REVERSION TO CONVERSION? THE BOARD'S INTERPRETATION OF THE INTERPLAY BETWEEN SECTIONS 8(f) AND 9(a) IN THE CONSTRUCTION INDUSTRY

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I. INTRODUCTION

Recent developments concerning construction industry collective bargaining agreements (CBAs) have once again modified pre-hire agreement jurisprudence. Just under two decades ago, the Third Circuit affirmed the National Labor Relations Board’s (NLRB or "Board") decision in John Deklewa & Sons, Inc. (Deklewa), and since then, various decisions have loosened the interpretation of the interplay between sections 8(f) and 9(a) of the National Labor Relations Act (NLRA or "the Act"). Recently, in Central Illinois Construction, the Board adopted an approach crafted by the Tenth Circuit that discusses how an 8(f) union may convert its status to that of a majority bargaining representative under 9(a) through contract language alone. The decision in Central Illinois is a reversion to the Conversion Doctrine and is practically a sub silentio overruling of the

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5. NLRB v. Oklahoma Installation Co., 219 F.3d 1160 (10th Cir. 2000); NLRB v. Triple C Maint., Inc., 219 F.3d 1147 (10th Cir. 2000).
6. The Conversion Doctrine is a term of art once used in pre-hire agreement jurisprudence wherein the Board could convert an 8(f) pre-hire agreement into a 9(a) CBA based on circumstantial evidence and without holding an employee election. James M. Wilton, Changed Interpretation of Section 8(f) of the National Labor Relations Act: Mesa Verde Construction Co. v. Northern California District Council of Laborers, 31 B.C.L. REV. 114, 117 (1989).
principles in Deklewa. While the Board has neither stated that it reverted to the Conversion Doctrine nor officially overruled Deklewa, the principles and elements set forth in the decisions discussed infra clearly reestablish the Conversion Doctrine and set a roadmap for unions to follow in order to convert their 8(f) status to majority status pursuant to 9(a).

In this Article the decisions that create this roadmap will be discussed and what is needed in CBAs for unions to later claim their bargaining relationships are controlled by 9(a) rather than 8(f) will be identified. Prior to discussing the decisions, an understanding of the legislative history of 8(f) agreements and their interplay with 9(a) is necessary. Concluding this Article will be views on the effects of the new Conversion Doctrine on construction industry unions and employers which take into consideration the General Counsel’s guidelines concerning the Agency’s investigation of these types of cases.

II. SECTIONS 8(f) AND 9(a) OF THE NLRA

A. The Legislative History of Section 8(f)

Section 8(f) of the NLRA states:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged ... in the building and construction industry with a labor organization ... because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement ... .

Section 8(f) permits employers and unions in the construction industry to enter into signed CBAs, or pre-hire agreements, before any employees are hired and prior to an actual showing of majority support by the union. Pre-hire agreements are necessary because the election process under Section 9(c) of the NLRA is impracticable in the construction industry where employers work in various geographical areas, “move from project to project in a relatively short time, and rely on unions in each area to refer employees to the job site.”

With the passage of the Taft-Hartley Amendments in 1947, the Board began to exercise jurisdiction over construction industry disputes.

As a result, industry lobbyists began to pressure Congress to create an exception to the NLRA that would exempt pre-hire agreements. The lobbyists’ concerns were finally heard in the late 1950s when Congress responded to public disclosure of union corruption and anti-union sentiment by conducting hearings on legislation-directed “union abuses of power.” The hearings were in connection with what would be adopted as the Landrum-Griffin amendments to the NLRA. To promote passage of the amendments, 8(f) was considered a “sweetener” provision. The Senate first took up the language of 8(f) in the Kennedy-Ives bill, but it was not until the eighty-sixth Congress convened that Congress seriously considered the language. At the beginning of the eighty-sixth Congress, the Kennedy-Ervin bill reintroduced, inter alia, the language of 8(f); however, the bill was considerably amended before it passed the Senate and was referred to the House. Attached to the Kennedy-Ervin bill that went to the House was a committee report setting forth reasons for adopting 8(f). Among the reasons were the importance for employers to know their labor costs before making estimates upon which bids were based and the employers’ need for an available supply of skilled craftsmen. The report went on to mention that a majority of the skilled craftsmen in the construction industry were union members, and thus, Congress deductively assumed that a union signatory to a pre-hire

11. David J. Lowe, Prehire Agreements in the Construction Industry: Empty Promises or Enforceable Rights?, 81 COLUM. L. REV. 1702, 1706 (1981). Strict application of the NLRA to the construction industry is impracticable because of the transient workforce and the impossibility of conducting an election of employees who are not considered a stable workforce.

12. Debra L. Willen, Regulation of Section 8(f) Contract Negotiations After the NLRB’s Decision in Deklewa, 4 LAB. LAW. 797, 800 (1988).

13. Known as the Landrum-Griffin Act, the law was the first comprehensive federal regulation of internal union affairs that sought to require unions to function democratically. JULIUS F. GETMAN & JOHN D. BLACKBURN, LABOR RELATIONS: LAW, PRACTICE AND POLICY 36 (2d ed., the Found. Press, Inc. 1998).

14. Willen, supra note 12, at 800. This “sweetener” provision (Section 8(f)) favored labor and was retained by Congress in the final passage of the Landrum-Griffin Act.

15. S. 3974, 85th Cong. § 604 (1958). See, e.g., Willen, supra note 12, at 800 (“The basic text of the provision [8(f)], legalizing prehire agreements in the construction industry, passed the Senate in 1958 as part of the Kennedy-Ives Bill.”).


17. Willen, supra note 12, at 800. The Eisenhower administration pushed for a narrower amendment for the construction industry, one that would have permitted the Board to certify a union as a 9(a) representative, absent an election but instead based upon the filing of a petition by the employer and union and upon a collective bargaining relationship. Id. Even though the administration wanted to see the more narrow type of amendment to the NLRA, 8(f) nevertheless prevailed.

18. Id. at 801.


agreement represented a majority of the employees hired by the employer.\textsuperscript{21}

B. The Express Intent Behind Section 9

Section 9 of the NLRA, the representatives and elections section of the Act, begins with subsection (a), which states that:

[r]epresentatives designated or selected for the purposes of collective bargaining by the \textit{majority} of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .\textsuperscript{22}

The premise underlying section 9 is that if a substantial number of the employees wish to be represented by a union for the purposes of collective bargaining and the union is selected by a majority of those employees in a secret ballot election, such a union is deemed the exclusive bargaining representative for all the employer's employees. Section 9(c)(1) of the Act clearly states that upon the filing of a petition by an employee, group of employees, individual, or labor organization, "alleging that a substantial number\textsuperscript{23} of employees . . . wish to be represented for collective bargaining and that their employer declines to recognize their representative . . . \textit{[the Board]} shall direct an election by secret ballot and shall certify the results thereof."\textsuperscript{24}

The express intent of section 9 is to ensure that a union represents a majority of the employees. In addition, section 9 protects employees' free will by giving them an opportunity to cast their vote as to whether or not they wish to be represented for the purposes of collective bargaining. Furthermore, section 9 protects employers, as well as employees, from a "paper" union—a union that does not represent a majority of the employees, but merely states that it does, or one that provides falsified records, such as forged union authorization cards, which go unchecked by an unsuspecting employer.\textsuperscript{25} Also prevented by secret ballot election is the danger of "top-down" organizing, a "practice by which a union gains

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  \item \textsuperscript{21} S. REP. NO. 86-187, at 2318. Congress believed that pre-hire agreements could be permitted in the construction industry because of the widespread use of hiring halls. Congress determined that reliance on a union hiring hall for obtaining employees results in that union representing a majority of the employees ultimately hired. Timothy Volk, \textit{Prehire Agreements in Construction Industry: The Deklewa Decision}, 9 J.L. & COM. 243, 246 (1989).
  \item \textsuperscript{22} 29 U.S.C. § 159(a) (2004) (emphasis added).
  \item \textsuperscript{23} A "substantial number" has been interpreted to mean that at least thirty percent of the employees express intent to be represented for the purposes of collective bargaining.
  \item \textsuperscript{24} 29 U.S.C. § 159(c)(1).
  \item \textsuperscript{25} See, e.g., Volk, \textit{supra} note 21, at 245.
\end{itemize}
acceptance as bargaining representative from the employer instead of the employees.\(^{26}\)

Section 9 not only advances employees' right to choose their representation, but provides safeguards against corrupt unions taking advantage of both employers and employees.\(^{27}\) However, the full force of the application of section 9 is not felt in the construction industry where CBAs are governed by pre-hire agreements.

