

James Julian, Inc. and International Union of Operating Engineers, Locals 37 and 77, AFL-CIO, Petitioner. Case 5-RC-13826

May 6, 1993

ORDER DENYING REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions are attached). The request for review is denied as it raises no substantial issues warranting review. The Employer's request to stay the election is also denied as moot.¹

¹The only issues raised in the request for review were whether the Regional Director erred in finding that the current contract between the Employer and the Intervenor (United Steelworkers of America) was an 8(f) contract and, therefore, did not bar processing of the instant petition; and whether the Regional Director erred in retroactively applying the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987). In adopting the Regional Director's conclusion with regard to the 8(f) status of the Employer's current contract with the Intervenor, the Board does not find it necessary to determine the correctness of the Regional Director's additional finding that the pre-1970 project agreements were also 8(f) agreements.

Even if those project agreements were reached pursuant to Sec. 9(a), it has not been established that any presumption of continued majority support which might thereby have been created was applicable to the substantially altered and expanded multistate unit created by the subsequent agreements (including the agreement asserted to be a bar to this petition), which by their terms applied not to specific projects but to all work performed by the Employer in the specified geographic area.

APPENDIX

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

³James Julian, Inc. (the Employer or the Company) is a Delaware corporation with an office and its principal place of business in Wilmington, Delaware. The Employer is a contractor, engaged in the heavy and highway construction industry, which operates in the States of Maryland, Delaware, and Pennsylvania. For many years, since the early 1960s, the Employer has maintained a collective-bargaining relationship with the United Steelworkers of America, AFL-CIO (the Steelworkers or USWA), or with the labor organizations that were predecessors of the USWA. The most recent collective-bargaining agreement is effective for the period from April 8, 1991, to February 11, 1994. As described in this decision, the Employer and the Steelworkers maintain that the USWA is the 9(a) majority representative of the Employer's employees, and therefore this current agreement (Intervenor's Exh. 1) is a bar to the petition filed in this case.

The petition was filed by International Union of Operating Engineers, Locals 37 and 77, AFL-CIO (the Operating Engineers or IUOE). The petition was filed December 2, 1992,

during the term of the current contract between the Employer and the USWA. Nonetheless the Operating Engineers assert the petition is not subject to the "contract bar" rules. Rather, IUOE asserts that the Steelworkers and the Employer have had, at most, an 8(f) relationship, in which the Steelworkers have never established majority status among the Employer's employees. Therefore the IUOE argues that the Steelworkers have never achieved status as the employees' 9(a) majority representative, and under the rules of *John Deklewa & Sons*, 282 NLRB 1375 (1987), its representation petition is timely filed and the current collective-bargaining agreement does not bar its petition.

Operating Engineers amended the petition at the hearing, and all parties agree that the following unit is appropriate for purposes of collective bargaining:

All full-time and regular part-time field construction employees including master mechanics and apprentices employed by the Employer at construction sites located in the following Maryland counties: Garrett County, Allegheny County, Washington County, Frederick County, Carroll County, Baltimore County, Harford County, Howard County, Montgomery County, Anne Arundel County, Prince George's County, Calvert County, Charles County, and St. Mary's County, and Baltimore City, excluding engineering staff, security personnel, timekeepers, office clerical employees, guards and supervisors as defined in the Act.

There are approximately 30 employees in this proposed unit. The parties acknowledged that the Employer's current collective-bargaining agreement with the USWA contains the same job classifications as are listed in the above unit, although that agreement covers a broader geographic area; specifically, the current agreement, which the Employer and USWA interpose as a contract bar, covers the Employer's employees in the States of Delaware and Maryland. Nevertheless, as noted, the parties agree that a unit limited to the above-noted Maryland counties is appropriate and that an election may be conducted in the narrower unit if the current contract is not found to be a bar.

The Employer's Bargaining Relationship with the
Steelworkers and the Predecessors of the Steelworkers

The Employer offered the testimony of Joseph Julian, its president, and James L. Hoban, its human resource manager, as witnesses. Joseph Julian has been employed with the Company since 1958. He is the son of James Julian, the Company's founder, and has been involved in various phases of the Company's business, including industrial relations and the negotiation of collective-bargaining agreements, during that period. Human Resources Manager Hoban has served in that capacity for approximately 16 years, and has served as the Employer's chief labor negotiator in bargaining with the USWA. Both men testified as to events in which they were personally involved on behalf of the Employer as well as to reports made to them by other company representatives charged with the Company's legal and personnel affairs. Although portions of their testimony reflect hearsay statements—particularly with respect to events that occurred approximately 30 years ago—and IUOE objected on this basis,

I find their testimony sufficiently reliable and base my findings on their assertions and statements.

At this time the Employer has two collective-bargaining agreements with the USWA: the agreement noted above which is interposed as a contract bar is effective for the 1991–1994 term covering employees in Maryland and Delaware (Intervenor’s Exh. 1) and another agreement, through a multiemployer bargaining association known as the Pennsylvania Heavy and Highway Contractors Bargaining Association (the Pennsylvania Association), covering the Employer’s operations in the State of Pennsylvania. The latter contract, through a written extension agreement (Employer’s Exh. 2), is effective for the period January 1, 1992, through December 31, 1994.

