

**Goodless Electric Co., Inc. and Local Union No. 7, International Brotherhood of Electrical Workers, AFL-CIO.** Cases 1-CA-31249, 1-CA-31429, and 1-CA-31657

October 31, 2000

SUPPLEMENTAL DECISION AND ORDER  
BY CHAIRMAN TRUESDALE AND MEMBERS FOX  
AND LIEBMAN

On April 30, 1996, the National Labor Relations Board issued its decision in this proceeding, finding that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union, implementing unilateral changes in employees' contractual terms of employment, and dealing directly with employees concerning their employment terms. 321 NLRB 64. The Board also found that the Respondent violated Section 8(a)(3) and (1) by constructively discharging four of its apprentice employees who refused to work without their collective-bargaining representative and under the changed terms of employment.

Subsequently, the Board filed with the United States Court of Appeals for the First Circuit a petition for enforcement of its Order, and the Respondent petitioned for review. On September 5, 1997, the court issued a decision denying enforcement of the Board's Order and remanding the case for further proceedings in accordance with its decision. *NLRB v. Goodless Electric Co.*, 124 F.3d 322 (1997).

By letter dated February 11, 1998, the Board notified the parties that it had accepted the remand and invited the parties to file statements of position. The Respondent, the General Counsel, and the Union filed statements of position. The International Brotherhood of Electrical Workers filed a statement of position as amicus curiae in support of its local union.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Background

As the Board stated in its initial decision, this case "turns on the legal effect of the Respondent's execution of the 1992 letter of assent and the Union's subsequent submission of authorization cards from a majority of unit employees." 321 NLRB at 65. That legal issue is presented on the following facts.

The Respondent, a construction industry employer engaged in electrical contracting, entered into an 8(f) relationship with the Union in 1988.<sup>1</sup> In July 1992, during

<sup>1</sup> Sec. 8(f) permits a union and employer in the construction industry to enter into a collective-bargaining relationship without claim or proof

the term of a 1990-1993 8(f) contract, the Respondent signed a letter of assent containing the following provision:

The Employer agrees that if a majority of its employees authorize the Local Union to represent them in collective bargaining, the Employer will recognize the Local Union as the NLRA Section 9(a) collective bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future jobsites.

In the spring of 1993, the Respondent and the Union were engaged in negotiations on an individual basis to succeed the contract due to expire on June 30. On June 25, in response to the Respondent's indication that it intended to terminate its 8(f) relationship with the Union upon expiration of the agreement, Union Business Agent Douglas Bodman presented the Respondent's president, Leon Goodless, with authorization cards signed by all of the Respondent's unit employees. Bodman told Goodless that "all 22 of your employees have asked us to represent them." Goodless examined all the cards individually and made comments about some employees who he had thought would not support the Union. As the conversation turned heated over threats of a strike, Goodless returned the cards to Bodman telling him he could "shove them." Despite this acrimonious encounter, the parties agreed to a 6-month extension of the current contract.

On December 13, 1993, Goodless informed the Union that he would withdraw recognition upon expiration of the contract extension on December 31. The employees were informed of this pending action in separate letters mailed to them by Goodless on December 17. These letters also offered the employees continued employment and invited them for personal interviews to "evaluate what we have to offer." The employees initially declined the offer. They informed the Respondent by individual letters that they intended to remain employed with the Respondent and to maintain their union membership, that they expected the Respondent to adhere to contractual terms and conditions of employment, and that any discussions over such matters should be conducted with their union representative.

Meanwhile, on December 21, the Union's attorney replied by letter to Goodless' letter of December 13. The Respondent was reminded of the signed 1992 letter of assent by which the Respondent agreed to recognize the Union as the 9(a) bargaining representative if a majority of employees authorized the Union to represent them.

that the union represented a majority of the employer's bargaining unit employees.

Union counsel asserted in the letter that the Union became the 9(a) representative on June 25 when, in accordance with the letter of assent, the Union presented Goodless with authorization cards signed by all employees.

