer unit. BCA Brief at 16-17. That argument is premised on a misunderstanding of the teachings of *Comtel*, which involved an RM petition filed by an employer that had just joined an existing multi-employer association that has a Section 9(a) relationship with a union in the construction industry. Given that set of facts, the Board held that when a new employer joins an existing multi-employer association that has a Section 9(a) relationship with a union, that employer will only have a Section 8(f) relationship with the union, unless and until the union establishes its majority status among the new employer’s bargaining unit employees. 305 NLRB at 291. Thus, the Board in *Comtel* sought to ensure that employees of an employer that had never bargained on a multi-employer basis, would have a vote in whether to join a multi-employer unit. Here, on the other hand, there is no risk that the employees did not get to choose whether they want to be represented by the District Council in a multi-employer unit. That’s the very question that appeared on the ballot, which the employees overwhelmingly elected for by a vote of 720 for and 14 against (with 70 non-determinative challenges).<sup>1</sup>

Also misplaced is the BCA’s reliance on *Greenhoot, Inc.*, 205 NLRB 250 (1973), which

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<sup>1</sup> If any of the BCA’s member-employers had truly wished to have their respective employees vote individually on a single employer basis, they simply could have filed RM Petitions when the District Council made its demand for recognition. However, none of the member-employers opted to do so. Rather, they elected to have the BCA represent their interests before the Board with respect to the Union’s RC Petition, just as they voluntarily elected to have the BCA represent their interests at the bargaining table for at least the past thirty years.

arose in the context of an initial bargaining relationship and involved a different issue, *i.e.*, whether consent is required in a petitioned-for unit of jointly employed and solely employed employees of a single user employer. BCA Brief at 6-7. The Board in *Greenhoot* stated that establishing a multi-employer unit requires a showing that “employers have expressly conferred a joint bargaining agent the power to bind them in negotiations or that they have by an established course of conduct unequivocally manifested a desire to be bound in future collective bargaining by group rather than individual action.” *Greenhoot*, 205 NLRB at 251. Accordingly, consent under *Greenhoot* refers to consent to bargain collectively and be bound by group action - not consent to proceed to a Board-conducted election. In this case, the record evidence establishes firmly that the BCA’s member-employers have consented to bargain collectively and be bound by group action.

***The Petitioned-for Unit is an Appropriate Unit***

The Regional Director’s finding that the petitioned-for unit is an appropriate unit is based upon well-established Board law:

[T]he Board’s traditional deference to bargaining history to determine unit scope is applicable in the construction industry. *See P.J. Dick Contracting*, 290 NLRB 150, 151(1988) (8(f) bargaining history was significant in determining appropriateness of unit in construction industry). *See also Alley Drywall*, 333 NLRB 1005, 1007 (2001) (history of collective bargaining under 8(f) is one factor in determining scope of unit for 9(a)); *Crittenton Hospital*, 328 NLRB 879, 880 (1999) (Board accords great deference to collective-bargaining history); *Great Atlantic & Pacific Tea Co.*, 153 NLRB 1549 (1965) (same); *West Lawrence Care Center*, 305 NLRB 212, 217 (“the longer the history of bargaining in a broader unit, the greater the weight of that history in the balance”).

DDE at 8-9.

In this case, the undisputed record evidence supports the finding that “the parties have bargained on a craft-wide multi-employer basis for at least 30 years. DDE at 9. The BCA has “provided no justification for disturbing the long-established stable bargaining relationship, nor

has it provided any evidence to suggest that the historical multi-employer unit is not an appropriate unit or repugnant to Board policy.” *Id.* Thus, as the Regional Director concluded, “as the parties chose to bargain in this manner, there is no reason for the Board to disturb it.” *Id.*

Moreover, the Regional Director correctly rejected the BCA’s claim that the unit is inappropriate because 49 of its members allegedly had not employed employees in the petitioned-for unit in the six month prior to the petition being filed. DDE at 9-10.

The BCA’s Request for Review abandons any argument over the 49 members and argues instead that the Regional Director erred in rejecting an exhibit (BCA Exhibit 17), which is a typewritten list prepared by the BCA captioned “BCA Members listed in BCA Exhibit 3 Who Employed no Carpenters During the *Daniel-Steiny* Period.” BCA Exhibit 17, which was rejected, lists 16 companies. When the BCA proffered the exhibit at the hearing on October 26, 2015, the BCA failed to present any evidence whatsoever to authenticate the document or otherwise take it outside the realm of hearsay. According to the BCA’s counsel at the hearing, the exhibit is “a list that we prepared” apparently from the 4,000 pages of documents (BCA Exhibit 13) that were produced by the non-party Benefit Funds pursuant to the BCA’s subpoena duces tecum. Tr. at 368. While the Union agrees that the exhibit was properly rejected as beyond the scope of the hearing, Tr. 370, it is noted that the list is inaccurate for at least one employer (listed as “Broad Construction (Reinforced)”), because the Benefit Funds records show that Reinforced Concrete & Masonry (which is the same company) did in fact employ Carpenters during the *Daniel-Steiny* period. This inaccuracy only serves to underscore the BCA’s utter failure to present substantive evidence - such as testimony by member employers – concerning the issues it raises in its Request for Review. In this regard, having failed to present relevant, probative evidence of its own, the BCA is left to complain that the Regional Director “made no inquiry into the future

hiring plans of any of the 16 Designating Contractors [listed on rejected BCA Exhibit 17].” BCA Brief at 20 n.29. This claim falls wide of the mark. Having elected not to present any admissible evidence concerning the 16 employers hiring practices – past, present or future – it’s the BCA that failed to make inquiries, not the Regional Director.

