



COMMENTS ON THE NLRB'S PROPOSED RULE REGARDING REPRESENTATION-CASE PROCEDURES

Introduction

The Associated General Contractors of America (“AGC”) is the leading association in the construction industry. Founded in 1918 at the express request of President Woodrow Wilson, AGC is now the nation’s largest and most diverse trade association in the commercial construction industry, representing more than 33,000 companies in nearly 100 chapters throughout the United States. AGC members include approximately 7,500 of general contractors, 12,500 specialty contractors, and 13,000 suppliers and service providers working in the building, highway, heavy, industrial, municipal utility, and virtually all other sectors of the construction industry.

AGC submits the present comments in response to the notice of proposed rulemaking relating to representation-case procedures as published by the National Labor Relations Board (“NLRB” or “Board”) in the Federal Register on June 22, 2011. Although AGC is a member of the Coalition for a Democratic Workplace (“CDW”) and fully supports the comments submitted by CDW, we submit these comments to supplement CDW’s comments in order to emphasize certain points and to point out the relevancy and practical impact of the Board’s proposed rule on AGC members and on the construction industry.

Like F. Scott Fitzgerald’s famous comment that the rich were just different,¹ the same is true of the construction industry when it comes to almost everything under the National Labor Relations Act (“NLRA” or “the Act”), including such matters as unit determinations and voter eligibility in NLRB-conducted elections. In the unionized sector of the industry, the conducting of an NLRB election is less common than in all other industries since the industry largely inhabits a special world of voluntary recognition that is permissible under NLRA § 8(f) only in construction and of voluntarily crafted bargaining units that might not resemble any rational grouping of employees. The nonunionized sector of the industry consists of construction contractors that refer to themselves as “open shop” or “merit shop” contractors. AGC proudly represents both union and open shop contractors and points out that the Board’s proposed regulations on representation cases affect both groups significantly in much the same way.

The Proposed Rule is Not Needed

As a preliminary matter, AGC wishes to emphasize that the proposed rule should be withdrawn as it is not needed. The summary of the proposed rule in its preamble states that the proposed

¹ F. Scott Fitzgerald, “The Rich Boy” (1926).

amendments “would remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation.” 76 Fed.Reg. 36812. However, the Board’s own published data belie the assumption that such barriers exist. Notably, data from the Board’s last annual report, for fiscal year 2009, reveal that unions won 63.8 percent of the 1,691 representation cases closed in FY2009. Seventy-Fourth Annual Report of the National Labor Relations Board, Table 11A.—Analysis of Elections Conducted in Representation Cases Closed, Fiscal Year 2009, p. 119. Given that much of the criticism of the proposed rules centers on the expectation that the changes will make it easier for unions to prevail in Board-conducted elections, the Board’s own statistics raise the question: what percentage of union victories is mandated by the Act? It is difficult to understand from the data available just what problem is being fixed by these proposed amendments.

In fact, much of the purported rationale for the proposed amendments is undercut by the data presented in support of the changes. For example, footnote 40 to the proposed rule notes that “[i]n the last decade, between 86 and 92 percent of representation elections have been conducted pursuant to either a consent agreement or stipulation,” 76 Fed.Reg. 36818 n.40. This statistic tends to diminish the force of the Board’s rationale for an overhaul of the current representation procedures.

The Proposed Rule Would be Particularly Burdensome and Impracticable in the Construction Industry

Because of the unique nature of the industry – especially with regard to unit determinations and voter eligibility, as well as its decentralized workplaces – several of the Board’s proposed regulations would have a particularly difficult application and a detrimental impact in the construction industry. Those include the Board’s proposed mandates governing: hearings within seven days of service of notice, as set forth in proposed §102.63; the deferral of certain eligibility issues to a post-election procedure pursuant to proposed §§102.64 and 102.66; the furnishing of an Excelsior list within two days of the Regional Director’s decision following hearing or of his/her approval of an election agreement, as proposed in §§102.67(j) and 102.62(d); and the filing of a pre-hearing statement of position, as described in proposed §102.63(b)(1).

To help the current Board fully understand how these proposed regulations would impact the construction industry, we begin with a discussion of the nature of unit determinations and voter eligibility in the industry.

Unit Determination in the Construction Industry

Bargaining unit determinations in the construction industry arise primarily in two contexts: (1) conversion situations where an existing §8(f) bargaining representative seeks to convert to §9(a) status through an election, and (2) initial organizing situations where there is no existing §8(f) representative. In each, even a cursory review will show that the seven-day hearing rule is not feasible, and in the case of 8(f)/9(a) conversion election, simply irrelevant with respect to the Board’s stated value of speeding up the election process.