**C. Distinctions and Consequences of an 8(f) or 9(a) Agreement**

The difference between an 8(f) agreement and a 9(a) agreement is great, and the consequences arising from each are distinct. Labeling a CBA an 8(f) agreement or a 9(a) agreement has a substantial impact on the type of bargaining relationship that exists following expiration of the CBA. This relationship is the heart of the issue facing the interpretation of pre-hire agreements.\(^{28}\)

There is a presumption in the construction industry that a union and an employer intend their relationship to be governed by 8(f).\(^{29}\) This presumption has a substantial impact on the continuity of the bargaining relationship following expiration of the CBA. The *Deklewa*\(^{30}\) decision is pertinent to developing an understanding of the impact an 8(f) agreement has on other sections of the Act.\(^{31}\) First, the Board in *Deklewa* stated that an 8(f) employer is subjected to the application of section 8(a)(5) while the CBA is in effect, meaning that the employer's unilateral repudiation of the 8(f) CBA during its term constitutes an unfair labor practice.\(^{32}\) Second, the

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27. This is done through the procedural safeguards established in section 9 of the Act, specifically section 9(c), which states, inter alia, that the Board shall investigate such petitions requesting representation and if the Board determines that such a question of representation exists, a secret ballot election shall be directed. 29 U.S.C. § 159(c)(1).
28. The focal point of this Article is that 8(f) agreements are converting into 9(a) agreements without an actual showing of majority support by the signatory union and that once the CBA is identified as a 9(a) agreement, the signatory employer is bound by section 8(a)(5) of the Act to continue bargaining with the signatory union upon expiration of the CBA. For this reason, construction industry unions favor CBAs identified by section 9(a). Construction industry employers, on the other hand, favor CBAs identified by section 8(f), because the employer, upon the expiration of an 8(f) agreement, may refuse to bargain with the signatory union and will not be subject to an 8(a)(5) failure to bargain unfair labor practice charge.
31. More specifically, *Deklewa* discusses what rights and obligations are afforded signatory parties to an 8(f) agreement while the agreement is in effect and what each party is legally permitted to do following expiration of the agreement.
Board noted that, "upon the contract's expiration, the signatory union will enjoy no majority presumption and either party may repudiate the 8(f) relationship." The Board determined that it was both "reasonable and desirable to adopt a rule that constitutes a limited application of section 8(a)(5)'s contract enforcement mechanisms by virtue of the strictly limited 9(a) representative status . . . a[n] 8(f) signatory union necessarily possesses."34

The notion that an 8(f) signatory employer may unilaterally repudiate following expiration of the 8(f) agreement is the biggest distinction between the construction industry, which relies on 8(f) agreements, and other industries covered by the Act, which are governed by the principles of 9(a).35 A collective bargaining relationship pursuant to 9(a) carries with it a duty imposed on both parties to the CBA that they continue to bargain in good faith following expiration of the CBA.36 These duties arise from sections 8(a)(5) and 8(b)(3), which make it an unfair labor practice for an employer and union respectively to refuse to bargain collectively with each other.

The distinction between the imposition of a duty to bargain upon the expiration of a 9(a) agreement and the absence of a duty to bargain upon the expiration of an 8(f) agreement, as well as how each type of agreement applies, have given rise to recent developments in 8(f) jurisprudence. Construction industry unions have argued that they entered into bargaining relationships pursuant to 9(a), and therefore, a duty to bargain must be imposed upon the employers following expiration of the CBAs. On the

representatives of his employees, subject to the provisions of section 159(a) . . .

33. Deklewa, 282 N.L.R.B. at 1386.
34. Id. at 1386–87. The Board justified this rationale in a footnote, stating that

[a] rule conferring limited representational status on an 8(f) union does not present the dangers such a rule would create outside the construction industry. After all, an 8(f) union is not a stranger to the employees. Rather, it is usually the initial employment referral source for most of the employees the employer hires.

Id. at 1387 n.52.
35. The important message here is not that 9(a) principles apply, but that section 8(a)(5) of the Act guides the bargaining relationship of parties to such a degree that upon expiration of a CBA, solely created pursuant to 9(a) of the Act, a duty is imposed upon the signatory employer to bargain in good faith with the signatory union. The Board in Deklewa made it clear that "an 8(f) employer has no 8(a)(5) obligations after expiration of the agreement . . . ." Id. at 1388.
36. Section 8(a)(5) of the Act imposes a duty on the employer "to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) . . . ." 29 U.S.C. § 158(a)(5). Section 8(b)(3) of the Act imposes a duty on the union "to bargain collectively with an employer, provided [the union] is the representative of his employees subject to the provisions of section 159(a) . . . ." 29 U.S.C. § 158(b)(3) (2004). The underlying premise of these duties is that, so long as employees are represented, subject to the provisions of section 9(a) of the Act, a duty to bargain will be imposed on both parties.
other hand, because there is no imposition of a duty to bargain following expiration of an 8(f) agreement, construction industry employers argue that they entered into bargaining relationships pursuant to 8(f), and therefore, they may unilaterally repudiate the agreement without being subjected to an 8(a)(5) unfair labor practice charge.\footnote{This assumes that the employer no longer wishes to continue its bargaining relationship, because the 8(f)/9(a) dichotomy does not impact the relationship otherwise. It is only when, upon the expiration of a construction industry CBA, the employer looks to escape any further obligations that the employer will argue that the relationship is pursuant to section 8(f) of the Act.}

The application of either 8(f) or 9(a) to a construction industry CBA is certainly not a new idea. In 1971, the Board first considered the interplay between these two sections and their impact on the bargaining relationship between construction industry employers and unions.\footnote{This was the beginning of the Conversion Doctrine, whereby an 8(f) agreement could convert into a 9(a) agreement upon the “showing that a majority of the employees supported the union.” Volk, supra note 21, at 248 (footnote omitted). See generally R.J. Smith Constr. Co., 191 N.L.R.B. 693 (1971) (holding that the contract between the employer and the union was not validly executed under 8(f) because at no time did the union represent a majority of the employer’s employees), enforcement denied sub nom. Local No. 150, Int’l Union of Operating Eng’rs v. NLRB, 480 F.2d 1186 (D.C. Cir. 1973).}

From the Board’s consideration of these two sections arose the Conversion Doctrine, whereby an 8(f) agreement could convert into a 9(a) agreement upon a showing that a majority of employees support the union signatory to the CBA.\footnote{Volk, supra note 21, at 248.}

Instability arose in the construction industry following the Board’s adoption of the Conversion Doctrine and, as a result, the Board completely revamped its 8(f) jurisprudence with its decision in Deklewa. However, the Board’s adoption of language in recent circuit court cases has loosened the standards set forth in Deklewa to such an extent that 8(f) jurisprudence has reverted back to the Conversion Doctrine, and not just to the 1971 Conversion Doctrine adopted in R.J. Smith Construction Co.,\footnote{191 N.L.R.B. 693 (1971).} but to a Conversion Doctrine with a much less stringent showing of majority requirements previously imposed on a construction industry union.\footnote{It will become quite clear that the recent cases have reinterpreted Board decisions so as to allow for a “paper” union to once again dominate the construction industry.}
III. PRE-DEKLEWA CONVERSION AND THE RESULTING DEKLEWA DECISION

A. The Board’s Adoption of the Conversion Doctrine

First developed by the Board in *R.J. Smith Construction Co.* and *Ruttmann Construction Co.*, the Conversion Doctrine viewed an 8(f) agreement between the construction industry employer and the union merely as a predecessor to the eventual 9(a) agreement that would develop as a result of a continuing bargaining relationship between the two parties. The 8(f) principles continued to be applied under the Conversion Doctrine; however, the Board in *R.J. Smith* and *Ruttmann* allowed for an 8(f) agreement to convert into a 9(a) agreement with the principles of 9(a) applying in full.