At bottom, as the Regional Director noted, we are talking about a construction industry multi-employer bargaining unit here:

Because there is evidence that employees often work for multiple member-employers, if employees do not meet the eligibility formula for any one employer, the eligibility formula should be applied using their aggregate employment with all the 145 member-employers. If eligibility is not calculated in this aggregated way, there is a great risk of disenfranchising individuals who would otherwise be eligible by prohibiting them to vote. To hold otherwise would be to deny employees their fundamental right to choose their collective bargaining representative. Indeed, applying this formula in a multi-employer wide unit ensures that all eligible employees are able to vote.

DDE at 9.

In sum, the petitioned-for unit is an appropriate unit. As the Regional Director found, “eligible employees of every member-employer will cast their individual vote to determine whether the Petitioner will be their representative for the petitioned-for unit. Because every employee will have an opportunity to vote in the historical unit, the Act’s objectives are secured by promoting employee free choice while also deferring to the stability of labor relations between Petitioner and the [BCA].” DDE at 9.

***The Regional Director’s Supplemental Decision and Direction of Election Correctly found that the BCA Failed to Meet Its Burden of Establishing Supervisory Status of Foremen and General Foremen***

The burden of showing supervisory status to exclude employees from the protections of the Act “is a heavy one,” and “cannot be satisfied by ‘general conclusory claims’ or proof of ‘paper authority.’ Moreover, since ‘the issue of supervisory status is heavily fact-dependent and

job duties vary, per se rules designating certain classes of jobs as always or never supervisory are generally inappropriate.’” *Franklin Home Health Agency*, 337 NLRB 826, 829 (2002) (citations and parentheticals omitted).

In this case, the BCA fell woefully short of satisfying its heavy burden of proving Foremen and General Foremen as a class are statutory supervisors. Indeed, rather than attempting to address the *actual* authority and responsibility of specific individuals that BCA would identify as foremen or general foreman, BCA points to language in Article VI of the 2011-2015 CBA (Joint Ex. 2), which states the general proposition that “the General Foreman and Foreman shall be agents of the Employer. The right to hire and discharge employees, rests with the General Foreman and/or Foreman who are the authorized representatives of the Employer.” This, standing alone, does not and cannot confer supervisory status on each and every employee that the employers have designated as foremen and general foremen on their jobs. “Job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. The Board insists on evidence supporting a finding of actual as opposed to mere paper authority.” *Training School at Vineland*, 332 NLRB 1412, 1416 (2000) (citing cases); *see also Franklin Home Health Agency*, *supra*, 337 NLRB at 829.

In addition to relying on CBA language to establish supervisory status of each and every foremen and general foremen simply by virtue of their title, the BCA presented testimony of its Assistant Managing Director, John O’Hare, and its Director of Member Services, Craig Noller. As the Regional Director found in the Supplemental Decision and Direction of Election (SDDE), “although the BCA’s two witnesses spoke at length about the supervisory status of the foreman classifications, their testimony was “utterly lacking in specificity” and neither was able to provide any specific evidence, recent or otherwise, addressing the supervisory status of the

foreman classifications. *See Avante at Wilson*, 348 NLRB at 1057 (rejecting claim of supervisory status absent evidence of specific examples). . . .” SDDE at 7. *See also id.* (“[W]hile O’Hare and Noller testified generally as to foreman responsibilities, neither of them particularized their testimony in any way, such as by specifying any specific incidents that they might have witnessed, including any hiring, firing, discipline, assignment of work, adjusting grievances, or any other supervisory duties performed by foremen. Further, although O’Hare testified that he visits several job sites a week, he failed to specify which job sites he visits, the names of the foremen he observed while on the job sites, or any other detailed information to meet the Association’s burden.”).

In sum, the Regional Director correctly concluded that the BCA’s proffered testimony, which was couched in terms of conclusory recitation of the bare legal standard for supervisory status and without current, probative evidence and concrete facts, failed to satisfy the Board’s requirements for establishing supervisory status. *See Oakwood Health Care, Inc.*, 348 NLRB 686, 687 (2006); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003); *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-12 (2001).

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For all these reasons, the Board is urged to deny the BCA’s request for review in its entirety.

Dated: Melville, New York  
February 18, 2016

Respectfully submitted,  
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**CERTIFICATE OF SERVICE BY E-MAIL**

I certify that on February 18, 2016 I served the foregoing **PETITIONER'S RESPONSE IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW** fully executed by counsel for the parties in Case 02-RC-154031, upon:

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by e-mail addressed to said parties at the e-mail addresses above set forth, being the addresses designated by said parties for that purpose.

/s/ Jessica Claud

Jessica Claud