There was no reply to this letter. Rather, on December 30, Goodless followed through with his stated intentions by announcing new terms of employment to take effect on January 1, 1994. The Respondent unilaterally implemented the new employment terms on this day and withdrew recognition from the Union. The four apprentice employees who are alleged discriminatees in this case then quit their jobs in order to protect their eligibility to participate in the Union's apprenticeship training program.

In its initial decision, the Board found that since June 25, 1993, the Union has been the exclusive representative of the Respondent's journeymen electricians and apprentices for purposes of collective bargaining under Section 9(a) of the Act. In the Board's judgment, the June 1992 letter of assent

constituted for the remainder of its term both a continuing request by the Union for 9(a) recognition and a continuing enforceable promise by the Respondent to grant voluntary recognition on that basis if the Union demonstrated majority support.

321 NLRB at 66 (footnote omitted). In response to the judge's finding that the Union did not make a demand for recognition and that the Respondent did not agree to recognize the Union at the June 25, 1993 meeting (*id.* at 75, 90), the Board stated:

The letter of assent did not impose the additional requirement that the Union specifically renew its demand for 9(a) status or refer to the parties' prior agreement when making this showing [of majority support].

321 NLRB at 67. Accordingly, the Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and by refusing to bargain with the Union since January 1, 1994, by unilaterally discontinuing and changing employees' existing terms and conditions of employment, and by dealing directly with employees concerning terms and conditions of employment. The Board found, also in disagreement with the judge, that the Respondent violated Section 8(a)(3) and (1) of the Act by constructively discharging the four apprentices because of their refusal to accept unilaterally imposed terms and conditions of employment.

The First Circuit reversed. Reviewing the Board's case law before and after the seminal *Deklewa* decision,<sup>2</sup> the court held that the Board had departed from its own precedent in finding that the course of dealings between the union and the company was sufficient to change their relationship from one based on Section 8(f) to one based on Section 9(a). 124 F.3d at 328–330.

In analyzing the controlling legal principles, the court noted that, while pre-*Deklewa* law allowed 8(f) agreements to be converted to 9(a) relationships with "no notice, no simultaneous union claim of majority, and no assent by the employer to complete the conversion process" (124 F.3d at 328 (quoting *Deklewa*, 282 NLRB at 1378)), *Deklewa* overturned that conversion doctrine "on the ground that it did not serve the 'statutory objectives of employee free choice and labor relations stability.'" *Id.* (quoting *Deklewa*, 282 NLRB at 1379). The court understood the Board's current rules for establishing the existence of a 9(a) relationship through voluntary recognition to consist of three requirements:

- (1) the union must expressly and unequivocally demand recognition as the employees' Section 9(a) representative;
- (2) the employer must expressly and unequivocally grant the requested recognition; and
- (3) that demand and recognition must be based on a *contemporaneous* showing that the union enjoys majority support of the employers' work force.

*Id.* at 328–329 (emphasis in original) (citing, *inter alia*, *J & R Tile*, 291 NLRB 1034, 1036 (1988)). The court concluded "that the third requirement is essential" under Board law (*id.* at 329) but was not satisfied in this case. The court found that

[T]he record does not support the conclusion that, when the Union presented the letter of assent to Goodless in June 1992, in which it allegedly sought Goodless' recognition, it made a contemporaneous claim of majority support on which Goodless' recognition *of the union's majority status* could be made. A showing of majority support at least a year later can hardly be considered a showing made contemporaneously with, and as a prerequisite to, the Union's demand for recognition.

*Id.* at 330 (emphasis in original) (footnote omitted).<sup>3</sup>

<sup>2</sup> *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enfd.* sub nom. *Ironworkers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

<sup>3</sup> The court commented, moreover, that "the record raises serious doubts regarding whether Goodless in fact conceded that the Union had obtained majority support" on June 25, 1993. *Id.* at 330. It found that, even assuming that the Board's interpretation of Goodless' June 25 statements were sound, the Board's "case law unmistakably holds that