Before an 8(f) agreement could convert, “the union would have to file an unfair labor practice charge claiming: (1) that the prehire relationship had converted into a full 9(a) relationship; and (2) that the employer had committed an unfair labor practice by failing to treat it as such.” Conversion could occur “automatically, at any time, without notice or claim of majority status by either the union or the employer.” Once an unfair labor practice charge was filed, the investigation began by searching backwards from the date of filing to determine whether there was majority support for the union in a relevant unit of employees. A “relevant unit of employees depended on the nature of the employer’s work force and whether he was [a] party to an 8(f) agreement individually or through membership in a multi-employer association.” The Board categorized a

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42. 191 N.L.R.B. 693 (1971).
43. 191 N.L.R.B. 701 (1971).
44. Volk, *supra* note 21, at 248. Furthermore, “[d]uring this preliminary step there was no presumption of majority status protecting the signatory union from challenge during the contract’s term.” *Id.* (footnote omitted). The implication of this fact was that an employer could repudiate an agreement at any time. Conversely, a union could also repudiate at any time.

45. These principles included each party’s right to repudiate an agreement at any time and non-enforceability of the agreement through the duty to bargain principles set out in sections 8(a)(5) and 8(b)(3) of the Act. *Id.*
46. *Id.*
47. *Id.* at 248–49 (footnote omitted).
48. *Id.* at 248 (footnote omitted). *See, e.g.*, Wheeler Constr. Co., 219 N.L.R.B. 541, 542 (1975) (stating that conversion can occur immediately upon the signing of an 8(f) agreement); Pac. Intercom Co., 255 N.L.R.B. 184, 191 (1981) (holding that conversion may occur within a matter of days); John Deklewa & Sons, Inc., 282 N.L.R.B. 1375, 1383 (1987) (noting the Board’s previous findings regarding conversion as determined in *Wheeler Construction Co.* and *Pacific Intercom Co.*).
49. Volk, *supra* note 21, at 249.
50. *Id.* (citing *Deklewa*, 282 N.L.R.B. at 1379) (footnote omitted). Multi-employer associations are commonplace in the construction industry. Volk, *supra* note 21, at 249
construction industry employer's workforce into two distinct groups: permanent and stable, or project-by-project.51

An employer who employed the same group of employees over an extended period of time, regardless of when and where the employees were hired to complete a job, had a unit of employees considered to be permanent and stable.52 Conversely, an employer who hired employees based upon its movement from job-site to job-site had a unit of employees considered to be hired on a project-by-project basis.53 If a workforce were considered permanent and stable, the Board looked to the entire workforce of the employer to determine whether the union represented a majority of those employees.54 A workforce labeled project-by-project required the Board to look at the employer's individual existing projects to determine whether the union represented a majority of those employees.55 Once the Board determined that a union represented a majority of the employer's workforce, 9(a) attached to the bargaining relationship between the employer and the union.56 The permanency of conferring 9(a) status upon the bargaining relationship depended on the category in which the Board placed the employer's workforce.57 That is, a union representing a permanent and stable workforce enjoyed "9(a) status at all existing and future jobsites,"58 whereas a union representing a project-by-project workforce enjoyed 9(a) status on only "the individual projects at which majority support was demonstrated."59 Those unions that represented a permanent and stable workforce truly enjoyed full 9(a) status, because the resulting effect was that the employer was bound by the duty to bargain pursuant to section 8(a)(5) and could not repudiate the CBA following its

n.41. They enable several employers to have the opportunity to negotiate a CBA with a construction industry union. Id. The CBA binds all parties signatory to it and allows smaller employers to save time and money in the process. Id. The multi-employer factor will not be explored in this Article; however, it is wise to inquire into whether or not the employer signatory to a construction industry contract is a member of a multi-employer association, the reason being that there are certain doctrines the Board has established that govern multi-employer associations. For an overview of multi-employer associations see Sheet Metal Workers' Int'l Ass'n Local 19 v. Herre Bros., 201 F.3d 231, 244–48 (3d Cir. 1999) (providing a general description of what a multi-employer association is, what the benefits are for having membership in one, and what rules the employer must abide by having joined the association).

51. Volk, supra note 21, at 249.
52. Id.
53. Id.
54. Id.
55. Id.
56. Id.
58. Id. (emphasis added).
59. Id.
expiration.\(^{60}\)

The *Deklewa* Board discussed the "bifurcation" of construction industry employees into workforce categories and the resulting rule as being inconsistent with the "objectives Congress expressed in enacting Section 8(f),"\(^{61}\) but it failed to discuss the obvious struggle between construction industry employers and the unions they relied on for a workforce. This struggle was economic in nature. That is, pre-*Deklewa* employers who knew of the dichotomy created by the Board had the option of either picking and choosing their bargaining relationship from job-site to job-site or establishing a bargaining relationship that would carry forward to each of their job sites. An employer who elected to pick and choose its bargaining relationship only had to vary its employees from job-site to job-site, making sure it did not satisfy the test set forth by the Board for a permanent and stable workforce.\(^{62}\) Choosing a project-by-project workforce, and therefore eluding the permanent and stable classification, did not foster economic growth on behalf of employees. Employees working for an employer that chose to carry a project-by-project workforce could not rely on being rehired after the project they were immediately working on had ended. This type of working relationship left a number of employees wondering how long they would be employed, where, if at all, their next position would be, and whether or not a paycheck would continue to come their way.

Whatever the case may be for the dichotomy created by the Board and the application of the Conversion Doctrine in the construction industry, the Board determined that the Conversion Doctrine was full of shortcomings and decided to review 8(f) jurisprudence in *Deklewa*. Ultimately, the Board reversed itself and abandoned the Conversion Doctrine. However, as will be seen in Part IV of this Article, the Board, with help from the circuit courts, has now reverted back to the streamlined Conversion Doctrine.

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60. For a discussion of the duty to bargain and the co-existence of sections 8(a)(5) and 9(a), see Part II.C, infra.

