United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

FOR DISTRIBUTION DATE: December 23, 2010

TO : Kathleen McKinney, Regional Director
Region 15

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Austin Fire Equipment, LLC
Case 15-CA-19697

Section 8(f) chron
530-8045-8700
596-044-7500

The Region submitted this construction-industry case for advice on whether a voluntary recognition agreement signed by the Employer and Union established a Section 9(a) relationship, and whether the Employer violated Section 8(a)(5) by withdrawing recognition at the expiration of their collective-bargaining agreement.

We conclude that the Region should issue complaint in order to argue, based on current Board law as set forth in Central Illinois Construction,[1] that the parties' relationship was governed by Section 9(a) rather than Section 8(f). Accordingly, the complaint should allege that the Employer violated Section 8(a)(5) by refusing to bargain with the Union for a successor collective-bargaining agreement. However, the Region should further argue that the better view of the law would require the Board to overrule Central Illinois to the extent that that case would preclude the Board from reviewing the circumstances of the Employer's initial grant of recognition.

FACTS

On July 8, 2008, Austin Fire Equipment (the Employer), a construction industry employer, signed the signatory page of the collective-bargaining agreement between the Union and the National Fire Sprinkler Association, Inc., thereby, binding the Employer to the terms of the agreement. The agreement was effective from April 1, 2007 to March 31, 2010.

The Union claims that soon after signing on to the collective-bargaining agreement, the Employer also signed a document entitled "Acknowledgement of the Representative Status of Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO." The Acknowledgement provides that:

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[1] 335 NLRB 717 (2001).

> The Employer executing this document below 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 are represented by Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, for purposes of collective bargaining.
>
> The Employer therefore unconditionally acknowledges and confirms that Local Union 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

At the time the Employer signed the Acknowledgement, the Union had not presented or offered to present to the Employer any documentation indicating that it represented a majority of the bargaining unit employees, and none of the unit employees were Union members. Soon after, between July 9 and 21, the unit employees all completed applications for Union membership.

By letter dated December 4, 2009, the Union notified the Employer that it wanted to terminate the existing collective-bargaining agreement when it expired on March 31, 2010, and to start negotiations for a new agreement. Thereafter, the parties met on several occasions, with the Employer repeatedly stating that it was only willing to negotiate one-job agreements with the Union, and the Union repeatedly asserting that the parties were bargaining for a new collective-bargaining agreement. After several meetings and exchanges of this sort, on July 13, 2010, the Employer made it clear that it would not attend any more meetings and that it was not going to continue to negotiate. The parties have not met since that date.

ACTION

We conclude that, based on current Board law as set forth in Central Illinois Construction,[2] the parties' relationship was governed by Section 9(a) rather than Section 8(f). Accordingly, the Region should issue complaint alleging that the Employer violated Section 8(a)(5) by withdrawing recognition from the Union and subsequently refusing to meet and bargain over a successor agreement. However, the Region should further argue that the better view of the law would require the Board to overrule Central Illinois to the extent that that case

[2] 335 NLRB 717 (2001).

would preclude the Board from reviewing the circumstances of the Employer's initial grant of recognition.

A. Under Current Board Law, the Employer's Relationship With the Union Was Governed By Section 9(a) Rather Than 8(f)

There is a significant difference between a union's representative status in the construction industry under Section 8(f) and under Section 9(a) of the Act. Under Section 8(f), an employer may terminate the bargaining relationship upon expiration of the agreement.[3] Under Section 9(a), an employer must continue to recognize and bargain with the union after the agreement expires, unless and until the union is shown to have lost majority support.[4]

In the construction industry, there is a rebuttable presumption that a bargaining relationship is governed by Section 8(f).[5] Therefore, a party asserting the existence of a 9(a) relationship has the burden of proving it.[6]

In Central Illinois, the Board reaffirmed that contract language alone may establish a Section 9(a) relationship. Adopting the Tenth Circuit's three-part test to determine the sufficiency of the contract language,[7] the Board held that Section 9(a) status is established with contract language that unequivocally indicates (1) that the union requested recognition as the majority or 9(a) representative of the unit employees, (2) that the employer recognized the union as the majority or 9(a) bargaining representative, and (3) that the employer's recognition was based on the union having shown, or having offered to show, that it had the support of a majority of unit employees.[8] The agreement need not contain specific terms or "magic words;" however, the contract language should accurately

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[3] See, e.g., Central Illinois Construction, 335 NLRB at 718.