James Julian stated that in the post-World War II period the predecessor of the USWA was District 50 of the United Mine Workers of America (UMWA). His testimony reveals that District 50 split from the UMWA in the 1960s, became known for a time as the Allied Technical Workers, and that in 1972 District 50 merged with the Steelworkers. The Employer was party to collective-bargaining agreements with these organizations throughout the period of time spanned by James Julian’s testimony, and this decision will contain references to these different labor organizations.

The Reading, Pennsylvania Project, 1961

Julian testified that the Employer was first approached by District 50 in 1961, while constructing a sewer system in Reading, Pennsylvania. He explained that District 50 representatives met with the Employer seeking a collective-bargaining agreement for that project. The Employer’s policy, Julian stated, was not to deal with a labor union unless “we were satisfied” the union represented a majority of employees on a particular project. After the Employer examined a list submitted by District 50, and concluded that District 50 did not represent a majority, District 50 filed a representation petition with the NLRB in Case 4–RC–4616 seeking a unit of construction employees at the Reading project. However, no election was ever conducted, as the project came to an end.

The Downington, Pennsylvania Project, 1961

The Employer started a highway construction project in Downington, Pennsylvania, at this time and again was approached by District 50 organizers claiming to represent a majority of the Employer’s employees on that construction site. An agreement was made for a check of District 50’s authorization cards—after an earlier agreement for a card check also involving a different local of the IUOE was cancelled—and the Employer’s office manager and its legal counsel reviewed District 50’s cards. According to Joseph Julian, those individuals—both of whom are now deceased—verified that District 50 represented a majority of the Employer’s employees. Joseph Julian stated that he was in charge of the Employer’s labor relations at the time, and that he delegated to the Company’s representatives the task of verifying District 50’s claim of majority status against the Employer’s personnel and income tax records. As a result, the Employer signed a recognition agreement with District 50 and established its bargaining relationship with that labor union. Julian testified that the Employer entered into a collective-bar-

gaining agreement with District 50 for this project, although the particular agreement is not in the record.

As an apparent consequence of the Employer’s granting recognition to District 50, Local 542 of the IUOE filed a petition with the Board in NLRB Case 4–RC–4688. The Regional Director issued a decision in that case in 1961, directing an election in two bargaining units, including the Downington Bypass project where the Employer had recognized District 50. The record fails to reveal if an election was ever conducted among the employees at the Downington Bypass construction site. Copies of records of the Board concerning these two representation cases, offered in evidence by the Employer, suggest—but do not show—that both cases were dismissed without elections ever being conducted.

The Delaware Turnpike Project, 1961

Julian further testified that the Employer secured a construction contract to build a portion of Interstate 95-Delaware Turnpike in this 1961–1962 period. Employees who worked for the Employer at the Downington Bypass site were hired for the Interstate 95-Delaware Turnpike project, which opened in August 1962, although the precise number of employees is not shown by the record. Julian stated that District 50 representatives approached the Employer, asking if the Employer “would engage them in a contract” and “represent[ing] they had the cards signed.” (Tr. 39.) Julian, who was the Employer’s labor relations spokesman, reiterated the Employer’s policy of requiring a demonstration of the Union’s majority status; he also noted that some employees expressed their support for continued representation by District 50 in view of their involvement with the pension and health benefits obtained as a result of the Employer’s collective-bargaining relationship with District 50 at the Downington Bypass. Julian delegated to the office manager the task of verifying District 50’s claim, and Julian testified that “to the best of my knowledge that evidence was supported.” He added that the office manager was instructed to verify the signatures on the authorization cards against W-2 tax forms, and that the office manager subsequently confirmed the authenticity of the cards and District 50’s majority status.

The Employer executed a recognition agreement with District 50 dated July 26, 1962, recognizing that union as bargaining agent for its hourly paid construction employees. The agreement also committed the Employer, 10 days after its signing, to “enter into negotiations for the purpose of consummating a prehire collective-bargaining agreement with District 50, United Mine Workers of America; relating only to Delaware Highway Contract No. 7002.” Addressing the “pre-hire” language of the recognition agreement, which he characterized as “boilerplate,” Julian testified that the employees were actually employed at the time the recognition agreement was signed, and he added that “I don’t think we signed a pre-hire, I don’t recall, but I think we went directly into a contract.” (Tr. 42.) The Employer was unable to locate a copy of a collective-bargaining agreement for this project, although Julian stated “there is no doubt whatsoever” a collective-bargaining agreement was executed.