61. *Deklewa*, 282 N.L.R.B. at 1382. More specifically, the Board stated that Congress classified the hiring in the construction industry as being on a project-by-project basis and that the dichotomy created by the pre-*Deklewa* Board "seem[ed] plainly contrary to Congress' expressed view of the industry." *Id.*

62. An employer's workforce was deemed to be "permanent and stable" if it employed the same group of employees "from job site to job site over extended periods of time." Volk, *supra* note 21, at 249. This choice would allow the employer to repudiate the CBA upon expiration, because a new job site brought about a new workforce with the possibility that the union from which the employer obtained its workforce did not represent a majority of the employer's employees. *Id.*
1. **Deklewa: The Board Abandons the Conversion Doctrine**

John Deklewa and Sons, Inc. (Deklewa) was a construction industry employer engaged in the construction of commercial and industrial buildings and was a member of the multi-employer Iron Workers Employer Association of Western Pennsylvania, Inc. ("Association").\(^6\) In June of 1980, Deklewa became a member of the Association and entered into a three-year agreement for the period 1982 to 1985 ("the agreement").\(^6\) The terms of the agreement included "a 60-day notice of termination provision, an exclusive hiring hall provision, and a union-security clause."\(^6\) On September 23, 1983, Deklewa timely withdrew from the Association and notified the union that it would be repudiating the agreement and withdrawing its recognition of the union.\(^6\)

Litigation ensued, presenting to the Board the issue of whether Deklewa "violated [s]ection 8(a)(5) . . . by repudiating its collective-bargaining agreement entered into with the Union under the provisions of Section 8(f) of the Act, and by withdrawing recognition from the Union."\(^6\) The Board asked the parties to "express their views on . . . whether the Board should continue to adhere, in whole or in part, to the [then] current body of law interpreting and applying [s]ection 8(f)."\(^6\) More specifically, the Board wished for the parties to focus their attention on whether adherence to the Conversion Doctrine should continue.\(^6\) The General Counsel argued for adherence to the Conversion Doctrine and contended

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\(^6\) Deklewa, 282 N.L.R.B. at 1376.
\(^6\) Id. Prior to becoming a member of the Association, Deklewa and the Union had previously been involved in a bargaining relationship that began in 1960 and ended in 1980 when Deklewa formally agreed to become a member of the Association. Id. During the twenty-year period from 1960 to 1980, Deklewa "agreed to be bound by the provisions of the contract between the Association and the Union" by "execut[ing] and adher[ing] to the successive Association-Union collective bargaining agreements." Id. Deklewa entered into these agreements with the Association-Union "as a separate entity and not by virtue of any membership" in the Association. Id. However, in 1980, Deklewa decided to join the Association and thereby continued to carry on its twenty-year bargaining relationship by executing CBAs pursuant to its membership in the Association. The CBA relevant to the Deklewa decision is the 1982–1985 CBA and is noted in the text for that reason.

\(^6\) Id.

\(^6\) Id. At the time of Deklewa's withdrawal and repudiation of the agreement, Deklewa was not working on any construction projects in which it "directly employed employees covered by" the agreement. Id. Furthermore, from the date of withdrawal and repudiation until May 3, 1984, the date the parties stipulated to the facts in Deklewa, Deklewa had no such employees employed by it. Id.

\(^6\) Id. at 1375.

\(^6\) Id. at 1377.

\(^6\) Id. The Board in Deklewa described the Conversion Doctrine as being one "whereby an 8(f) relationship/agreement can 'convert' into a 9(a) relationship/agreement by means other than a Board election or voluntary recognition." Id.
that Deklewa violated section 8(a)(5) "by repudiating the contract and withdrawing recognition because the Union enjoyed prior majority status . . . ." 70 Several amici 71 urged the Board to adhere to the Conversion Doctrine, but argued for the adoption of certain rules prohibiting an 8(f) agreement from converting into a 9(a) agreement absent a Board-certified election or voluntary recognition. 72 The AFL-CIO, its Building and Trades Department, and the Teamsters joined in to "argue that the Board should overrule R.J. Smith and abandon the [C]onversion [D]octrine" while at the same time urging "the Board to adopt the position that [s]ection 8(f) provides 'an alternative means' by which unions in the construction industry can obtain the full status of exclusive representative within the meaning of [s]ection 9(a) . . . ." 73

Rather than make a decision on whether the CBA converted from an 8(f) pre-hire agreement to a 9(a) agreement, the Board utilized Deklewa as a springboard to abandon the Conversion Doctrine and develop new rules when analyzing 8(f) agreements. 74 The Board stated that there were three shortcomings to the Conversion Doctrine and the then current law surrounding 8(f) agreements. 75 Shortcomings of the Conversion Doctrine were that it did not coincide with the legislative history behind 8(f), it did not further the "statutory objectives of employee free choice, 76 and its administrative and litigation difficulties frustrated the policies of the Act. 77

Regarding the Conversion Doctrine not coinciding with the legislative history of 8(f), the Board noted that Congress, with the passage of 8(f), permitted the once illegal pre-hire agreements by including the second

70. Id. The General Counsel urged adherence to the conversion doctrine set forth in R. J. Smith Constr. Co., 191 N.L.R.B. 693 (1971) (holding that the contract was not valid because the Union did not represent a majority of the employer's employees).

71. Amici is the plural of amicus curiae, which is Latin for "friend of the court," and is a term used to refer to a non-party who, because of related interests in the litigation, is either asked by the Board or petitions the Board to submit a brief on the issue(s) before the Board in an attempt to persuade the tribunal that the position advocated by them in their brief is a correct solution to the issue(s) before the Board. The amici arguing this position were the ABC, the Council on Labor Law Equity, and the National Right to Work Legal Defense Foundation. Deklewa, 282 N.L.R.B. at 1377.

72. Id. Deklewa advocated this position, which, if the Board adopted it, would mean dismissal of the complaint in its entirety. Id. That is, because adoption of this principle would never permit an 8(f) agreement to convert into a 9(a) agreement absent either Board certification, which had not occurred in Deklewa, or voluntary recognition, which Deklewa withdrew, the complaint would have no legal basis.

73. Id.

74. Volk, supra note 21, at 251–52.

75. Deklewa, 282 N.L.R.B. at 1379.

76. Id. at 1380.

77. Id. at 1379–80. See also Volk, supra note 21, at 253 (discussing the three weaknesses found by the Deklewa Board within the Conversion Doctrine).
proviso of 8(f) that preserved employee free choice. The Board reasoned that the decisions that created the Conversion Doctrine, *R.J. Smith* and *Ruttmann*, were incorrect insofar as those decisions suggested that either party had an unfeathered right to voluntarily repudiate the agreement. Furthermore, the Board noted that the second proviso of 8(f) “should not have been interpreted as also permitting unilateral anticipatory repudiation of a collective bargaining agreement prior to the resolution of the conversion question.” Instead, the second proviso could only have been interpreted to further a method by which employees could decertify a union or request alternative representation. “Therefore, granting 9(a) status to an 8(f) agreement and barring elections during the term of the agreement, in spite of the second proviso, could not be consistent with congressional intent.”

The second shortcoming of the Conversion Doctrine was its inability to further the statutory objective of employee free choice. Because *R.J. Smith* allowed for unilateral repudiation of an 8(f) agreement, at any time and for any reason, such a rule was “not a necessary predicate for advancement of the employee free choice principles embodied in the second proviso” of 8(f). The Board stated that it would be entirely inconsistent to continue adhering to the holding in *R.J. Smith*, for the mere fact that a “proviso enacted to preserve employees’ rights to choose, change, or reject their own collective-bargaining representative can serve

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78. Volk, *supra* note 21, at 253. See also 29 U.S.C. § 158(f) (2005) (“That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section [9(c)] or [9(e)] . . . .”).


81. *Id.* (footnote omitted).

82. The contract bar doctrine operates to prevent the holding of a representational election under section 9(e) and (e) when there exists a current and valid contract between an employer and a union. *Id.* at 254 n.75. The contract must have a definite duration if it is to serve as a bar to an election; it will then preclude petitions by either the employer or a certified incumbent union for the entire term of the agreement. *Id.* at 256 n.88. This doctrine was imposed on converted 8(f) agreements under the Conversion Doctrine set forth in *R.J. Smith* and *Ruttmann*.

83. Volk, *supra* note 21, at 254 (footnote omitted). In other words, the *Deklewa* Board ruled that because of the inconsistency between the Conversion Doctrine and the legislative history of 8(f), an agreement authorized by section 8(f) does not bar an election. While the *Deklewa* Board ruled that an 8(f) agreement could not act as a bar to a representational election because of the second proviso in 8(f), subsequent Board decisions have interpreted the language in CBA’s and the NLRA’s statute of limitations period in such a way as to reverse the decision in *Deklewa*. That is, in light of the Act’s six-month statute of limitations for instituting a charge alleging an unfair labor practice, an 8(f) CBA that includes, voluntarily, recognition language will bar a representational election, provided the employer does not institute an unfair labor practice charge alleging lack of majority status within six months of execution of the 8(f) CBA.

as a basis for an employer unilaterally to repudiate a voluntary collective-bargaining agreement for any reason it chooses." Therefore, the Board held that 8(f) agreements would not bar the processing of valid petitions filed pursuant to section 9(c) and (e).