[4] Id.

[5] John Deklewa & Sons, 282 NLRB 1375, 1385 n.41 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

[6] Central Illinois, 335 NLRB at 721.

[7] See 335 NLRB at 719-20, citing NLRB v. Triple C Maintenance, Inc., 219 F.3d 1147, 1155 (10th Cir. 2000) and NLRB v. Oklahoma Installation Co., 219 F.3d 1160, 1164 (10th Cir. 2000).

[8] Central Illinois, 335 NLRB at 719-720.

describe events that would independently establish the creation of a 9(a) relationship.[9]

The 2008 Acknowledgement containing recognition language of the Union's Section 9(a) status, satisfies each element of the Central Illinois test. In two pre-Central Illinois cases, the Board held that identical Acknowledgement forms submitted by a union created Section 9(a) relationships with signatory employers. The Board held that by proffering the form the union made an "unequivocal demand" for Section 9(a) recognition, which the employers "voluntarily and unequivocally granted."[10] The Board thus concluded that, "[i]t is clear that the parties intended to establish a bargaining relationship under Section 9(a) of the Act."[11]

The Acknowledgement also satisfies the final element of the Central Illinois test, requiring a statement that the Union made a contemporaneous offer to show or an actual showing of majority support. The Acknowledgement provides that the Employer "has, on the basis of objective and reliable information, confirmed that a clear majority of the [employees] … are represented" by the Union. This language unequivocally states that the Union showed, and that the Employer, upon review of evidence, recognized that the Union had the support of a majority of unit employees.[12] Accordingly, the parties' relationship was governed by Section 9(a), rather than Section 8(f). We therefore

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[9] See, e.g., Saylor's, Inc., 338 NLRB 330, 334 (2002) (contract language need not specifically state language in compliance with Central Illinois standard where there is a clear intent to satisfy each element of Board test).

[10] Triple A Fire Protection, 312 NLRB 1088 (1993), enfd. 136 F.3d 727 (11th Cir. 1998), cert. den. 525 U.S. 1067 (1999) (remanding to ALJ for determination of legality of unilateral changes; rejecting employer's 8(f) argument as untimely under Casale Industries, infra). See also MFP Fire Protection, 318 NLRB 840 (1995) (employer unlawfully repudiated 9(a) relationship; applying Casale Industries).

[11] Triple A Fire Protection, 312 NLRB at 1088-89. See NLRB v. Oklahoma Installation, 219 F.3d at 1164 ("critical question" is whether contract language establishes that "parties intended to be governed by § 9(a) rather than § 8(f).")

[12] See, e.g., Saylor's, Inc., 338 NLRB at 330 (contract language sufficient to establish 9(a) relationship where it stated that union "submitted to the [e]mployer evidence of majority support").

conclude that the Employer unlawfully withdrew recognition from the Union on July 13, 2010.

Under existing Board law, the Employer also would be precluded from now asserting that the Union lacked majority support at the time of the recognition. In Casale Industries,[13] the Board refused to permit an RC petitioner to challenge the incumbent union's majority status where the challenge was based on events at the time of recognition made approximately six years earlier, and the employer at that time had expressed its intent to enter into a 9(a) relationship with the union. The Board noted that in non-construction industries, if an employer grants Section 9(a) recognition to a union and more than six months elapse, the Board would not entertain a claim that majority status was lacking at the time of recognition. The Board found that unions in the construction industry should not be treated less favorably than those in non-construction industries. Accordingly, the Board concluded that "if a construction industry employer extends 9(a) recognition to a union, and six months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition."[14] While the Board has subsequently raised questions about Casale,[15] the case remains Board law.

