

The Distinction Between Section 8(f) and Section 9(a) Collective Bargaining Relationships, and their Relative Advantages/Disadvantages

Union proposals for Section 9(a) recognition language have become more prevalent, apparently prompted by the Carpenter's stated intentions to disregard existing bargaining relationships, and traditional jurisdictional lines, in an attempt to obtain new members. A contractor faced with such a contract proposal has to make an important decision. That decision should be based on a sound analysis, rather than a knee jerk reaction. This memorandum has been prepared to provide contractors information concerning the most frequently asked questions about recognition language.

Note that throughout this memorandum, frequent references are made to the Association as the bargaining representative of contractors. For purposes of this analysis, therefore, the Association should be viewed as synonymous with a multi-employer bargaining unit.

I. Background

In most industries, federal labor law provides that an employer cannot legally enter into a collective bargaining agreement with a union, unless there has been a satisfactory showing that the union has the support of a majority of the employer's employees. In that setting, an employer and the union would actually commit an unfair labor practice if they were to become parties to a collective bargaining agreement without satisfactory proof that a majority of employees support the union. The proof is usually derived from an election supervised by the National Labor Relations Board, or, voluntary recognition by the employer after the union establishes that a majority of employees have signed what are known as "authorization cards", reflecting their support for the Union.

Employers in the construction industry operate under notably different rules. Congress recognized that contractors often work in a variety of geographic areas, with no established workforce. Instead, employees are often hired sporadically on a job-by-job basis. In such a setting, observance of the traditional rules could be very cumbersome for a contractor. A contractor bidding for a job in a different geographic area obviously needs to know what its labor costs will be. Those costs would be established by the collective bargaining agreement covering the individuals that the employer intends to hire for that project. Yet, under the traditional rules, the employer would not be able to enter into that agreement until after it hired its employees, and a majority of those employees expressed their support for the union.

Recognizing that the traditional rules were a poor fit for the construction industry, in 1959, Congress adopted Section 8(f) of the National Labor Relations Act. In its relevant part, that section provides:

"It shall not be an unfair labor practice...for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members...because the majority status of such labor organization has not been established under the provisions of Section 9 of this Act, prior to the making of such agreement..."

The contractor that makes use of this provision, and signs such a contract, becomes signatory to a Section 8(f) "pre-hire" agreement. During the term of that agreement, the contractor has what is known as a Section 8(f) "pre-hire" relationship with the union.

Such a contract, and the bargaining relationship that results from it, is in contrast to one established under Section 9(a) of the National Labor Relations Act. That section of the Act provides:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment..."

A bargaining relationship that results from an election supervised by the National Labor Relations Board is a Section 9(a) relationship. Any subsequent contract negotiated between the employer and the union will, for purposes of this discussion, be referred to as a Section 9(a) contract. Therein lies the critical distinction between the two relationships. In an 8(f) relationship, the contract may be signed even before any employees are hired. In a Section 9(a) relationship, a contract will be negotiated only after employees have been hired, and a majority of those employees have evidenced their support for the union.

Note that except for several distinctions not important to this analysis, the collective bargaining agreements negotiated between the parties may be identical. They will typically cover wages, fringe benefit contributions, terms of employment, and the like. However, even though the terms of the collective bargaining agreements might be identical, the legal framework governing a Section 8(f) relationship, in contrast to a Section 9(a) relationship, is dramatically different.

II. Primary Distinctions Between a Section 8(f) and Section 9(a) Relationship

The primary distinction between a Section 8(f) and Section 9(a) collective bargaining relationship relates to the duties of the contractor, and the union, upon contract expiration. If the parties have only a Section 8(f) bargaining relationship, neither party has duty to negotiate a new collective bargaining agreement upon expiration of the old. Either the contractor, or the union, is generally free to walk away from the relationship at contract expiration. If either party elects to do so, the contractor will become a non-union employer, or it could sign an 8(f) contract with another union.