In confronting the litigation difficulties of the Conversion Doctrine, the Board noted that in order to determine whether an 8(f) agreement converted into a 9(a) agreement, it would be required "to 'look back' any number of years . . . to determine whether the union, at any time, enjoyed majority support." To make such a determination, the Board utilized such factors as "union membership rolls, . . . exclusive hiring hall referrals, or union fringe benefit contribution records," all of which were subject to the adversary system. The Board concluded that the documentary evidence presented to support a union's claim of majority status during conversion litigation was often "incomplete, contradictory, or unavailable," leaving significant questions as to whether the evidentiary factors presented do indeed justify finding the requisite majority support to confer full 9(a) status upon an 8(f) signatory union. "In short, the majority status finding that is a necessary predicate for conversion often is based on a highly questionable factual foundation."

After determining a need for altering the law surrounding 8(f) pre-hire agreements, more specifically the Conversion Doctrine, the Board considered the two positions, discussed above, offered by the parties in response to the Board's presentation of the issue. The position offered by Deklewa and several amici urged adherence to *R.J. Smith* and the adoption of certain rules prohibiting an 8(f) agreement from converting into a 9(a) agreement, absent a Board certified election or voluntary recognition. The position offered by the AFL-CIO and the Teamsters urged the Board to overrule *R.J. Smith*, abandon the Conversion Doctrine, and adopt a position that would permit 8(f) to provide "alternative means" by which unions in the construction industry could obtain the full status as an exclusive representative.

The Board rejected both proposed solutions and instead chose a middle-of-the-road approach to the new principles behind pre-hire agreements and 8(f). Rejecting Deklewa'a proposed solution, the Board revisited the same shortcomings of the law for which it expressed the need to overrule *R.J. Smith*. Indicating that accepting the first position would

85. *Id.* at 1383.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 1384.
91. *Id.*
92. *Id.*
mean unilateral repudiation, giving rise to "potential disruptive effects," inconsistencies within legislative history and intent, and a rendering of the second proviso of 8(f) null and void, the Board rejected Deklewa's proposal as being consistent with R.J. Smith and likewise unworkable. Rejecting the AFL-CIO and the Teamsters' proposed solution, the Board noted that such a method was indeed closer to its holding, but stated that the "alternative means" were clearly contrary to the "express congressional mandate that an employer cannot be coerced . . . into negotiating or adopting an 8(f) agreement." The Board reasoned that

[i]f, as this alternative [means] contends, a union acquires full 9(a) status based solely on the employer's adoption of an 8(f) agreement, the union should also acquire the full rights and privileges of an exclusive bargaining representative. In that event, the signatory union would enjoy a rebuttable majority presumption upon the contract's expiration and could lawfully seek to compel the employer, through strikes or picketing, to negotiate and sign a successor agreement. This would be directly contrary to the express congressional mandate . . . .

Because the Board's then 8(f) law did not coincide with its text and legislative history, did not advance employee free choice in the most effective way, and entailed "evidentiary determinations that [were] inexact, impractical, and generally insufficient to support the conclusions they purport[ed] to demonstrate," the Board overruled R.J. Smith and set forth several principles. First, 8(f) CBAs would be enforceable through 8(a)(5) principles. Second, such agreements would not be subject to the contract bar doctrine. Third, in processing election petitions, the appropriate unit would be the single employer's employees covered under the agreement.

93. Id.
94. Id. at 1384–85. The Board relied on the Conference Report on the 1959 amendments, which states that "[n]othing in [section 8(f)] is intended . . . to authorize the use of force, coercion, strikes, or picketing to compel any person to enter in such [8(f)] agreements." Id. at 1385 n.39 (quoting 2 LEG. HIST. 934, 946).
95. Id. at 1384–85. This is the most interesting statement of the decision. The main reason for rejecting the second position was the Board's refusal to allow an 8(f) agreement to "convert" into a 9(a) agreement, thereby giving the 8(f) signatory union a rebuttable majority presumption and allowing that union to force the signatory employer to bargain with it through 8(a)(5) principles. It is the most interesting statement because, when reading the most recent decisions regarding 8(f) agreements in conjunction with the NLRA's statute of limitations, one sees that an automatic conversion can occur, provided that several requirements are met. These requirements will be discussed in some detail in Part IV of this Article.
96. Id. at 1384.
97. Id. at 1377–78.
98. Id. at 1377.
99. Id.
100. Id.
Finally, upon the expiration of such agreement, the signatory union would no longer enjoy a presumption of majority status and either party would be able to repudiate the agreement. Of the four principles set forth in Deklewa, the first and fourth are the two principles that, when read in conjunction with recent decisions, suggest that Deklewa has been overruled, sub silentio, and the Conversion Doctrine has been given new life.

With regard to the first principle, that 8(f) CBAs would be enforceable through the principles of 8(a)(5), the Board adopted a position to ensure that such agreements were executed fully during their term, thereby prohibiting unilateral repudiation during the term of the CBA, a practice the Board wanted to abolish as a result of the R.J. Smith decision. The Board stated that “[w]hen parties enter into an 8(f) agreement, they will be required, by virtue of [s]ection 8(a)(5) . . . to comply with that agreement . . . Neither employers nor unions . . . will be free unilaterally to repudiate such agreements.”

The Board explained the application of [s]ection 8(a)(5) to 8(f) agreements by stating that such application would be limited to the prohibition of unilateral repudiation of the CBA until it expires or until the employees “vote to reject or change their representative.” It was the chance to “provide greater stability” in the construction industry that led the Board to declare limited application of 8(a)(5) to 8(f) agreements. Furthermore, the notion that parties would be more aware of their “rights, privileges, and obligations” during the existence of a collective bargaining relationship, and that changes would come in a more “orderly, nonadversarial context,” solidified the Board’s reasoning behind allowing limited application of the 8(a)(5) principles during the term of the CBA.

With respect to an 8(f) signatory union not enjoying a rebuttable majority presumption upon expiration of the 8(f) agreement, the Board believed that Congress intended a limited linkage between section 8(a)(5) and section 9(a), but stated that the “9(a)” status conferred upon 8(f) signatory unions is “only coextensive with the bargaining agreement that is the source of its exclusive representational authority.” The Board was
not attempting to grant any obligations upon 8(f) signatory unions other than a limited 9(a) conferral during the operative term of the agreement. Thus an 8(f) signatory union would "acquire[] no other rights and privileges of a 9(a) exclusive representative" beyond the operative term of the contract.\textsuperscript{107} Creating the link between sections 8(a)(5) and 9(a) for the limited purpose of enforcing an 8(f) agreement was not only consistent with the Act, the Board said, but "[was] the interpretation and application of Section 8(f) that [gave] the most meaning and substance to that section's text and legislative history."\textsuperscript{108}

IV. THE REVERSION TO CONVERSION

A. Post-Deklewa Decisions: A Roadmap to Reversion

Few scholars have considered the Conversion Doctrine, and the Board and circuit courts continue to rely on the same few cases. Shortly after the Deklewa decision in 1987 the Board decided J & R Tile, Inc.,\textsuperscript{109} a case that laid the foundation for re-emergence of the Conversion Doctrine. Cases following J & R Tile have formulated principles that mirror the Conversion Doctrine abolished by Deklewa. The most notable cases, and those which will be the focus of the remaining portions of this Article, were decided within months of each other and by the same circuit court judge.\textsuperscript{110} Ultimately the Board adopted the language of the circuit court and completed the roadmap for reverting to the Conversion Doctrine.\textsuperscript{111}