In *John Deklewa & Sons*, 282 NLRB 1375 (1987) the Board handed down its most significant decision on the interpretation of Section 8(f) of the Act. Although *Deklewa* was a case involving the enforceability of pre-hire agreements in an unfair labor practice context, it became the Board's seminal decision regarding unit determinations in 8(f)/9(a) conversion cases. In *Deklewa*, the Board held that it would abandon the so-called conversion doctrine in unfair labor practice cases and *modify* relevant unit scope rules in 8(f) cases. According to the Board:

We shall apply the following principles in 8(f) cases: (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e); (3) *in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement*; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

Deklewa, 282 NLRB at 1377-1378 (emphasis added). The Board also stated in *dicta* that in determining the appropriate unit for election purposes that it would no longer distinguish between "permanent and stable" and "project by project" work forces, and that single employer units would normally be appropriate. 282 NLRB at 1385.²

It is thus clear that the Congressional focus behind the enactment of 8(f) was primarily to protect the interests of employers and unions from what would otherwise be violations of the Act. Section 8(f) sanctions the right of the employers and unions to make such agreements without regard to the fundamental concept inherent in unit determinations under 9(b) of the Act, *i.e.*, the community of interest of employees.³ However, as the Board further stated in *Deklewa*:

In legitimating these practices, however, Congress was mindful of employee free choice principles. In this regard, the second proviso to Section 8(f) declares that an 8(f) agreement "shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)." In that proviso, Congress sought to assure that the rights and privileges accorded employers and unions in the body of Section 8(f) would not operate to thwart or undermine construction industry employees' representational desires.

² Obviously, the reference to "project by project" versus "permanent and stable" work forces was to concepts developed by the Board to deal with the application of the conversion doctrine in Section 8(a)(5) cases relating exclusively to the repudiation of Section 8(f) agreements or relationships based on the signatory union's lack of majority status in the relevant bargaining unit. *See Hageman Underground Construction*, 253 NLRB 60 (1980); *Land Equipment Inc.*, 248 NLRB 685 (1980); *Precision Striping, Inc.*, 245 NLRB 169 (1979); *Dee Cee Floor Covering, Inc.*, 232 NLRB 421 (1977). Nevertheless, as discussed below, these concepts are still relevant in initial organizing contexts.

³ "Section 9(b) of the Act, in empowering the Board to decide in each case 'the unit appropriate for the purposes of collective bargaining,' directs it to make an appropriate unit determination which will 'assure to employees the fullest freedom in exercising the rights guaranteed by this Act' – *i.e.*, the rights of self organization and collective bargaining." *R. B. Butler, Inc.*, 160 NLRB 1595, 1599 (1966).

282 NLRB at 1380-1381.

While the Board in *Deklewa* initially decided to give binding effect to 8(f) agreements vis-à-vis the contracting parties, it simply does not follow, in every case where the contracting union seeks to convert to full 9(a) status under the Act's procedures, that the appropriate unit for certification will necessarily be coextensive with the 8(f) contractual unit. Arguably giving binding effect to the contractual unit in a proceeding under 9(c) of the Act would simply permit the contracting parties to always define the contours of the unit, regardless of whether it is representative of either the employer's operation or the employees' desires. This would mean, for example, that the majority of employees employed almost exclusively on an employer's projects in one geographic (county) area, who do not interchange, and have no contact, with employees employed on projects in another area, would completely control the present and future collective bargaining desires of the latter group.

What *Deklewa* obviously requires is that the Section 8(f) unit be appropriate – that is, that an election in that unit will be representative of employee desires with respect to collective bargaining and a realistic indicator that the union is the majority choice of employees on future projects. Arguably, the principal basis in *Daniel Construction Company*, 133 NLRB 264 (1961), and prior cases for permitting broad geographic units is the fundamental assumption that the employer has a core group of employees that has a sufficient presence on each of the employer's projects in the area to justify reliance on the results of an election now as an accurate barometer of employee choice in the future. Cf. *Construction Erectors, Inc.*, 265 NLRB 786, 787 (1982).

In *P. J. Dick Contracting, Inc.*, 290 NLRB 150 (1988), consistent with the language of *Deklewa*, the Board found that the appropriate unit for certification was the contractual 8(f) unit covered by the current multi-employer agreement. The Board pointed to the 11-year bargaining history. It held that: "Units with extensive bargaining history remain intact unless repugnant to Board policy, or interfere with rights guaranteed by the Act." 290 NLRB at 151. The Board further stated that its "... traditional deference to bargaining history in general applies to the construction industry." *Id.* Then, based on its own perception of "the limited evidence presented," the Board held that bargaining history was a determining factor in finding that the 11-county unit covered by the current contractual unit was appropriate.⁴

Although the Board has indicated that *P. J. Dick* is somewhat limited to its facts, subsequent Board cases continue to cite it for the role that 8(f) bargaining history plays in unit determinations. Thus in *Barrow Heating & Air Conditioning*, 343 NLRB 450, 453 (2004), the Board stated that both the language of *Deklewa* and the decision in *P. J. Dick* make it clear that "the 8(f) contractual unit is not necessarily conclusive as to the determination of the appropriate unit. In finding the historical unit to be appropriate, the Board did not find that its decision in

⁴ The Board noted that historically it had declined to define the scope of an appropriate unit based on geographical terms, but since both of the union's requests were based on geographic definitions, it would "give deference to this terminology." 290 NLRB at 151, n.10. The Board rejected the Union's 33-county request, based on its geographic jurisdiction, and the single-county unit requested by the employer based on the scope of its projects.