This situation is very different with respect to parties that have a Section 9(a) relationship. At the expiration of a Section 9(a) collective bargaining agreement, both parties have an affirmative duty, under the National Labor Relations Act, to attempt to negotiate a new collective bargaining agreement. Even if the parties are unable to reach agreement, the employer continues to have an obligation to recognize the union, and the union continues to represent its employees.¹

Another significant difference flows from this first principle. In a Section 9(a) collective bargaining relationship, the parties must observe certain rules while they attempt to negotiate a new collective bargaining agreement. For example, the law imposes a duty upon each party to negotiate in “good faith” while they attempt to reach agreement upon a new contract. The failure of either party to observe those rules constitutes an unfair labor practice.

In contrast, very few rules govern the conduct of parties to a Section 8(f) agreement. The National Labor Relations Board has stated that the duty to bargain in good faith exists during the term of the agreement, and under current case law, that duty consists of only two elements: (1) observing the terms of the collective bargaining agreement, while it is in effect, and (2) upon request of the union, furnishing relevant information to establish that the agreement has been complied with.

Once the collective bargaining agreement has expired, it is clear that the parties are under no legal obligation to bargain in good faith, even if they choose to attempt to negotiate a new Section 8(f) agreement. Therefore, conduct during negotiations that might be an unfair labor practice in a Section 9(a) relationship would not violate the law in the context of an 8(f) relationship.

However, it must be emphasized that the reliance upon such technical distinctions will frequently be self-defeating. Even though an 8(f) relationship allows either party to engage in conduct that might otherwise be unlawful, doing so will likely cause long-term harm to the bargaining relationship, and may prolong negotiations. Parties to any type of bargaining relationship may legitimately expect that negotiations will be a serious effort to reach a fair agreement, rather than a resort to technical gamesmanship.

A. Conversion of a Section 8(f) relationship to a Section 9(a) relationship.

The fact that parties presently have a Section 8(f) bargaining relationship does not mean that the relationship cannot change. In fact, when the law was first interpreted to permit either party to walk away from the bargaining relationship at contract expiration, many unions understandably initiated steps to convert Section 8(f) relationships to those that were governed by Section 9(a).

¹ However, as will be explained in greater detail later in this memorandum, the ability to walk away from the relationship does not necessarily mean that there will be no financial consequences. Such a contractor may have substantial financial exposure for what is known as “withdrawal liability” if it has been contributing to a multi-employer pension plan under the expired pre-hire agreement.

Such a conversion can occur in one of two ways.

By an election supervised by the National Labor Relations Board – A union may file a petition for an NLRB supervised election if it has obtained authorization cards from at least 30% of employees in the proposed bargaining unit.

In addition, if the union can show that it is currently party to a Section 8(f) agreement with that employer, or, has been party to a recently expired 8(f) agreement with that employer, the existence of such a contract alone will support the petition for an election, and the Board will conduct an election. If a majority of the employees who vote, vote in favor of the union, it will then be the majority representative of those employees, and the bargaining relationship will be governed by Section 9(a).

Voluntary Recognition – The union can also attain Section 9(a) status through a voluntary recognition with a contractor or an Association. Conversion to Section 9(a) status can occur through such an agreement where there has been:

- 1) a demand for recognition as the majority representative by the union, and
- 2) a simultaneous grant of such recognition by the contractor, or Association, and
- 3) the grant of such recognition was based upon actual proof that the union has the support of a majority of employees, or, that it offered to provide such proof to the contractor.

A sample contract provision from an industry agreement that would satisfy these requirements is as follows:

The Association hereby recognizes the Union as the Collective Bargaining Representative of all the Employees covered by this Agreement. The non-member signatories who become parties to this Agreement do hereby likewise recognize the Union as the Collective Bargaining Representative of all Employees of said Employer and as is covered by this Agreement.

