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

Advice Memorandum

S.A.M.

DATE: July 10, 2014

TO: Wanda Pate Jones, Regional Director
Region 27

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

SUBJECT: Colorado Fire Sprinkler Inc.
Case 27-CA-115977

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This case was submitted for advice as to whether the parties had entered into a Section 9(a) or Section 8(f) relationship and whether the charge alleging that the Employer violated Section 8(a)(5) by unilaterally ending contributions to the Union's benefit funds would be untimely under Section 10(b). We conclude that the wording of the parties' 2005 assent agreement meets the Board's *Staunton Fuel* [1] requirements for establishing a Section 9(a) relationship. Although there is uncontested extrinsic evidence that the Union did not have majority support at the time the Employer initially extended 9(a) recognition in 1991, the Union has submitted evidence demonstrating that the Union had majority support when the Employer again extended 9(a) recognition in 2005. Further, we conclude that the instant charge was timely filed because the Union did not have clear and unequivocal notice that the Employer had discontinued benefit fund contributions until well within the 10(b) period. Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by unilaterally discontinuing contributions to the Union's benefit funds.

FACTS

Colorado Fire Sprinkler Inc. ("the Employer") has performed construction-industry fire sprinkler work in Pueblo, Colorado since October 1991. The Employer's owner states that when he began operating the business, the owner performed all fire

[1] *Staunton Fuel & Material*, 335 NLRB 717, 718 (2001) (also referred to as "Central Illinois").

sprinkler work by himself. Around this time, the Road Sprinkler Fitters Local Union No. 669 ("the Union" or "Local 669") contacted the Employer about becoming a Union contractor. The Employer agreed to sign up with the Union on the grounds that it would not have to make benefit fund contributions as long as the owner was performing all of the fire sprinkler work. In November 1991, the Employer signed a document agreeing to be bound by the terms of the Union's multi-employer agreement ("master agreement") and agreeing to make any "necessary financial contributions" to the Union's benefit funds. At the same time, the Employer also signed a document entitled "Acknowledgment of the Representative Status of the [Union]," which states that:

> 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 have designated, are members of, and are represented by [Local 669] for purposes of collective bargaining.
>
> The Employer therefore unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

The Union has not presented any evidence to dispute the Employer's claim that the Employer had no employees at the time this document was signed.

In 1994, the Employer began hiring other employees to perform fire sprinkler work. In 1994, 1997, and 2000, the Employer signed "assent agreements" adopting the Union's revised master agreements and agreeing to contribute to the Union's benefit funds on behalf of unit employees. In March 2005, the Employer and the Union executed another assent agreement, which stated in part:

> The Employer hereby freely and unequivocally acknowledges that it has verified the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the National Labor Relations Act, as amended, for the purposes of establishing wages, hours, and working conditions for all journeyman sprinkler fitters, apprentices and unindentured apprentice applicants in the employ of the Employer, and that the Union has offered to provide the Employer with confirmation of its support by a majority of such employees.

The Union asserts that, at least as of March 2005, a majority of the Employer's employees were Union members. The Union submitted copies of benefit fund reports prepared by the Employer listing employees on the Employer's payroll between February 21 and April 18, 2005 and Union records regarding the Employer's employees from the same time period. The benefit fund reports and Union records show that a majority of employees were members of the Union and had authorized the

Employer to deduct dues on their behalf. The Employer has presented no evidence to the contrary.

In 2007 and 2010, the Employer again signed assent agreements adopting the Union's master agreements. In the 2010 assent agreement, the Employer agreed to be bound by the Union's latest master agreement, effective April 1, 2010 through March 31, 2013. Under these agreements, the Employer agreed to continue contributions to the benefit funds, including welfare and pension funds, on behalf of unit employees.

On November 30, 2012, the Union sent notice to all contractors, including the Employer, that it intended to terminate the master agreement upon expiration and would begin bargaining for a new master agreement in early 2013. Each notice included copies of a new assent agreement that would bind the signatories to the new master agreement when the Union and the multi-employer association reached agreement. The Employer did not sign the new assent agreement.

In January 2013,[2] the Employer began experiencing financial difficulties and stopped making contributions to the Union benefit funds. On April 25, the Union filed a charge (27-CA-103761) alleging that the Employer had unilaterally discontinued benefit fund contributions. Around this time, according to the Union, the Employer's owner held a company meeting and told the employees that he could not afford to be a union contractor and was going to operate the company "nonunion." The owner also told the employees that he would directly provide health insurance to all employees. After employees called the Union, the Union's business agent called the owner and told him that he "couldn't just walk away from the Union." The owner agreed to bargain with the Union for a new contract and stated that he "wanted to remain a union contractor." The business agent and the owner also discussed the Employer's outstanding debt with the benefit funds and the owner stated that he would contact the benefit fund office. As a result of the owner's agreement to bargain with the Union for a new contract and his assurances that he would call the funds' office, the Union withdrew its charge against the Employer.