Deklewa compelled a finding that only the historical unit was appropriate.” 243 NLRB at 453 n.15. See also *Alley Drywall, Inc.*, 333 NLRB 1005, 1007 (2001) (“Bargaining history pursuant to an 8(f) agreement is not the conclusive consideration in determining whether a petitioned for unit is appropriate.”). The Board went on to find that the 8(f) units in *Barrow Heating*⁵ and *Alley Drywall*⁶ were not controlling, and found other units to be appropriate.

What happens where there is no bargaining history based ostensibly on a geographical defined contractual unit and the employer asserts that it only signs project agreements and, therefore, for conversion purposes, the historical units existing at each project are the only appropriate units?

In *Dezcon, Inc.*, 295 NLRB 109, 112 (1989), the Board found that the parties’ bargaining history was unsettled and did not support either party’s contention. The Board remarked that its prior statements about the scope of units in the construction industry in *Deklewa* “should not be interpreted so as to rob construction industry employees of meaningful choice, simply because an employer has unilaterally decided to limit its relations with craft unions to project agreements” [footnote omitted]. *Id.* The Board then found the petitioned for three-county unit appropriate.⁷

⁵ In *Barrow Heating, supra*, the employer was an HVAC contractor with two facilities. It also sold and installed wood and gas stoves, fireplaces, spas, and accessories. Its operations were divided into six departments: commercial, residential, service, spa, hydronics, and fireplace. The union had a lengthy 8(f) relationship with the employer. The sheet metal employees were initially covered by a master agreement and separate addenda covering the commercial, residential, and service departments respectively, but the employer subsequently did not renew the addenda for the residential and service department employees, which, according to the Board, ended their representation by the union. When the employer discontinued the residential addendum, the union filed a petition to represent sheet metal employees working in the commercial, residential, and service departments. The Regional Director found that the petitioned for unit was not appropriate and that two units were appropriate: one comprised of sheet metal employees in the commercial department, and one comprised of those in the residential and service departments. The employer argued that only the 8(f) contractual unit was appropriate, and that under *Deklewa*, that was the relevant inquiry. The Board rejected this argument, indicating that the issue was always whether the petitioned for unit was appropriate. 343 NLRB at 453. It found that the petitioned for unit was appropriate. *Id.*

⁶ The Board’s decision in *Alley Drywall, supra*, grew out of the nationwide dispute between the Plasterers and the Bricklayers. The Plasterers had an 8(f) agreement with a Chicago area multiemployer association of wall and ceiling contractors. By trade agreement with the Bricklayers, plasterers work was done by bricklayers in DuPage County. The Plasterers subsequently revoked its agreement with the Bricklayers and sought to expand its geographic jurisdiction to cover the disputed county. The Plasterers then filed a petition seeking to become the 9(a) representative of the employer’s employees without regard to geographical jurisdiction. The Bricklayers intervened, arguing that the unit sought was inappropriate because it was broader than the 8(f) unit, and the history of bargaining controlled the scope of the unit. The employer agreed with the Plasterers on the scope of the unit, but wanted to define the unit by geographical limitations; the Plasterers objected to the insertion of any such limitation. Since there was no disagreement that the Plasterers constituted an appropriate craft unit, the Board upheld the Regional Director’s decision that the 8(f) unit was not controlling based on bargaining history alone and that the petitioning union could represent employees in the broader geographical area sought based on the core group nature of the employer’s operations. In addition, the Board upheld the Regional Director’s refusal to impose any geographical jurisdiction on the petitioner’s unit description. 333 NLRB at 1006-1008.

⁷ While the Board noted that over 20 percent of the employer’s projects were located in the three-county area sought by the union, it never indicates what the actual percentage was. Although the Board, in *Premier Plastering, Inc.*, 342 NLRB 1072, 1073 (2004), relying on *Alley Drywall, supra*, indicated that a proper unit description, where an employer uses a core group of employees at its various worksites, is one without geographic

Lastly, despite *Deklewa*'s holding, bargaining unit history may have little weight where the unions represent separate 8(f) units and the Board ultimately concludes that neither group constitutes a true craft unit. *See A. C. Pavement Striping Co.*, 296 NLRB 206, n.2 (1989).

In contrast to conversion situations under Section 8(f), in initial organizing situations in the construction industry under Section 9(e) where no labor organization currently represents the employees who are the subject of the petition, there are two principal issues: (1) whether the group of employees sought constitutes a traditional craft unit; and (2) whether the scope of the unit is limited to the job site or includes multiple job sites. These subjects are discussed separately below.

With regard to the first issue, the Board has frequently held that traditional craft units in the construction industry are appropriate. *R. B. Butler, Inc.*, *supra* (proposed unit of laborers where no other employees are sought constitutes appropriate craft unit); *Del-Mont Construction Company*, 150 NLRB 85(1964) (unit of equipment operators including crane, backhoe, shovel, bulldozer, compressor and pump operators, and mechanics is appropriate unit). *See also Air Conditioning Contractors*, 110 NLRB 261(1955) (plumbers and pipefitters); *Michigan Cartagemen Assn.*, 117 NLRB 1778 (1957) (riggers); *Employing Plasterer's Assn.*, 118 NLRB 17(1957) (latherers); *Dezcon Inc.*, *supra* (carpenters); *Schaus Roofing*, 323 NLRB 3781 (1997) (sheet metal workers).

