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

Advice Memorandum

DATE: February 24, 2009

TO: Irving E. Gottschalk, Regional Director
Region 30

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

SUBJECT: Fine Finishes Unlimited, Inc.
Case 30-CA-18169 530-8045-8700
596-0440-7500

This case was submitted for advice as to whether this construction-industry Employer established a Section 9(a) relationship with the Union based upon recognition language in one or more of the parties' successive collective-bargaining agreements, and, if so, whether the Employer violated Section 8(a)(5) by unilaterally changing employees' terms and conditions of employment after the most recent of those agreements expired.

We conclude that none of the parties' agreements established a Section 9(a) relationship. In particular, we conclude that the recognition language contained in the parties' initial agreement did not satisfy the three-part test in Central Illinois Construction.[1] We further conclude that there is an insufficient basis upon which to find that a Section 9(a) relationship was established by the recognition language in the parties' most recent agreement. Even if that language satisfied Central Illinois Construction, the Union's inability to establish that the Employer signed that agreement is a substantial obstacle, among others, to overcoming the presumption that the parties' relationship was governed by Section 8(f). We conclude, therefore, that at all material times the parties' relationship remained a Section 8(f) relationship, which the Employer was free to terminate at the conclusion of the most recent agreement. Accordingly, the Employer's post-expiration unilateral changes did not violate the Act, and the Region should dismiss the Section 8(a)(5) charge, absent withdrawal.

---

[1] 335 NLRB 717 (2001).

FACTS

Fine Finishes Unlimited, Inc. (the Employer) is a small painting contractor in Racine, Wisconsin. Since 1999, it has operated under successive collective-bargaining agreements with the Racine Painters Local Union #108 or the District Council with which it is affiliated.

Local 8 Area Agreements

On April 1, 1999, the Employer signed the Racine Painters Local Union #108 Area Agreement for the Painting and Drywall Industry (the Local 108 Area Agreement) between Local 108 and the Racine Chapter of the Painting and Decorating Contractors of America (PDCA). The Employer signed the Local 108 Area Agreement (and all subsequent agreements) as an independent signatory and has never been a member of the multi-employer association. That agreement was effective June 1, 1998 to May 31, 2000. At the time of signing, the Employer employed either no employees or one employee.

The recognition clause of the Local 108 Area Agreement provided:

> The Union has claimed and demonstrated and the employers, both individually and as a group, are satisfied and acknowledge that the Union represents a majority of the employer's employees in classifications of work covered by this agreement.
>
> Therefore, the P.D.C[.] of A. and the employers hereby recognize Racine Painters and Allied Trades Local Union #108 of the International Brotherhood of Painters and Allied Trades as the exclusive collective bargaining representative under Section 9(a) of the National Labor Relations Act for all employees performing work within the bargaining unit covered by this Agreement . . . .

The Local 108 Business Manager admits that at the time of signing of this agreement, or any subsequent agreement, he did not ask the Employer to voluntarily recognize the Union, and he did not make a showing of majority support or offer to make a showing of majority support.

There were two successor Local 108 Area Agreements, effective from June 1, 2000 to May 31, 2002, and from June 1, 2002 to May 31, 2004, respectively. Both agreements contained the same recognition language set forth above. Although it has not been established that the Employer signed those successor agreements, the Employer considered itself bound by the agreements and complied with their terms.

2004-2007 Tri-County Contract

The next agreement signed by the Employer, effective June 1, 2004 to May 31, 2007, was known as the "Tri-County Contract." The Tri-County Contract differed from the Local 108 Area Agreements in two relevant respects. First, the Tri-County Contract was the product of negotiations between geographically broader employer and union groups; the Racine, Kenosha, and Walworth County PDCA chapters on the employer side and, on the union side, Painters District Council Local 7, with which Local 108 had affiliated in June 2003. Second, the Tri-County Contract contained new recognition language, which provided:

> The Employer recognizes, acknowledges, and agrees that Painters District Council No. 7, and its affiliated Local Union's [sic] 108 & 934 is, within the meaning of Section 9(a) of the National Labor Relations Act, the exclusive representative for purposes of collective bargaining, of all the Employer's employees . . . .