The court dismissed the Board's finding that the July 1992 letter of assent was a continuing request for 9(a) recognition (as well as a continuing promise by the Respondent to grant such recognition upon a showing of majority support by the Union) as an unwarranted attempt to rely on technical principles of general contract law. The court found that principles of contract law "cannot supplant the requirement of a federal labor policy such as that embodied in Section 9(a) requiring that employees be represented by an organization approved by a majority of employees." 124 F.3d at 330. Based on its understanding of the Board's post *Deklewa* policy for transforming 8(f) relationships into 9(a) relationships, the Court held that "[u]nder Board precedent, the parties maintained a Section 8(f) relationship because no contemporaneous showing of majority support accompanied the Union's demand to Goodless." *Id.* The court held that "we cannot accept the Board's departure from its own precedent in this case in the absence of some cogent explanation," and it remanded the case for proceedings in accordance with its opinion. *Id.* at 330–331.

#### Analysis

Having accepted the court's remand, we are bound by the law of the case established in the court's opinion. However, in order to determine the limits that the law of the case has placed on our freedom of action on remand, we find it necessary to delineate more precisely the issue that divided the Board and the court in this case.

As noted, in its initial decision, the Board found that the case "turns on the legal effect of the Respondent's execution of the 1992 letter of assent and the Union's subsequent submission of authorization cards from a majority of unit employees." 321 NLRB at 65. The Board concluded that, under the clear meaning of the parties' contract language (i.e., "if a majority . . . authorize the Local Union to represent them . . . the Employer will recognize the Local Union as the NLRA Section 9(a) collective bargaining agent"), the presentation of authorization cards to the Respondent in June 1993 was, without more, "sufficient to trigger the Respondent's obligation to recognize the Union as a 9(a) majority representative." *Id.* at 66. The Board expressly found that "[t]he letter of assent did not impose the additional requirement that the Union specifically renew its demand for 9(a) status or refer to the parties' prior agreement when making this showing." *Id.* at 67. The Board ultimately concluded "that the Union has proved that it met all the Board's requirements for establishment of a 9(a)

relationship with the Respondent as of June 25, 1993." *Id.*

In rejecting the Board's attempt thus to give effect to the literal language of the parties' contract, the court focused on Board precedent setting forth the Board's requirements for establishing a 9(a) relationship in the construction industry. That Board precedent, if read literally, as the court did, appeared to require that a union's demand for 9(a) recognition, the employer's agreement to recognize the union, and the union's showing of majority status must all be simultaneous. 124 F.3d at 328–329. As the Board phrased the matter in its initial decision in this case:

[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.

321 NLRB at 66 (quoting *Golden West Electric*, 307 NLRB 1494, 1495 (1992)). See also 124 F.3d at 328 (quoting *J & R Tile, Inc.*, 291 NLRB 1034, 1036 (1988) (same)).

In its initial decision, the Board found that the 1992 letter constituted both "the Union's unequivocal demand for recognition as a 9(a) bargaining representative and the Respondent's voluntary acceptance of the demand on that basis." 321 NLRB at 66. It further found that the 1992 letter obligated the Respondent to grant 9(a) recognition on "condition that the Union prove its majority support at some point prior to the letter of assent's expiration." *Id.*

The Board's attempt to fit the parties' 1992 agreement into the framework of existing Board law was not persuasive to the court. The court concluded that to give the parties' contract language the legal effect that the Board did was inconsistent with the Board precedent indicating that the showing of majority status must be contemporaneous with the union's unequivocal demand for 9(a) recognition and the employer's unequivocal acceptance of the union as such. 124 F.3d at 330.

Having accepted the court's remand, we take this opportunity to provide the explanation that the court found was lacking in our previous decision. In so doing, we acknowledge that the Board's construction industry precedent at the time of the events at issue made no express provision for agreements like the one contained in the parties' 1992 letter of assent. What is distinctive about the 8(f) agreement at issue is that it provides for prospective 9(a) recognition. None of the cases cited by the Board in its initial decision and the court on review dealt with such a provision. All the cases dealt with the

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nevertheless the showing of majority status must be contemporaneous with the demand and recognition of that status [and] [t]hese preconditions to a 9(a) recognition are clearly lacking here." *Id.*

question whether a union made an unequivocal demand for 9(a) recognition based on a contemporaneous showing of majority status.<sup>4</sup> Accordingly, as the court held, in giving effect to the literal language of the prospective 9(a) recognition clause in the parties' 8(f) agreement, the Board, without "cogent explanation," permitted a 9(a) relationship to be established by a means other than those specified in the Board precedent governing the post-*Deklewa* transformation of 8(f) relationships into 9(a) relationships. 124 F.3d at 330.

