The Associated General Contractors of America's Comments on the National Labor Relations Board's Notice of Proposed Rulemaking on Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships; RIN 3142–AA22

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I. Introduction

The Associated General Contractors of America[1] ("AGC") respectfully submits these comments in response to the National Labor Relations Board's (the "Board") Notice of Proposed Rulemaking and Request for Comments on Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships ("NPRM"), RIN 3142–AA22, published in the Federal Register on November 4, 2022.

AGC is a member of the Coalition for a Democratic Workplace ("CDW") and supports the comments filed in this matter by the CDW. The purpose of the present submission is to supplement the CDW's comments on the third proposal of the NPRM, the proposal addressing proof of majority support in construction-industry collective bargaining relationships.

II. The Board Should Adopt a Broad Policy Recognizing Voluntary 9(a) Recognition in the Construction Industry Only When There is Positive Evidence, Beyond Contract Language, that the Elements of 9(a) Recognition Have Been Met

In multiple cases involving employers engaged primarily in the building and construction industry and unions representing employees engaged in the industry, the Board has inappropriately relied only on the contracting parties' intent as expressed in contract language to determine whether the parties' relationship is one governed by Section 8(f) of the National Labor Relations Act (an "8(f) relationship") or Section 9(a) of the National Labor Relations Act (a "9(a) relationship"). While the parties' intent, as expressed in contract language, to establish a 9(a) relationship may be a legitimate factor to consider in ascertaining whether a lawful 9(a) relationship has been established, it should not be dispositive. Given the substantial impact of such a determination, not only on the bargaining parties but on employee free choice and on rival unions' rights, the Board should require positive evidence, beyond contract language, that the necessary elements of voluntary 9(a) recognition have been met – i.e., that the union unequivocally demanded recognition as the Section 9(a) exclusive bargaining representative of employees in an appropriate bargaining unit and that the employer unequivocally granted such recognition based on the union's contemporaneous showing of, or offering to show, support from a majority of employees in that unit ("9(a) elements").

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[1] AGC is the nation's largest and most diverse trade association in the commercial construction industry, representing more than 27,000 companies, including over 6,500 general contractor firms, 8,500 specialty construction firms, and 11,000 service providers and suppliers. AGC proudly represents both union- and open-shop employers through a nationwide network of 89 chapters.

In the preamble to the proposed rule in the NPRM ("Preamble"), the present Board indicates its agreement with the principle that the parties' intent to establish a 9(a) relationship is not dispositive, stating that contract language meeting the minimum requirements set forth in the Board's *Staunton Fuel* decision "does not substitute for the union showing or offering to show evidence of its majority support"[2] and by stating:

> Construction industry employers and unions—like those in all other industries—cannot have created a 9(a) relationship where the union did not enjoy majority support, regardless of whether they agree to a contractual provision falsely attesting to the union's majority support.

The Board's proposed withdrawal of the current regulation at Section 103.22, however, undercuts that principle. By requiring extrinsic evidence supporting a contractual attestation of 9(a) status (or the elements of such status), Section 103.22 goes a long way to prevent false attestations from effectively establishing 9(a) recognition, at least for purposes of establishing an election bar. The Board's proposal to rescind the regulation and to allow 9(a) status to take effect unless evidence disproving the attestations is proffered within six months of the grant of recognition does little to prevent false attestations from creating a 9(a) relationship and to protect employee free choice.

Furthermore, by establishing a policy whereby contract language asserting that the elements of voluntary 9(a) recognition have been satisfied is sufficient to prove that those elements were in fact satisfied absent contrary evidence, the Board is effectively creating a rebuttable presumption of a 9(a) relationship in the context of such language. Such a presumption runs contrary to the Board's holding in *Deklewa* and progeny that a construction-industry collective bargaining relationship is presumed to be governed by Section 8(f) and that the burden of proving that the relationship is governed by Section 9(a) falls on the party asserting a 9(a) relationship. The Board should maintain the rebuttable presumption of 8(f) status and fortify it by clearly requiring evidence showing satisfaction of the 9(a) elements, beyond contract language alone, to rebut that presumption.

AGC recommends that the Board not only maintain the Section 103.22 policy that voluntary 9(a) recognition in the construction industry requires positive evidence beyond contract language that the parties satisfied the 9(a) elements, it should expand the policy to apply generally and not only for the purpose of barring an election petition. In AGC's experience since *Deklewa*, the issue of whether a labor relationship is governed by Section 8(f) or Section 9(a) most often arises not when an election petition is filed but when the employer needs to know its ongoing duties to the signatory union are upon CBA expiration. For example, the employer may need to know whether it has a duty to bargain to impasse prior to implementing a final offer or initiating a lockout, or it may need to know whether it has a duty to continue to

[2] While AGC agrees with the Board that such language "does not substitute for the union showing or offering to show evidence of its majority support," AGC disagrees with clause that follows in the Preamble, that such contract language "does, however, provide a contemporaneous, written memorialization that the union had majority support at the time of the 9(a) recognition." As the Board has acknowledged, the contract language can be a false attestation. It may or may not be a written memorialization that the union had majority support at the time of 9(a) recognition or at any time, or that there even any employees in the bargaining unit at the time of 9(a) recognition.

recognize the union or instead enter into a new 8(f) CBA with a rival union. Adopting AGC's recommendation would provide bargaining parties much-needed clarity about their rights and obligations upon CBA expiration.

