

Comtel Systems Technology, Inc., Petitioner and National Electronic Systems Technicians Union and Northern California Electronics Systems Contractors Association and International Brotherhood of Electrical Workers, Local 617, AFL-CIO, Intervenor. Case 20-RM-2710

September 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY, OVIATT, AND RAUDABAUGH

On July 27, 1989, a three-member panel of the National Labor Relations Board granted Comtel's request for review of the determination by the Regional Director for Region 20 that Comtel's petition for an election among its technicians is barred by the contract between the Northern California Electronics Systems Contractors Association (NCESCA), of which Comtel is a member, and the National Electronics Systems Technicians Union (NESTU). Thereafter, Comtel and NCESCA filed briefs with the Board.

The Board has considered the record in light of the request for review and briefs and has decided to reverse the Regional Director's decision, reinstate the election petition, and remand the case to the Regional Director for further processing.

I. FACTS

The parties stipulated at a hearing conducted in this case, that Comtel is a construction industry employer engaged in the installation of low-voltage electrical systems. Its work force, like that of the other employer-members of NCESCA, is a permanent and stable one¹ Until May 31, 1988,² Comtel had been party to numerous successive collective-bargaining agreements with International Brotherhood of Electrical Workers, Local 202 through its membership in the employer association NCESCA³ For reasons not related to the issues in this case, employees who had been represented by Local 202 decided to form a new union, and on May 24 they created NESTU⁴ On that date, three of Comtel's six technicians signed forms authorizing NESTU to represent them.⁵

¹ The parties stipulated further that employees of the employer-members are trained primarily on the job; the employers maintain a repeat business with customers, often providing maintenance services on the systems they install; and NESTU does not refer employees or operate a hiring hall and neither did the union with which NCESCA previously had had a bargaining relationship.

² All dates are in 1988.

³ The last collective-bargaining agreement between NCESCA and Local 202 expired on May 31. The unit in question is composed of low-voltage technicians.

⁴ Local 202 subsequently merged with International Brotherhood of Electrical Workers, Local 617, the Intervenor.

⁵ One of the three authorization forms signed on May 24 was admitted into evidence and two were rejected. By way of proffers that

On May 25, NESTU demanded bargaining with NCESCA, stating that it represented a majority of the employer-members' employees and other former Local 202 members. NESTU reduced its claim of majority representation to writing on May 26 at the request of NCESCA President Dale Kirkland, and Kirkland in turn, on May 27, secured bargaining authorizations from 13 employer-members, including Comtel⁶ At the first bargaining session, also on May 27, NESTU Attorney Robert Hooy explained that the Union had secured 115 representation authorizations from employees. Of that number, 70 were obtained from employees of NCESCA members who employed an aggregate of approximately 110 employees covered by the expiring collective-bargaining agreement between NCESCA and Local 202 (including 3 of the 6 Comtel employees). The remainder of the cards signed were from Local 202 members whose employers were not NCESCA members⁷ A contract was then negotiated between NCESCA and NESTU, but was rejected by the employees on May 31. A revised contract was ratified by employees in early June⁸ A fourth Comtel technician signed a NESTU representation authorization form after this contract had been ratified⁹ The revised contract was executed by NCESCA and NESTU on June 12. On October 11, Comtel filed the election petition giving rise to the instant proceedings.

were similarly rejected, counsel for NCESCA read the signatures and dates that appear thereon. The form that was admitted was allowed in because it was used to refresh the recollection of witnesses with respect to the sequence of events surrounding the creation of NESTU and the ratification of the NCESCA-NESTU agreement. Although excluded on other grounds, the authenticity of the other two forms was not questioned by the judge or the parties.

⁶ The bargaining authorization executed by Hintz, Comtel's president, is captioned "General Assent and Bargaining Authorization" and specifically authorizes NCESCA to bargain with NESTU on Comtel's behalf.

⁷ NESTU's financial secretary, Mark Day, testified that in the week prior to the commencement of negotiations, he had three or four telephone conversations with Kirkland in which he and Kirkland compared each employer-member's employee complement with the running tally Day was keeping of the number of employees from whom NESTU had obtained authorizations. Day further testified that he told Kirkland in one of these conversations that NESTU had secured authorizations from four Comtel employees, a claim not otherwise supported in this record.