We therefore take the opportunity afforded by the court's remand to clarify that in the construction industry, as in other industries, agreements for future 9(a) recognition are permissible and do not depend for their validity on showing of majority status at the time of the execution of the agreement. Rather, as explained below, where, as here, the parties' agreement so specifies, the union's providing the employer with reliable evidence of its majority status during the term of the 8(f) agreement is sufficient to trigger the employer's contractual obligation to grant 9(a) recognition to the union.

Outside the construction industry, the Board has long held that an employer who agrees to have majority status determined by a means other than a Board election may not thereafter breach its agreement and refuse to bargain because of dissatisfaction with the agreed-upon method. *Snow & Sons*, 134 NLRB 709 (1961), *enfd.* 308 F.2d 687 (9th Cir 1962). Of particular relevance here is the application of the *Snow & Sons* principle in the context of "after-acquired store" recognition clauses whereby the employer agrees to recognize the union as the representative of employees in stores acquired after the execution of the contract. Enforcing such a clause in *Kroger Co.*, 219 NLRB 388, 389 (1975), the Board reasoned that it had previously held that an employer might

agree in advance of a card count to recognize a union on the basis of a card majority, and we can perceive of no reason why it may not contract with the union to do so in advance of the time the union has commenced organization.<sup>5</sup>

In approving *Kroger*-type prospective recognition clauses, the Board expressed agreement with the observation of the D.C. Circuit that "national labor policy" actually favors

enforcing agreements by an employer to recognize a union in the future upon a showing of majority support.<sup>6</sup> As the Board explained in *Kroger*, these agreements are

contractual commitments by the Employer to forgo its right to resort to the use of the Board's election process in determining the Unions' representation status [at future sites]. To permit the Employer to claim the very right which it has forgone, perhaps in return for concessions in other areas, would violate the basic national labor policy requiring the Board to respect the integrity of collective-bargaining agreements. 219 NLRB at 389.

See also *Hotel Employees Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992) (endorsing *Kroger* and finding consistent with national labor policy the enforcement of a prehire agreement by an employer "to accept the results of a card check in lieu of an NLRB election").<sup>7</sup>

In our view, the rationale for the *Kroger* doctrine is no less applicable to 8(f) agreements in the construction industry and warrants the Board's approval of voluntary prospective recognition agreements in that industry. A contrary policy would directly contravene the fundamental principle stated in *Deklewa* that unions should not have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry. *Deklewa*, 282 NLRB at 1387 *fn.* 53.

Moreover, approval of prospective recognition agreements in the construction industry presents none of the problems of the involuntary "conversion doctrine" that the Board discredited and discarded in *Deklewa*. That doctrine operated as a matter of law to convert a union's representative status from Section 8(f) to Section 9(a) without notice to or consent by the employer or the represented employees. A prospective recognition agreement, by contrast, has no potential for surprise or covert conversion. The agreement itself manifests notice to and consent by an employer that, if the union gives proof of majority support to the employer during the term of the agreement, the union is thereby claiming the 9(a) repre-

<sup>6</sup> See *Retail Clerks Local 455 v. NLRB*, 510 F.2d 802 (1975).

<sup>7</sup> We have long held that each of the parties to a collective-bargaining relationship should honor its voluntary express promises. See, e.g., *Deklewa*, 282 NLRB at 1386, 1387; *Lexington House*, 328 NLRB 894, 895 (1999) (holding union to its express promise to refrain from organizing certain employees and dismissing election petition). Although Chairman Truesdale dissented in *Lexington House*, for reasons stated there at 897, he fully agrees with this fundamental notion that each party is accountable for its contractual undertakings.