The Pottstown, Pennsylvania Project, 1962

Julian also testified about another contract which the Employer obtained, building a highway project known as the Pottstown Bypass in Pennsylvania. The Employer began this project as the Downingtown Bypass work was concluding, and Julian testified that the Employer was again approached by District 50 with "a request for a contract project agreement." (Tr. 6.) Julian stated the Employer again conducted a card check, verifying the union's cards, and as a result the Employer and District 50 signed a recognition agreement on September 24, 1962. That agreement also granted recognition to District 50 as exclusive bargaining agent for non-supervisory construction employees and committed the Employer to enter negotiations "for the purpose of consummating a collective bargaining agreement with District 50 . . . Relating only to Pa. Dept. of Highways, Contract L.R. 779(4)."

As a result of the recognition agreement, the Employer and District 50 negotiated a collective-bargaining agreement dated October 3, 1962. (E. Exh. 7.) The agreement provides that it "applies only to heavy and highway construction perform on Project 779(4) with the Pa. Dept. of Highways." The agreement contains a union-security article, Article XI. That provision, as to employees who were not members of District 50 on the effective date of the agreement, required nonmembers "on the eighth day following the effective date of this Agreement become and remain members in good standing" as a condition of employment; employees hired after the effective date of the agreement, as a condition of employment, "shall on the eighth day following the beginning of such employment become and remain members in good standing in the Union." Julian did not recall the number of employees at the Contract 779(4) project, characterizing it as a "sizeable" job not as large as the Downingtown project.

The Employer Joins the Pennsylvania Association, 1963

Thereafter, in August 1963, the Employer became a member of the Pennsylvania Association and authorized that multiemployer association to bargain with District 50 on the Employer's behalf. (E. Exh. 8.) That authorization included the obligation on the part of the Employer to assume and become party to the existing multiemployer collective-bargaining agreement between District 50 and the Pennsylvania Association, and by letter dated September 4, 1963, District 50 sent copies of that agreement, "covering work done in the State of Pennsylvania." Julian testified that at the time the majority of the Employer's work force was employed on the Contract 779(4) project, in Pennsylvania, on the Pottstown Bypass construction site. Julian testified that a copy of the collective-bargaining agreement referenced in the September 4, 1963 letter could not be located in the Employer's records.

The Interstate 95 Project, 1963

At this same time, as the Employer's work on the Interstate 95-Delaware Turnpike project was ending, the Employer secured another construction contract for a different portion of the Delaware Turnpike. A majority of the Employer's employees from the earlier Delaware Turnpike project continued to work for the Employer on this new site, near Wilmington, Delaware, and Julian testified the Employer

again recognized District 50 following verification of authorization cards by company personnel. He stated that the Employer signed a project agreement with District 50 for this site, and noted as well that the Employer and its employees were developing "a history" of involvement with District 50 and the pension and health benefits that came with continued representation by that labor union.

The Boyertown, Pennsylvania Project

As a member of the Pennsylvania Association, the Employer obtained a highway construction contract at the same time its employees were also engaged in the Interstate 95 Project near Wilmington. Julian noted that the Employer shifted personnel between these locations, resulting in employees being covered by the multiemployer contract with District 65 through the Pennsylvania Association and then by the specific project agreement covering employees working on the Interstate highway job near Wilmington.

The Interstate 95 Projects in Harford and Cecil Counties of Maryland, 1970

Julian also testified that the Employer obtained construction contracts for work on Interstate 95 sections located in Harford and Cecil Counties of Maryland. In dealing with District 50, he testified, "specific project agreements" were executed for the distinct construction contracts which the Employer performed. Thus the record contains collective-bargaining agreements entered June 1, 1970, for Interstate 95 Contract sections NE 350, NE 351, and NE 352, and Contract sections NE 353, NE 354, and NE 355, all in Harford County, Maryland, and a collective-bargaining agreement entered October 12, 1970, for Interstate 95 Contract sections NE 367 and NE 368, located in Cecil County, Maryland. (Employer's Exhs. 10 and 11.) Each of these agreements specifies that it applies "only to work performed under" the specific construction contracts in those Maryland counties. The union-security clause contained in the collective-bargaining agreement (E. Exh. 10) requires "as a condition of employment" that employees who are not members of District 50 "shall on the eighth day following the effective or execution date . . . become and remain members in good standing," and that newly hired employees "shall on the eighth day following the beginning of such employment become and remain members in good standing in the Union." Julian testified these contracts were a result of the "fifth or sixth time" the Company's policy of verifying District 50's claim of majority status was utilized, and after "verification" the Employer executed these project agreements. He noted that by this time the Employer's work force had expanded, and that "[t]he majority of our work force was in Delaware and Maryland was represented by District 50." (Tr. 57.) The record does not show when any of these highway construction projects were completed.