As stated, it has been established that the Employer signed the Tri-County Contract, again as an independent employer.

Tri-County Contract Extension

Upon the expiration of the Tri-County Contract, the Tri-County PDCA and District Council 7 agreed to a 1-year extension of that contract, with increased wages and benefits contributions, effective June 1, 2007 to May 31, 2008 (the Tri-County Extension). The recognition clause of the Tri-County Extension differed from all previous agreements. It provided:

> The Employer hereby recognizes IUPAT, District Council No. 7 and Local Union's [sic] 108 and 934 ("the Union") as the sole and exclusive bargaining representative, within the meaning of Section 9(a) of the National Labor Relations Act ("the Act"), of all full-time and regular part-time employees employed on all present and future job sites within the jurisdiction of the Union. Such recognition is predicated on the Union's demand for recognition pursuant to Section 9(a) of the Act, and on the Union's presentation of clear showing [sic] of the majority of employees in the bargaining unit are members of the Union and desire the Union to act as their exclusive representative within the meaning of Section(a) [sic] of the Act. The Employer acknowledges that it has reviewed the Union's showing and agrees that it reflects the employees' desire to be represented by the Union under Section 9(a) of the Act.

The Employer complied with the terms of the Tri-County Extension insofar as it paid the increased wages and benefits contributions required by that agreement, and remitted union dues, through May 31, 2008. The Employer's president asserts, however, that he is "almost absolutely positive (99%)" that he did not sign the Tri-County Extension. The Union claims that the Employer did sign that extension, but the Union has been unable to produce a signed document to substantiate its claim. Further, the Union asserts that the Employer's president signed the Tri-County Extension at the Union's Kenosha County office, but the Employer's president asserts that he is "positive" he has never been to that office.

Following the expiration of the Tri-County Extension, the Employer declined the Union's request that it sign a successor collective-bargaining agreement. The Employer thereafter unilaterally changed its employees' wages and benefits.

ACTION

We conclude that there is insufficient evidence to overcome the presumption that the parties' relationship was governed by Section 8(f) rather than Section 9(a). We first conclude that the Local 108 Area Agreements, as well

as the subsequent Tri-County Contract, did not establish a Section 9(a) relationship because the language in those contracts failed to satisfy the test in Central Illinois Construction.[2] Second, we conclude that, even if the recognition language in the Tri-County Extension agreement satisfied Central Illinois, the presumption of Section 8(f) status has not been overcome, largely because it cannot be established that the Employer signed that agreement. The Region, therefore, should dismiss the charge, absent withdrawal.

There is a significant difference between a union's representative status in the construction industry under Section 8(f) and Section 9(a) of the Act. Under Section 8(f), an employer may terminate the bargaining relationship upon expiration of the agreement.[3] Under Section 9(a), an employer must continue to recognize and bargain with the union after the agreement expires, unless and until the union is shown to have lost majority support.[4]

In the construction industry, there is a rebuttable presumption that a bargaining relationship is governed by Section 8(f).[5] Therefore, a party asserting the existence of a 9(a) relationship has the burden of proving it.[6]

In Central Illinois, the Board reaffirmed that contract language alone may establish a Section 9(a) relationship. Adopting the three-part test established by the Tenth Circuit in Triple C Maintenance[7] and Oklahoma

---

[2] 335 NLRB 717 (2001).

[3] See id. at 718.

[4] Id.

[5] John Deklewa & Sons, 282 NLRB 1375, 1385 n.41 (1987), enfd. sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

[6] Central Illinois, 335 NLRB at 718.

[7] NLRB v. Triple C Maintenance, Inc., 219 F.3d 1147, 1155 (10th Cir. 2000), enfg. 327 NLRB 42 (1998).