⁸ The revised contract was initially ratified by employees in the multiemployer group on a shop-by-shop basis on June 6, but no response was received from the Comtel employees during the course of this vote. After the initial ratification, Comtel employees complained that they had not been afforded an opportunity to vote on the contract. A meeting was conducted on June 9 to allow for their vote, and the contract was then reratified.

⁹ Employee Michael DiPasquale's authorization form is dated June 6, but he testified uncontrovertedly that that date is incorrect and that he signed the form on June 9 or 10, after the newly negotiated contract between NCESCA and NESTU was ratified. We note that the date which appears on this authorization card is subsequent to the dates NCESCA recognized NESTU and commenced bargaining with that union. Even had DiPasquale's authorization card been signed on June 6, the outcome of this case would not be affected, as explained below.

II. CONTENTIONS OF THE PARTIES

Comtel and the Intervenor contend that an 8(f) relationship exists between NCESCA and NESTU as to all employees covered by this multiemployer contract, and that under the principles enunciated in *John Deklewa & Sons*, 282 NLRB 1375 (1987), Comtel is privileged to petition for an election to determine whether NESTU represents a majority of its employees. Alternatively, they contend that regardless of the nature of the relationship between NCESCA and NESTU, Comtel employees in particular are represented only under an 8(f) relationship because no showing has been made that NESTU represented a majority of Comtel employees at the time recognition was granted. Accordingly, under *Deklewa* principles, they argue, the RM petition should be processed to an election among the *Comtel* employees in a single-employer unit.

NCESCA contends that a 9(a) relationship exists between the parties, and that the collective-bargaining agreement executed June 12 is a bar to an election. In addition, NCESCA contends that the unit covered by Comtel's RM-petition (i.e., Comtel technicians) is inappropriate and that the appropriate unit for purposes of any election is the multiemployer unit.

III. DISCUSSION

For purposes of the issue we find dispositive of this case, we assume, without deciding, that the construction industry multiemployer association, NCESCA, and the union, NESTU, formed a collective-bargaining relationship under Section 9(a) of the Act, when NCESCA granted NESTU's request for recognition as the 9(a) exclusive bargaining representative. As set out above, NCESCA granted that recognition on the basis of NESTU's representation that it had secured authorization cards from a majority of the employees in the overall unit made up of the technician employees of the 13 employer-members of NCESCA. Under familiar contract bar rules, a collective-bargaining agreement executed in the context of a 9(a) relationship will ordinarily bar an election in the unit covered by the agreement during its term for a period not to exceed 3 years. *General Cable Corp.*, 139 NLRB 1123 (1962).

The question presented is whether, in the construction industry, such an agreement will bar an election in a unit consisting of the employees of an individual employer-member of the multiemployer association if it is not established that a majority of that employer's employees in the classification covered by the agreement had expressed a desire for union representation at the time recognition was extended by the multiemployer association. For reasons set forth below, we find no contract bar in those circumstances, and we find that the individual employer's employees are not merged into the multiemployer unit so as to make them an inappropriate unit for an election. Accord-

ingly, we find that the NCESCA-NESTU collective-bargaining agreement is not a bar to the RM-petition filed by Comtel, and that the single-employer unit of Comtel technicians is an appropriate unit for purposes of the petitioned-for election.

A. Applicable Principles

Because this case arises in the construction industry, we must consider the special provisions governing bargaining relationships in that industry set out in Section 8(f) of the Act, and the Board's modification, in *John Deklewa & Sons*, supra, of its earlier views concerning how relationships normally governed by Section 8(f) might be converted to, or initially established as, collective-bargaining relationships governed instead by Section 9(a). In particular, we focus on the establishment of 9(a) relationships between unions and individual members of construction industry multiemployer associations.

Both before and after the issuance of *Deklewa*, construction industry employers have been free to enter into collective-bargaining agreements with unions without regard to whether a majority of their employees wanted union representation or whether the employers even had employees at the time they entered the agreements. Before *Deklewa*, employers could lawfully repudiate such 8(f) agreements at any time, and, pursuant to the second proviso of Section 8(f), such agreements would "not be a bar" to election petitions filed under Section 9(c) or (e) of the Act by employees, employers, or unions. *Deklewa*, 282 NLRB at 1378. A construction industry bargaining relationship could, however, be found to have "converted" to a 9(a) relationship on such grounds as a showing that a majority of the unit employees belonged to the union or that the agreement contained an enforced union-security clause. *Id.* and cases there cited. Once conversion occurred, any existing agreement or any agreement thereafter executed (if loss of union majority were not shown in the interim) acquired full 9(a) status. *Id.* at 1379. It would therefore logically bar election petitions under ordinary contract-bar principles.

