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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15**

AUSTIN FIRE EQUIPMENT, LLC

Respondent,

and

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

Union.

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Case No. 15-CA-019697

**COUNSELS FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO UNION'S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

COMES NOW Kevin McClue and Caitlin E. Bergo, Counsels for the Acting General Counsel (Counsels) in the above-styled matter and files this brief with the National Labor Relations Board (Board).

I. STATEMENT OF THE CASE¹

On November 29, 2011, Administrative Law Judge Margaret G. Brakebusch (ALJ) issued her Decision and Order (ALJD) in this matter in which she concluded that Section 8(f) rather than Section 9 (a) of the Act governs the relationship between the parties. The ALJ

¹ Reference to the Exhibits of the General Counsel and Respondent will be designated as "GCX" and "RX" respectively, with the appropriate number or numbers for those exhibits. The Joint Exhibits of General Counsel and Respondent will be designated as "JX". Reference to the transcript and the ALJD in this matter will be designated as "Tr." and "ALJD" respectively. An Arabic numeral(s) after "Tr." or "ALJD" is a spot cite to a particular page of the transcript or the ALJD; and an Arabic numeral(s) following a page spot cite references specific lines of the page cited. E.g. Tr. 15, 13-16 is transcript page 15 at lines 13-16.

found that Respondent violated Section 8(a)(1) and (5) of the Act as alleged in paragraph 11 of the Complaint and Notice of Hearing (Complaint) issued on January 31, 2011, and dismissed Complaint paragraphs 13, 14, 15, 16, and 17.

On January 10, 2012, the Union filed Exceptions to the Administrative Law Judge's Decision (Exceptions) and a Brief in Support of Exceptions. Therein, the Union made seven (7) exceptions as noted below:

1. The Union excepted to the ALJ's failure to recognize the parties' express 2008 NLRA Section 9(a) agreement as contrary to the undisputed facts of the case and well-settled NLRA precedent (ALJD 21).

2. The Union excepted to the ALJ's attempt to distinguish the Board's decisions in *MFP Fire Protection*, 318 NLRB 840 (1995), *enf'd*, 101 F.3d 1341 (10th Cir. 1996), *Triple A Fire Protection*, 312 NLRB 1088 (1993), *enf'd*, 136 F. 3d 727 (11th Cir. 1998), *cert. denied*, 544 U.S. 948 (2005), and *American Automatic Sprinkler Systems, Inc.*, 323 NLRB 920 (1997), *enf'tment denied in part*, 163 F. 3d 209 (4th Cir. 1998), *cert. denied*, 528 U.S. 821 (1999), as contrary to well-settled NLRB precedent (ALJD 15-16).

3. The Union excepted to the ALJ's erroneous attempt to create an ambiguity in the parties' NLRA Section 9(a) agreement as contrary to the undisputed facts and applicable NLRA precedent (ALJD 6-18).

4. The Union excepted to the ALJ's consideration of purported extrinsic evidence as contrary to applicable NLRA precedent and as based on a misreading of the undisputed record (ALJD 18-21).

5. The Union excepted to the ALJ's conclusion that the parties entered into an NLRA Section 8(f) agreement on July 8, 2008, as contrary to the undisputed facts, applicable

NLRB precedents, and the plain language of Section 8(f) itself (ALJD 21).

6. The Union excepted to the ALJ's alternative finding that this case should be determined under the United States Court of Appeals for the D.C. Circuit's decision in *NLRB v. Nova Plumbing*, 330 F. 3d 531 (D.C. Cir 2003), on the basis that *Nova Plumbing* is contrary to well-settled NLRB precedent and that a challenge to the recognition agreement in this case would, in any event, be barred by Section 10(b), an issue not presented by *Nova Plumbing*, 330 F.3d at 538-39 (ALJD 27-29).

7. The Union excepted to the ALJ's erroneous failure to conclude that Respondent was barred by NLRA Section 10(b) from challenging the validity of its 2008 NLRA Section 9(a) recognition of the Union (ALJD 29-30).

II. STATEMENT OF FACTS

Counsels concur with the facts of the case as stated by the ALJ in the ALJD.