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[13] 311 NLRB 951, 953 (1993).

[14] Ibid.

[15] In Central Illinois, the Board indicated that where the recognition language is couched in terms of the union's "offer to show" majority support, an employer may challenge the union's majority support, but that any such challenge must be made within six months after the written recognition was given as required by Section 10(b) of the Act. 335 NLRB at 720 n.14. By contrast, the Board specifically left open the issue of "whether an employer would be permitted to make a similar challenge within the 10(b) period [emphasis added] where the language it agreed to unequivocally stated that the union did make (as opposed to "offered to" make) a showing of majority support." Ibid. Consistent with Central Illinois' questioning whether employers would be permitted to challenge their own contractual acknowledgment of majority status (even within the 10(b) period), the Board in Nova Plumbing, 336 NLRB 633, 634-36 (2001), enf. den. 330 F.3d 531 (D.C. Cir. 2003), did not rely on 10(b) in finding a 9(a) relationship based on contract language. However, although raising questions about the status of the Board's prior 10(b) policy, neither Nova nor Central Illinois overruled Casale, an R case.

In the case before us, the Acknowledgement clearly expressed the Employer's intent to enter into a 9(a) relationship with the Union, the parties signed the form in July 2008, and the challenge to the Union's majority status occurred more than six months afterwards. Thus, under current Board law, the Employer's challenge to the Union's majority status at the time of recognition is time-barred under Section 10(b).

B. The Region should ask the Board to modify its decision in Central Illinois that contract language, standing alone, is sufficient to establish a Section 9(a) relationship.

Although the Region should issue complaint, the Region should further argue, as the General Counsel directed in Lambard, Inc.[16] and D & B Fire Protection, Inc.,[17] that the better view would require the Board to overrule Central Illinois to the extent that that case precludes the Board from reviewing whether the Union actually enjoyed majority support at the time the employer purported to grant it Section 9(a) recognition.

In Nova Plumbing, Inc. v. NLRB,[18] the D.C. Circuit rejected the Board's determination that contract language alone can establish a Section 9(a) relationship between a union and a construction industry employer, "at least where, as [there], the record contains strong indications that the parties had only a Section 8(f) relationship."[19] The D.C. Circuit found that the Board's reliance on contract language, standing alone, to establish a 9(a) relationship "runs rough shod" over the principles established in International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altmann).[20] The D.C. Circuit explained:

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[16] 31-CA-27033 (July 7, 2005) (Significant Appeals Minute 05-13).

[17] Case 21-CA-36915 (Advice memorandum dated December 9, 2005).

[18] 330 F.3d 531 (D.C. Cir. 2003).

[19] Id. at 537.

[20] Ibid, citing 366 U.S. 731 (1961). In Bernhard-Altmann, the Supreme Court found that a Section 9(a) collective bargaining agreement that recognizes a union as an exclusive bargaining representative must fail in its entirety where, at the time the agreement was signed, only a minority of the employees actually authorized the union to represent them.

> The Board's ruling that contract language alone can establish the existence of a section 9(a) relationship – and thus trigger the three-year "contract bar" against election petitions by the employees and other parties – creates an opportunity for construction companies and unions to circumvent both section 8(f) protections and [Bernhard-Altmann's] holding by colluding at the expense of employees and rival unions. By focusing exclusively on employer and union intent, the Board has neglected its fundamental obligation to protect employee section 7 rights, opening the door to even more egregious violations than the good faith mistake issue in [Bernhard-Altmann].[21]

In the instant case, while the Acknowledgement form clearly states that the Employer recognized the Union based on the Union's contemporaneous showing of evidence of its majority support, the statement is illusory in light of the absence of any evidence, or even assertion, that the Union ever made or offered to make such a showing. Accordingly, despite contract language, the Union did not demonstrate majority support at the time the Employer granted it Section 9(a) recognition. Indeed, the fact that the unit employees signed Union membership forms in the days and weeks following execution of the Acknowledgement would suggest that the Union did not have their support at the time of its execution.