In *Burns & Roe Services Corp.*, 313 NLRB 1307, 1308 (1994), the Board described a "craft unit as one consisting of a distinct and homogeneous group of skilled journeymen craftsmen who together with helpers or apprentices, are primarily engaged in the performance of tasks which are not performed by other employees and which require the use of substantial craft skills and specialized tools and equipment" [footnote and citations omitted]. 313 NLRB at 1308. The Board then articulated its most recent formulation of the test for whether or not a particular group of employees constitutes a true craft unit, stating as follows:

In determining whether a petitioned-for group employees constitutes a separate craft unit, the Board looks at whether the petitioned-for employees participate in a formal training or apprenticeship program; whether the work is functionally integrated with the work of the excluded employees; whether the duties of the petitioned-for employees overlap with the duties of the excluded employees; whether the employer assigns work according to need rather than on craft or jurisdictional lines; and whether the petitioned for employees share common interest with other employees, including wages, benefits and cross-training.

Id.

limitation, it claimed that its decision in *Dezcon* was not to the contrary, and that the geographically limited unit in *Dezcon* was supported by a full analysis of all of the commonality of interest factors.

Obviously, the threshold issue has always been whether the group of employees being sought by the petitioning union constitutes a true craft or functionally distinct group of employees, or includes other employees who would not fall into that category. If the latter is the case, must the unit then include all employees on the construction site or may there be a different grouping that is otherwise appropriate?

Another variant of the issue of craft unit appropriateness is when the employer asserts that its particular operations are sufficiently integrated so that only an overall unit of skilled employees is appropriate. In *Brown & Root, Inc.*, 258 NLRB 1002 (1981), the Plumbers and Boilermakers jointly sought to represent a unit composed of the employer's pipefitters, pipe welders, pipefitter helpers, boilermakers, boiler welders, and boilermaker helpers, excluding all other employees. The employer contended that its operation was sufficiently integrated that only an overall unit of all skilled employees was appropriate. The employer maintained its construction operation at a large power plant where it employed approximately 560 employees in its construction workforce. These employees were assigned to several departments, including pipe, boilermaker, ironworkers, instrument, millwright, insulator, electrical, and building. All of the employer's skilled employees received the same hourly rate and same fringe benefits. They were also eligible for the employer's upgrading and cross training program and were covered by the same work and safety rules.⁸ All employees in the construction workforce started and stopped work at the same time, and took their lunch breaks at the same time.⁹

In rejecting the Regional Director's determination that the unit sought was appropriate, the Board held:

In the construction industry, the Board has found a separate unit of craft employees to be appropriate. The Board has also found appropriate a unit of employees that constitute a clearly identifiable and functionally distinct group of employees. The record in the instant case fails to reveal that the petitioned-for unit satisfies the requirements of either a craft unit or a functionally distinct group with common interest separate from the employer's other skilled employees. (Footnotes and citations omitted.)

258 NLRB at 1023

In *S. J. Grove and Sons Company*, 267 NLRB 175 (1983) the Board rejected the Regional Director's determination that a petition for a unit comprised of four craft groups — carpenters and helpers, concrete finishers and helpers, general laborers, and power equipment operators — was appropriate. The Board specifically found that during the various stages of the employer's

⁸ Only employees in the building department received a slightly lesser wage.

⁹ In addition, there were no separate craft layout areas, but some of the crafts shared common storage areas. Also, the record evidence did not indicate that employees in the requested unit participated in or completed any traditional apprenticeship programs or had achieved craft journeymen status. Rather, the employer maintained its own tests and certifications as to prospective skilled employees. Lastly, it is undisputed that while the employer had job classifications, it maintained no formal job descriptions and did not recognize or follow traditional craft jurisdictions when assigning work or in transferring or laying off employees.

construction projects, craft groups such as ironworkers and bricklayers worked directly alongside employees in the four craft group units sought by the petition. While the Board conceded that each of the craft groups could be separated into seven craft or functional groups, it said “[I]t does not follow, as found by the Regional Director, that any arbitrary grouping of those crafts constitutes an appropriate collective bargaining unit. The unit sought here is neither a traditional craft unit, a departmental unit, nor a functional unit. Without more evidence, we cannot find here that a single multicraft or multifunctional unit is appropriate, since the evidence clearly reveals that other craft or functional groups are being excluded from the unit.” 267 NLRB at 176.¹⁰

Reading the Board’s cases as a whole, one can perhaps draw the following conclusions as to the composition of bargaining units in initial organizing situations: (1) if the group of employees performs traditional craft functions associated with a particular craft union, the union and the employer involved mandate apprenticeship and journeyman training, and the union seeking to represent the group does not seek to expand the unit beyond traditional craft jurisdiction or a classification that would be functionally aligned with that particular group, the unit will be found to be an appropriate craft unit; and (2) if the union attempts to add employees outside a traditional craft grouping that creates a segment of the employer’s workforce, it is likely that the narrower unit will not be appropriate. It also follows that in multicraft situations, where no traditional apprenticeship programs are required or utilized, a traditional craft unit will not be found appropriate. Finally, where there may be traditional craft workers on a given worksite, an arbitrary grouping of such crafts will not be appropriate and only an overall unit encompassing all crafts on the site will be appropriate.¹¹

Regarding the second issue – whether the scope of a unit is limited to the job site or includes multiple job sites – the Board first articulated the factors that would guide it in multisite unit determinations in the construction industry in *Daniel Construction Company*, 133 NLRB 264 (1961). In that case, the Board enumerated three essential factors it would consider in determining the scope of the appropriate bargaining unit in the construction industry:

(1) whether there exists a centralized control of labor relations; (2) whether there is a similarity of skills, functions and working conditions at all of the employer’s construction projects; and (3) whether there is any employee transfer between projects. *Daniel Construction Company*, 133 NLRB at 265-266.