With respect to multiemployer associations, the status of the collective-bargaining relationship between the association and the union governed the relationship between an individual employer-member and its employees. Thus, if a single employer joined an association that had a 9(a) relationship with a union and adopted the agreement, that employer was deemed to have a 9(a) relationship and the employer's employees were considered to have merged into the larger unit. *Id.*, citing *Amado Electric*, 238 NLRB 37 (1978); and *Authorized Air Conditioning Co.*, 236 NLRB 131 (1978). Moreover, in both *Amado* and *Authorized Air Conditioning*, the Board stated that the employees of the individual employer could be merged into a multi-

employer unit operating under Section 9(a) without regard to whether a majority of that employer's employees supported the union at the time the employer joined the multiemployer association and became bound by its agreement. *Amado*, supra at 37 fn. 1; *Authorized Air Conditioning*, supra at 131 fn. 2. In *Deklewa*, however, the Board noted that the law was not entirely certain on this point, because the presence of evidence of majority union support among the single employer's employees in both cases meant that the Board's statements could be considered dictum. 282 NLRB at 1379 fn. 14.¹⁰

In any event, as noted above, the Board in *Deklewa* announced a new construction of the law governing construction industry bargaining relationships. Among other holdings, it stated that employers—whether bargaining on an individual basis or as members of a multiemployer association—would no longer be free to repudiate 8(f) agreements during their term. Id. at 1385. As specified in the second 8(f) proviso, however, the agreements would still not bar petitions for elections, including elections conducted pursuant to an “RM petition” filed by an employer; and an RM petition could be filed by an employer without the necessity of showing “objective considerations” for believing that majority support for the union did not exist. Id. at 1385 & fn. 42. The employer's demonstration that it had signed an 8(f) agreement would be sufficient to support such a petition; and, in the construction industry, it would be presumed, until shown otherwise, that a collective-bargaining relationship was 8(f) rather than 9(a). Id. at 1385 & fns. 41 and 42. Accord: *J & R Tile*, 291 NLRB 1034, 1036 (1988). A bargaining agreement entered into as an 8(f) agreement would continue to be regarded as such regardless of whether a majority of the employees had become union members in the interim, because the Board in *Deklewa* also overruled its so-called conversion doctrine. Id. at 1385, 1386.

With regard to the determination of an appropriate unit in which to conduct an election, the Board held that “single employer units will normally be appropriate” (id. at 1385). Most significantly for purposes of this case, the Board overruled *Authorized Air Conditioning* and its progeny (id. at 1384), and “reject[ed] the so-called merger doctrine's applicability to [Section] 8(f) cases.” Id. 1385 at fn. 42. Specifically, it held that “the employees of a single employer cannot be precluded from expressing their representational desires simply because their employer has joined a multiemployer association.” Id.

¹⁰As the *Deklewa* Board further noted, the court of appeals that enforced the order in *Authorized Air Conditioning*, specifically relied on evidence of majority support in the smaller unit in concluding that the employees had been merged into the multiemployer unit. Id., citing *Authorized Air Conditioning Co. v. NLRB*, 606 F.2d 899, 905–906 (9th Cir. 1979).

In our view, it is consistent with the foregoing principles and with the Board's overruling of *Authorized Air Conditioning*, to hold that an employer that has designated a multiemployer association as its collective-bargaining representative will be bound by any agreement reached by that association, but the agreement will not be binding as anything other than an 8(f) agreement in the absence of a showing that a majority of the employees in the employer's covered work force had manifested their support for the union before the employer became bound by the agreement. Therefore, the individual employer's covered employees remain an appropriate unit for an 8(f) proviso election, and the agreement does not bar an election in that unit on a petition (including an RM petition) filed under Section 9(c) or (e).