III. EXCEPTIONS 1-5

The Counsels concur with the Union's exceptions to extent they assert the ALJ improperly found the Acknowledgment standing alone did not establish a Section 9(a) relationship between the parties.

IV. EXCEPTION 6

Although Counsels agree with the Union that the plain language of the Acknowledgment was sufficient to unambiguously establish the parties' intent to establish a Section 9(a) relationship, the Counsels assert that a better view of the law would require the Board to overrule *Central Illinois*, 335 NLRB 717 (2001) to the extent that case precludes the Board from reviewing whether a union actually enjoyed majority support at the time the employer purported to grant it Section 9(a) recognition.

In *Nova Plumbing, Inc.*,² 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."³ 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-Altman)*, 366 U.S. 731 (1961).⁴ The D.C. Circuit explained:

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-Altman'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-Altman*].⁵

In the instant case, while the Acknowledgement form clearly states the Respondent recognized the Union based on the Union's contemporaneous showing of evidence of its majority support,

² 330 F.3d 531 (D.C. Cir 2003).

³ *Id.* at 537.

⁴ *Id.*, citing 366 U.S. 731 (1961). In *Bernhard-Altman*, 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.

⁵ *Id.* at 537.

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 Respondent granted it Section 9(a) recognition. Indeed, the fact the unit employees signed Union membership forms in the days and weeks following execution of the Acknowledgement would suggest 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.⁶

⁶ Other cases also illustrate that same point. In *Triple C Maintenance*, 327 NLRB 42 n.2, 44-45 (1998), enf. 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 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.

The employees' 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 the union lacked majority support at the time of recognition, while permitting employees to challenge that union's 9(a) status at any time with 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].'"⁷ 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."⁸

⁷ *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), enf'd. 601 F.2d 575 (3rd Cir. 1979). Accord, *Brown & Connolly*, 593 F.2d 1373, 1374 (1st Cir. 1979).

⁸ *Sound Contractors Assoc.*, 162 NLRB 364, 365 (1966); *Jack Williams, D.D.S.*, 231 NLRB 845, 846 (1977).

The Board formerly had just such a test in the construction industry.⁹ 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.¹⁰ However, in view of the criticism that the *Central Illinois* standard invites abuse,¹¹ the Board's former extrinsic evidence test would better serve the interests of the parties and the public where employees are challenging a union's Section 9(a) status or where the employer has presented evidence a union did not in fact enjoy majority status at the time of the Section 9(a) recognition.

Under the proposed rule, contractual language that meets the standards set forth in *Central Illinois* will be sufficient to establish a rebuttable presumption of Section 9(a) status for the employer who is a party to the contract. The employer may rebut the presumption of Section 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 Section 9(a) relationship.

⁹ 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).

¹⁰ 219 F.3d at 1155.

¹¹ 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);

Regarding employee challenges, however, the contractual language will not create a rebuttable presumption of Section 9(a) status since the employees are not party to the recognition clause. Rather, the union will be presumed to be a Section 8(f) representative. Under *John Deklewa & Sons*, 282 NLRB 1375 (1987), 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 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.*, 331 NLRB 304 (2000). 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 Section 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 Section 9(a) recognition.¹² 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 Section 9(a) recognition.¹³

In this case, the employees are not challenging the Union's 9(a) status. Rather, it is the Respondent that contends that, despite the language of the Acknowledgement form, there is no evidence the Union showed or offered to show majority support at the time the Respondent

Saylor's, Inc., 338 NLRB at 330-33 (Member Cowen, dissenting)(quoting *American Automatic Sprinkler Sys. Inc.*, 163 F.3d at 222).

¹² *Id.* at 304-05.

purportedly granted 9(a) recognition. Accordingly, under the proposed rule, there would be a rebuttable presumption of Section 9(a) status, and the Respondent would have the burden of establishing that the Union did not enjoy majority support at the time of the agreement.

Here, the record demonstrates that on the date the Employer entered into the collective bargaining agreement with the Union, the Union never showed or offered to show the Respondent 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.

Based on the proposed rule noted above, the ALJ correctly found the parties enjoyed a Section 8(f) relationship and not a Section 9(a) relationship.