In finding that the broad geographic unit sought by the union was appropriate, the Board found that the employer maintained a *nucleus* (or core group) of pipefitters and plumbers who were employed at all times on each project and were transferred to all employer projects although the employer did hire additional pipefitters and plumbers at various job sites. *Daniel Construction Company*, 133 NLRB at 265. The Board also found that the employer’s overall personnel policies were set by a central office and that the working conditions, skills and nature of

¹⁰ The Board reached a similar result to the one in *S. J. Groves, supra*, in *Brown & Root Braun*, 310 NLRB 632, 636(1993).

¹¹ For a recent decision involving a multicraft unit, see *Turner Industries Group, LLC*, 349 NLRB 428 (2007).

employment at all job sites were similar. Further, the Board noted that there was no history of collective bargaining for the pipefitters and plumbers.

In *Longcrier Co.*, 277 NLRB 371 (1985), the Board refused to find appropriate a union's request for a broader geographic unit of construction equipment operators of a general contractor's employees. In *Longcrier*, the union's petitioned-for unit would have encompassed all of the employer's projects within a particular county. In rejecting the county-wide unit, the Board reasoned as follows:

In finding appropriate a [county-wide] unit limited to the employees operating construction equipment, the Regional Director noted that the geographic scope of the unit encompassed a practical working area and that the unit sought consisted of employees who were identifiable by their job functions, i.e. their primary function being the operation of construction equipment. Initially, we do not agree that the county wide unit is appropriate here. Rather, we find, on this record, that employees of each project constitute a separate appropriate unit. Thus, each project has a superintendent who is responsible for all hiring at his project, deciding the composition of his crew, assigning work to the crewmembers, and, within the Employer's established guidelines, setting each member's wages and terms and conditions of employment. There are no seniority lists maintained, and, when the project is completed or an employee's services are no longer required, the employee is terminated. Except in rare circumstances, employees are not transferred between projects. There is no showing that a *common nucleus* of employees is retained from project to project. Each project is geographically separate, the Park Central project being approximately five miles away from the others. We find, therefore, that each project functions as a virtually independent and autonomous operation, and, when each project is completed, the employees are terminated rather than transferred to other sites. Consequently, insufficient basis exists here for finding appropriate the broader unit. We conclude instead that each project of the Employer constitutes a separate appropriate unit.

277 NLRB at 571 (emphasis added; footnote omitted).

The Board specifically noted that, unlike cases where it had found appropriate broader geographic units, e.g., *Daniel I, supra* and *Trammel Construction Co., Inc.*, 126 NLRB 1365 (1960), there was no showing that members of the nucleus or core group were retained or transferred from project to project on a regular basis. 277 NLRB at 571. When the projects were over, the employees were, for the most part, terminated. *Id.* The Board reversed the Regional Director's decision finding the requested countywide unit to be appropriate and found that the appropriate unit was limited to each separate project.¹² *Id.*

¹² The Board also did not find that the requested unit was either a craft unit or a functionally distinct group, and found that a project-wide unit was appropriate. 277 NLRB at 572. Indeed, while all employees were classified as carpenters or laborers, the job superintendents on each project decided which employees operated what equipment; moreover, such employees also performed other tasks. *Id.*

In *Oklahoma Installation Co.*, 305 NLRB 812 (1991), the Board somewhat expanded the relevant factors for determining when a multisite unit is appropriate. Thus, the union sought a unit of carpenters, apprentice carpenters, and carpenters' helpers employed by the employer in a three-county area in the state of Tennessee. The employer's principal business was interior millwright work. The employer argued that only a job site unit was appropriate. Further, while the employer had no policy of transferring employees from job to job, it also had no policy that would prevent its superintendents from taking *key* employees from one job to another. Although agreeing with the Regional Director that a multisite unit was appropriate, the Board rejected the Regional Director's decision to find the three-county unit appropriate. 305 NLRB at 813. It found that there was insufficient evidence indicating the likelihood of future work in the remaining two counties.

The Board's decision in *Oklahoma Installation* points up a possible difference in the treatment of geographic units in 8(f)/9(a) conversion cases and those sought in initial organizing situations. Clearly, even though an employer's operations may be limited geographically in both cases, the Board appears to make bargaining history controlling in the former, even though there is no substantial evidence that the employer will perform future work in all of the geographical area covered by the 8(f) unit.