On June 21, the Employer and the Union held their first bargaining session. The Employer proposed a $5 per hour wage cut, Employer-provided health insurance in lieu of participation in the Union's benefit funds, and that the Union forgive the Employer's past due balance with the benefit funds. The Union's business agent told the Employer that he would need to forward these proposals to the Union's business manager for approval.

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[2] All dates *infra* are 2013 unless otherwise noted.

On October 29, the parties met for a second bargaining session. The Union told the Employer that it was unwilling to forgive the Employer's debt to the benefit funds, and the parties were unable to reach agreement in other areas. Later that day, the Union filed the instant charge alleging that the Employer had unilaterally discontinued benefit fund contributions in violation of Section 8(a)(5).

In mid-November, the Employer made payments to the benefit funds to apply to the balance owed under the expired master agreement for January, February, and March. In January 2014, the Union filed another charge (27-CA-120823) alleging that the Employer had implemented a new health insurance plan without providing notice or an opportunity to bargain.[3] The Employer has made no further contributions to the benefit funds, and the parties have been unable to reach agreement on a new collective-bargaining agreement.

ACTION

We conclude that the wording of the parties' 2005 assent agreement meets the Board's *Staunton Fuel* requirements for establishing a Section 9(a) relationship. Although there is extrinsic evidence that the Union did not have majority support at the time the Employer initially extended 9(a) recognition, the Union has presented evidence that it had majority support when the Employer again extended 9(a) recognition in 2005. We further conclude that the instant charge was timely filed because the Union did not have clear and unequivocal notice that the Employer had discontinued benefit fund contributions until well within the 10(b) period. Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by unilaterally discontinuing contributions to the Union's benefit funds.

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), a collective-bargaining agreement does not bar representation petitions and an employer may terminate the bargaining relationship upon expiration of the contract.[4] Under Section 9(a), a collective-bargaining agreement bars representation petitions and 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.[5] In the construction industry, a rebuttable presumption exists that a

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[3] The Region is holding this case in abeyance until a determination is made regarding the Union's 8(f) or 9(a) status.

[4] *Staunton Fuel*, 335 NLRB at 718.

[5] *Id.*

bargaining relationship is governed by Section 8(f).[6] Therefore, a party asserting the existence of a 9(a) relationship has the burden of proving it.[7]

Under Board law, contract language alone may establish a Section 9(a) relationship if the language satisfies a three-part test: 1) the union requested recognition as the majority or 9(a) representative of the unit employees; 2) the employer agreed to recognize the union as the majority or 9(a) bargaining representative; and 3) the employer's recognition was based on the union having shown, or having offered to show, evidence of its majority support.[8] In order to satisfy the third prong of this test, the parties' agreement must confirm that the union has the support or authorization of a majority of unit employees; language concerning union membership and representation is consistent with both Section 8(f) and Section 9(a) relationships and thus does not independently demonstrate an intent to form a 9(a) relationship.[9] Further, a collective-bargaining agreement must be examined in its entirety to determine if the Section 8(f) presumption has been rebutted; when the agreement is ambiguous, the Board will look to extrinsic evidence to determine the parties' intent.[10]

Here, the 9(a) recognitional language contained in the 1991 Acknowledgment form would satisfy the three-part *Staunton Fuel* test because it states that the Union requested recognition as the 9(a) representative and that the Employer recognized the Union as such because a majority of employees designated the Union as their representative.[11] However, the Employer claims that it had no employees at the time

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[6] *John Deklewa & Sons*, 282 NLRB 1375, 1385 n.41 (1987), *enforced*, 843 F.2d 770 (3d Cir. 1988).

[7] *Staunton Fuel*, 335 NLRB at 720.

[8] *Id.*

[9] *Id.*

[10] *Madison Industries*, 349 NLRB 1306, 1308 (2007). *See also Staunton Fuel*, 335 NLRB at 720 n.15 ("we will continue to consider relevant extrinsic evidence bearing on the parties' intent in any case where we find that the contract language is not independently dispositive").

