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

Advice Memorandum

DATE: July 22, 2003

TO : Robert H. Miller, Regional Director
Joseph P. Norelli, Regional Attorney
Timothy Peck, Assistant to Regional Director
Region 20

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

SUBJECT: Babylon's Painting & Decorating, Inc.,
Kikuta Painting Corp., & Raymond's
Painting Co., Inc.
Cases 37-CA-6385-1, 37-CA-6386-1,
& 37-CA-6387-1

Painters and Allied Trades. Local Union
1791, AFL-CIO (Babylon's Painting &
Decorating, Inc., Kikuta Painting Corp.,
& Raymond's Painting Co., Inc.)
Cases 37-CB-1648-1, 37-CB-1649-1, &
37-CB-1650-1

This case was submitted to Advice as to whether the Painting and Decorating Contractors' Association of Hawaii (PDCA or Association), and the International Brotherhood of Painters and Allied Trades, Local Union 1791, AFL-CIO (the Union) effectively converted their 8(f) relationship to a 9(a) relationship through the execution of a 1998-2003 collective bargaining agreement. We conclude that the parties established a 9(a) relationship, which continues to apply to the individual employers that have left the multi-employer unit.

FACTS

The PDCA is a multi-employer organization that represents, for collective bargaining purposes, employers who employ painter foremen, journeymen, and apprentices in the painting industry in Hawaii. Babylon, Raymond, and Kikuta (the Employers) are painting contractors which were members of the PDCA, but each withdrew in late 2002. The PDCA and the Union have been involved in a collective-bargaining relationship since 1975, and have reached successive collective-bargaining agreements, the most recent of which is effective from February 1, 2003 through January 31, 2008. Both parties agree that each contract preceding the 1998 agreement was an 8(f) agreement. In the

months preceding the signing of the 1998 collective-bargaining agreement, there were 29 members of PDCA, all being represented by PDCA in the negotiations leading up to the signing of the 1998-2003 collective-bargaining agreement, which the Union claims established a 9(a) relationship between the parties.

Babylon Schoniwitz, owner and president of Babylon, has been a member of the PDCA and has had a collective-bargaining relationship with the Union since starting his business in 1990. Henry Naganuma, owner and president of Kikuta, has been a member of the PDCA and has had a collective-bargaining relationship with the Union for 27 years. Raymond Shimamoto, owner and president of Raymond, has been a member of PDCA and has had a collective-bargaining relationship with the Union for about 36 years. Babylon, Kikuta, and Raymond were all signatory contractors to the 1998-2003 agreement.

Beginning in November 1997, the Union became concerned that it was losing some of its jurisdiction to the United Brotherhood of Carpenters and Joiners of America, Local 745, because the Carpenters had been securing many wall-to-wall agreements between 1994-1997. In an effort to prevent this, the Union desired to convert its current 8(f) relationship with the PDCA to a 9(a) relationship. In November or December, the Union did a mass mailing of union authorization cards to approximately 956 Union members, irrespective of whether or not they were employed by painters' contractors at the time.

At this time, Lynn Kinney, the Union's Business Manager and Financial Secretary, and also sole spokesperson during negotiations, expressed to the PDCA the Union's desire to convert the current 8(f) relationship to a 9(a) relationship, because of the carpenters' wall-to-wall agreements. Kinney presented to Raymond Fujii, Administrator of the PDCA, the following language that Kinney said would be sufficient to obtain 9(a) status:

> WHEREAS, Union claims and the Association and Employers acknowledge and agree that a majority of the aforementioned bargaining unit employees have authorized the union to represent them for purposes of collective bargaining, ... [t]he Association and Employers pursuant to Section 9(a) of the NLRA voluntarily agree to recognize and do hereby recognize the Union as the exclusive bargaining representative of all bargaining unit employees as described herein.

During January 1998, painting contractors who were signatories to the PDCA agreement employed about 490 Union members. A majority of these 490 had returned authorization cards by January 31. In this same month, Babylon employed 12 painters, 10 of whom signed and returned union authorization cards; Raymond employed 25 painters, 20 of whom signed and returned cards; and Kikuta employed 8 painters, 5 of whom signed and returned cards.