<sup>4</sup> See *Hayman Electric*, 314 NLRB 879 (1994); *Precision Striping*, 284 NLRB 1110 (1987); *Triple A Fire Protection*, 312 NLRB 1088 (1993); *Casale Industries*, 311 NLRB 951 (1993); *Golden West Electric*, 307 NLRB 1494 (1992); *Comtel Systems Technology*, 305 NLRB 287 (1991); *J & R Tile*, 291 NLRB 1034 (1988); *James Julian, Inc.*, 310 NLRB 1247 (1993); and *Decorative Floors, Inc.*, 315 NLRB 188 (1994).

<sup>5</sup> See also *Alpha Beta Co.*, 294 NLRB 228 (1989); *Jerry's United Super*, 289 NLRB 125 (1988).

sentative status that the employer agreed to recognize upon the happening of that single condition.<sup>8</sup>

We would be improperly modifying the explicit terms of the parties' own agreement if we were to require that a union which has fulfilled the only contractual condition for obtaining voluntary recognition as a 9(a) representative—presenting adequate proof of majority status—must, in addition, formally and explicitly demand 9(a) recognition contemporaneously with its submission of proof of its majority status. As a practical matter, it may be the unusual case where the union does not take that additional step. But as a legal matter, the failure of a particular union agent to make an explicit demand (or of the employer to make an explicit response) is not a sufficient reason to allow an employer to avoid the obligations expressed in a prospective recognition clause.

Accordingly, we hold that where the parties by express language have agreed that 9(a) recognition will be granted if the union submits proof of majority status during the contract term, the happening of the specified event, without more, triggers the legal consequences agreed on by the parties. In giving effect to prospective 9(a) recognition clauses in 8(f) agreements, we will presume that by providing the employer with reliable proof of majority status, the union is demanding recognition in accordance with the parties' agreement. The question whether the Union provided a contemporaneous showing of majority status will be examined as of the time that the contractually specified evidence is presented to the employer.<sup>9</sup>

On the foregoing grounds, we conclude that a union's performance of the valid majoritarian conditions specified in a prospective 9(a) recognition clause constitutes a legally effective means for achieving 9(a) status in the construction industry. This is, in effect, a third option, in addition to the "two-option[s]" that the court identified as

the only available options for achieving 9(a) status at the time of this dispute. 124 F.3d at 330.<sup>10</sup>

Having thus responded to the court's objection that our prior decision departed without explanation from our post *Deklewa* decisions for achieving voluntary 9(a) recognition, we must confront the question whether, consistent with the law of the case, we can reaffirm our previous unfair labor practice findings. The General Counsel, the Union, and the amicus all urge that we are free to do so. The Respondent contends that given the court's explicit holding that it did not violate the Act, and the fact that the court did not retain jurisdiction to allow further review, the only appropriate course of action on remand is for the Board to dismiss the complaint in its entirety.

We do not read the court's opinion as narrowly as does the Respondent. If the court's intent were merely to vacate the Board's prior Order and to dismiss the complaint, there would have been no need to remand the case. Furthermore, as noted above, the court stated that it could not accept the Board's departure from precedent "in the absence of some cogent explanation, an explanation that has not been forthcoming." The precedent it cited for that proposition was *Shaw's Supermarkets v. NLRB*, 884, F.2d 34, 35 (1st Cir. 1989), a case in which the court, as here, also remanded and in which the Board clearly was not foreclosed from reaffirming its prior decision provided it adequately explained why it was departing from precedent. See *Shaw's Supermarkets, Inc.*, 303 NLRB 382 (1991) (on remand). Accordingly, we are satisfied that the court did not predetermine the result on remand but left it to the Board to decide in the first instance whether, in light of the law of the case and such explanation or change of Board precedent the Board deemed appropriate, the prior unfair labor practice findings should be reaffirmed.