[11] *Cf. Austin Fire Equipment, LLC*, 359 NLRB No. 3, slip op. at 1 & n.5 (Sept. 28, 2012) (*Noel Canning* Board) (distinguishing earlier cases where the Board found 9(a) status based in part on a Local 669 Acknowledgment form stating that the employer had confirmed that a clear majority of its employees "ha[d] designated" the union for

the 1991 Acknowledgment was signed, and the Union has failed to present any evidence to the contrary. Even though a challenge to the Union's 9(a) status over twenty years later would be barred,[12] in analogous situations it has been General Counsel policy to refuse to issue complaint.[13] In addition, such cases present a variety of prosecutorial difficulties, and prosecuting them would not effectuate the purposes and policies of the Act.[14] We continue to adhere to that view.[15]

However, the 2005 assent agreement signed by the Employer also clearly meets the *Staunton Fuel* test. The language indicates that the Union requested recognition as the 9(a) representative,[16] the Employer recognized the Union as the 9(a)

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purposes of collective bargaining and concluding that an Acknowledgment which lacked those words failed to satisfy the third prong of *Staunton Fuel*); *see also Austin Fire Equipment, LLC*, 360 NLRB No. 131, slip op. at 2 & n.12, 3 (June 25, 2014) (affirming that Local 669 Acknowledgment form stating that employees "have designated" the union would indicate a showing of majority support).

[12] *See Casale Industries*, 311 NLRB 951, 953 (1993) (holding that construction industry employers are precluded from challenging a union's majority status where the initial grant of 9(a) recognition occurred outside the Section 10(b) period).

[13] *See* Memorandum GC 09-04, "Guideline Memorandum Concerning Withdrawal of Recognition Based on Loss of Majority Support," dated November 26, 2008 (reiterating long-standing policy that the General Counsel will decline to issue complaint on an unlawful withdrawal of recognition charge where the General Counsel has sufficient evidence that the union lost majority support even if the employer has no such evidence).

[14] *See Morse Electric, Inc.*, Case 13-CA-44938, Advice Memorandum dated March 30, 2009 (determining that it would not effectuate the purposes and policies of the Act to issue complaint against a construction industry employer that withdrew recognition, where it was a close question whether the parties' contract language satisfied the *Staunton Fuel* test and the extrinsic evidence did not demonstrate that the union had majority support, such that the case would likely result in ultimate dismissal).

[15] *See Martin J. Concrete*, Case 07-CA-107919, Advice Memorandum dated April 1, 2014 (explaining that it would not effectuate the purposes and policies of the Act to issue complaint alleging a 9(a) relationship in circumstances where there is uncontested evidence that a union did not show or offer to show evidence of majority support, notwithstanding contract language that meets *Staunton* requirements).

[16] *See, e.g., Saylor's, Inc.*, 338 NLRB 330, 334 (2002) (reiterating principle that an agreement otherwise meeting *Staunton Fuel* requirements is not required to explicitly

representative, and the Union "offered to provide the Employer with confirmation" of majority support.[17] Further, there are no provisions in the contract as a whole that create ambiguity as to the parties' intentions.[18] Indeed, the master agreement states that signatories[19] recognize the Union as the Section 9(a) representative and there is no petition-bar or other language that would suggest the parties intended an 8(f) relationship.[20] Though there is a seven-day union security clause in the master agreement, this provision is commonly included in both 8(f) and 9(a) contracts in the construction industry.[21]

Furthermore, there is uncontested evidence that, at least by the time the parties signed the 2005 assent agreement, the Union had majority support. The Union submitted evidence that, in March 2005, the majority of employees were members of

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state that a union requested recognition where the language clearly indicates that the employer granted recognition based on the union's request).

[17] *See Staunton Fuel*, 335 NLRB at 717; *see also King's Fire Protection*, 358 NLRB No. 156, slip op. at 1 n.1, 4 n.4 (Sept. 27, 2012) (*Noel Canning* Board) (concluding that the parties had 9(a) relationship based on language of Local 669's 2005 assent agreement).

[18] (b) (5) [redacted]

[19] Although the Employer is not a signatory, the Employer agreed to be bound by terms and conditions of the master agreement by virtue of the 2005 assent agreement.

[20] *Cf. Madison Industries*, 349 NLRB at 1309 (finding a petition-bar provision strong evidence that the parties did not intend a 9(a) relationship because an agreement governed by Section 9(a) already bars an employer from filing a petition for an election during its term and such a provision would only have value in an 8(f) relationship).