Negotiations leading up to the 1998 agreement apparently began in November 1997 and concluded about mid-January 1998. During negotiations, Kinney again raised the issue of converting the Section 8(f) agreement into a Section 9(a) relationship by inserting the language that he had previously presented to Fujii. Kinney testified that he told Fujii and John Wyman, President of the PDCA at the time, that the "Union had signed up at least a majority of the painters statewide" by this point. No proof of majority authorization was shown by Kinney, but neither Fujii nor Wyman questioned this assertion or requested a presentation of the cards. Wyman testified that he understood the proposed language "would change the relationship between the Union and its members, and that the language would mean that the Union would become the employees' sole negotiating body."

At this time, Fujii and Wyman tentatively agreed to the inclusion of the Section 9(a) language on behalf of the PDCA. Both testified that they understood that the Union represented a majority of the employees working for painting contractors in the Association. This belief was based on the fact that contractors got their employees from union hiring halls.

Following the tentative agreement on this language, the entire contract was presented to the PDCA Board. The Board approved the contract, including the 9(a) recognition language.

As Administrator, Fujii forwarded a notice of a ratification meeting to all members of the Association, along with a copy of the proposed agreement. Fujii noted in bold-faced and italic print any changes from the 1993-1998 agreement that were now included in the 1998-2003 agreement, including the WHEREAS clause to be used to establish a 9(a) relationship between the Union and employers in the Association.

Fujii conducted a ratification meeting concerning the proposed agreement, and explained any changes to the past agreement. This explanation included the statement that, "by agreeing to the 9(a) language, this means that the

painting contractors are recognizing that the Painters Union represents a majority of their employees, and that the painting contractors are recognizing the Union as the Section 9(a) majority representative for bargaining purposes." Fujii also explained that the language would prevent the Carpenters Union from obtaining wall-to-wall contracts. Of 29 Association members, 18 attended the meeting and 17 voted in favor of ratification. Schoniwitz, Shimamoto, and Naganuma all voted to ratify the agreement. Following the ratification vote, Fujii sent the new contracts to all members of the PDCA, including a cover page indicating the changes from the previous contract. Each of the PDCA contractors signed the 1998-2003 contract, including Babylon, Raymond, and Kikuta.

On October 28, November 25, and November 28, 2002, Kikuta, Raymond, and Babylon, respectively, each timely withdrew from the PDCA prior to the beginning of the negotiations that led to the 2003-2008 agreement. On January 13, 2003, the Union sent each Employer a letter, informing these Employers of the Union's position that they have an ongoing obligation to bargain with the Union, and requesting that the Employers cease and desist from making any changes to the existing terms and conditions of employment. The Employers have failed and refused to recognize and bargain with the Union, claiming that they have no obligation to do so because the 1998-2003 agreement is a Section 8(f) agreement.

ACTION

We conclude that the Union and the PDCA established a Section 9(a) relationship through execution of the 1998-2003 agreement, and that the Employers violated Section 8(a)(1) and (5) by refusing to bargain with the Union following withdrawal from the multi-employer unit.

In Central Illinois Construction[1], the Board established that a construction industry union claiming the existence of a 9(a) relationship based on contractual language carries the burden of showing that: (1) the union requested recognition as majority representative, (2) the employer recognized the union as the majority representative, and (3) the employer's recognition was based on the union having shown, or offered to show, evidence of its majority

[1] Central Illinois Construction, 335 NLRB No. 59, slip op. at 4 (August 27, 2002).

support.[2] In a multi-employer bargaining unit situation, even assuming a showing of majority in the overall unit is sufficient to establish 9(a) status, the bargaining relationship with any individual member employer will be 9(a), rather than 8(f), only on a showing of the union's majority support among the employees of that individual employer.[3]

In the present case, it is clear from the Agreement language that the first two elements of the test are met. The Agreement specifically states that the Union claimed 9(a) status as the majority representative of the unit employees, and the Employers and Association have recognized the Union as such. With regard to the third element, in Pontiac,[4] the Board established that an acknowledgement of a union's majority status can satisfy that element because it is sufficient to demonstrate a union "offer" to make a contemporaneous showing of majority support. Thus the agreement satisfies the Central Illinois test vis-à-vis the PDCA and establishes the Union as the 9(a) representative of the PDCA unit.[5] Furthermore, extrinsic evidence here indicates that Kinney had claimed majority status in discussions with the PDCA prior to the signing of the contract, and neither Wyman or Fujii

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[2] The Board thus adopted the approach taken by the 10th Circuit in NLRB v. Triple C Maintenance, Inc., 219 F.3d 1147, 164 LRRM 2785 (10th Cir. 2000), and NLRB v. Oklahoma Installation Co., 219 F.3d 1160, 164 LRRM 2841 (10th Cir. 2000).

