UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOSHAW THERMAL TECHNOLOGY, LLC

and Case 05-CA-158650

INTERNATIONAL ASSOCIATION OF HEAT AND
FROST INSULATORS AND ASBESTOS WORKERS,
LOCAL UNION NO. 23

NOTICE AND INVITATION TO FILE BRIEFS

On July 7, 2016, Administrative Law Judge Eric M. Fine issued a decision in the above-captioned case, applying *Staunton Fuel & Material*, 335 NLRB 717 (2001), to find that language in the parties' collective-bargaining agreement established a bargaining relationship under Section 9(a) of the National Labor Relations Act, and applying *Casale Industries*, 311 NLRB 951 (1993), to find that the Respondent's challenge to the Union's Section 9(a) status was time-barred.

The Respondent is an employer in the construction industry, and the Board presumes that bargaining relationships in the construction industry are established under Section 8(f) of the Act.[1] Under *Staunton Fuel*, above, however, that presumption is overcome, and a 9(a) relationship is established, where language in the parties' collective-bargaining agreement unequivocally indicates that the union requested and was granted recognition as the majority or 9(a) representative of the unit employees, based on the union having shown, or having offered to show, evidence of its majority support. Id. at 719–720. And in *Casale Industries*, above, the Board held that it would "not entertain a claim that majority status was lacking at the time of recognition" where "a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition." Id. at 953. This 6-month limitations period applies regardless of whether the 9(a) recognition is itself alleged as an unfair labor practice or whether, as in this case, the invalidity of the recognition is advanced as a defense against a refusal-to-bargain charge.[2]

Excepting to the administrative law judge's decision, the Respondent asks the Board to overrule *Staunton Fuel* and require a "contemporaneous showing of majority support" to establish a 9(a) bargaining relationship in the construction industry. The Respondent also urges the Board to revisit *Casale Industries*' 6-month limitation on challenges to 9(a) status in the construction industry.

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[1] *John Deklewa & Sons*, 282 NLRB 1375, 1385 fn. 41 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).
[2] See *Triple A Fire Protection,* 312 NLRB 1088, 1089 (1993), supplemented 315 NLRB 409 (1994), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999).

In a recent decision, the United States Court of Appeals for the District of Columbia Circuit rejected the holding of *Staunton Fuel* that contract language alone may create a 9(a) bargaining relationship in the construction industry. *Colorado Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031 (D.C. Cir. 2018); see also *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003). Other federal courts of appeals, however, have held to the contrary. See *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147 (10th Cir. 2000); *Sheet Metal Workers Local 19 v. Herre Bros., Inc.*, 201 F.3d 231 (3d Cir. 1999). In addition, the District of Columbia Circuit has expressed doubt regarding the holding of *Casale Industries*, see *Nova Plumbing*, 330 F.3d at 538–539, while other courts have upheld the Board's position, see *Triple C Maintenance*, 219 F.3d at 1156–1159; *NLRB v. Triple A Fire Protection,* 136 F.3d 727, 736–737 (11th Cir. 1998).

To aid in the consideration of the issues presented by the Respondent's exceptions, the Board now invites the filing of briefs in order to afford the parties and interested *amici* the opportunity to address the following questions.

1. Should the Board adhere to, modify, or overrule *Staunton Fuel*?

2. If the Board were to overrule *Staunton Fuel*, what standard should the Board adopt in its stead? Specifically, what should constitute sufficient evidence to overcome the presumption of a Section 8(f) relationship in the construction industry and establish a Section 9(a) relationship? Even if not dispositive, should contract language be deemed relevant to that determination? Where a union in the construction industry asserts (and the employer disputes) that a 9(a) bargaining relationship has been in existence for a period of time, should the Board's standard for determining whether the grant of 9(a) recognition validly reflects the wishes of a majority of employees in the bargaining unit be the same as for finding an initial establishment of a 9(a) relationship? If not, how should the standards differ?

3. Even if the Board modifies or overrules *Staunton Fuel*, under *Casale Industries* contract language alone would continue to be sufficient to establish 9(a) status whenever that status goes unchallenged for 6 months after 9(a) recognition is granted. If *Staunton Fuel* is modified or overruled, should the Board adhere to, modify, or overrule *Casale Industries*, and, if either of the latter, how?

Briefs not exceeding 25 pages in length shall be filed with the Board in Washington, D.C., on or before Friday, October 26, 2018. The parties may file responsive briefs on or before 15 days after the initial briefs are due, which shall not exceed 15 pages in length.[3] No other responsive briefs will be accepted. The parties and *amici* shall file briefs electronically by going to www.nlrb.gov and clicking on "eFiling." Parties and *amici* are reminded to serve all case participants. A list of case participants may be found at http://www.nlrb.gov/case/05-CA-158650 under the heading "Service Documents." If assistance is needed in E-filing on the Agency's website, please contact the Office of Executive Secretary at 202-273-1940 or Deputy Executive Secretary Roxanne Rothschild at 202-273-2917.

[3] If this due date falls on a weekend or holiday, the due date will be the next business day.

Dated, Washington, D.C., September 11, 2018.

JOHN F. RING,	CHAIRMAN
LAUREN McFERRAN,	MEMBER
MARVIN E. KAPLAN,	MEMBER
WILLIAM J. EMANUEL,	MEMBER