Specifically, AGC recommends that the Board adopt a policy along the following lines:

> A voluntary recognition or collective-bargaining agreement between an employer primarily engaged in the building and construction industry and a labor organization will not establish recognition as the section 9(a) exclusive bargaining representative of employees absent positive evidence that the union unequivocally demanded recognition as the section 9(a) exclusive bargaining representative of employees in an appropriate bargaining unit and that the employer unequivocally accepted it as such, based on a contemporaneous showing of support from a majority of employees in that appropriate unit. Collective-bargaining agreement language, standing alone, will not be sufficient to provide the showing of majority support.

Such a policy is necessary to maintain the protections of employee free choice established in the National Labor Relations Act and affirmed by the Supreme Court in *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961) and by the Board in *John Deklewa & Sons*, 282 NLRB 1375 (1987). As the U.S. Court of Appeals for the D.C. Circuit aptly stated in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003):

> The proposition that contract language standing alone can establish the existence of a section 9(a) relationship runs roughshod over the principles established in *Garment Workers*, for it completely fails to account for employee rights under sections 7 and 8(f). An agreement between an employer and union is void and unenforceable, *Garment Workers* holds, if it purports to recognize a union that actually lacks majority support as the employees' exclusive representative. While section 8(f) creates a limited exception to this rule for pre-hire agreements in the construction industry, the statute explicitly preserves employee rights to petition for decertification or for a change in bargaining representative under such contracts. . . .The Board's ruling that contract language alone can establish the existence of a section 9(a) relationship—and thus trigger the three-year "contract bar" against election petitions by employees and other parties—creates an opportunity for construction companies and unions to circumvent both section 8(f) protections and *Garment Workers*' holding by colluding at the expense of employees and rival unions. By focusing exclusively on employer and union intent, the Board has neglected its fundamental obligation to protect employee section 7 rights, opening the door to even more egregious violations than the good faith mistake at issue in *Garment Workers*.
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> Section 8(f) represents a real benefit to both employers and unions in the construction industry, allowing them to establish bargaining relationships without regard to a union's majority status. But the Board cannot…allow this relatively easy-to-establish option to be converted into a 9(a) agreement that lacks support

> of a majority of employees. Otherwise the Board would be giving employers and unions "the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." *Garment Workers*, 366 U.S. at 738–39, 81 S.Ct. 1603.

Nova Plumbing, 350 F.3d at 536-537.

As Members Ring and Kaplan note in their Dissenting View of the proposed rule, the court affirmed the above position in *Colorado Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031 (2018) and focused more sharply on the centrality of employee free choice. They further note that the court there:

> emphasized that ''[t]he unusual [s]ection 8(f) exception is meant not to cede all employee choice to the employer or union, but to provide employees in the inconstant and fluid construction and building industries some opportunity for collective representation. . . . [I]t is not meant to force the employees' choices any further than the statutory scheme allows.'' Id. at 1039. Accordingly, ''[b]ecause the statutory objective is to ensure that only unions chosen by a majority of employees enjoy [s]ection 9(a)'s enhanced protections, the Board must faithfully police the presumption of [s]ection 8(f) status and the strict burden of proof to overcome it. Specifically, the Board must demand clear evidence that the employees—not the union and not the employer—have independently chosen to transition away from a [s]ection 8(f) pre-hire arrangement by affirmatively choosing a union as their [s]ection 9(a) representative.'' Id. Pursuant to that strict evidentiary standard, the court found that it would not do for the Board to rely under *Staunton Fuel* solely on contract language indicating that '' 'the employer's recognition was based on the union's having shown, or having offered to show, an evidentiary basis of its majority support.' '' Id. at 1040 (quoting *Staunton Fuel*, 335 NLRB at 717). Such reliance ''would reduce the requirement of affirmative employee support to a word game controlled entirely by the union and employer. Which is precisely what the law forbids.'' Id.

While the Board majority in the Preamble certainly acknowledges the importance of employee free choice, it places a much greater emphasis on stability in labor relations. AGC agrees with the Board that stability is important, but we believe that stability should not, and may not, take priority over employee free choice.

