Comments
on Notice of Proposed Rulemaking
on Representation-Case Procedures; RIN 3142 AA16

Submitted electronically through www.regulations.gov

Introduction

The Associated General Contractors of America AGC is

As the Board 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
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> section 9(a) relationship and thus trigger the three-
> petitions by employees and other parties creates an opportunity for construction companies and unions to circumvent both section 8(f) protections and *Garment Workers* 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
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> 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
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> realization of the premise of the Act that its prohibitions will go far to assure freedom of
> *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 expressed intent to overrule its holding in *Staunton Fuel & Material, Inc., 335 NLRB 717 (2001),* to

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 preamble 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 t text of proposed Section 103.21(b)