As the D.C. Circuit noted, allowing contract language alone to create a Section 9(a) relationship creates an opportunity for construction industry companies and unions to collude at the expense of employees, who would be precluded from filing an R-case petition during the term of a 9(a) contract under contract bar rules.[22] The employees'

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[21] Id. at 537.

[22] Other cases also illustrate that same point. In Triple C Maintenance, 327 NLRB 42 n.2, 44-45 (1998), enfd. on other grounds, 219 F.3d 1147 (10th Cir. 2000), for instance, the employer and the union executed a collective-bargaining agreement that included language stating that recognition was based on a "clear showing of majority support" even though the employer had no statutory employees at the time of recognition. Similarly, in Oklahoma Installation Company, 325 NLRB 741 (1998), enf. denied on other grounds, 219 F.3d 1160 (10th Cir. 2000), the parties' agreement

rights under Sections 7 to reject an 8(f) relationship should not be defeated without some evidence to support the words drafted by highly interested parties. These rights would be better served by a rule that would bind the Employer and the Union to their bargain, unless either party comes forward with evidence that the Union lacked majority support at the time of recognition, while permitting employees to challenge that Union's 9(a) status at any time through an RD petition. If an employee files an RD petition, or if an employer presents evidence that the union did not have majority support at the time of recognition, a test like that often used in voluntary recognition and contract bar cases in non-construction industries would better protect employee rights. That test emphasizes that "[t]he essence of voluntary recognition is the 'commitment of the employer to bargain upon some demonstrable showing of majority [status].'"[23] The Board has used a similar test in declining to find a recognition bar to an election where it does not "affirmatively appear" that an employer extended recognition in good faith "on the basis of a previously demonstrated showing of majority."[24]

The Board formerly had just such a test in the construction industry.[25] And as the Tenth Circuit noted in Triple C Maintenance, in its original form the Board's test required extrinsic evidence of a contemporaneous showing of majority support and not, as in later cases, a bare recitation of that fact in a contract. That later development was a permissible one.[26] However, in view of the criticism that the Central Illinois standard invites

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indicated that the union represented a majority of employees although there were no employees working within the jurisdiction of the union at the time of recognition.

[23] NLRB v Lyon & Ryan Food, Inc., 647 F.2d 745, 751 (7th Cir. 1981), cert. den. 454 U.S. 894 (1981), quoting Jerr-Dan Corp., 237 NLRB 302, 303 (1978), enfd. 601 F.2d 575 (3rd Cir. 1979). Accord, Brown & Connolly, 593 F.2d 1373, 1374 (1st Cir. 1979).

[24] Sound Contractors Assoc., 162 NLRB 364, 365 (1966); Jack Williams, D.D.S., 231 NLRB 845, 846 (1977).

[25] See Golden West, 307 NLRB 1494, 1495 (1992); Id. at 1495 n.5, 1496 (opinions of Member Stephens and Member Oviatt); J&R Tile, Inc., 291 NLRB 1034, 1036 & n.11 (1988). See also Island Construction, 135 NLRB 13 (1962) (finding contract bar under these principles).

[26] 219 F.3d at 1155.

abuse,[27] the Board's former extrinsic evidence test would better serve the interests of the parties and the public where employees are challenging the union's 9(a) status or where the employer has presented evidence that the union did not in fact enjoy majority status at the time of the 9(a) recognition. For these reasons, it was determined that this case should be presented to the Board with a request that it modify its holding in Central Illinois that contract language alone is sufficient to establish 9(a) majority status.