The First Maryland-Delaware Collective-Bargaining Agreement, 1972 to 1974

Julian stated that the first multilocation collective-bargaining agreement encompassing all the work performed by the Employer in the States of Maryland and Delaware was entered on June 5, 1972, for the period to December 31, 1974. (E. Exh. 12.) By this time District 50 was affiliated with the

Allied and Technical Workers Union (ATW). Julian noted that the practice of executing project-specific collective-bargaining agreements with District 50 was becoming administratively inefficient, and that the Employer entered into a single collective-bargaining agreement in order to coordinate its relationship with District 50. Julian explained that the reason for this alteration of the Company's policy was because by 1972 the Employer had signed project agreements with District 50 throughout a 10-year period, and that the Employer and District 50 were establishing a history with one another (Tr. 62-63). He was not able to recall which, if any, of the Maryland or Delaware project agreements were in effect, however, as of June 1972, when the first multilocational collective-bargaining agreement was signed.

There is no evidence that a card check—or any other demonstration of District 50's majority status—was conducted in the time period *after* the 1970 project agreements (Employer's Exhs. 10 and 11) were signed and *before* the June 5, 1972 multistate agreement was executed. Moreover, after the June 1972 agreement was signed the Employer did not conduct any card checks to verify the majority status of the USWA; rather, according to Julian, the Employer stopped the practice because "it was obvious at that point in time that the majority of our employees were represented by and elected to be represented by the United Steel Workers." (Tr. 91.)

As discussed below, since 1972 the Employer has entered into a series of multistate collective-bargaining agreements. Julian added that when these statewide collective-bargaining agreements expired, the Employer regarded itself obligated to continue to negotiate with the ATW for successor contracts, and did so "because we considered it a contract with the majority of our employees who had elected to be with the United Steelworkers and the ATW." (Tr. 63.) The 1972-1974 contract refers, by its terms, to all work performed by the Employer in the States of Maryland and Delaware. The union-security language of this contract, as in the project agreements summarized above, contains the same obligation for nonmembers to become members "on the eighth day following the effective or execution date of the Agreement," and that newly hired employees had a similar obligation, "on the eighth day following the beginning of such employment become and remain members in good standing of the Union."

The record shows that some time during the term of the 1972-1974 collective-bargaining agreement, and in acknowledgement of the fact that District 50 merged with the USWA on or about August 1972, the Employer and the USWA signed an amendment to their collective-bargaining agreement. The amendment substitutes USWA as the "contracting party" in the agreement; provides for the transmittal of dues and fees to USWA; and notes that the 1972-1974 agreement otherwise remains in full force and effect "according to its terms." Thomas Jones, a staff representative with the USWA, testified that the merger of USWA and District 50 resulted in the latter being designated as USWA Local 15253, with that Local continuing to be recognized as the successor of District 50.

After the 1972-1974 collective-bargaining agreement, the Employer entered into successor contracts covering the work performed in Maryland and Delaware. The record does not disclose the location of any work performed by the Employer under these agreements, the dates of any projects, nor the

number of employees involved. These agreements were in effect for the following periods:

January 1, 1975 to December 31, 1976. (E. Exh. 13.) The agreement is with the United Steelworkers, and contains, at Article XI, the same eight-day union security obligation for employees.

January 1, 1977 to December 31, 1978. (E. Exh. 14.) Also with the Steelworkers, the agreement at Article XI has the same eight-day union security obligation for employees.

Extension Agreement, extending the above-noted collective-bargaining agreement to February 28, 1979. (E. Exh. 15.)

January 1, 1979 to December 31, 1980. (E. Exh. 16.) The same eight-day union security obligation is contained at Article XI.

January 1, 1981 to December 31, 1982. (E. Exh. 17.) The same eight-day union security obligation is found at Article XI.

Extension Agreement, extending the above-noted collective-bargaining agreement to February 11, 1985. (Employer's Exh. 20.)

Amended Collective-Bargaining Agreement, extending the two collective-bargaining agreements noted above to February 11, 1988. (E. Exh. 18.) The same eight-day union-security obligation is repeated at Article XI.

Supplemental Collective-bargaining Agreement, effective February 11, 1988 to February 11, 1991. (E. Exh. 19.) Article XI contains the same eight-day union-security obligation.

With respect to these collective-bargaining agreements for the Maryland-Delaware area, Julian asserted that the Employer has maintained an agreement with the USWA—through complete agreements or extension agreements—at all times since 1972 to 1991, and at no time was there a "gap" between the agreements. He testified that health and welfare fund contributions have been paid for all covered employees continually since 1961, and that union dues have also been deducted for hourly paid employees since 1961 and paid to the USWA (or its predecessors). During this period, through the contract expiring in 1991, Julian also testified that the Employer regarded itself as obligated to bargain with the USWA. (Tr. 74.) He noted that when the contract expiring February 11, 1991, reached its termination date, there was a period of time when the Employer did not reach a successor contract with the USWA; however, he added, the Employer subsequently determined that it had a continuing duty to bargain with the USWA. As noted above, the current collective-bargaining agreement applicable to the employees in the Delaware-Maryland area (Intervenor's Exh. 1) is effective for the period April 8, 1991, to February 11, 1994. That agreement, like the other agreements summarized above, contains at Article XI the same 8-day union-security language found in all the preceding collective-bargaining agreements.

None of the collective-bargaining agreements or recognition agreements in this record contain any statement or other expression that the USWA or any of the predecessor labor unions represented a majority of the Employer's employees in a collective-bargaining unit.