In *CCI Construction Co.*, 326 NLRB 1319 (1998), the Board found a unit of sheet metal workers limited to the employer's Pennsylvania job sites to be appropriate. The union had sought a larger, employer-wide unit. The employer contended that the work sought was not a true craft unit and the union was seeking to represent employees beyond its own geographic jurisdiction. The case was also complicated by the fact that at one site there was an 8(f) agreement with a different local of the same international union.¹³

In *Premier Plastering, Inc.*, 342 NLRB 1072 (2004), the petitioning union sought to represent a unit of plasterers working in five northeastern Ohio counties. At the time, the petitioner and the employer were parties to an 8(f) agreement covering, by its own terms, a single county within that five-county area. However, the parties had historically applied the agreement to work in an adjacent county. The employer and the intervener were also parties to a 9(a) agreement covering bricklaying and cement masonry work in three northeastern Ohio counties. The employer also had an 8(f) agreement with another plastering local covering a limited geographic area, as well as a 9(a) agreement with yet another plastering local. In *Premier*, the Regional Director found the geographically limited residual unit appropriate. While the Board indicated that normally the

¹³ At the time of the hearing, the employer also had sites in Maryland, Missouri, and Virginia. Based on the facts that the required work skills, duties, and working conditions did not vary from jobsite to jobsite for sheet metal workers, that they also had the same fringe benefits, except where covered by an 8(f) agreement, and that labor relations was centralized for the Pennsylvania sites, and that the only transfers occurred between the Pennsylvania jobsite, if the sites were "close enough for people to go," the Regional Director found that only a statewide unit was appropriate. The Board approved the Regional Director's statewide unit limited to the employer's Pennsylvania sites — even though the union was seeking a broader unit. 326 NLRB at 1324. Significantly, the employer had clearly indicated that it did not intend to make any transfers to projects located outside of Pennsylvania. *Id.*

only appropriate unit would be one including all of the employer's plasterers without geographic limitation, it was forced to consider an alternative position because the employer was party to an admitted 9(a) agreement covering a more limited geographic area. 342 NLRB at 1272-1273. The Board decided it would direct an election in a residual geographic unit of all of the employer's plasterers working in areas not covered by the 9(a) agreement between the employer and a sister local. 342 NLRB at 1073.¹⁴

Given the Board's decision in *Premier Plastering*, *supra*, and the Board's decisions in *Oklahoma Installation* and *Dezcon*, it is unclear whether bargaining units in either 8(f) conversion or 9(a) initial organizing situations can ever be defined or limited by geography. This adds yet another layer of analyses that points to the need for full and complete hearings under Section 9(c) of the Act.

AGC believes that the foregoing discussion demonstrates how the sheer variety and complexity of unit determinations in the construction industry render the proposed seven-day hearing rule unworkable and, particularly in an 8(f) context, unnecessary. Deferral of eligibility issues concerning supervisors and others is also unnecessary, because the incumbent union is already the limited 9(a) representative of the unit covered by the Section 8(f) contract.¹⁵ Rather than speed, what is important is to correctly determine unit scope and composition. Yet, absent extraordinary circumstances, the proposed rule provides for slavish adherence to a seven-day rule.¹⁶ AGC submits that either the Regional Director must be given complete discretion to schedule the hearing, as is the case now, or the construction industry should be exempt from this requirement of the proposed regulations. Also, because there will be differing views on bargaining history and the weight to be attached, which also affect voter eligibility, the use of a post-election procedure to resolve unit scope issues is not only impractical, but will simply create a greater burden on the parties than is necessary or warranted.

With respect to initial organizing situations, the law on bargaining unit scope and composition is difficult to both understand and apply, and we think it is likely that few Board personnel truly understand it. Forced compliance with an arbitrary seven-day rule will mean that neither side

¹⁴ The Board reached a similar result in *G.L. Miliken Plastering*, 342 NLRB 1277 (2003). This is particularly important with respect to supervisors. Section 8(f) agreements frequently include employees in the unit by specific classifications who are, if the truth be known, individuals who satisfy the criteria for Section 2(11). Determining their status is a delicate issue, and where agreement on such for 9(a) purposes is an issue, it is absolutely necessary that the issue be resolved before the election.

¹⁵ In existing Section 8(f), situations where the union seeks a 9(a) conversion election, the unit may very well include foremen by express language who are Section 2(11) supervisors, or a representative of the employer for the purposes of Section 8(b)(1)(B). See *Elevator Contractors*, 349 NLRB 583, 585 (2009) (Mechanic-in-charge of elevator construction crew was Section 2(11) supervisor but not a representative of the employer for Section 8(b)(1)(B)).