The roadmap began to emerge with the Board's decision in J & R Tile. This decision interpreted Deklewa and its progenies in such a way as to allow a party to an 8(f) agreement to allege and prove the existence of a 9(a) agreement by one of two methods: a Board-conducted election, or

\begin{itemize}
  \item \textsuperscript{107} Id. "Operative term of the agreement" is intended to mean the length of the agreement. The Board will apply section 8(a)(5) only to the extent that the parties to an 8(f) agreement are under contract. Following expiration, no rights are granted and, absent Board-certified election, section 8(a)(5) is not applied.
  \item \textsuperscript{108} Id.
  \item \textsuperscript{109} 291 N.L.R.B. 1034 (1988).
  \item \textsuperscript{110} Tenth Circuit Senior Judge Monroe G. McKay sat by designation in the Third Circuit and authored Sheet Metal Workers' Int'l Ass'n v. Herre Bros., 201 F.3d 231 (3d Cir. 1999). Months later, and back on his home "court," Judge McKay authored NLRB v. Oklahoma Installation Co., 219 F.3d 1160 (10th Cir. 2000), and NLRB v. Triple C Maint., 219 F.3d 1147 (10th Cir. 2000). All three cases are pivotal to the roadmap used to ultimately revert to the Conversion Doctrine.
  \item \textsuperscript{111} See, e.g., Staunton Fuel & Materials, 335 N.L.R.B. 717 (2001) (holding that the contract did not establish a 9(a) relationship).
\end{itemize}
voluntary recognition. The J & R Tile Board stated that a party may assert its bargaining relationship as one governed by 9(a), but must affirmatively prove such a relationship in order for it to be binding.112 This standard of the Board is within the battle of the footnotes. That is, the J & R Tile Board was relying on a footnote in Deklewa that noted that the party asserting the existence of a 9(a) relationship must prove such a relationship.113 The Board in Deklewa, however, never stated by what means an 8(f) agreement could convert to a 9(a) agreement,114 but did suggest in a subsequent footnote that a presumption of majority status could flow from voluntary recognition “based on a clear showing of majority support among the unit employees . . . .”115 In essence, the J & R Tile Board decision, which included two members who decided Deklewa,116 formulated the underlying premise that an 8(f) relationship and its resulting agreement could affirmatively be proven to have been governed by 9(a) rather than 8(f).

The Board in J & R Tile added to its analysis by noting that post-Deklewa Boards had stated that a 9(a) relationship could be proven “either through a Board-conducted representation election, or a union’s express demand for, and an employer’s voluntary grant of, recognition to the union as bargaining representative based on a contemporaneous showing of union support among a majority of the employees in an appropriate unit.”117 The post-Deklewa Board decision that established the voluntary grant of recognition as a method of proving the existence of a 9(a) agreement was American Thoro-Clean,118 and its reliance on Deklewa is misconstrued. That is, the Board in American Thoro-Clean stated that Deklewa held that a party to an 8(f) relationship that asserts the existence of a collective-bargaining relationship under section 9(a) of the Act would have the burden of affirmatively proving the existence of such a relationship, through either (1) a Board-conducted

113. Deklewa, 282 N.L.R.B. at 1385 n.41.
114. The premise underlying Deklewa was abandonment of the Conversion Doctrine, and the Board was very cautious to leave out any language in the text of its decision that would permit such a conversion.
115. Deklewa, 282 N.L.R.B. at 1387 n.53. Deklewa does not say anything about what would become of a presumption of majority status, but does state that such a presumption could be had by voluntary recognition.
116. Member Johansen agreed with the majority in both Deklewa and J & R Tile, while Member Stephens concurred in Deklewa and was in the majority on J & R Tile. Stephens had been elevated from Member to Chairman by the time he and Members Johansen and Cracraft decided J & R Tile.
representation election or (2) a union’s express demand for, and an employer’s voluntary grant of, recognition to the union as bargaining representative, based on a showing of support for the union among a majority of the employees in an appropriate unit. 119

The problem with American Thoro-Clean is that its analysis of Deklewa is misplaced. That is, there is no language in Deklewa supporting American Thoro-Clean’s contention that Deklewa held that an 8(f) bargaining relationship could be converted to a 9(a) relationship merely by a party asserting that it should be and relying on voluntary recognition. 120 The Board in American Thoro-Clean cited pages 1384 and 1385 121 of the Deklewa decision to support the contention that developing voluntary recognition is the method of proving the existence of a 9(a) bargaining relationship. However, the only language supporting this contention is in footnote fifty-three of Deklewa. 122 What the Board managed to accomplish in American Thoro-Clean was to take a footnote that was tucked away in Deklewa and elevate it to the text of its decision. Doing so helped develop the voluntary recognition method as a way in which a party asserting the existence of a 9(a) bargaining relationship could prove that relationship.

The opinion in J & R Tile altered the voluntary recognition method by requiring that the “recognition to the union as bargaining representative [be] based on a contemporaneous showing of union support among a majority of the employees in an appropriate unit.” 123 Therefore, the foundation upon which the voluntary recognition method rests is a three-prong test requiring: (1) the union to expressly and unequivocally demand recognition as the employees’ 9(a) representative; (2) the employer to expressly and unequivocally grant the requested recognition; and, (3) the demand and recognition be based on a contemporaneous showing that the union enjoys majority support of the employer’s work force. 124

119. Id. at 1108–09 (emphasis added).
120. The only language in Deklewa that even closely resembles the second method established in American Thoro-Clean comes from its fifty-third footnote. That footnote states that the Board did not mean to suggest that normal rebuttable presumptions of majority status could not “flow from voluntary recognition...where that recognition is based on a clear showing of majority support among the unit employees.” Deklewa, 282 N.L.R.B. at 1387 n.53.
121. See Am. Thoro-Clean, 283 N.L.R.B. at 1109 n.8 (“Respondent is clearly an employer in the construction industry and the parties signed the agreement without regard to whether the Union had a preexisting majority.”).
122. Deklewa, 282 N.L.R.B. at 1387 n.53.
1. Applying “Voluntary Recognition”: Watch What You Agree To!

The most recent cases dealing with the application of 9(a) to 8(f) agreements have focused on the voluntary recognition method of proving the existence of a 9(a) relationship. The reason for this focus is that section 9(c) of the Act governs the first method: a Board-conducted election. Thus, the voluntary recognition method has been the method that needs interpretation by the Board. If one recalls, the voluntary recognition method of proving the existence of a 9(a) relationship had no firm textual support other than what was in the footnote in Deklewa. Rather, the method has developed with interpretation given to it by Boards following Deklewa.

Three cases, *Sheet Metal Workers’ International Ass’n Local 19 v. Herre Bros., Inc.*, *NLRB v. Oklahoma Installation Co.*, and *NLRB v. Triple C Maintenance, Inc.*, can be analyzed together, not for the fact that the decisions were authored by the same judge, but for the reason that each case deals with the application of the voluntary recognition method of proving the existence of a 9(a) relationship. *Sheet Metal Workers’* sets the tone for applying voluntary recognition, and *Oklahoma Installation* and *Triple C Maintenance* further explain what is needed to affirmatively prove the existence of a 9(a) relationship. Finally, the Board in *Central Illinois Construction* gave credence to language used in *Oklahoma Installation* and *Triple C Maintenance* as the approved method by which a construction industry union, whose status as bargaining representative is governed by 8(f), can acquire the status of majority representative under 9(a).

a. Voluntary Recognition: Prongs One and Two

*Sheet Metal Workers’* concentrated on the first two prongs of the voluntary recognition method. In doing so, the Third Circuit took a strict textualist approach by applying the literal terms of the CBA to *Sheet Metal Workers’ International Ass’n Local 19 v. Herre Bros., Inc.* The court noted that the Board had held that “by signing a collective bargaining agreement

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126. 201 F.3d 231 (3d Cir. 1999).
127. 219 F.3d 1160 (10th Cir. 2000).
128. 219 F.3d 1147 (10th Cir. 2000).
129. It is interesting to note how the Board carefully avoided the term “conversion” when identifying the issue in *Central Illinois Construction* and, instead, used the term “acquire.”
containing contractual language which unequivocally demands and grants 9(a) recognition and states that 'the Employer is satisfied that the Union represents a majority of its eligible employees,' the employer confers 9(a) status on the union without more."