Under the proposed rule, contractual language that meets the standards set forth in Central Illinois will be sufficient to establish a rebuttable presumption of 9(a) status as to the employer who is a party to the contract. However, the employer may rebut the presumption of 9(a) status by presenting evidence that the union did not actually enjoy majority support at the time of the purported 9(a) recognition. If the employer presents such evidence, the union then has the burden to present sufficient evidence to establish that it did in fact have majority support at that time. If the union is unable to rebut the employer's contention that it lacked majority support, the employer has successfully established that the parties do not have a 9(a) relationship.

In regards to employee challenges, however, the contractual language will not create a rebuttable presumption of 9(a) status since the employees are not parties to the recognition clause. Rather, the union will be presumed to be an 8(f) representative. Under Deklewa, employees will be free to file an appropriate representation petition during the term of contract. Upon filing such a petition, the burden of introducing evidence supporting the claim that the union did, in fact, have majority support at the time of recognition would be on the party alleging that a 9(a) relationship exists. If that party is unable to meet this burden, the contractual language, standing alone, would be insufficient to

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[27] See Nova Plumbing, 330 F.3d at 536-37, discussed above. See also American Automatic Sprinkler Systems, Inc. v. NLRB, 163 F.3d 209, 222 (4th Cir. 1998) ("[T]o credit the employer's voluntary recognition absent any contemporaneous showing of majority support would reduce this time-honored alternative to Board-certified election to a hollow form which, though providing the contracting parties stability and repose, would offer scant protection of the employees free choice that is a central aim of the Act."), cert. denied 528 U.S. 821 (1999); Saylor's, Inc., 338 NLRB at 330-33 (Member Cowen, dissenting)(quoting American Automatic Sprinkler Sys. Inc., 163 F.3d at 222).

establish such a relationship and the contract would not block the election.

This proposed rule is consistent with the Board's holding in H.Y. Floors and Gameline Painting, Inc.[28] In H.Y. Floors, an RD case, the Board held that while the employer and the union had a collective bargaining agreement that constituted a 9(a) contract vis-à-vis each other, the decertification petitioner was not a party to the agreement and was not estopped from timely challenging the 9(a) recognition.[29] The Board remanded the case to the Regional Director to reopen the record with respect to the union's evidentiary burden of showing it represented a majority of employees at the time that the employer extended 9(a) recognition.[30]

In this case, the employees are not challenging the Union's 9(a) status. Rather, it is the Employer that contends that, despite the contrary language of the Acknowledgement form, there is no evidence that the Union had shown or offered to show majority support at the time the Employer purportedly granted 9(a) recognition. Accordingly, under the proposed rule, there would be a rebuttable presumption of 9(a) status, and the Employer would have the burden of establishing that the Union did not enjoy majority support at the time of the agreement. Here, the investigation revealed that on the date when the Employer entered into the 2008-10 collective bargaining agreement with the Union, the Union never showed or offered to show the Employer evidence that it represented a majority of its unit employees. Therefore, the evidence is sufficient to rebut the presumption of 9(a) status created by the contract language.

While current Board law would preclude the Employer from actually challenging the Union's 9(a) status because more than six months had passed before it withdrew recognition from the Union, the Region should also urge the Board to reconsider its policy under Casale of treating voluntary 9(a) recognition in the construction industry under the same set of 10(b) rules that apply to employers outside of that industry, as established in Machinists Local 1424 v. NLRB (Bryan Mfg., Co.).[31] This is not to say

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[28] 331 NLRB 304 (2000).

[29] Id. at 304-05.

[30] Id.

[31] 362 U.S. 411 (1960). Bryan Mfg. involved an 8(b)(1)(A) charge filed by an employer alleging that the union did not have majority support at the time of recognition, which

that the 10(b)-based policy the Board approved in Casale Industries is unreasonable. As explained by the Tenth Circuit in Triple C Maintenance, the Board's Casale policy furthers the policy of the Act to achieve uniformity and stabilize bargaining relationships.[32] Additionally, there are practical reasons for the Board's policy under Casale, such as concerns about stale evidence, the availability of witnesses, and fairness to unions that are not on notice of the need to preserve evidence of majority support.