Finally, we note that this resolution of the issue is not—as NCECSA contends—inconsistent with the statements in *Deklewa* that the “normal presumptions” of majority status will “flow from voluntary recognition accorded to a union by the employer of a stable work force where that recognition is based on a clear showing of majority support among the . . . employees” and that unions seeking recognition from such employers in the construction industry will not have “a less favored status” than those seeking recognition from employers outside of that industry. Id. at 1387 fn. 53. If an employer outside the construction industry joined a multiemployer association and became bound to an agreement negotiated by that association, that agreement would be vulnerable to an 8(a)(2) charge filed within 6 months of the employer's action if a majority of the individual employer's employees had not manifested their support of the union prior to the employer's adoption of the agreement. *Mohawk Business Machines Corp.*, 116 NLRB 248 (1956). Construction industry employers are, of course, immune to such premature recognition challenges by virtue of Section 8(f), which permits the execution of agreements without regard to majority support. The second 8(f) proviso allowing for elections without regard to contract bar is a limited analogue to the unfair labor practice challenge available outside the construction industry.¹¹

¹¹See *Alton-Wood River Building Trades Council (Kapp-Evans Construction)*, 144 NLRB 260 (1963). There, in ruling on a defense to an 8(b)(7)(A) picketing charge, the Board noted that the employer picketed by the respondent union would probably have violated Sec. 8(a)(2) of the Act through its act of binding its unconsenting employees to representation as part of a multiemployer unit in which another union was recognized, except that the 8(f) construction industry exemption permitted such voluntary recognition without regard to employee choice. Id. at 262–263. The Board then noted the 8(f) safeguard that the multiemployer agreement would “not be a bar to a petition filed under Section 9(c).” Id. at 262–263. Because a question concerning representation could thus be raised regarding the individual employer's employees, notwithstanding the existence of the multiemployer collective-bargaining agreement with an incum-

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Therefore, when, as here, (1) a union seeks full 9(a) status as the exclusive bargaining representative of employees in a multiemployer unit, and the multiemployer group voluntarily extends such recognition, (2) within a reasonable time after such recognition is extended, a question is raised about the existence of majority support among the employees of a member employer at the time the association granted recognition, and (3) the record fails to show that a majority of the single employer's employees supported the union at that time,¹² we conclude that allowing an election in which the views of the single employer's employees can be ascertained before they are merged into the larger unit is a reasonable means of striking a "balance between the legitimate and often conflicting congressionally expressed policies embodied in Section 8(f) and the Act as a whole." *Deklewa*, supra, 282 NLRB at 1385.

Our dissenting colleague apparently does not take issue with the principles we are applying here with respect to cases not involving initial recognition. Thus, we assume, he would reach a different result if Comtel, instead of becoming a member of the multiemployer group in its initial formation, had joined at some later stage, after NCECSA had already established a 9(a) relationship with NESTU. We fail to see a principled basis for the distinction. We believe that the circumstances of this case are plainly within the rationale of *Deklewa* for rejecting the merger doctrine with respect to construction industry employers and the rationale of *Mohawk Business Machines*, supra, for finding that an employer outside the construction in-

bent union, the Board held that the picketing union did not violate Sec. 8(b)(7)(A), which proscribes picketing "where the employer has lawfully recognized . . . any other labor organization and a question concerning representation cannot be raised under section 9(c) of this Act."

¹²We recognize, as our dissenting colleague points out, that a non-construction-industry employer who voluntarily recognizes a union, subsequently reneges, and then defends against an 8(a)(5) charge by contending that the union lacked a majority at the time of recognition has an initial burden of proof on the question of majority status. *Royal Coach Lines*, 282 NLRB 1037 & fn. 2 (1987), enf. denied on factual grounds 838 F.2d 47 (2d Cir. 1988). *Moisi & Son Trucking*, 197 NLRB 198 fn. 2 (1972). But those cases did not involve recognition through a multiemployer association. Further, because they did not involve construction industry employers, there could be no ambiguity concerning the nature of the recognition the employer had initially agreed to extend. In this regard, we note that the NCECSA bargaining authorization document executed by Comtel's president does not allude to the type of relationship in which bargaining was to take place, nor does the 1988-1990 agreement expressly state whether it is 8(f) or 9(a). Cf. *Best Plumbing Co.*, 283 NLRB 1167 fn. 2, 1170 (1987) (clear and unequivocal evidence required to show employer assent to group bargaining).