In applying the Board law to the terms of the CBA, the court recited the recognition clause of the CBA that stated:

[i]nasmuch as, the Union has submitted proof and the Employer is satisfied that the Union represents a majority of its employees in the bargaining unit . . . the Employer recognizes the Union as the exclusive Collective Bargaining Unit on all present and future job sites . . . until such time as the Union loses its status . . .

The court stated that this type of language "conclusively establishes a 9(a) relationship" for three reasons. First, even though the union did not explicitly demand recognition pursuant to 9(a) of the Act, the language expressed in the recognition clause clearly evidenced intent on behalf of the parties to imply that the demand was pursuant to 9(a). Secondly, the language unequivocally stated that the employer recognized the union as the exclusive bargaining representative until the union lost such status. Finally, the CBA stated that the union submitted proof of its majority status and such proof was satisfactory to the employer. The court went on to state that there was "no way to read an 8(f) relationship" into the CBA, nor was there any way to escape the conclusion that "a 9(a) relationship governed the parties in this case."

130. Sheet Metal Workers', 201 F.3d at 241 (citing Decorative Floors, Inc., 315 N.L.R.B. 188, 188 (1994)). See also MFP Fire Protection, Inc., 318 N.L.R.B. 840, 841–42 (1995) (holding that an employer's execution of a CBA acknowledging a union has 9(a) status is sufficient to establish such a relationship absent any other proof of majority status).

131. A recognition clause is typically one of the first few clauses in a CBA and usually identifies the union as the exclusive bargaining agent for a majority of the employer's employees pursuant to 9(a) of the Act.


133. Sheet Metal Workers', 201 F.3d at 242.

134. For a union to explicitly demand 9(a) status, the union must state in the recognition clause that, for example, the union has submitted proof and the employer is satisfied that the union represents a majority of its employees pursuant to section 9(a) of the National Labor Relations Act. The court is stating that an explicit demand such as this would satisfy the requirement, but because the content of the CBA in Sheet Metal Workers' established intent and language that unequivocally implied a demand for such 9(a) status, such language would also satisfy.

135. Sheet Metal Workers', 201 F.3d at 242.

136. Id.

137. Id.

138. Id.
b. Voluntary Recognition: The Contemporaneous Showing

Oklahoma Installation and Triple C Maintenance can be analyzed together because most of the analysis in Oklahoma Installation is based on the principles established in Triple C Maintenance. In Triple C Maintenance, the court dealt with the issue of what proof is needed to satisfy the third prong of the voluntary recognition method. The court began its analysis by saying that "in order to satisfy the voluntary recognition standard, the Board requires rigorous compliance with its first two prongs... however, [the Board] has interpreted the contemporaneous showing requirement with greater latitude..."\(^{139}\) A contemporaneous showing may be satisfied in a number of different ways, including actual objective proof\(^{40}\) or an "employer-conducted poll prior to initial recognition."\(^{141}\) Additionally, a contemporaneous showing does not have to be made by reliance on extrinsic evidence.\(^{142}\) Rather, the court said, the Board has permitted proof of the contemporaneous showing requirement by contractual language supporting the notion that a union has made an offer to the employer to prove its majority support and the employer has acknowledged its satisfaction with such an offer of proof.\(^{143}\)

In applying past court and Board decisions, the Tenth Circuit noted that because Triple C Maintenance recognized the Union "as the sole and exclusive bargaining agent for... a unit [of employees] appropriate for bargaining within the meaning of [s]ection 9(a)"\(^{144}\) and because the CBA included language indicating the employer's recognition was predicated on a "clear showing of majority support,"\(^{145}\) the CBA met the voluntary recognition standard for proving the existence of a 9(a) relationship without resorting to parol evidence. The court continued its application of the CBA to Board law by holding that "reference to the statutory section [section 9(a)] is particularly helpful in... these types of agreements generally... because... Triple C's [and other employers similarly situated] argument that it did not have notice that § 9(a) governed its relationship with the

\(^{139}\) NLRB v. Triple C Maint., Inc., 219 F.3d 1147, 1153 (10th Cir. 2000).
\(^{141}\) Triple C Maint., 219 F.3d at 1153 (quoting Precision Striping, Inc., 284 N.L.R.B. 1110, 1112 n.6 (1987)).
\(^{142}\) Id. at 1154.
\(^{143}\) Id.
\(^{144}\) Id. at 1155 (emphasis added).
\(^{145}\) Id. The court dealt with the Sheet Metal Workers' analysis that did not require specific mention of 9(a) in the recognition clause by saying that "so long as the remainder of the recognition language conclusively shows that the parties intended § 9(a) to apply," the burden of overcoming the 8(f) presumption is met. Id. at 1155–56 n.3.
Union rings rather hollow." The court stated that it did not see any analytical difference between a contract stating that the union’s majority support was offered by way of union authorization cards that the employer chose not to see, and a contract, like the CBA in Triple C Maintenance, that states that proof of the union’s majority support was offered to the employer who accepted such proof and extended recognition to the union based on such proof.

The distinction between the decision in Sheet Metal Workers’ and the decisions in Triple C Maintenance and Oklahoma Installation is the requirement that a CBA specifically state that the relationship is pursuant to 9(a) before such 9(a) status can be conferred. Oklahoma Installation acknowledged that the narrow difference was that its own CBA did not contain the words “section 9(a)” while the Triple C Maintenance CBA did.

2. Central Illinois Construction: The Roadmap Completes

In Central Illinois Construction the Board completed the so-called “roadmap” by setting forth, once and for all, the method by which unions can use exclusively contractual language to convert their 8(f) agreements into 9(a) agreements. Until the Central Illinois decision, the Board had not fully resolved the issue of how a union whose status as a bargaining representative is governed by 8(f) may acquire, through agreement with the employer, the status of majority bargaining representative under 9(a). It was the Central Illinois decision that provided the Board the vehicle with which to adopt the language of the Tenth Circuit decisions. The court ultimately held that a written agreement will establish a 9(a) relationship if its “language unequivocally indicates that the union requested recognition as majority representative, the employer recognized the union as majority representative, and the employer’s recognition was based on the union’s having shown, or having offered to show, an evidentiary basis of its majority support.”

