The Associated General Contractors of America's Comments on the National Labor Relations Board's Notice of Proposed Rulemaking on Representation-Case Procedures; RIN 3142–AA16

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Introduction

The Associated General Contractors of America ("AGC") is the nation's largest and most diverse trade association in the commercial construction industry, representing more than 27,000 companies, including over 6,600 general contractors, 8,800 specialty contractors, and 11,500 service providers and suppliers. AGC proudly represents both union- and open-shop construction employers through a network of approximately 90 chapters across the United States.

AGC is a member of the Coalition for a Democratic Workplace and supports the Coalition's comments on the first two amendments proposed in the above-referenced Notice of Proposed Rulemaking (the "Proposed Rule") – namely, the amendment to modify the election blocking charge policy by establishing a vote and impound procedure and the amendment to modify the recognition bar policy by re-establishing a notice requirement and 45-day open period for filing an election petition following voluntary recognition. AGC submits these comments to provide an independent position on the third amendment in the Proposed Rule – i.e., the amendment seeking to overrule Board law holding that contract language, standing alone, can establish the existence of a Section 9(a) bargaining relationship in the construction industry and, therefore, an election bar (the "third amendment").

As discussed below, AGC strongly supports the Board's intent in establishing the third amendment but has concerns about the specific regulatory language proposed and asks the Board to modify the language in the final rule. AGC also asks the Board to explain how the third amendment will apply to existing Section 9(a) relationships established under current Board policy.

The Board Should Modify the Regulatory Language in the Third Amendment to Ensure Accomplishment of the Board's Stated Objectives

In numerous cases involving employers engaged primarily in the building and construction industry and unions representing employees engaged in the industry, the Board has wrongly 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) (a "9(a) relationship"). While the parties' intent may be a legitimate factor to consider in determining whether a 9(a) relationship exists in the construction industry, it should not be dispositive. Given the substantial impact of such a determination, not only on the bargaining parties but on employees and rival unions, the Board should require proof of majority support for the establishment of a 9(a) relationship.

As the Board notes in the Proposed Rule's preamble, the U.S. Court of Appeals for the D.C. Circuit recognized this in *Nova Plumbing, Inc.* v. *NLRB,* 330 F.3d 531 (D.C. Cir. 2003), aptly stating:

> 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.

For these reasons and others cited by the Board in the preamble, AGC supports the Board's expressed intent to overrule its holding in *Staunton Fuel & Material, Inc., 335 NLRB 717 (2001),* to adopt the D.C. Circuit's position that contract language alone cannot create a 9(a) relationship in the construction industry, and to require extrinsic proof of a contemporaneous showing of majority support for the establishment of a 9(a) relationship. AGC agrees with the Board's statement in the preamble that a rule "requiring positive evidence, apart from contract language, that a 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 an appropriate unit, will restore the protections of employee free choice in the construction industry that Congress intended, that *Deklewa* sought to secure, and that the D.C. Circuit insists must be restored."

AGC is concerned, however, that the proposed regulatory change would not fulfill that intent because it appears narrowly focused on elections. The Board seeks to achieve its third-amendment objectives by promulgating a new Section 103.21(b) of 29 CFR part 103, subpart B. That subpart is titled "Election Procedures." Likewise, the text of proposed Section 103.21(b)

focuses on elections. More specifically, the text of Section 103.21(b) addresses the prevention of a voluntary recognition election bar in the construction industry absent evidence of an employer's unequivocal acceptance of a union's unequivocal demand for recognition based on a contemporaneous showing of majority support. By removing the election bar and enabling the filing of election petitions under Section 9(c) or 9(e) of the Act when no such evidence is presented, the proposed regulation takes an important step toward meeting the Board's objectives, but it does not go far enough, or at least not clearly so.