For the reasons stated, we construe the remand as leaving real issues for the Board to decide. On consideration of those issues, we conclude that, consistent with the clarification of Board law that we have made on remand, the law of the case permits us to reaffirm our previous unfair labor practice findings. This case ultimately turns on the meaning of the parties' 1992 letter of assent and the legal effect of the Union's June 1993 actions under that contract. In such a circumstance, we are guided by the principle that the parties' contract, like any contract,

<sup>8</sup> Because we consider prospective recognition clauses in the construction industry in light of our experience with additional stores clauses, we do not share the concern, which the court voiced as "a secondary matter," that such clauses lack "any reasonable, temporally limiting principles." 124 F.3d at 331 fn. 11. Where, as here, the prospective recognition clause is contained in an 8(f) contract with a fixed term, the parties themselves have placed a mutually agreeable temporal limitation on the contractual obligation to grant 9(a) recognition. Cf. *McLean County Roofing*, 290 NLRB 685, 686 (1988) (absence of agreed upon termination date is evidence that there was no mutual intent to enter a binding 8(f) agreement).

<sup>9</sup> See *Hovey Electric, Inc.*, 328 NLRB 273 (1999). There the Board dismissed an unfair labor practice complaint alleging that a construction employer had improperly granted 9(a) recognition to a union prior to its demonstrating majority status. The Board affirmed the judge's finding that the parties initially had a lawful 8(f) relationship and that 9(a) recognition was not granted until after the union had presented evidence of its majority status in accordance with the prospective recognition clause in the parties' 8(f) agreement.

<sup>10</sup> The court's "two-option" reference reflects its earlier determination, 124 F.3d at 328–329, that "Board case law since *Deklewa* has set forth only two means by which a union may obtain 9(a) status during the course of a 8(f) relationship: (1) through a Board-certified election, or (2) through the employer's voluntary grant of recognition" in accordance with standards of *J & R Tile, Inc.*, 291 NLRB 1034, 1036 (1988), and *Golden West Electric*, 307 NLRB 1494, 1495 (1992), discussed above.

“must be read as a whole and in light of the law relating to it when made.” *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956); *Oil, Chemical & Atomic Workers Local 1-547 v. NLRB*, 842 F.2d 1141, 1143 (9th Cir. 1988). See also *Electrical Workers IBEW Local 1977 (A. O. Smith Corp.)*, 307 NLRB 138, 139 (1992) (“legal context in which the contract was negotiated” a factor in ascertaining contracting parties’ intent).<sup>11</sup>

As explained above, the court’s decision reflected its judgment that the plain language of the parties’ agreement was properly construed only against the background of settled Board law and that, when so construed, the actions taken by the Union in June 1993 to enforce its recognition agreement were insufficient to achieve 9(a) status. The settled Board law was not, however, limited to the two 9(a) recognition options identified by the court. Outside the construction industry, the settled Board law was that prospective recognition agreements were a valid “third option” for achieving 9(a) recognition. Although no case prior to the present proceeding called upon the Board to apply this precedent to parties

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<sup>11</sup> Cf. *Indianapolis Power Co.*, 291 NLRB 1039, 1041–1042 (1988), enf. 898 F.2d 524 (7th Cir. 1990) (where the Board’s finding of a violation on remand ultimately turned on the actual intent of the contracting parties regarding the no-strike clause in effect at the time of the dispute).

in the construction industry, the declaration in *Deklewa* that unions should not have less favored status with respect to that industry signaled the applicability of this precedent to the construction industry. Thus, our clarification of existing precedent here does nothing more than expressly confirm the state of the law as it existed when the Respondent signed the 1992 letter of assent.

Accordingly, based on the clarification of Board precedent set forth above, we adhere to the Board’s original decision that the Union established its 9(a) representative status during the term of the parties’ 8(f) contract and that the Respondent, therefore, was not free upon expiration of that contract to withdraw recognition from the Union and unilaterally change terms and conditions of employment. By doing so and dealing directly with employees, the Respondent violated Section 8(a)(5) and (1), and it violated Section 8(a)(3) and (1) by constructively discharging its apprentice employees.

#### ORDER

The National Labor Relations Board reaffirms the Board’s original Order reported at 321 NLRB 64 (1996), and orders that the Respondent, Goodless Electric Co., Inc., Springfield, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order.