The 1991 Negotiations Between the Employer and USWA

In response to questions from the USWA's representative at the hearing, Julian testified that in early 1991, during negotiation of the current collective-bargaining agreement, discussions took place regarding the USWA's majority status and the necessity for a card check. Julian testified that the subject was initiated by Tom Jones, the USWA's representative, and that the Employer answered this point by asserting, "[f]ine, let's do it correctly so that there is no question about it." Thomas Hoban, who chaired the Employer's team in those negotiations, added that Jones raised the subject of a card check "a couple of times," including the final bargaining session, as a condition to settle their contract negotiations. Hoban attributed Jones' position to concern about the Board's *Deklewa* decision (Tr. 126), to which Hoban replied there was no concern on the Employer's part. Indeed, Hoban testified he "had no doubt of their [USWA's] majority status as representative of our employees," (Tr. 119), based on Hoban's familiarity with the employees and his knowledge of the personnel records showing "full support and cards from all of our employees." (Tr. 121.) Hoban gave Jones such an assurance in negotiations, stating: "I responded to him that I had no question that they did, I agreed that they did represent the majority of our employees and that I would do a card check without any question because that was the fact of the matter, that they represented the employees." (Tr. 122.) Hoban stated that he actually agreed to such a card check in April 1991. Hoban added that the USWA raised the subject of conducting a card check "on one occasion, possibly two," after the negotiation of the 1991-1994 contract. No card check was ever conducted, however, *before* the petition was filed in this case.

Addressing this same issue, the USWA called Thomas Jones as a witness. Jones testified that he participated in the 1991 contract negotiations with the Employer. He added to Hoban's account of the card-check issue only the assertion that the USWA "never doubted that we area a 9A, we were the majority group," with respect to the Employer, and that the subject of a card check was not raised in order to establish 9(a) status with the Employer. (Tr. 137, 139.) Rather, Jones testified that the USWA sought a card check from a relatively large company such as the Employer in order to be able to influence and gain bargaining leverage in relation to some of the *other* employer-members of the Pennsylvania Association—those he characterized as under 8(f) rather than 9(a) agreements—to agree to card checks with the USWA.

The Postpetition Card Check

Hoban also testified that a card check was in fact conducted *after* the petition in this case was filed, although the precise date of the card check is not revealed by the record. Thus, in response the hearing officer's questions, Hoban explained that he checked authorization cards himself, reviewing the photocopies of USWA dues-authorization cards maintained in the Employer's files, i.e., authorizations which employees had previously signed as required by the then-current agreement's union-security clause. Hoban testified that USWA representatives brought to this meeting a box of cards in the USWA's possession, which were the second part of the two-part membership and dues-checkoff authorization

cards presented to employees. He explained that the cards were compared against a list of employees who were employed as of April 1991, inasmuch as he agreed to the card check at that time, and he confirmed the USWA had cards from a majority of those employees. (Tr. 129.) The record does not reveal the number of employees employed as of April 1991, nor the number of cards which Hoban verified to support USWA's claim of majority status. Hoban noted, however, that he told the USWA representatives he did not want to participate in a card check "in relation to the area covered by the petition." (Tr. 127.)

Nevertheless, Julian stated there was "absolutely no question in my mind" that the USWA represented a majority of the Employer's employees, based on "too many negotiations and too many votes after contracts," as well as 31 years of collecting dues, health and welfare and pension contributions for employees represented by the USWA. Moreover, he added that all the Employer's current employees have executed checkoff authorization cards on behalf of USWA as a condition of employment under the terms of the current collective-bargaining agreement.

Julian conceded that during the entire course of the Employer's bargaining relationship with USWA or its predecessors, the Union's majority status has never been reviewed or verified by any independent party unrelated to the Employer. He also agreed that there has never been a certification of any labor union by the Board following a Board-conducted secret-ballot election.

Positions of the Parties

A. The Employer argues that its collective-bargaining agreements with the USWA have been premised on the USWA's "clearly established majority support," and that the current collective-bargaining agreement embodies a 9(a) relationship with the USWA that bars the IUOE petition. (Br., p. 9.) The Employer contends that for a 10-year period, when confronted with demands for recognition, the Employer routinely verified the USWA's majority status through card checks prior to negotiating collective-bargaining agreements. Thereafter, the Employer entered into the contract covering employees in Maryland and Delaware in 1972, and has "continued to sign statewide agreements, and their current agreement runs until 1994." (Br., p. 11.) Based on these factors, the Employer argues, it has presented "direct evidence" of the USWA's majority status and met its burden of establishing that a 9(a) relationship exists, citing *Island Construction Co.*, 135 NLRB 13 (1962), *J & R Tile, Inc.*, 291 NLRB 1034 (1988), and *Golden West Electric*, 307 NLRB 1494 (1992). Moreover, the Employer maintains, "additional" evidence of the USWA's majority is found among a combination of factors, including but not limited to the statements by Julian, Hoban, and Jones that the USWA was the majority representative; that the Employer has had dues-checkoff authorizations and fringe benefit authorizations from a majority of its employees; and has paid union dues and health and welfare benefits on behalf of all the employees covered by collective-bargaining agreements since 1961 to the present. *Oil Capital Electric*, 308 NLRB 1149 (1992). Accordingly, the Employer maintains, it has established that USWA is the 9(a) majority representative and the petition is barred by the current collective-bargaining agreement with USWA.