Installation[8] to determine the sufficiency of the contract language, the Board held that Section 9(a) status is established by language that unequivocally indicates (1) that the union requested recognition as the majority or 9(a) representative of the unit employees, (2) that the employer recognized the union as the majority or 9(a) bargaining representative, and (3) that the employer's recognition was based on the union having shown, or having offered to show, evidence of its majority support.[9] The Board also stated that it would "continue to consider relevant extrinsic evidence" in cases where the contractual language is not "independently dispositive."[10]

A. The Local 108 Area Agreements and the Tri-County Contract

Assuming arguendo that the recognition language in the Local 108 Area Agreements satisfies the first two elements of the Central Illinois test, it does not satisfy the third element. The pertinent language--"[t]he Union has claimed and demonstrated and the employers . . . are satisfied and acknowledge that the Union represents a majority of the employer's employees"--does not unequivocally state that the Union showed, or offered to show, the Employer any evidence that would prove that a majority of unit employees supported the Union. For this reason we find the language closer to that in cases that failed to meet the Central Illinois test than cases in which it did.

---

[8] NLRB v. Oklahoma Installation, 219 F.3d 1160, 1164 (10th Cir. 2000), denying enf. of 325 NLRB 741 (1998).

[9] See Central Illinois, 335 NLRB at 719-720. But see Nova Plumbing, Inc. v. NLRB, 330 F.3d 531, 536-538 (D.C. Cir. 2003), denying enf. of 336 NLRB 633 (2001)(contract language alone did not establish a Section 9(a) relationship where evidence showed unit employees resisted union representation).

[10] Central Illinois, 335 NLRB at 720, n.15.

In Nies Eggert Waterproofing,[11] language that the union "demonstrated to the Employer's satisfaction that a majority of the bargaining unit employees . . . has designated the Union to serve as their collective bargaining representative" was insufficient to satisfy the third element of the Central Illinois test because it did not unequivocally state that the union had showed, or offered to show, the employer evidence of its majority support. Consequently, it was susceptible to being seen as establishing only that the employer was satisfied with an assertion, without proof or an offer of such proof, of majority status. The "demonstrated" language in the Local 108 Area Agreements suffers from the same defect.

In contrast, recognition language that the Board has found sufficient to meet the third Central Illinois element explicitly recites that "the Union has submitted to the Employer *evidence of majority support*." Saylors, Inc., 338 NLRB 330, 334 (2002) (emphasis supplied).[12] That clear reference to concrete proof of majority status

---

[11] Case 25-CA-29777, Advice memorandum dated March 30, 2006.

[12] See also M&M Backhoe Service, 345 NLRB 462, 465, 467 (2005)("The Union claims, and the Employer acknowledges and agrees, based on a showing of signed authorization cards, that a majority of its employees . . . ." and extrinsic evidence confirmed majority), enfd. 469 F.3d 1047 (D.C. Cir. 2006); Nova Plumbing, Inc., 336 NLRB 633 (2001)("Based upon evidence presented to the Contractor by the Union, which evidence demonstrates that the Union represents an uncoerced majority of the employees of the Contractor, and which has been independently verified by a Certified Public Accounting firm . . . ."), enf. denied 330 F.3d 531 (D.C. Cir. 2003); Reichenbach Ceiling & Partition Co., 337 NLRB 125, 126 (2001)("The Union has submitted to the Employer evidence of majority support, and the Employer is satisfied that the Union represents a majority . . . ."); see also William J. Zickel Co., Case 17-CA-24172, Advice memorandum dated July 30, 2008 (language stating that Employer submitted "evidence" and "proof" satisfied Central Illinois and is thus distinguishable from Oklahoma Installation line of cases).

distinguishes such language from that in Nies Eggert and the Local 108 Area Agreements, which lack an accompanying reference to any evidence.

