A Timely Analysis of Legal Developments

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8(f) v. 9(a) Relationships in the Construction Industry: The Controversy Continues

By Richard Hill

Responding to an 11-year-old decision by the U.S. Court of Appeals for the D.C. Circuit, the National Labor Relations Board's General Counsel recently issued a memorandum that provides guidance to NLRB regional offices on investigating cases involving whether construction industry prehire agreements have been transformed into collective bargaining agreements governed by Section 9(a) of the National Labor Relations Act (the "Act").

The Act contains several provisions that are unique to the construction industry. Among them, Section 8(f) permits construction industry employers and unions to sign so-called "prehire agreements." Prehire agreements are collective bargaining agreements signed without a union's first being certified through an NLRB election or recognized after demonstrating majority support, oftentimes, as the name implies, even before any employees have been hired. Such agreements are enforceable for the term of the agreement but they do not bar a representation petition filed by a rival union or disaffected employees. Upon termination of a prehire agreement, the employer has no duty to bargain for a new agreement.[1]

A recurring issue in the construction industry is how a collective bargaining relationship that began under Section 8(f) can be transformed into a relationship governed by Section 9(a), which requires that the union be the chosen representative of a majority of the bargaining unit employees. If the relationship is governed by Section 9(a), the union has the same rights, and the employer has the same obligations, that exist in any non-construction industry collective bargaining relationship.

In *Staunton Fuel & Material, Inc. dba Central Illinois Construction*,[2] the NLRB ruled that a collective bargaining relationship governed by Section 9(a) can be created by contractual language alone, if the contractual language unequivocally indicates (1) the union requested recognition as the majority or Section 9(a) representative of the unit employees; (2) the employer recognized the union as the employees' majority or Section 9(a) representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of majority support. Under *Central Illinois*, the mere recitation of the union's majority status can create a Section 9(a) relationship, even if the union, in fact, never enjoyed majority support and never offered to demonstrate its majority support.

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1 *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enforced sub nom, Iron Workers Local 3 v. NLRB*, 843 F.2d 1770 (3d Cir. 1988), *cert. denied*, 488 U.S. 889 (1988).

2 335 N.L.R.B. 717 (2001).

This precise issue came before the D.C. Circuit in *Nova Plumbing, Inc. v. NLRB*.[3] The employer in that case signed a collective bargaining agreement containing Section 9(a) recognitional language consistent with *Central Illinois*, but there was clear evidence that the union did not have majority support at the time the agreement was signed. The court of appeals refused to enforce the Board's order. The court reasoned that allowing a Section 9(a) relationship to be created by contractual language alone, where the actual facts are to the contrary, runs counter to the principle of majority rule built into the Act.

Nearly 11 years after the D.C. Circuit decided *Nova Plumbing*, the NLRB General Counsel has refined the approach to be taken in cases involving Section 9(a) relationships allegedly created under contractual language satisfying the *Central Illinois* requirements. The General Counsel has directed that, in cases in which such contractual language exists, regional offices are not to affirmatively seek, and are not to require, evidence that the union possessed majority support. Nor are they to affirmatively seek evidence that contradicts the contractual language.[4]

However, if "the Region is presented with direct evidence that the union did not actually have majority support at the time the employer extended the Section 9(a) recognition to the union," the Region should investigate whether the union had majority support and should submit those cases to the NLRB's Division of Advice to determine if a compliant should be issued.[5]

While the General Counsel's memorandum is not an outright rejection of *Nova Plumbing*, it is a grudging acknowledgment at best.

There are two clear takeaways from the General Counsel's memorandum. First, when a construction industry employer first signs a prehire agreement containing Section 9(a) recognitional language, it should inquire whether there is any "direct evidence" that the union is not, in fact, supported by a majority of the bargaining unit employees. If so, the employer should save the evidence for possible future use. Second, if an employer is terminating or is considering terminating a collective bargaining agreement containing Section 9(a) recognitional language, it should ask whether any evidence exists that the union did not enjoy majority support when that language was first adopted. There may be a basis for terminating the collective bargaining agreement and refusing to bargain over a new agreement.

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3 330 F.3d 531 (D.C. Cir. 2003).

4 NLRB, Office of the General Counsel, Memorandum OM 14-23.

5 *Id.*