In any event, we note that evidence was proffered concerning authorization cards signed by Comtel employees, and our dissenting colleague agrees that NESTU did not have a card majority among Comtel employees at the time of recognition by NCECSA. We also note that, in its brief to the Board, NCECSA simply relies on the evidence of union majority within the larger multiemployer unit.

dustry violates Section 8(a)(2) if it seeks to include its employees in a multiemployer unit without majority support among those employees. In *Deklewa* the Board explained, albeit in dictum (282 NLRB at 1385 fn. 42):

In [the construction] industry the merger doctrine can operate to bind a single employer and its employees to full 9(a) status without providing the employees any opportunity to express their representational preferences because Sec. 8(f) eliminates majority status as a prerequisite for signing a contract. . . . [W]e do not imply that multiemployer associations and multiemployer bargaining are no longer appropriate in the construction industry. Rather, we hold that the employees of a single employer cannot be precluded from expressing their representational desires simply because their employer has joined a multiemployer association.

Similarly, in *Mohawk Business Machines*, the Board stated simply that an employer cannot "unilaterally and without the express or implied consent of the employees bind them to representation in a multiemployer unit." 116 NLRB at 249. The concerns expressed for employee choice in each case were not described as concerns which would logically attach only to the binding of employees into an established multiemployer unit, as opposed to one that was being initially formed. Furthermore, in neither situation is the stability of a long-established bargaining relationship threatened by allowing the employees of the individual employer to express their views through a Board election. In the cases in which our dissenting colleague would agree that an election is permissible, the individual employer is a newcomer to an established multiemployer unit. In cases such as the present one, the multiemployer unit had barely begun its existence before the filing of the individual employer's petition challenging the inclusion of its employees.¹³ Hence, we reject the view that the principles we apply here are inapposite because the case involves initial recognition.¹⁴

¹³The petition was filed approximately 5-1/2 months after recognition was extended. We do not pass on whether a different result would have obtained if the petition had been filed later or under a succeeding contract.

¹⁴Those principles are also not inapposite simply because an RM petition, rather than an RC petition, is presented here. Comtel's petition legitimately raises a question whether there was majority support for NESTU before the attempt to sweep the employees under the coverage of a binding 9(a) multiemployer agreement; and if there is now a majority in favor of such representation, that choice can be vindicated in the election pursuant to the RM petition.

Our dissenting colleague makes the observation that if NESTU had petitioned for an election in the existing multiemployer unit, the Board would have proceeded with an election in that unit and, if NESTU had won, would have included Comtel's employees in that unit even if they had voted against union representation. Because the scenario posed by our colleague is not presented in this case, we need not reach this issue.

B. The Effect of the Multiemployer Agreement on the Petition for an Election in the Unit of Comtel Technicians

Comtel's formation of a relationship with NESTU essentially involves an initial recognition situation, since there is no contention that either NESTU or the Intervenor, Local 617, is a successor to the previously recognized Local 202 under "continuity of representation" principles. Cf. *Western Commercial Transport, Inc.*, 288 NLRB 214 (1988). It is undisputed that Comtel is a construction industry employer and the employees who would be covered by the collective-bargaining agreement are construction industry employees. The Comtel-NESTU relationship is therefore presumptively an 8(f) relationship.

For the reasons stated in section A, above, assuming arguendo that a 9(a) relationship arose between NCESCA and NESTU, Comtel's act of joining NCESCA and assenting to the multiemployer agreement did not make it subject to a 9(a) relationship with NESTU and did not merge its employees into the larger unit unless majority support among the Comtel employees was manifested prior to that assent.¹⁵ As shown in our recitation of the facts (part I, above), only three of Comtel's six employees had signed NESTU authorizations prior to May 27, when NCESCA extended 9(a) recognition to NESTU on the basis of the asserted majority in the overall multiemployer unit. The day on which NCESCA stated it was granting 9(a) recognition was the critical day—either the Comtel unit was merged into the multiemployer unit in a 9(a) bargaining relationship at that time or it remained subject to the normal presumption of 8(f) status for construction industry bargaining relationships. Events occurring after that date (such as a fourth Comtel employee's signing a NESTU card after a multiemployer contract had been executed and ratified) cannot operate nunc pro tunc to transform circumstances as they existed before.

