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The “Construction Industry Proviso” and Pre-Hire Agreements 8(f) and 9(a) Revisited

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Most contractors are aware that sections 8(f) and 9(a) of the National Labor Relations Act (NLRA) have particular significance to their industry, but are not exactly sure what that significance is. This article will attempt to clarify the relatively complex area of law governing the relationships between construction contractors and construction trade unions and Sections 8(f) and 9(a) of the NLRA.

What Is 8(f)?

Section 8(f) of the NLRA was enacted in 1959 to “take into account the occasional nature of employment in the building and construction industry”. Section 8(f) declares that unlike in other industries it is *not* an unfair labor practice for an employer “engaged primarily in the construction industry” and a bonafide labor organization of construction employees to negotiate a collective bargaining agreement even though (1) the union’s majority status has not been established, and (2) the parties agree that the employer will hire only employees referred by the union. Thus, section 8(f), known commonly as the “Construction Industry Proviso” allows what are known as “pre-hire agreements” between employers and unions in the construction industry. Such “pre-hire” agreements would be illegal in all other industries because by their very nature they take away from employees the fundamental right to choose their own collective bargaining representative or even to

determine that they do not wish to be represented by any labor organization. The legislative history behind the 1959 amendments to the NLRA which added this so-called “Construction Industry Proviso” indicate that Congress felt that the proviso was necessary due to the particular circumstances that exist in the construction industry, and such “pre-hire” agreements have become the standard in the industry ever since then.

A Section 8(f) pre-hire agreement, however, does not mean that the employer has recognized the union as a collective bargaining agent of its employees for all time. In fact, an employer is free to repudiate an 8(f) agreement with the union following the termination of the agreement, and unilaterally withdraw recognition of the union as the bargaining agent of its employees. In other words, the employer need not continue to honor the agreement following its expiration until a new agreement is negotiated, and need not even negotiate with the union for a successor agreement, provided, however, that the employer’s 8(f) relationship with the union has not been converted into a 9(a) relationship.

What Is 9(a)?

The phrase “representative,” defined in Section 9(a), means a labor organization chosen by a majority of employees in a union appropriate for collective bargaining to be the exclusive representative of all employees therein for such

purposes. Once a Section 9(a) relationship has been established, either through a NLRB conducted election, or otherwise, the union continues to enjoy a presumption of representation status until the employees decertify it, again through an election, or until it abandons the bargaining unit, neither of which hardly ever occurs. Once a 9(a) relationship is established as a practical matter the Employer is a Union Company until such time as he either goes out of business or has no employees in the particular trade for an extended period of time.

Changing From 8(f) to 9(a).

A Section 8(f) relationship can be converted into a Section 9(a) relationship in several ways. One, the employees or union could petition for certification during the term of the 8(f) agreement, or even thereafter, and the NLRB could hold an election. Also, if a union representative presents authorization cards to the employer, signed by the employees, indicating that they are interested in the NLRB conducting an election to determine majority status of the union, and the employer examines those authorization cards, such examination can be and has been in the past deemed by the NLRB a sufficient showing by the union of majority status to the employer, and an acknowledgment of such majority status by the employer, to convert a 8(f) relationship into a 9(a) relationship.

Again, the important thing to remember is that once an 8(f) relationship is converted into a 9(a) relationship, the employer can no longer repudiate the agreement following its termination, and can no longer refuse to bargain with the union for a successor agreement. If the 8(f) relationship has been converted into a 9(a) relationship, the union continues to enjoy the presumption of majority status, until it is either decertified in an NLRB conducted election or until the almost equally unlikely event that the union abandons the unit.

The Bottom Line.

The moral of the story is: *never, never, never* look at authorization cards that are presented to you by a union representative, and *never* sign any acknowledgment that the union has presented evidence that it enjoys a majority status among the employees or that you acknowledge such. Such “9(a) language” is often included in memorandum agreements that unions solicit to construction employers to sign. These memorandums are not merely 8(f) pre-hire agreements, but purport to be acknowledgments by the employer that the union has presented to the employer evidence that it enjoys a majority status among the employees, and that the employer has acknowledged such majority status, thus thereby converting an 8(f) relationship to a 9(a) relationship for life.

Once a 9(a) relationship is established the employer has a continuing duty to negotiate terms and conditions of employment with the union until either the employer goes out of business or no longer employs employees in the particular trade for an extended period of time. The employer must negotiate to impasse before changing any terms and conditions of employment that were contained in any expired collective bargaining agreement, and even once impasse is reached, can only implement its last best offer, which then would become the terms and conditions of employment for any strike replacements that the employer might hire. Surprisingly, under NLRB case law the union continues to enjoy a presumption of majority status as to any strike replacements until such time as those strike replacements either decertify the union or there is other compelling evidence that they do not wish to be represented by the union. But, this is another subject that will be further elaborated upon in future articles.