The finding of a 9(a) relationship is significant not only because a 9(a) relationship confers an election bar but because it confers on the employer duties to recognize and bargain with the union that an 8(f) relationship does not confer. An employer with a 9(a) relationship must continue to recognize the union and bargain in good faith even after contract expiration, including bargaining to impasse before making any unilateral changes to wages, hours, or terms and conditions of employment. By contrast, an employer with an expired 8(f) agreement is free to terminate its relationship with the union and to make unilateral changes without bargaining at all. Such an employer is further free to enter into a new 8(f) agreement with a rival union or to operate on an open-shop basis. Accordingly, the issue of whether contract language alone can establish a 9(a) relationship has very important implications beyond elections.

Unfortunately, the proposed regulatory text does not address those other implications. It fails to clearly overturn the existing policy that the Board may find a 9(a) relationship based on contract language alone for all purposes. Rather, it eliminates only one consequence of such a finding, the election bar, and leaves in place the others. While the final sentence – "Contract language, standing alone, will not be sufficient to prove the showing of majority support" – would suffice when read alone or in another context, the fact that it is placed in a regulatory subpart dedicated to elections and is placed immediately after a lengthy, detailed sentence only about elections could reasonably lead one to interpret the sentence as intended to merely qualify the preceding sentence (i.e., to clarify that contract language alone will not be sufficient to prove the showing of majority support for the purpose of barring an election petition). Use of the article "the" rather than "a" between the words "prove" and "showing" arguably bolsters that interpretation.

To avoid ambiguity and provide clarity to bargaining parties and courts interpreting the rule, and to ensure that the Board's stated objectives are fully met, AGC suggests that the Board revise the third amendment regulatory text to the following:

> A voluntary recognition or collective-bargaining agreement between an employer primarily engaged in the building and construction industry and a labor organization will establish the labor organization as the exclusive bargaining representative of employees in an appropriate bargaining unit under Section 9(a) of the Act only if the employer or labor organization proffers positive evidence that the labor organization unequivocally requested that the employer recognize the labor organization as the Section 9(a) exclusive bargaining representative of employees in the unit and that the employer unequivocally granted such recognition based on the labor organization's contemporaneous showing of support for such recognition by a majority of employees in the unit. Contract language, standing alone, is not sufficient to prove the showing of majority support.

We further point out that the preamble states that, to establish a 9(a) relationship, the proposed third amendment "would require extrinsic evidence, *in the form of employee signatures on union authorization cards or a petition*" (emphasis added), yet the proposed regulatory text fails to mention this. The text does not designate this or any other particular form of evidence to show majority support. If the Board wishes to require a particular form of evidence for the showing of majority support, then we suggest that the Board solicit public comment on that particular requirement.

The Board Should Clarify How the Rule Impacts Relationships that Previously Converted to 9(a) Based on Contract Language Alone

AGC also asks the Board to explain how the third amendment affects those employers and unions in the construction industry that have existing (potentially long-term) 9(a) relationships based on contract language alone (absent evidence that the union actually proffered a showing of majority support at the time of voluntary recognition) in accordance with the policy that the Board set forth in *Staunton Fuel*. We presume that, once the third amendment becomes a final rule, such relationships will no longer be viewed by the Board as 9(a) relationships and will revert back to 8(f) status. Because this is not clearly stated in the Proposed Rule, however, affected parties might be uncertain, leading to unnecessary litigation.

AGC believes that the presumed approach discussed above is the cleanest and most sensible policy, and we recommend that the Board explicitly address the matter in the final rule. Parties facing a reversion under these circumstances could then choose to remain governed by Section 8(f) or to newly establish a 9(a) relationship through voluntary recognition based on a contemporaneous showing of majority support or through a Board-supervised election. To help prevent a possible rush to file election petitions and resulting burden on the agency, we further recommend that the Board provide detailed guidance, either in the preamble to the final rule or in a separate subregulatory publication issued contemporaneously with the final rule, about the proper process for voluntary recognition.

Conclusion

In summary, AGC supports the Board's objectives in promulgating the Proposed Rule and recommends that the Board make the above-described changes to better accomplish those objectives, guide affected parties, and prevent unnecessary litigation and petitions.

We thank you for the opportunity to provide input on this important matter.

Respectfully submitted on January 8, 2019, by:

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