In sum, given the overruling of *Authorized Air Conditioning in Deklewa*, if a labor organization desires to achieve status as a 9(a) representative of employees of employers in a construction industry multiemployer association—and therefore eliminate the potential for 8(f) proviso elections that would test its majority during a contract's term—it must have the manifest support of a majority of the employees of any individual employer whose employees it seeks to merge into the unit under a 9(a) agreement. NESTU did not have majority support among the Comtel technicians when the events asserted to create the 9(a) NCESCA-NESTU re-

lationship occurred, so when Comtel filed its RM petition, it was doing so as an employer bound by an 8(f) agreement filing for an election in an appropriate single-employer unit. The agreement therefore did not constitute a bar to the election. Inasmuch as the petition was properly filed, we shall remand this case to the Regional Director for further processing of the petition.

ORDER

It is ordered that the petition is reinstated and that this proceeding be remanded to the Regional Director for Region 20 for action consistent with this Decision and Order.

MEMBER DEVANEY, dissenting.

The Employer, Comtel, is in the construction industry. Comtel filed an RM petition for an election in a unit limited to Comtel's employees. The Regional Director found that the National Electronic Systems Technicians Union (NESTU) had a 9(a) relationship with the multiemployer group of which Comtel was a part and that the bargaining agreement between NESTU and the Northern California Electronics System Contractors Association (the Association) barred Comtel's petition. Thus, the Regional Director dismissed the petition. Contrary to the majority I would affirm the Regional Director's dismissal. Because I believe the majority's decision undermines voluntary 9(a) recognition and seriously erodes the viability of multiemployer units, I dissent at some length.

For 30 years prior to May 1988¹ employees were represented by IBEW Local 202. Since the early 1970s IBEW bargained with the Association. In April and May IBEW Local 202 members formed a new union—NESTU.

After obtaining authorization cards from 115 technicians present at a meeting, NESTU requested that the Association recognize it as the representative of the multiemployer group's employees. After learning from its members that NESTU represented a majority of their employees and after NESTU certified in writing that it possessed a card majority, the Association recognized NESTU. NESTU also informed the Association's bargaining committee that it had 70 cards from the 110 employees working for employer members of the Association² Apparently the Association never asked to examine the cards, and NESTU never showed the Association the cards. NESTU did not at that time have a card majority among Comtel's own employees. There is no dispute, however, that Comtel was then a member of the multiemployer group.

¹⁵ Since NESTU did not achieve majority support among the Comtel employees prior to Comtel's assent to the multiemployer agreement, we need not reach the issue of whether NESTU must demonstrate its majority support to Comtel before a 9(a) status can attach.

¹ All dates are in 1988 unless otherwise noted.

² NESTU also said it had 45 cards from employees who worked for non-Association employers.

On May 31 NESTU members rejected a tentative bargaining agreement. After modifications were made on June 6, the agreement was submitted to unit employees on a shop-by-shop basis. A majority of unit employees approved the modified agreement, but Comtel's employees did not respond. NESTU submitted the modified agreement for ratification at the June 9 general membership meeting. The agreement was unanimously ratified by those present, including Comtel employees. Subsequently, the agreement was unanimously ratified by the multiemployer group. The contract was effective from June 1, 1988, through May 31, 1990.

I would affirm the Regional Director's decision that NESTU was voluntarily recognized as the 9(a) representative of the employees in the multiemployer unit. Although the majority's decision does not turn on what it takes to show voluntary 9(a) recognition in the construction industry, the decision, in my opinion, undermines such voluntary recognition. I would, so far as practicable, treat voluntary recognition in the construction industry the same as in any other industry. *Deklewa*, footnote 53, states,

We do not mean to suggest that the normal presumptions would not flow from voluntary recognition accorded to a union by the employer of a stable work force where that recognition is based on a clear showing of majority support among the unit employees, e.g., a valid card majority. *Island Construction Co.*, 135 NLRB 13 (1962). That is, nothing in this opinion is meant to suggest that unions have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry.³

The first sentence permits voluntary 9(a) recognition. The second suggests the standard should be the same as that in the nonconstruction industries.

In nonconstruction industries valid voluntary recognition has three primary requirements: (1) The union must request recognition as a majority representative⁴ (2) The employer must accept the union as the majority representative⁵ (3) Recognition must be in a lawful unit.⁶

³ *John Deklewa & Sons*, 282 NLRB 1375, 1387 fn. 53 (1987).

⁴ Requests can take many forms. The request must be as a majority representative. Recognition granted because of 8(b)(7)(C) picketing is suspect.

⁵ This can be done on the basis of a card check, a poll, or the union's assertion it represents a majority.