B. The USWA fully participated in the hearing and argued that its current collective-bargaining agreement bars IUOE petition. USWA did not file a posthearing brief.

C. IUOE contends the current Employer-USWA contract is not a bar under *Deklewa* because the USWA and the Employer have an 8(f) rather than a 9(a) relationship. IUOE argues that USWA and the Employer have not substantiated their claim of majority status “at the time they entered into an agreement . . . covering the Maryland/Delaware region in 1972.” (Br., p. 4.) Citing *J & R Tile* for the rule that “[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 that relationship between the parties is 9(a) and not 8(f),” 291 NLRB at 1036, IUOE argues that the testimony of Julian and Hoban with respect to the card checks in the 1960s is hearsay and unreliable, and in any event the record fails to prove that the USWA had demonstrated majority status at the time the 1972 collective-bargaining agreement was entered. IUOE also points to the record testimony concerning the 1991 negotiations of the current collective-bargaining contract, in which the USWA demanded a card check as a condition of reaching agreement, as well as the fact that no card check was conducted in 1991 nor at any other time since the 1970 USWA-Employer agreements, as further support for its position.

Analysis

In *Golden West Electric*, 307 NLRB 1494, the Board discussed the legal standards and the evidence necessary to establish the existence of a 9(a) relationship in the construction industry. In *Golden West*, an employer was a member of a multiemployer association having a contract with the IBEW for the 1987–1990 period. In September 1988 a union representative presented a recognition agreement and a letter of assent to the employer’s president, who signed the documents. The recognition agreement provided that “The Union claims, and the Employer acknowledges and agrees, that a majority of its employees has authorized the Union to represent them in collective bargaining.” The recognition agreement also provided that the Employer “agrees to recognize . . . the Union as the exclusive collective bargaining agent for all employees performing electrical work on all present and future jobsites within the jurisdiction of the Union.” In addition the union agent presented authorization cards from two of the three unit employees to the employer, and the latter’s representatives acknowledged the authenticity of those cards. *Golden West Electric*, supra.

Reiterating its holding in *Deklewa*, that “the relationship between a union and a construction industry employer will be presumed to be governed by Section 8(f) unless the Union shows it is the 9(a) majority representative of the employees in question,” and that “the party asserting a 9(a) relationship in the construction industry has the burden of proving such relationship exists,” the Board explained in *Golden West Electric* that this burden could be met “by showing that a construction industry employer voluntarily recognized a union ‘based on a clear showing of majority support among the unit employees, e.g., a valid card majority.’ [*Deklewa*] at 1387 fn. 53.” The Board added:

Subsequent cases have further explained that a union can establish voluntary recognition by showing its express demand for, and an employer’s voluntary grant of, recognition to the union as bargaining representative based on a contemporaneous showing of union support among a majority of employees in an appropriate unit. *Brannan Sand & Gravel Co.*, 289 NLRB 977, 979–980 (1988); *American Thoro-Clean*, 283 NLRB 1107, 1108–1109 (1987). Further in *J & R Tile*, 291 NLRB 1034, 1036 (1988), the Board held that, to establish voluntary recognition, there must be positive evidence that a union unequivocally demanded recognition as the employees’ 9(a) representative and that the employer unequivocally accepted it as such.

Golden West Electric, supra at 1495. In that case the Board found evidence of “a clear intent of the parties . . . to establish a 9(a) relationship founded on the Union’s majority status.” The Board concluded that the recognition agreement by its terms unequivocally states that the union claimed it represented a majority of the employees and the employer acknowledged this was so. The recognition agreement, and the testimony of the employer’s owner, therefore demonstrated that both the union and the employer “were in accord” that the union was seeking recognition as the unit employees’ majority representative and that the Employer was granting the union recognition as such. Moreover, the Board pointed out, the union was “cognizant of the requirements for acquiring 9(a) status and, in approaching the Employer, conducted itself accordingly.” Supra at 1495.

In *J & R Tile*, 291 NLRB at 1035, the Board found insufficient evidence to establish a 9(a) relationship. In that case a company was a member of a multiemployer association and party to a collective-bargaining agreement with the union; all five unit employees were union members and the contract provided for pension and health and welfare benefits to be paid to a union-sponsored fund on the employees’ behalf. The employer purchased all the assets and business of the company, hired all the five unit employees, and the Board found the employer as a successor of the prior company. Thereafter the employer was approached by the union to sign the existing multiemployer contract. Although the union representative did not present authorization cards from the unit employees, the union’s agent stated that all the unit employees were union members and the agent testified that both the union and the employer knew all the unit employees were members. Moreover, the employer’s owner—who was himself a union member—believed that all the employees were union members, based on his having worked with those employees for nearly 20 years.