The facts of Central Illinois are simple, straightforward, and common among construction industry employers and unions. Central Illinois executed a successor agreement offered by the Union that included a recognition clause identical to previous agreements. The recognition

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146. Id. at 1155–56.
147. Id. at 1156.
149. 335 N.L.R.B. 717 (2001). This case is also referred to as Staunton Fuel & Material, Inc.
150. Id. at 717.
151. Id. (emphasis added).
clause stated that the employer ""recognize[d] the Union as the sole and exclusive collective bargaining agent' for all employees in the defined unit."¹⁵² In addition to the recognition clause, the successor agreement included article 43, entitled “Majority Representative,” which reads: “‘[t]he Contractors Party hereto recognize [the Union] as the Majority Representative of all employees in Operating Engineers classifications employed by them and the sole and exclusive bargaining agent of such employees.’”¹⁵³ Just prior to expiration of the successor agreement, Central Illinois sent written notice of its intent “‘to terminate any and all Collective Bargaining Agreements . . . ‘”¹⁵⁴ Upon expiration of the agreement, Central Illinois made several unilateral changes in the terms and conditions of employment and the Union filed charges alleging a violation of section 8(a)(5).¹⁵⁵

The Administrative Law Judge (ALJ) found that article 43 and the recognition clause established a 9(a) relationship and that the relationship continued after the contract’s expiration.¹⁵⁶ The Board reversed the ALJ’s decision that the agreement established a 9(a) agreement, stating: “Although . . . article 43 states that the Respondent [Central Illinois] ‘recognize[s] [the Union] as the Majority Representative,’ it does not state that the Respondent’s recognition was based on a contemporaneous showing, or offer by the Union to show, that the Union had majority support.”¹⁵⁷ Thus, under the requirements the Board adopted from the Tenth Circuit, the Board could not adopt the ALJ’s finding that a 9(a) relationship “was established by the contract language . . . .”¹⁵⁸

a. Points of Interest in Central Illinois Construction

The Board in Central Illinois discussed how Deklewa was the decision that “discarded” the former Conversion Doctrine. The Board correctly interpreted the Conversion Doctrine as one in which an 8(f) relationship could be converted to a 9(a) relationship without an election, but did so based on several criteria that did not necessarily reflect employee majority support for the union.¹⁵⁹ The Board said that the Conversion Doctrine allowed employees to be “locked in” to 9(a) representation by a union that lacked majority support and that “abandoning the doctrine served the interest of protecting employees’ right to determine their own

¹⁵². Id. (citation omitted).
¹⁵³. Id.
¹⁵⁴. Id.
¹⁵⁵. Id. at 717–18.
¹⁵⁶. Id. at 718.
¹⁵⁷. Id. at 720.
¹⁵⁸. Id.
¹⁵⁹. Id. at 718. See Section III.A, supra.
representation status." It certainly can be argued that by adopting the language of the Tenth Circuit, the Board effectively revived the Conversion Doctrine.

The Board specifically states that a contract provision will be independently sufficient to establish a union's 9(a) representation status where the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support.  

According to the Board, to obtain 9(a) status in the construction industry, unions only need to place the above language in the recognition clause of their agreements and then obtain unsuspecting and desperate construction industry employers to execute the agreement. Upon execution, unions must then wait at least six months before they can affirmatively argue that their relationship with the employer is governed by 9(a). If at any time from execution to six months thereafter the employer discovers the union did not have majority support, it may challenge the union's 9(a) status, pursuant to section 10(b) of the Act. Moreover, "[i]f the employer fails to act within the 10(b) period, it may terminate its bargaining obligation only by affirmatively showing that the union has lost majority support."  

In addition to the six-month statute of limitations set forth in section 10(b) of the Act, precision can also act as a bar to attacking the 9(a) representation status of a construction industry union. The Central Illinois Board went the extra step in completing the roadmap by offering ways in which construction industry unions can draft their contract language and ward off attacks by signatory employers. In doing so, the Board noted that because of its conditional nature, "a recognition provision stating that the employer 'will' recognize the union as the majority or 9(a) bargaining representative 'if' the union presents evidence that a majority of its employees have authorized the union to represent them in collective

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160. *Id.* (citing John Deklewa & Sons, Inc., 282 N.L.R.B. 1375, 1386–87 n.47 (1987)).
161. *Id.* at 719–20 (emphasis added).
162. *Id.* at 719 (stating that "written contract language, standing alone, could independently establish 9(a) bargaining status").
163. 29 U.S.C. § 160(b) (2004). This is the Act's statute of limitations wherein it states: "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . ." *Id.*
165. *Id.* The affirmative showing must be in accordance with the Board's decision in Levitz Furniture Co., 333 N.L.R.B. 717 (2001).
bargaining, would not be independently sufficient to establish a 9(a) relationship . . . "166 The Board also made the observation that the contractual language regarding a "union’s claim of majority support" is significant in establishing 9(a) recognition status.167 On one hand, contractual language that states a union “represents” a majority of unit employees is accurate under either an 8(f) or 9(a) agreement; on the other hand, contractual language that states a union “has the support” or “has the authorization” of a majority to represent them is more in line with a 9(a) relationship.168 Finally, in a footnote speaking more about 10(b) than anything else, the Board discussed contractual language that would enable an employer to challenge a union’s showing of majority support. In connection with this, the Board stated that if the contract recites that the union “offer[ed] to show” majority support, "the employer may challenge it by establishing that the union did not, in fact, make the required showing of majority support."169 The Board “[l]eft open the issue of whether an employer would be permitted to make a similar challenge within the 10(b) period where the language . . . unequivocally stated that the union did make (as opposed to offered to make) a showing of majority support."170 I suggest that in the latter situation, where the contractual language is clear and unambiguous, the employer would be prohibited, on the basis of parol evidence, from challenging the language.

b. New Guidelines for Investigations: Does the Evidence Contradict Contractual Language?

On September 2, 2004, the Office of the General Counsel issued its Regional Directors, Officers-in-Charge, and Resident Officers casehandling instructions for cases in which the status of a collective-bargaining relationship in the construction industry is at issue.171 The basis for issuance of the memorandum was Equal Access to Justice Act litigation that arose from an adverse court decision involving an 8(f)/9(a) dispute. In Nova Plumbing, Inc.172 the Board applied the test set forth in Central Illinois and found that a 9(a) relationship existed. Upon a petition for review and cross-application for enforcement, the D.C. Circuit Court of

167. Id.
168. Id.
169. Id. n.14. To comply with section 10(b), the challenge must be made within six months after the written recognition was given.
170. Id.
Appeals (D.C. Circuit) applied the same test and denied enforcement "where unrebutted evidence contradicted the contractual assertions."\textsuperscript{173} "[T]he court relied on evidence that when the employer recognized the union, the employees emphatically expressed opposition to union representation."\textsuperscript{174} The court concluded that the 8(f) presumption had not been overcome and that while contract language and intent are "perfectly legitimate factors"\textsuperscript{175} for determining the nature of a bargaining relationship in the construction industry, "[s]tanding alone . . . [they] cannot be dispositive, at least where . . . the record contains strong indications that the parties had only a section 8(f) relationship."\textsuperscript{176}

The memorandum directs that, in light of the above, investigations of charges premised on a claim that contractual language created a 9(a) relationship must include an "inquiry into whether there is evidence that contradicts the contractual language."\textsuperscript{177} The memorandum goes on to state that "[r]elevant evidence would include evidence that when recognition was granted there was no representative complement of employees, or that employees who were employed opposed union representation, or that the union made no showing or offer to show majority support."\textsuperscript{178} When such evidence is present, Regions should submit the matter to Operations Management, Division of Advice.

V. CLOSING ADVICE

It goes without saying that before executing a construction industry CBA, both parties should closely read the recognition clause in order to be absolutely certain that the language contained therein represents precisely what it says and precisely what was agreed to. A recognition clause based solely on words, without further evidence of actual majority support, may lead to problems in terms of the legitimacy of the union. Construction industry employers have to be very careful to ensure that the CBA they sign is one that is backed by legitimacy and not just the appearance of legitimacy.\textsuperscript{179}

\textsuperscript{173} Casehandling Instructions, supra note 171, at 2 (citing Nova Plumbing, Inc., 336 N.L.R.B. 633 (2001), enforcement denied, 330 F.3d 531 (D.C. Cir. 2003)).
\textsuperscript{174} Casehandling Instructions, supra note 171, at 2 (citing Nova Plumbing v. NLRB, 330 F.3d at 537).
\textsuperscript{175} Nova Plumbing, 330 F.3d at 537 (emphasis in original).
\textsuperscript{176} Id.
\textsuperscript{177} Casehandling Instructions, supra note 171, at 2.
\textsuperscript{178} Id.
\textsuperscript{179} I would like to thank my colleague Laura Elrashedy, whose simple request for cite checking led to this Article being written.