V. EXCEPTION 7

The Union also argues that Section 10(b) bars the Respondent's untimely challenge to the Respondent's voluntary recognition of the Union. While current Board law would preclude Respondent from actually challenging the Union's Section 9(a) status because more than six months had passed before it withdrew recognition from the Union, Counsels urge the Board to reconsider the Board's policy under *Casale Industries*, 311 NLRB 951 (1993) of treating voluntary 9(a) recognition in the construction industry under the same 10(b) rules that apply to employers outside of that industry, as established in *Machinists Local 1424 v. NLRB (Bryan Mfg. Co.)*.¹⁴ This is not to say that the Section 10(b)-based policy the Board approved in *Casale* 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

¹³ Id.

¹⁴ 362 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 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

bargaining relationships.¹⁵ 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 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 Section 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.¹⁶ 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.

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 than 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.

¹⁵ 219 F.3d. at 1159.

¹⁶ 311 NLRB at 953.

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.¹⁷ Practically, the question whether a stranger union purporting to be the employees' representative is lawfully 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.¹⁸

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 Section 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.¹⁹ Because of *Deklewa*, a Section 9(a) contract in the construction industry does not have the same immediate consequences for employers and employees as would a Section 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

¹⁷ See *Bernhard-Altmann*, 366 U.S. at 736-38.

¹⁸ *Bryan Mfg. Co.*, 362 U.S. at 418.

¹⁹ *Deklewa*, 282 NLRB at 1387.

ordinarily would have no effect on their day to day relations under the contract.²⁰ 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 Section 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 unfair labor practice.”²¹ 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 fact lacks majority support.²² 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.

²⁰ 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.

²¹ 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-Altman*, 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

Considerations similar to these led the Board to conclude in *Brannan Sand & Gravel Co.*,²³ that nothing in the 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.²⁴

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."²⁵ *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, the Board should reconsider *Casale's* rationale for engrafting a six-month rule for challenging Section 9(a) recognition in the construction industry. *Casale* is vulnerable to the criticism that it attempts to grant a Section 9(a) protected status to bargaining relationships in the construction industry in circumstances where the language of Section 8(f) suggests that a different treatment would better accord with Congress' intent. A better rule.

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).

²² 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").

²³ 289 NLRB 977, 982 (1988).

²⁴ *Id.* at 982.

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.²⁶

In sum, because *Casale*'s six month time limit neither has a functional relationship to the critical differences between a Section 9(a) relationship and a Section 8(f) relationship nor has a firm legal basis in view of Section 8(f)'s privileging nonmajority bargaining in the construction industry, the Board should 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 Section 9(a) representative.

Based on the above, the ALJ correctly stated that "it is imperative that the Board be able to look beyond the 10(b) period to determine whether a union actually had majority support at the time that it was recognized or purported to have been recognized, as a 9(a) representative and I recommend the Board's adoption of such analysis." (ALJD 30, 34-37).

²⁵ 311 NLRB at 953 n.18.

²⁶ The Board, however, should not 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, Counsels are merely asking the Board to reconsider the application of *Casale* in the setting of a complaint alleging a Section 8(a)(5) withdrawal of recognition.

VI. CONCLUSION

Counsels respectfully submit, for the reasons detailed above, the Board should not grant the Union's Exceptions 6 and 7. Specifically, Counsels concur with the ALJ's finding that the Board should:

1. overrule *Central Illinois* to the extent it precludes the Board from reviewing whether a union actually enjoyed majority support at the time an employer purported to grant it Section 9(a) recognition, and
2. modify the Board's policy under *Casale Industries* of treating voluntary 9(a) recognition in the construction industry under the same 10(b) rules that apply to employers outside of that industry to allow claims of full 9(a) status to be appropriately challenged by employers and employees beyond the 10(b) period.

Dated at New Orleans, Louisiana this 6th day of February 2012.

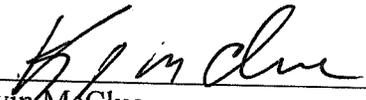

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2012, I electronically filed a copy of the Counsels for the Acting General Counsel's Answering Brief to Union's Exceptions to the Decision of the Administrative Law Judge in Case No. 15-CA-019697 to the National Labor Relations Board's Office of the Executive Secretary and forwarded a copy by electronic mail to the following:

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