As a threshold matter, the Board noted that the availability of 8(f) agreements in the construction industry “renders ambiguous” a union’s demand to execute a collective-bargaining agreement, and as a result “an employer in the construction industry may not be certain whether a union, in requesting recognition or presenting a collective-bargaining agreement for execution, is seeking an 8(f) or a 9(a) relationship.” The “ambiguity is exacerbated in the context of successive collective-bargaining agreements when the employer had previously established an 8(f) relationship with the union.” *J & R Tile*, 291 NLRB at 1036. Thus the Board stated, “regardless of whether the contract in dispute is an initial

or successive collective-bargaining agreement, absent 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).” Id.

The Board then concluded that neither the predecessor nor the successor employer in *J & R Tile* had a 9(a) relationship. The Board found insufficient evidence of a 9(a) relationship as to the predecessor, because there was no evidence the collective-bargaining agreement was entered on the basis of a demonstrated showing of the union’s majority. Additionally, the Board determined that the fact the unit employees were union members covered by the collective-bargaining agreement did not establish 9(a) status. Similarly the Board found there was no 9(a) relationship as to the successor employer. In so finding, the Board stated it was “not dispositive” of the status of the collective-bargaining agreement that all the unit employees are union members, “or that an employer has personal knowledge of its employees’ union membership.” Rather, the Board concluded, the “Union never expressly stated that it desired to be the 9(a) representative as opposed to the 8(f) representative, and the Employer did not expressly designate the Union as the 9(a) representative.” Therefore, in the absence of evidence showing that the Union “clearly and unequivocally demanded recognition as the 9(a) representative of the Employer’s employees,” the Board found an 8(f) relationship which did not bar a representation petition. *J & R Tile*, 291 NLRB at 1037.

Applying this test to the facts of the case, I must find that the Employer and USWA have not clearly and unequivocally demonstrated a 9(a) relationship. Therefore, I find the current collective-bargaining agreement is not a bar to the IUOE petition and I shall direct an election among the employees in the unit.

The Bargaining Relationship: 1961–1970

The record shows that at the inception of the relationship between the Employer and District 50, in the 1960s, through and including the parties’ 1970 collective-bargaining agreements, District 50 sought to organize and represent employees on specific construction projects. The Employer recognized District 50 solely on that basis at the Downingtown, Delaware Turnpike, Pottstown, Boyertown, Interstate 95-Delaware and Interstate 95-Maryland projects. Julian testified and the record shows that recognition was granted to District 50 at those project sites only after a card check by company managers verified District 50’s claim of majority status at those specific sites. Nevertheless, and despite the record testimony establishing that card checks verifying District 50’s majority status were conducted, the evidence is inconclusive as to whether District 50 and the Employer established—or intended to establish—9(a) relationships at those construction sites through the 1970s.

The evidence in the record as to this period fails to establish that the parties intended to establish a 9(a) relation. The recognition agreements entered in this period (E. Exhs. 5 and 6) do not contain any acknowledgement of District 50’s majority status. The recognition agreement for the Delaware Turnpike project by its terms, commits the Employer and District 50 to negotiate a “pre-hire” collective-bargaining agreement, and both recognition agreements are expressly

limited only to the specific highway construction projects. A copy of the resultant collective-bargaining agreement for the Delaware Turnpike project could not be located for this hearing, whereas the collective-bargaining agreement negotiated for the Pottstown, Pennsylvania project is applicable only to that particular location. This latter contract (E. Exh. 7) does not contain any acknowledgement of District 50’s majority status among the employees at that site. Similarly, the Employer’s grant of bargaining authority to the Pennsylvania Association does not contain any statement with respect to District 50’s majority status among employees in Pennsylvania, Delaware, or Maryland, and a copy of the collective-bargaining agreement resulting from the Employer’s affiliation with the Pennsylvania Association also could not be located for this hearing. These documents do not show the Employer and District 50 intended to create 9(a) agreements.

The remaining collective-bargaining agreements for this period are the first covering employees working in Maryland and Delaware on portions of Interstate 95. These, too, are project agreements applicable only to employees working at specific locations on certain highway construction contracts, and are in effect only for the duration of these projects. The collective-bargaining agreements in evidence (Employer’s Exhs. 10 and 11) do not contain any statement or acknowledgement of District 50’s majority status. Although Julian testified, without contradiction, that these—and all the above-noted collective-bargaining agreements with District 50—were entered only after verification of majority status, there is simply no evidence that the Employer and District 50 *intended* these agreements to create a 9(a) relationship. At best, the record supports only the finding that the Employer and District 50 entered collective-bargaining relationships of limited duration confined only to the specific construction-project locations. The agreements, devoid of any acknowledgement that District 50 previously demonstrated majority status in card checks or that the parties intended to create 9(a) relationships, do not, in my opinion, establish the requisite “positive” evidence that District 50 “unambiguously” demanded and the Employer “unequivocally” granted recognition as the 9(a) representative. *Golden West Electric*, supra at 1495.

