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

Advice Memorandum

DATE: December 31, 2002

TO : Robert H. Miller, Regional Director
Joseph P. Norelli, Regional Attorney
Timothy Peck, Assistant to Regional Director
Region 20

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

SUBJECT: Petro Chem Insulation, Inc.
Case 20-CA-20820-1 590-7575-2500

Int'l Union of Petroleum and Industrial
Workers Union, AFL-CIO
Case 20-CB-11794-1

These cases were submitted for advice on whether this construction industry Employer and Union violated Sections 8(a)(2) and 8(b)(1)(A) of the Act by extending coverage of their Section 9(a) collective-bargaining agreement to a group of the Employer's previously unrepresented construction employees at another location when the union did not represent a majority of those employees.

FACTS

Petro Chem (the Employer) is a California corporation engaged in the construction industry as an industrial insulation contractor working principally in refineries, chemical plants and power plants in California and other states.[1] The Employer has a branch facility and its corporate headquarters in Vallejo (Northern California), and branches in Los Angeles (Southern California) and Indiana. The Employer apparently has worked on long-term projects in a number of other states—including the states of Washington, Utah and Hawaii.

In 1996, in Case 21-RC-19710, IUPIW (the Union) was certified as the Section 9(a) representative of a bargaining unit of employees working out of the Employer's Los Angeles branch, and the parties have had a collective-bargaining relationship at that location since that time. In 1997, in Case 9-RC-16916, the Union was certified as the Section 9(a) representative of a bargaining unit of employees employed by the Employer on projects directed by the Employer's Indiana area branch. In October 2001, the

[1] See, e.g., Petrochem Insulation, Inc., 330 NLRB 47 (1999).

Employer voluntarily recognized the Union as the representative of a bargaining unit of employees working at the Longview Fibre Company in Longview, Washington, and entered into a collective-bargaining agreement covering those employees.

Prior to July 2002,[2] the employees at the Vallejo facility were not represented by a union. International Association of Heat and Frost Insulators and Asbestos Workers, Local 16 (Local 16) unsuccessfully attempted to represent the Vallejo employees about ten years ago. Local 16 began a new organizing drive among the Vallejo employees in February 2002. In June 2002, Local 16 contacted the Employer concerning representing its employees, and Local 16 and the Employer met twice in June to discuss Local 16's possible representation of employees.

On June 28, the Union sent a letter to the Employer demanding recognition as the exclusive bargaining representative of the Employer's employees in Northern California, Hawaii and Utah. The Union asserted that those employees had been accreted into the Southern California unit and, in the alternative, that it had majority support among the employees. By letter dated July 8, the Union demanded that the Employer immediately recognize it and negotiate "a national collective bargaining agreement."

On July 9, the Employer and the Union entered into a Memorandum of Understanding (MOU) stating, in part:

> Accordingly, the parties agree that the coverage of their current collective bargaining agreement and the scope of the collective bargaining unit certified by the National Labor Relations Board in Case 21-RC-19710 has evolved and integrated with the Employer's operations throughout the State of California and in other States so as to accrete and include those employee members of the Union who perform work in the classifications set forth by this Agreement throughout the State of California as well as in any other States where the Employer's employees perform such work.
>
> In this regard, it is further agreed between the Employer and the Union that this same evolution and integration of the Employer's workforce throughout the State of California

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[2] Unless otherwise indicated, all dates refer to 2002.

> has resulted in a majority of Union-represented employees performing work for the Employer throughout the State of California as well as in other States where the Employer's employees perform such work. Accordingly, based upon this established majority support, the Employer recognizes the Union as the exclusive representative of the Employer's employees in the classifications described by this Agreement as set forth in the NLRB certification in Case 21-CA-19710 regardless of where they work in the State of California and in any other State where the Employer performs such work.

Since that time, the Employer and the Union have applied the collective-bargaining agreement from Southern California to the employees in Vallejo, including a union security provision.

Both the Employer and the Union contend that the parties lawfully expanded their Section 9(a) relationship to cover employees in Northern California, Hawaii and Utah because those employees constituted an accretion to the Southern California bargaining unit. The Region has found that the parties have not met their burden of proof in establishing an accretion.

In the alternative, the Employer and the Union assert that their agreement is privileged under Section 8(f) of the Act.

ACTION

We conclude that, because there has been no showing of majority support for the Union, the Employer and the Union could not lawfully enter into an agreement conferring Section 9(a) status on the Union as the representative of the Employer's employees in the locations covered by the parties' MOU. If the parties insist on maintaining their relationship under Section 9(a) of the Act, then the Region should issue complaint. However, if the parties agree to accord their relationship 8(f) status, then the Region should dismiss the charges, absent withdrawal.

In the construction industry, as elsewhere, an employer may enter into a Section 9(a) relationship by voluntarily recognizing a union based on a clear showing of majority support among employees.[3] However, it is presumed

that parties in the construction industry intend their relationship to be a Section 8(f) relationship, and the burden of proof is on the party who seeks to prove that the relationship is a Section 9(a) relationship.[4]

To prove such a relationship, the parties may rely upon a written agreement to establish a union's 9(a) representation status where the language unequivocally indicates that (1) the Union requested recognition as the majority representative; (2) the employer recognized the union as the majority representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, an evidentiary basis of its majority support.[5]

We agree with the Region that the parties fail to meet the Central Illinois test for demonstrating a Section 9(a) relationship. Although it appears that the first two prongs are satisfied, there is no evidence that the Union enjoyed the majority support of the employees over whom Section 9(a) recognition was extended. As noted above, the parties rely on an accretion theory to establish the Union's majority status, but the Region has rejected their contention that the employees they intended to cover under the MOU have been accreted into the established Southern California bargaining unit.

We further agree that, technically, the parties have violated the Act by agreeing to accord the Union Section 9(a) status when there is no proof that it represented a majority of the employees in the unit. However, we recognize that, since the Employer is in the construction industry, the parties could lawfully enter into a bargaining relationship governed by Section 8(f), notwithstanding the lack of majority support.

Therefore, the Region should inform the Employer and the Union of our decision and further inform them that the matter can be resolved by withdrawing 9(a) recognition and by according their relationship 8(f) status. If they agree, the Region should dismiss the charges, absent withdrawal. Although the parties were in technical violation of the Act from July 8 to the present, it would not effectuate the purposes and policies of the Act to

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[3] John Deklewa & Sons, 282 NLRB 1375 (1987), enfd. sub. nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988).

[4] Id. at 1385 n. 41.

[5] Staunton Fuel & Material, Inc., d/b/a Central Illinois Construction, 335 NLRB No. 59, slip op. at 1 (2001).

issue complaint at this time. However, absent the consent of the Employer and the Union to accord their relationship Section 8(f) status, the Region should issue complaint, absent settlement, alleging violations of Sections 8(a)(2) and 8(b)(1)(A).

B. J. K.