[21] *See id.* at 1310 n.5 (Liebman, dissenting) (stating that, although seven-day union security clauses are specifically authorized in Section 8(f), this statutory authorization applies to any collective-bargaining agreement in the construction industry, regardless of whether an agreement establishes a Section 8(f) or a Section 9(a) relationship, and therefore "cast[s] no light on the nature of the parties' relationship").

the Union and had authorized the Employer to deduct dues on their behalf.[22] Ordinarily, union membership does not independently demonstrate majority support because union security clauses commonly included in 8(f) and 9(a) collective-bargaining agreements require employees to become "members," i.e., join the union or pay agency fees.[23] But in a state such as Colorado, which prohibits unions and employers from entering into union security clauses,[24] union membership is evidence that employees support the union. Since employees cannot be required to join a union or pay agency fees as a condition of continued employment, proof that a majority of employees have voluntarily joined the union and agreed to have dues withheld demonstrates to an employer that a majority of its employees support the union.[25] Here, the Union has presented reports completed by the Employer between February

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[22] The Employer's fringe benefit fund reports for February 21 through April 18, 2005 lists fifteen employees and the hours each individual worked during those reporting periods. The Union submitted internal records showing dues paid by each of the fifteen employees and the date that each became a Union member; fourteen of the fifteen employees were Union members prior to March 2005. The Union also claims that the benefit fund reports independently confirm that each employee is a member of Local 669 because the number 669 is written under a column entitled "Home Local" preceding the name of fourteen employees and there is another column containing dollar amounts entitled "Work Assessment," which is a term used by the parties to describe Union dues. Regardless of whether the benefit fund reports independently indicate Union membership, considering the documents in tandem, it is clear that the vast majority of the employees in March 2005 were Union members.

[23] *See Staunton Fuel*, 335 NLRB at 720 (statements that a majority of unit employees "are members" of the union would be consistent with a union security obligation under an 8(f) or 9(a) relationship and would not independently establish 9(a) status).

[24] Under Colorado law, as permitted by Section 14(b) of the Act, a union cannot negotiate with an employer for a valid union security provision unless the union petitions the Colorado Division of Labor for a secret ballot election and obtains approval from a majority of eligible bargaining unit members (or three quarters of employees participating in the vote) to negotiate for a union security provision. *See* Colo. Rev. Stat. Ann. § 8-3-108(1)(c) (2014). There is no evidence or assertion that these requirements have been met here.

[25] *See USA Fire Protection*, 358 NLRB No. 162, slip op. at 1 n.2 (Sept. 28, 2012) (concurring in the result, then-Member Griffin noted that in a state that prohibits union security provisions, an employer could appropriately rely on evidence of union membership to extend 9(a) recognition if the union demonstrates that a majority of unit employees are members).

and April 2005 and Union records, which demonstrate that the vast majority of employees had chosen to become Union members and thus provides evidence of majority support at the time the parties executed the 2005 assent agreement.

As the parties had a 9(a) relationship since at least 2005, the Employer was not free to unilaterally change terms and conditions of employment, including benefit fund contributions, in 2013 merely because the collective-bargaining agreement had expired.[26]

Finally, Section 10(b) does not preclude issuing a complaint against the Employer alleging that it violated Section 8(a)(5) by unilaterally discontinuing benefit fund contributions. The Union did not have "clear and unequivocal notice" of the unilateral change until the parties' initial bargaining session in June 2013, which falls well within the 10(b) period.[27] Although the Union receives monthly delinquency reports from the fund administrator, the Union did not learn about the Employer's failure to make the contribution owed for April 2013—the first contribution owed after the expiration of the master agreement—until sometime in June. That payment was not due until May 15 and did not appear on the delinquency report until a month later.[28] And when employees informed the Union sometime in April that the Employer intended to become a "nonunion" company, the Union exercised reasonable diligence: the Union immediately contacted the Employer and received assurances that the Employer would contact the benefit funds office regarding the balance owed and bargain for a new contract.[29] Thus, the Union's October 29 charge was timely filed.

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[26] *John Deklewa & Sons*, 282 NLRB at 1387.

[27] *See A&L Underground*, 302 NLRB 467, 469 (1991) (Section 10(b) period begins to run at the moment that the party has clear and unequivocal notice of a violation of Section 8(a)(5)).

[28] *Cf. Chemung Contracting Corp.*, 291 NLRB 773, 774-75 (1988) (finding complaint barred by 10(b) where the parties' contract had long since expired and the union clearly knew more than six months prior that the employer was no longer contributing to contractual benefit funds).

[29] *Cf. Moeller Bros. Body Shop,* 306 NLRB 191, 192-93 (1992) (Section 10(b) precluded finding that employer violated 8(a)(5) by unilaterally failing to make fringe benefit payments on behalf of pre-journeymen employees where the union could have readily discovered that the employer did not consider them to be covered by the contract if the union had made minimal effort to monitor the employer's facility).

Accordingly, we conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by discontinuing contributions to the Union's benefit funds following the expiration of the parties' collective-bargaining agreement without providing notice or an opportunity to bargain.

/s/
B.J.K.

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