Nevertheless, for both legal and policy reasons, the Board's Casale policy should be modified. Casale's premise is that parties in the construction industry who clearly intend a 9(a) relationship are entitled to the benefit of the same six-month rule that protects parties outside the construction industry from belated claims that majority status was lacking at the time of recognition.[33] That policy of parity, while abstractly fair and reasonable, does not fully take account of the legal and practical differences that warrant different treatment for the construction industry.

Outside the construction industry, a six-month rule is firmly anchored in the text and policy of the NLRA, as well as the practical realities of the workplace. Legally, premature recognition of a union that has not been selected by a majority of the bargaining unit constitutes a form of unlawful support or assistance to that union and is an interference with the free choice of the employees.[34] Practically, the question whether a stranger union purporting to be the employees' representative is lawfully

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occurred 10 months prior to the filing of the charge. The Supreme Court found that the charge was time-barred under 10(b) for the entire foundation of the unfair labor practice was the union's time-barred lack of majority status when the original collective bargaining agreement was signed. 362 U.S. at 418. However, the Court stated that 10(b) does not prevent all use of evidence relating to events transpiring more then six months prior to the charge. Rather, in situations where occurrences in the 10(b) period in and of themselves may constitute, as a substantive matter, unfair labor practices, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period. Id. at 416.

[32] 219 F.3d. at 1159.

[33] 311 NLRB at 953.

[34] See Bernhard-Altmann, 366 U.S. at 736-38.

acting as exclusive representative is starkly presented to both the employer and the affected employees, who under Section 10(b) are given six months to file charges alleging the illegality of the bargaining relationship.[35]

Within the construction industry, by contrast, a six-month rule has neither a practical nor a compelling legal basis. Practically, even in the absence of any affirmative showing of majority support, construction unions, under the Board's Deklewa policy, are lawfully entitled to function exactly like a 9(a) representative during the term of a contract, with the single exception that the contract is not a bar to the conduct of a decertification election during its term.[36] Because of Deklewa, a 9(a) contract does not have the same immediate consequences for employers and employees as would a 9(a) contract in other industries. Construction employers and employees therefore lack the same practical incentives to file unfair labor practice charges within six months, since their doing so ordinarily would have no effect on their day to day relations under the contract.[37] Moreover, given the patterns of transient employment and pre-hire bargaining in the construction industry, employees employed on a project may have no information about whether or not the bargaining relationship was originally based on an affirmative showing of majority support.

Legally, because of Section 8(f), construction employers and employees are also not similarly situated with those in other industries insofar as a six-month rule for challenging 9(a) recognition is concerned. The plain language of Section 8(f) states that, in the construction industry, recognition of a union that has not been selected by a majority of the bargaining unit "shall not be an

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[35] Bryan Mfg. Co., 362 U.S. at 418.

[36] Deklewa, 282 NLRB at 1387.

[37] These practical realities may go far to explain why, in the 30-plus years since Deklewa was decided, there have been no cases finding an 8(a)(2) violation on the basis that a construction employer granted full 9(a) recognition to a construction union that lacked the support of a majority. Indeed, there appear to be only two construction cases where complaint was issued in circumstances that would invite the Board to adopt such a theory. Hovey Electric, 328 NLRB 273 (1999); Valley Crest Landscape Development, 2004 WL 2138583 (ALJD), adopted pro forma, in the absence of exceptions, by Board order dated January 31, 2005.

unfair labor practice."[38] This statutory language presents a formidable obstacle to the Board's ever finding an unfair labor practice where a construction industry employer grants 9(a) recognition to a construction union that in act lacks majority support.[39] And absent an unfair labor practice, the six month statute of limitations in Section 10(b) for filing unfair labor practice charges with the Board has no application.