¹⁶ Experience with Regional Office personnel whose performance is measured by the General Counsel's internal performance targets, *i.e.*, the infamous time targets has shown few personnel willing to exercise discretion beyond the time specified in the rule. In other words, there will be no exceptions to the seven-day rule. Adherence to the rule and not the quality of the result becomes the goal in itself.

will be prepared adequately for a hearing if the Board sticks to its one-size-fits-all view of the world with respect to the holding of representation case hearings.¹⁷

Voter Eligibility in the Construction Industry

Once an election has been directed, the normal rule for voter eligibility in most elections conducted outside the construction industry is that the employee must be employed in the unit during the payroll period of eligibility and employed in the appropriate unit on the date the election is held. *Beverly Manor Nursing Home*, 310 NLRB 538, n.3 (1993); *Plymouth Towing Co.*, 178 NLRB 651 (1969). If that formula were mandated for use in construction industry elections, it certainly would be simple for employers to comply with the existing seven-day rule to provide the *Excelsior* list. However, because of the nature of the industry, the Board has determined that few employees would be eligible to vote under the normal formula. Accordingly, the Board designed a special formula to deal with the unique nature of employment in the construction industry, which it characterized as one “where [because] projects are continually being started and completed, there is a minimum amount of interchange of employees.” *Daniel Construction Company, Inc.*, 133 NLRB 264, 265 (1961) (“*Daniel I*”). In other words, the industry is characterized by fluctuating and intermittent employment levels for those who work in it, one of the principal reasons Congress enacted Section 8(f) of the Act, which sanctioned pre-hire contracts and permitted shortened union security clauses. *Id.* at 266-267.

According to the Board in *Daniel I*, it was possible for an employee to have: (1) a pattern of intermittent employment with the same employer whereby an employee worked for short periods of time on different projects, followed by short layoffs; and also (2) to be employed by multiple employers during the same period of time. It therefore devised, in *Daniel I*, the basic formula still in use today for conducting construction industry elections, whether in initial organizing elections or Section 8(f) /9(a) conversion elections. Thus, in addition to those employees who would normally be able to vote because they meet the normal eligibility formula, an employee will be eligible to vote in an election if: (1) he has worked at least 30 days for the employer performing unit work during the 12 months preceding the eligibility date of the election; or (2) he has had some employment in the preceding 12-month period and has worked a total of 45 or more days in the 24-month period prior to the eligibility date. 133 NLRB at 267.

Use of the *Daniel* formula is predicated on the Board’s belief that this formula will encompass the greatest number of those employees with a reasonable expectation of employment in the future.¹⁸ However, it should be abundantly obvious that compliance with the proposed

¹⁷ Recent decisions in the construction industry point to the difficulty of Section 2(11) supervisory issues. See., e.g., *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 962 (2007) (Precast department foreman found to be statutory supervisor); *Shaw, Inc.*, 350 NLRB 354, 355 (2009) (Pipeline construction crew foreman found nonsupervisory); *Volair Contractors, Inc.*, 341 NLRB 673, 674 (2004) (Foreman of pipefitter/welder crew assembling and installing new boilers found nonsupervisory).

¹⁸ In *Steiny & Co.*, 308 NLRB 1323 (1992), the Board held that continued use of an eligibility formula in the construction industry is necessary and appropriate, noting that the essential nature of the industry had not changed. 308 NLRB at 1324-1325. The Board rejected the employer’s argument that use of a formula enfranchises laid off

requirement by the Board's draft regulations that the *Excelsior* list be compiled and submitted in two days will be impossible for even the most sophisticated contractors in the industry,¹⁹ and, as a result, there will be a significant number of errors which will lead to more elections being set aside because of a faulty *Excelsior* list. Given the fact that the employer must determine every employee who ever worked for the employer in the unit within a 12-month and 24-month period, and then, in each case determine how many days each worked in each period, to determine whether they meet the *Daniel* task has been daunting under the current seven-day period. For large construction contractors with multiple projects, the problem is the size and potential number of employee records that have to be reviewed; for small contractors without sophisticated payroll systems, the problem is time and available personnel to accomplish the task. When the Board now seeks to impose additional burdens like phone numbers and email address, compliance with the terms of proposed §§102.62(d) and 102.67(j) becomes impossible in all but the smallest of units.

Furthermore, the proposed rule indicates that, because the "median size of units ranged between 23 and 26 employees from 2001 to 2010," 76 Fed. Reg. at 36821, the Board presumes that its proposed 71-percent reduction in the time allowed for production of the list – from seven to two days – would be minimally burdensome for employers. This view seems premised on assumptions about the extent of computerization and the presence of a dedicated, sophisticated human resources staff that can respond to the now-to-be-electronically-served petition, research and generate an *Excelsior*-type list, and conceive and formulate statements of position all within the span of about a week. But these assumptions are inapposite to the typical construction workplace, where most personnel matters are handled on a decentralized basis, at each jobsite, by staff who work at a jobsite trailer or in the field and who are not human resource professionals but are engaged in managing various business and construction operations, and are not readily equipped to quickly respond to unanticipated bureaucratic and legal issues. They may not have immediate access to all records or electronic equipment, and they surely will lack the devoted time needed for compliance with the shortened timeframes set forth in the rule.

AGC therefore urges the Board to reconsider its position on the time required to file the *Excelsior* list, as well as the content and format for the information, for all employers covered by its proposed regulations. In the case of the construction industry, the need for modification of this proposal is absolutely critical.

AGC also has concerns about the proposal in §102.63(b)(1) requiring the employer to present its statement of position with respect to the issues raised by the representation petition no later than the date of the hearing, which in most cases will be scheduled no later than seven days after the

employees who might never work again for the employer. *Id.* at 1327. As the Board pointed out, the common denominator in the industry — intermittent employment — had not changed.