⁶ Voluntary units, as with stipulated units, need not conform to what the Board would find appropriate. An employer who voluntarily recognizes a minority union is subject for 6 months to an 8(a)(2) charge. Also, an employer who reneges on voluntary recognition can defend against an 8(a)(5) charge by proving that the union did not represent a majority at the time recognition was conferred, but it is the employer's burden of proof. *Royal Coach Lines*, 282

Because Section 8(f) permits lawful voluntary recognition of minority unions in the construction industry, voluntary 9(a), as opposed to 8(f), recognition must be clearly shown⁷ I would not, however, require an actual demonstration of majority support through an election, a card check, or a poll. Instead, I would require, just as in any other industry, evidence that the union requested and the employer extended recognition as the majority representative⁸ Thus, if it is clear the parties understood they were entering into a 9(a) relationship, I would find a valid 9(a) relationship.

In this case the Union certified in writing that it represented a majority of the Association employers' employees and informed the Association's bargaining committee it had cards from 70 of the 110 employees. The Association did not recognize the Union until after it had learned from its members that the Union represented a majority and it had received the Union's certification. This is positive evidence that the Union sought and the Association extended recognition to the Union as the 9(a) representative. Thus, this case involves both what is sufficient proof of majority status for establishing voluntary 9(a) recognition in the construction industry and what is the appropriate unit for bargaining. The majority holds that this is not the appropriate unit and therefore finds it unnecessary to address the voluntary recognition issue. To the contrary, because I believe there is sufficient proof of voluntary recognition in an appropriate unit here, I agree with the Regional Director that NESTU was recognized as the 9(a) representative of the unit employees.

This case involves the viability of voluntarily recognized multiemployer units in the construction industry. Contrary to the majority, I would not for the purpose of recognition treat multiemployer units differently from any other appropriate units. Multiemployer units are well established in this country⁹ They predate the Act. In fact they have been in existence for over 100 years.¹⁰ The Board has directed RC elections in multi-

NLRB 1037 (1987), enf. denied 838 F.2d 47 (2d Cir. 1988). (The court disagreed on the facts, not on the law. The court ably discusses the shifting burdens.) *Moisi & Son Trucking*, 197 NLRB 198 fn. 2 (1972).

⁷ *Deklewa* presumes an agreement in the construction industry is an 8(f) agreement (supra at 1385 fn. 41).

⁸ *J & R Tile*, 291 NLRB 1034, 1036 (1988). "[A]bsent a Board-conducted election, the Board will require positive evidence that the union sought and the employer extended recognition to a union as the 9(a) representative of its employees before concluding that the relationship between the parties is 9(a) and not 8(f)."

⁹ In 1938 the Board upheld the validity of multiemployer units. *Shipowners' Assn. of the Pacific Coast*, 7 NLRB 1002. During the debate on the 1947 amendments, attempts to prohibit and limit multiemployer units failed. In *NLRB v. Teamsters Local 449 (Buffalo Linen)*, 353 U.S. 87, 94-96 (1957), the Court upheld the Board's practice of certifying multiemployer units.

¹⁰ In 1888 the Associated Manufacturers of Pressed Glassware was formed to bargain with the Flint Glass Workers' Union. G. Somers, *Pressures on an Employers' Association in Collective Bargaining*, 6 Ind. & Lab. Rel. Rev. 557, 559 (1953). Multiemployer bargaining

employer units. *Employer Members of Grower-Shipper Vegetable Assn.*, 230 NLRB 1011 (1977) (32-year bargaining history); *Building Construction Employers Assn.*, 147 NLRB 222 (1964) (residual unit of all unrepresented employees of members of Lincoln Association, which had a history of multiemployer bargaining); *Alliance of Television Film Producers*, 126 NLRB 54 (1960) (multiemployer unit of musicians where multiemployer unit for other employees); *Calumet Contractors Assn.*, 121 NLRB 80 (1958) (multiemployer unit in existence for over 1 year); *Western Assn. of Engineers*, 101 NLRB 64 (1952) (collective-bargaining history not a prerequisite for a multiemployer unit as no party sought single employer units). The Board has found multiemployer units appropriate for RM petitions, *Milwaukee Independent Meat Packers Assn.*, 223 NLRB 922 (1976), for decertification petitions, *Taylor Motors*, 241 NLRB 711 (1979), and for residual unit petitions, *St. Luke's Hospital*, 234 NLRB 130 (1978) (dismissing petition as not coextensive with multiemployer unit of represented technicians). In none of these cases did the Board use separate voting groups for each employer's employees.