The Bargaining Relationship: 1970 to date

The record shows that the last time District 50 demonstrated its majority through card checks was in 1970, at the times the Employer was engaged in the construction of portions of Interstate 95 in Maryland and Delaware. As noted, the collective-bargaining agreements in evidence which were signed following these card checks are project agreements, limited by their terms to “cover work performed only” at specific locations corresponding to highway construction contracts with the State of Maryland in Cecil and Harford Counties. Julian testified that the Employer’s work force expanded in this 1970 period, and that “[t]he majority of our work force was in Delaware and Maryland was represented by District 50.”

The Employer and District 50 entered into a collective-bargaining agreement in 1972 which significantly altered the scope and duration of the bargaining relationship between those parties. Whereas all the prior collective-bargaining agreements covering employees in Maryland or Delaware were project agreements, the 1972 collective-bargaining

agreement dramatically altered the scope of the bargaining unit, so as to cover all work performed in those two States, and established a fixed contract term, such that the multistate agreement would expire on December 31, 1974. There is no evidence of a card check or other contemporaneous demonstration of majority status in the newly established two-state unit, nor does the collective-bargaining agreement acknowledge District 50's majority status. There is no evidence that District 50 expressly demanded recognition as the 9(a) representative of the employees in this significantly broader, two-state bargaining unit, and no evidence that the Employer unequivocally granted recognition to District 50 as the 9(a) representative. Consequently, as of the time the Employer and District 50 entered into the 1972 collective-bargaining agreement, I find there is insufficient "positive" evidence that District 50 sought and the Employer unequivocally granted recognition to District 50 as the employees' 9(a) representative. As there is no evidence of a card check or other demonstration of District 50's (or USWA's) majority at any time after 1970, I find that the 1972 agreement, and all of the successor collective-bargaining agreements, are 8(f) rather than 9(a) agreements. I conclude, therefore, that the current USWA-Employer collective-bargaining agreement does not bar the IUOE petition in this case and I shall direct an election among the employees in the stipulated unit.

Although the Employer strenuously argues that District 50 and its successor, USWA, are the majority representative of the employees, I conclude that neither the Employer nor USWA have been able to meet their burden of proof, by the "positive evidence" standard required under *J & R Tile* and *Golden West Electric*, of a 9(a) relationship. Although Julian and Hoban testified that a majority of the employees are, to their personal knowledge, members of USWA, and that during the course of the Employer's bargaining relationship contributions have been made to District 50-USWA sponsored pension and health and welfare funds on behalf of all employees covered by collective-bargaining agreements, the Board has made clear in *J & R Tile* and *Golden West Electric* that such evidence does not prove 9(a) status. Indeed, as noted above in *J & R Tile*, the fact "that employees are union members, or that an employer has personal knowledge of its employees' union membership [even in the absence of

a union-security obligation], is not dispositive of the status of the collective-bargaining agreement." 291 NLRB at 1037. Accord: *MK-Ferguson Co.*, 296 NLRB 776, 781 (1989); *McLean County Roofing*, 290 NLRB 685, 686 (1988). Rather, as stated in *J & R Tile* and as the record evidence in this proceeding shows, "The Union never expressly stated that it desired to be the 9(a) representative as opposed to the 8(f) representative, and the Employer did not expressly designate the Union as the 9(a) representative." *Id.* Moreover, the record shows that in the negotiation of the current agreement, in 1991, the Employer and the USWA were cognizant of the requirements to establish a 9(a) relationship but failed to conduct a card check, seek a Board-conducted election, or otherwise take the steps needed to prove 9(a) status. In these circumstances, and with due regard to the Employer's plea that its "historically stable" 30-year bargaining relationship is unjustifiably disrupted if the petition is not dismissed, I find that the Employer and USWA have not met their burden under *J & R Tile* and *Golden West Electric* and have not proved a 9(a) relationship.

I find that the Employer and USWA have not established that the pre-1972 project agreements were intended to be, or ever became, 9(a) agreements even though card checks were conducted. I also find that the last demonstration of District 50's majority occurred contemporaneously with the execution of specific project agreements in 1970. When the Employer and District 50 executed their 1972 collective-bargaining agreement, they abandoned their practice of negotiating project agreements. Instead, I find they created a new multistate bargaining unit covering all employees working on projects in Delaware and Maryland, but that they did so without any contemporaneous demonstration of District 50's majority status. Although cognizant of the *Deklewa* decision and the need for a card check to demonstrate majority status in April 1991, no card check was conducted at that time or at any time until after IUOE filed its petition in this case. Accordingly, in the absence of positive evidence showing that the 1972 agreement and all succeeding collective-bargaining agreements were intended to be 9(a) contracts, I find that the current collective-bargaining agreement does not bar the petition. *John Deklewa & Sons*, 282 NLRB at 1377.