III. Applying Such a Policy to the Limitations Period Union's 9(a) Recognition in the Construction Industry is Warranted

In addressing the six-month limitations period, the Board in the Preamble notes that, as the Board held in *Deklewa*, unions seeking 9(a) representation do not have less-favored status with respect to construction-industry employers than they have with respect to employers in other industries. AGC agrees. A union should, and does, achieve 9(a) recognition without the burdens of the election process in the construction industry just as in any other industry if it demands such recognition and if the employer grants such recognition based on the union's

contemporaneous showing, or offering to show, evidence of majority support. That is the key consistency. But consistency between construction and other employers is not across-the-board, because construction and construction labor relations are unique. The Act, Board, and courts have recognized in various contexts. For present purposes, a key difference is that a union may lawfully establish recognition with a construction employer under Section 8(f) without any showing of, or the existence of, majority support, and it may potentially convert its status to 9(a) through voluntary recognition based on a contemporaneous showing of majority support. This situation is completely unique to construction and is a reason why greater protections are needed to ensure that 9(a) status is truly based on majority support and not simply language set forth in an 8(f) CBA. It is, therefore, a reasonable basis for treating construction differently in regards to the limitations period for challenging 9(a) recognition.

The Board in the Preamble expresses concern "that the overruling of *Casale* pursuant to § 103.22 may create an onerous and unreasonable recordkeeping requirement on construction employers and unions." However, the Board does little to explain why it believes that such a recordkeeping requirement is "onerous and unreasonable," and AGC cannot fathom the basis for such an opinion. AGC is hard-pressed to understand why it is difficult for a union to maintain a record of majority support, particularly given the ease of making and maintaining digital photographs and other electronic records in the modern era. Unions (unlike employers in the construction business) are in the labor relations business and typically have staff, officers, and readily available attorneys who are well-trained in labor law requirements. They are required to maintain various other records and should be well-positioned to maintain these records as well. Furthermore, it is certainly easier to maintain positive evidence that a showing of, or offering to show, majority support *did* take place than it is to maintain evidence that such a showing or offering to show did *not* take place. Moreover, the relatively minor hardship of preserving the positive evidence is outweighed by the critical need to protect employee free choice as discussed in such cases as *Garment Workers*, *Nova Plumbing*, and *Colorado Fire Sprinkler*.

IV. The Board Should Take Into Consideration Relevant Realities of Construction-Industry Labor Relations

The Board has failed to address in the present rulemaking a very important feature of construction-industry labor relations: most collective bargaining is conducted on a multiemployer basis. Most construction contractors bound to CBAs with *Staunton Fuel*-type language did not individually negotiate over that language with the signatory union. Rather, most become bound to such CBAs because they assigned their bargaining rights to a multiemployer agent that agreed to the language or because they agreed to be bound to an existing multiemployer CBA during its term by signing a letter of assent, short-form or "me-too" agreement. The multiemployer agent may have agreed to the language absent any showing of majority support because either economic pressure from the union or a mutual desire to keep a rival union at bay. The reality is that employers bound to the CBA – especially those that are not members of the multiemployer unit and adopting the CBA during its term – are rarely aware that they are becoming bound to a CBA with *Staunton Fuel*-type language, nonetheless understand the significance of the language. Nor do they know to preserve any evidence (whatever that could be) to disprove the assertions of that language. Yet another relevant reality is that employers that sign short-form agreements directly with a union often do not even receive a copy

of the full CBA from the union within six months of adoption. These realities provide further cause for the Board to adopt the policy AGC recommends.

AGC acknowledges that the Board "categorically reject(ed)" a similar "unsophisticated contractor" argument in its recent *Enright Seeding* decision, asserting that acceptance would allow a contractor "to agree to Section 9(a) recognition, receive its benefits, and then years later challenge the existence of the union's majority status—to which it agreed—at the inception of the recognition." *Enright Seeding, Inc.*, 371 NLRB No. 127 (2023), slip op. at 7. AGC urges the Board to reconsider its position, as the Board is ignoring realities that are relevant to the issue of whether an employer has knowingly "agree(d) to Section 9(a) recognition." In some cases, contract language attesting to the satisfaction of 9(a) elements is not only unreliable as to the attestation, it can be unreliable as to the parties' intent.

In addition, AGC questions how the present Board would apply its proposed policy in a multiemployer setting. What would be the effects of language meeting *Staunton Fuel*'s requirements in a CBA negotiated by a multiemployer bargaining agent? Would a construction employer that is bound to such a CBA be deemed to have a 9(a) relationship even though the union never showed or offered to show proof of majority support to that particular employer or showed proof of majority support among all employers in the multiemployer unit to the multiemployer agent? AGC presumes from statements in the Preamble that the Board would answer in the affirmative, at least if the employer has not shown evidence contradicting the CBA recognition language within the six-month limitations period. If that is the case, AGC asks the Board to clearly state this and to explain how this protects employee free choice and prevents false contract language from conferring 9(a) status. If the Board intends a different position on voluntary 9(a) recognition among employers in a multiemployer unit, then please provide clear guidance on that position.

V. Conclusion

For all of the reasons set for the above and for the reasons set forth in comments submitted by the CDW, AGC asks the Board to withdraw the proposed rule and take further action as described herein.

Thank you for this opportunity to provide comments.

Respectfully submitted by:

Denise S. Gold
Corporate & Labor Senior Counsel
The Associated General Contractors of America
2300 Wilson Blvd., Suite 300
Arlington, VA 22201