[3] Comtel Systems Technology, Inc., 305 NLRB 287, 288-289 (1991).

[4] Pontiac Ceiling & Partition Co., LLC, 337 NLRB No. 16, slip op. at 6 (December 20, 2001). See also Reichenbach Ceiling & Partition Co., 337 NLRB No. 17, slip op. at 1, 3 (December 20, 2001).

[5] The recent ruling in Nova Plumbing, Inc. v. NLRB, 2003 WL 21313084, 172 LRRM 2700 (D.C. Cir. 2003), is distinguishable from the present case. Although the D.C. Circuit decided there that contract language alone could not establish a valid 9(a) agreement, its analysis was colored by the fact that there was no demonstrated majority status and reliance on contract language could impose a minority union. That is not the case here.

questioned this statement, and that the parties also discussed their hopes for forming the 9(a) relationship to prevent the loss of jurisdiction to the Carpenters' Union.[6]

With regard to the Union's 9(a) status vis-à-vis the individual Employers, it is not necessary to decide whether the contractual language was sufficient to demonstrate an offer of a showing of majority support amongst *each Employer's* employees,[7] because under Board law, the Employers are now barred from challenging the Union's 9(a) status. After six months without the filing of a charge or petition, the Board will no longer entertain a claim that majority status was lacking at the time of the agreement.[8] Having signed the 9(a) agreement in 1998, the Employers may not now, 5 years later, contest the majority status claim made by the Union.[9] In addition, it is clear from extrinsic

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[6] The Board has allowed the examination of extrinsic evidence in determining the validity of a 9(a) claim. See Central Illinois Construction, 335 NLRB No. 59, slip op. at fn. 15.

[7] Compare Pontiac, 337 NLRB No. 16, slip op. at 3.(contract stated that, "each employer, in response the Union's claim that it represents a majority of each Employer's employees, acknowledges [majority status]."). See also Comtel, 305 NLRB 287, n. 15 (leaving open the question of whether a union would have to demonstrate its majority status to each employer before a 9(a) relationship could be created).

[8] See Triple A Fire Protection, 312 NLRB 1088, 1089 (1993); Casale Industries, 311 NLRB 951, 953 (1993); MFP Fire Protection, Inc., 318 NLRB 840, 150 LRRM 1048 (1995). See also Comtel, supra, at 290 (Board specifically noted that challenge by individual employer to multi-employer 9(a) agreement must be done "within a reasonable time after recognition is extended.")

[9] Although the 6 month "Casale" rule was criticized by the D.C. Circuit in Nova, the court's concern about imposing a minority union on employees is not implicated here since, if the Board examined the Union's status in 1998, it would determine that the Union represented a majority of each of the Respondent Employer's employees. This case does not require us to resolve the question of whether, in view of Nova, other employers in the unit could challenge the Union's 9(a) status outside the six month period by

evidence that the parties on both sides of this agreement sought the formation of a 9(a) agreement as to each Employer, and that the Union in fact had the majority support of each Employer's employees. Thus, even if the Employers had timely challenged the Union's 9(a) status as to their employees, the Board would have determined that the Union had become the 9(a) representative.[10]

Based upon the above, we conclude that a 9(a) relationship was established and that the Region should issue a Section 8(a)(5) and (1) complaint, absent settlement.

B.J.K.

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demonstrating that the Union did not represent a majority of their employees when the contract was executed.

[10] Compare Comtel, supra (challenge to majority status was allowed, and an election held, because the union failed to demonstrate that there was majority status among the petitioning employer's employees at the time of the 9(a) recognition).