Had NESTU not obtained voluntary recognition but instead used its authorization cards to petition for an election in the existing multiemployer unit, the Board properly would have proceeded with an election in that unit.¹¹ Under well-established Board practice, had NESTU won such an election in the multiemployer unit, Comtel's employees would be included even if all of them had voted against union representation.¹² I see no reason the result should be different because NESTU was voluntarily recognized rather than certified.

In relying on the fact that NESTU did not represent a majority of Comtel's employees, my colleagues mistakenly apply the merger doctrine.¹³ The merger doc-

was in general use in the anthracite coal industry by 1903. Note, S. Perlman 66 Har. L. Rev. 886 (1953). Other multiemployer bargaining dates back to the early 1900s, notably in the pottery and construction industries. F. Pierson, *Multi-Employer Bargaining: Nature and Scope* 35 (1948).

¹¹ Bargaining history on the basis of an 8(f) relationship is a relevant, and even a determinative, factor in determining the appropriateness of a unit in the construction industry. *P. J. Dick Contracting*, 290 NLRB 150 (1988). Thus, even if predecessor IBEW Local 202 had only an 8(f) relationship with the multiemployer group, that relationship would be sufficient to establish the appropriateness of the multiemployer unit.

¹² Thus, the same result attaches to a multiemployer unit as it does to a multiplant unit. It is the vote of the entire unit, not the vote of any constituent segment, that governs.

¹³ Pre-*Deklewa* the General Counsel argued that, if an employer signed an appropriate letter of assent or joined a multiemployer bargaining association, its employees automatically merged and became

trine is inapplicable. This case involves the initial 9(a) recognition of NESTU as the representative of all employees in the multiemployer unit, not the merger of Comtel's employees into the multiemployer unit. Thus, it is the majority status in the unit as a whole that properly governs. In contrast, the merger doctrine involves the addition of a previously unrepresented group to an existing unit.¹⁴

By applying the merger doctrine to what is in fact an initial 9(a) recognition, the majority severely undermines the viability of multiemployer units in the construction industry. The majority's imposition of the merger doctrine on initial organization of multiemployer units effectively overturns 50 years of precedent. Such units have a long history, have been upheld by the Board and the Supreme Court, and have not been rejected by Congress. Contrary to my colleagues, I believe multiemployer units continue to play a vital role in industrial relations. Thus, I am reluctant to, and would not, overturn longstanding and well-supported precedent.

In accord with the above, I would find that, because Comtel was part of the multiemployer group at the time of the Association's initial 9(a) recognition of NESTU as representative of all the employees in the multiemployer unit, Comtel's employees are properly included in the multiemployer unit. As the collective-bargaining agreement between the Association and NESTU covers Comtel's employees as part of the unit, I would find, in accord with the Regional Director, that the agreement is a bar to the petition herein. Accordingly, I would dismiss the petition.¹⁵

a part of the multiemployer unit with a 9(a) relationship even though there was no evidence that the union represented any of the employer's own employees. *Deklewa*, 282 NLRB at 1385 fn. 42, expressly rejected the merger doctrine. Under *Deklewa* any such merger could not establish a 9(a) relationship nor prevent the testing of employee representational desires in the single employee unit. Former Member Dennis' concurrence in *C.I.M. Mechanical Co.*, 275 NLRB 685 (1985), rejected the merger doctrine because employees can be included in a multiemployer unit only by their expressed or implied consent and only a full 9(a) union can consent for employees. I do not disagree with either of these principles. I simply find that the merger doctrine is inapplicable.

¹⁴ If an unrepresented group of employees is not an accretion to a unit, the union must show that it represents a majority of the group before the employees may lawfully be added to the unit. At least since *Deklewa*, the Board has treated mergers into multiemployer units the same as additions to other existing units.

¹⁵ When there is an incumbent union, the voting unit for an RM petition must be coextensive with the existing unit. *K. Van Bourgondien & Sons*, 294 NLRB 268 (1989). In addition, established bargaining units will not be disturbed where they are not repugnant to the Act. *Fraser & Johnston Co.*, 189 NLRB 142, 151 fn. 50 (1971). Thus, there is additional reason to dismiss the petition.