Considerations similar to these led the Board to conclude in Brannan Sand & Gravel Co.,[40] that nothing in the

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[38] In relevant part, Section 8(f) provides (emphasis supplied):

> *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 section 8(a) of this Act as an unfair labor practice) *because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement . . . .*

Note that we deal here only with *uncoerced* 9(a) recognition where the sole issue, as in Bernhard-Altmann, is whether the union granted recognition had the support of a numerical majority. Coerced support for a construction union is in no way privileged by 8(f). To the contrary, by its express terms, Section 8(f) affords no protection if the union signatory to the agreement is "assisted by an action defined in section 8(a) of this Act as an unfair labor practice…." 29 U.S.C. 158(f). See, e.g., Precision Carpet, 223 NLRB 329, 340 (1976) (threatening employees with discharge for refusing to join the union).

[39] Accord, Nova Plumbing, 330 F.3d at 538-39; American Automatic Sprinkler Sys. v. NLRB, 163 F.3d at 218 n.6. See also Triple A Fire Protection, 312 NLRB at 1089 n.3 (Member Devaney, concurring) (relying solely on "the parties clear expression of their intent" to find a 9(a) relationship and declining to rely on 10(b) in construction industry cases because in that industry "there is no statutory prohibition on minority recognition").

[40] 289 NLRB 977, 982 (1988).

Supreme Court's construction of Section 10(b) in Bryan Mfg. Co. "precludes inquiry into the establishment of construction industry bargaining relationships outside the 10(b) period." As Brannan explained:

> Going back to the beginning of the parties' relationship here simply seeks to determine the majority or nonmajority based nature of the current relationship and does not involve a determination that any conduct was unlawful, either within or outside the 10(b) period.[41]

The Board in Casale sought to distinguish Brannan on the ground that it did not address cases where "the parties intended a 9(a) relationship."[42] Casale's suggested distinction, however, does not find compelling support in the text of Section 8(f), which on its face privileges nonmajority contracts in the construction industry without qualification.

For these reasons, we conclude that the Region should ask the Board to reconsider Casale's rationale for engrafting a six-month rule for challenging 9(a) recognition in the construction industry. Casale is vulnerable to the criticism that it attempts to grant a 9(a) protected status to bargaining relationships in the construction industry in circumstances where the language of 8(f) suggests that a different treatment would better accord with Congress' intent. A better rule, more tailored to the legal and practical realities of construction industry bargaining, is not a rule of parity like that announced in Casale, but the rule under Brannan Sand & Gravel. That rule allows claims of full 9(a) status to be appropriately challenged by employers and employees beyond the 10(b) period. Moreover, because 8(f) privileges nonmajority bargaining relations in the construction industry, a rule allowing the Board to examine whether a union had majority support at the time of recognition does not involve any determination concerning whether the recognition was an unfair labor practice.[43]

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[41] Id. at 982.

[42] 311 NLRB at 953 n.18.

[43] The Region, however, should not ask the Board to overrule Casale in its entirety. That matter was presented to the Board in the guise of an R case, in which the Board was not asked to go beyond Section 10(b) to find legal culpability. Moreover, as set forth above, in the R-case setting, Casale is premised on reasonable evidentiary factors and notions of fairness. The Region should merely ask the Board to

In sum, because Casale's six month time limit neither has a functional relationship to the critical differences between a 9(a) relationship and an 8(f) relationship nor has a firm legal basis in view of 8(f)'s privileging nonmajority bargaining in the construction industry, the Region should urge the Board to overrule Casale and adopt a rule that would allow the Board to look beyond the 10(b) period to determine whether a union actually had majority support at the time it was recognized as a 9(a) representative.

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reconsider its application of Casale in the setting of a complaint alleging a Section 8(a)(5) withdrawal of recognition.