¹⁹ It should be noted that the *Daniel/Steiny* formula is not used to determine whether the union's showing of interest in an initial organizing situation is adequate. *Pike & Co.* 314 NLRB 691 (1994). The union's showing of interest is to be measured among the employees in the unit at the time the petition is filed. *Id.* In 8(f)/9(a) conversion elections, a union's recently expired 8(f) contract will be accepted as a sufficient showing of interest. *Stockton Roofing Co.*, 304 NLRB 699, 721 (1991).

petition is filed. This, too, would be very difficult for construction employers to comply with, particularly the typical small construction contractor not well-versed in the ephemera of Board law and procedure of responding in timely fashion. The failure to raise an issue in the position statement will be deemed a waiver, and parties will be precluded from introducing evidence on the issue and from even cross-examining another party's witnesses on the issue. This is a severe and unfair consequence under the circumstances.

The Proposed Rule's Mandatory Disclosure of Employee E-mail Addresses and Telephone Numbers Is Dangerous

The CDW and many other commenters have properly explained why the mandatory employer disclosures of employee e-mail addresses and telephone numbers in proposed §§102.62 and 102.67 is misguided. AGC adds that this matter is of particular interest to construction contractors as some construction unions are known to have misused corporate email addresses and other contact information in furtherance of their labor disputes with contractors, as the Sixth Circuit's recent decision in *Pulte Homes v. Laborer's Int'l Union*, __ F.3d __, 191 LRRM 2161 (6th Cir. August 2, 2011) illustrates. There, the court held, among other things, that a union's corporate campaign against a contractor, which involved inundating Pulte Homes with thousands of emails and phone calls, could not be enjoined because of the restrictions imposed by the Norris-LaGuardia Act. Because the NLRB's proposed rule will require employers to disclose email addresses and telephone numbers of employees in the claimed unit, it is certainly foreseeable that a union could utilize this information in a manner similar to what the Laborers did to Pulte Homes.

It is not stated, although it is presumably to be assumed, that the employee email addresses that must be disclosed are those provided to employees by the employer. The stated purpose for requiring employers to provide employee email addresses is to permit unions to contact employees during the election campaign. Such contact will undoubtedly occur during working hours, and will necessarily be disruptive to the employer's business. This disruption is in addition to the Pulte Homes issue mentioned above, where email and telephone information was used abusively. Additionally, if the proposed rule contemplates requiring the disclosure by the employer of its employees' private email addresses and telephone numbers, then it implicates privacy issues that Board does not appear to have adequately considered.

AGC therefore asks the Board to withdraw these disclosure requirements. If the Board rejects this request, then AGC recommends that the Board deem the misuse of the disclosed information – i.e., use for any purpose other than the representation proceeding – an unfair labor practice under §§ 8(a)(1) or 8(b)(1) of the Act, and that the General Counsel should be directed to pursue injunctive relief under § 10(j) when there is evidence that a party has misused information.

The Proposed Rule May Lead to Additional Unintended and Undesired Consequences

AGC wishes to point out that the proposed rule, if implemented, is likely to have additional consequences apparently not intended or contemplated by the Board. For example, the requirement throughout the proposed rule for electronic service of documents, including the

initial representation petition and the eligibility list, may very well be defeated by the use of spam filters and similar tools which are nearly universally employed to protect computer data and equipment. To the extent that the Board is anticipating that electronic transmittal will expedite notice and enable it to accelerate the election process, it may in fact have the opposite effect if parties do not receive the electronic communications contemplated under the proposed rule. This, in turn, could lead to an increase in litigation surrounding the election process.

Likewise, the short timeframe for formulating and filing the employer's statement of position and designated consequence of failure to raise an issue therein will tend to encourage "shotgun pleading" to avoid waiver of an issue the merits of which cannot be determined in the time allotted. The unintended consequence of this approach may be more litigation, rather than less, much as was the result from increases to Occupational Safety and Health Administration and Mine Safety and Health Administration penalties and sanctions.

Not only might the regulations unintentionally lead to increased litigation, they might lead to new legislation. We have already seen unprecedented levels of legislative activity on labor issues, both at the federal and state levels in recent years. Congress has proposed pro-union and anti-union legislation, running the gamut from the Employee Free Choice Act to the Protecting Jobs from Government Interference Act, each responding in some form to the Board's policies, decisions or collective direction. It would not be unlikely to see similar, responsive action to follow here. Action on the state level is equally or even more likely. State lawmakers around the country were extraordinarily active on this front in the past year, with highly publicized labor bills shutting down legislatures in more than one state. On the forefront are right-to-work laws (expressly authorized under Section 14(b) of the Act), which have already been passed in 22 states, with new bills introduced in several more in 2011. It has been suggested that this increased legislative activity at the state level is responsive to and fueled by what is perceived as administrative activism on the federal level. Such laws affect even our members who choose and desire to be unionized. AGC's membership – both union and non-union – could therefore be negatively impacted by the proposed rules.

Conclusion

For all of the foregoing reasons as well as those set forth in comments submitted by the CDW, AGC urges the Board to withdraw its proposed rule governing representation-case proceedings. We thank the Board for considering our views and are available to provide additional information on the issues presented should the Board desire any.