The lack of clarity in this instance is exacerbated by the altered recognition language in the parties' subsequent Tri-County Contract. That language – which provides only that "the Employer recognizes, acknowledges and agrees that [the Union]. . . is . . . [the] Section 9(a) . . . exclusive bargaining representative" - does not even arguably satisfy the third element of Central Illinois. Indeed, the Tri-County Contract language not only fails to unequivocally state that the Union showed, or offered to show, evidence of majority support, but fails to contain even an assertion of majority support.[13]

Because the language in the Local 108 Area Agreements does not appear to be independently dispositive of whether a Section 9(a) relationship was created, consideration of relevant extrinsic evidence is appropriate.[14] There is no extrinsic evidence here that the Union presented, or offered to present, any evidence of majority support. In fact, the Union admits that it did not offer proof of majority support to the Employer.[15]

---

[13] The lack of consistency among predecessor and successor agreements is a relevant consideration. See MFP Fire Protection v. NLRB, 101 F.3d 1341, 1344 (10th Cir. 1996)(emphasizing satisfactory 9(a) language through a series of contractual acknowledgements); William J. Zickel Co., Case 17-CA-24172, Advice memorandum dated July 30, 2008 (the language of both the 2001 and subsequent 2004 agreements satisfied Central Illinois).

[14] The ambiguity present in the agreements at issue is not resolved by the presence of a 7-day union security clause in those agreements. In Madison Industries, 349 NLRB 1306 (2007), then-Member Schaumber found that such a provision suggests an 8(f) relationship but is not dispositive. Id. at 1309 n.11. Then-Member Liebman, in dissent, found that such a provision casts no light on the nature of the relationship. Id. at 1310 n.5.

[15] In addition, it bears mentioning that the Employer employed only one employee, or no employees, at the time it

Absent extrinsic evidence to clarify the language of the Local 108 Area Agreements, the Union has failed to carry its burden of demonstrating that its relationship with the Employer was a Section 9(a) relationship during the period in which those agreements and the Tri-County contract were effective.

B. The Unsigned Tri-County Extension

As described, upon expiration of the Tri-County Contract, the Union and the Tri-County PDCA executed the Tri-County Extension, which contained yet another recognitional provision. Although the Employer paid increased wages and benefit fund contributions, and remitted union dues, pursuant to the Tri-County Extension, the Employer vigorously denies ever signing that contract. The Union asserts that the Employer's president signed the Tri-County Extension at its office in Kenosha County, but the Union has not produced a signed document, or even called into question the Employer's denial. In those circumstances, we conclude there is insufficient evidence that the Employer signed the Tri-County Extension.[16]

Nevertheless, we assume arguendo that by these actions the Employer adopted by conduct the Tri-County Extension.[17]

---

signed the initial Local 108 Area Agreement. Hence, it appears there was no substantial and representative complement of employees at that time, and the Employer thus could not lawfully recognize the Union as the Sec. 9(a) representative of employees who had yet to be hired. See Garner/Morrison, LLC, 353 NLRB No. 78, slip op. at 6 (2009); Central Illinois, 335 NLRB at 718 (Board observed that Sec. 9(a) status could be achieved from "'voluntary recognition accorded . . . by the employer of a *stable work force* where that recognition is based on a clear showing of majority support. . . .'")(emphasis added), quoting John Deklewa & Sons, 282 NLRB 1375, 1387 n.53 (1987).

[16] There is no contention that the Employer agreed to sign the Tri-County Extension but failed to execute it.

[17] See, e.g., Vin James Plastering Co., 226 NLRB 125 (1976)(adoption by conduct when employer adhered to

We also assume arguendo that the new recognition language contained in that agreement satisfied the Central Illinois test. Even with both of those assumptions, however, we decline to apply the Central Illinois principle that contract language can rebut the presumption in favor 8(f) status to the contract language here.

The absence of a signed agreement appears to be a major obstacle to successfully prosecuting this case. All of the lead cases, including the Tenth Circuit's decisions in Triple C Maintenance and Oklahoma Installation and the Board's decision in Central Illinois, involved signed contracts.[18] Indeed, we are aware of no precedent finding Section 9(a) status in the construction industry based on a party's adoption by conduct of a contract containing language that satisfies Central Illinois.

Reading Central Illinois to require that there be a signed contract is consistent with the objective of the Central Illinois test. As the Tenth Circuit observed in NLRB v. Oklahoma Installation, the "critical question" is whether contract language establishes that "parties intended to be governed by Section 9(a) rather than 8(f)" and accordingly "conclusively give[s] notice that a 9(a)

---

contract terms including payments to benefit funds and deducted and remitted union dues). The Board has long held that a binding agreement may be formed even when the parties have not reduced to writing their intent to be bound. E.g., Haberman Construction Co. v. NLRB, 236 NLRB 79, 85-86 (1978), enfd. 641 F.2d 351 (5th Cir. 1981). Adoption by conduct may occur in either an 8(f) or 9(a) context. Asbestos Workers Local 84, 351 NLRB 19, 20 n.5 (2007).

[18] See Triple C Maintenance, Inc. v. NLRB, 219 F.3d 1147, 1155 (10th Cir. 2000)("The collective bargaining agreements *entered into* by Triple C and the Union in 1993, 1994, and 1995 meet th[e Central Illinois] standard.")(Emphasis supplied.); NLRB v. Oklahoma Installation, 219 F.3d 1160, 1162 (10th Cir. 2000)(signed recognition agreement at issue); Central Illinois, 335 NLRB at 717 (same).

relationship is intended."[19] We are unwilling to discern intent and conclusive notice from language in a contract that a party did not sign. Such an approach would be particularly problematic here where there is no evidence establishing that the Employer even saw or received a copy of the Tri-County Extension nor is there evidence that the Union actually presented evidence of majority support to the Employer in 2007.

Further, an expansion of Central Illinois to the adoption-by-conduct context is inconsistent with the narrowing of Central Illinois sought by the General Counsel in the Lambard[20] line of cases. Lambard posed the circumstance where the Central Illinois test is satisfied, but the evidence establishes that the union did not actually demonstrate majority support at the time the employer assertedly granted Section 9(a) recognition. It was determined that complaint should issue in such cases consistent with Central Illinois but that the General Counsel would argue that the Board should overrule Central Illinois to the extent it precludes consideration of whether the union actually enjoyed majority support at the time it was granted Section 9(a) recognition.[21] Lambard is an attempt to craft an approach more consistent with principles of employee free choice and majority rule in the construction industry.[22] That policy supports restraint in applying Central Illinois to adoption-by-conduct situations where employees' Section 7 rights could be limited based on an even more tenuous contractual basis.

---

[19] 219 F.3d at 1164, quoting Triple C Maintenance, Inc. v. NLRB, at 219 F.3d at 1155 (internal quotation marks omitted).

[20] Lambard, Inc., 31-CA-27033 (July 7, 2005)(Significant Appeals Minute 05-13).

[21] See Banta Tile and Marble Co., Case 4-CA-34569, Advice memorandum dated November 7, 2006 (applying Lambard); D & B Fire Protection, Inc., Case 21-CA-36915, Advice memorandum dated December 9, 2005 (applying Lambard).

[22] See Nova Plumbing, Inc. v. NLRB, 330 F.3d 531, 536-537 (D.C. Cir. 2003).

For those reasons, we conclude that the Union has failed to demonstrate, based on the Tri-County Extension (or any predecessor agreement), that its relationship with the Employer was a Section 9(a) relationship. The Employer was therefore free to terminate the relationship at the conclusion of the Tri-County Extension, and was not required to continue to recognize and bargain with the Union and refrain from making unilateral changes. Accordingly, the charge should be dismissed, absent withdrawal.

B.J.K.