In as much as the Union has requested recognition from the employer as the exclusive bargaining representative of the employees in the bargaining unit described herein under Section 9(a) of the National Labor Relation Act, and has submitted proof thereof in the form of signed and dated authorization cards, and the employer is satisfied that the Union represents a majority of its employees in the bargaining

unit described herein, the employer hereby recognizes the Union as the exclusive collective bargaining representative of its employees on all present and future job sites within the jurisdiction of the Union, unless and until such time as the Union loses its status as the employees' exclusive representative as a result of an NLRB election requested by the employees. The employer agrees that during the life of this agreement it will not request a NLRB election and expressly waives any right it may have to do so.²

It is also possible for such language to provide that Section 9(a) status will be conferred if the union provides proof of majority support at some time in the future. If the contractor has agreed to such a future grant of Section 9(a) status, its refusal to grant that status once the union provides proof of majority support may be an unfair labor practice.

An example of such language, found to be sufficient by the National Labor Relations Board, provided:

"The employer agrees that if a majority of its employees authorize the local union to represent them in collective bargaining, the employer will recognize the local union as the NLRA's Section 9(a) collective bargaining agent for all employees performing construction work within the jurisdiction of the local union on all present and future jobsites."

B. Perceived Advantages of a Section 8(f) relationship.

The contractor may have more options at contract expiration – In an 8(f) relationship, the contractor can walk away from that relationship at contract expiration. Some may argue that the ability to end the relationship is leverage in negotiating favorable contract terms.

However, that leverage may appear to be more significant than it really is. If the contractor ultimately elects not to negotiate a new collective bargaining agreement, the union can readily file a petition for an election with the National Labor Relations Board. In most cases, the union would easily win the election, which would then establish a Section 9(a) relationship with the contractor. Once that occurred, the contractor would have a legally enforceable obligation to negotiate a new agreement. And may have gained nothing except the hard feelings that may come from unilaterally attempting to end the relationship. Furthermore, in some geographic areas and markets, it is essential to be a signatory contractor in order to successfully bid for work. In such a setting, maintaining

² Even though such language may be negotiated into a multi-employer agreement, actual proof of the Union's majority status will typically be provided on a contractor by contractor basis. Once that proof is provided, then that particular contractor will have a Section 9(a) bargaining relationship.

Section 8(f) status presents no real advantage for the contractor, because operating non-union is unrealistic.

Withdrawal liability is another significant issue. Under a law known as the Multi-Employer Pension Plan Amendments Act, a contractor that walks away from the bargaining relationship may be assessed what is known as “withdrawal liability”. Withdrawal liability may occur if the contractor has contributed to a multi-employer pension plan that is not sufficiently funded to pay all of the vested benefits that are due to participants. That liability will be assessed if the contractor no longer has an obligation to make contributions to the plan, and the contractor continues to operate in the same geographic area that was covered by its former labor agreement. In such circumstances, the plan can require that the contractor pay its share of the unfunded, vested liability. Such liability exists under many national and local pension plans, and can amount to substantial amounts of money. Withdrawal liability could be assessed if the contractor either went non-union, or signed an agreement with another craft. Contractors in this latter category could then be in the unenviable position of making pension contributions under its new agreement, and withdrawal liability to the pension plan established under the old agreement.

As a final matter, it is important to keep in mind one of the reasons why Congress gave contractors the right to sign pre-hire agreements. Contractors had argued that it was critically important to be able to sign such an agreement, so that they could rely on union hiring halls to obtain well trained, skilled employees. A contractor refusing to sign a new agreement obviously forfeits that right, and may be faced with an immediate need to recruit a sufficient number of employees with adequate skills. Furthermore, such a contractor will no longer be able to rely on industry funded training programs, and will have to finance and conduct such activities on its own.

An 8(f) relationship may give the contractor or Association greater latitude in conducting negotiations – As previously discussed, if the parties have only a Section 8(f) relationship, neither side is obligated to bargain in good faith under the National Labor Relations Act, even if they choose to negotiate a new contract. For example, as noted, the Association or the union could insist on the inclusion of an item that is considered non mandatory in the contract, and could take the position that without that item, there will be no contract.

In contrast, if the parties have a Section 9(a) relationship, any party insisting upon the inclusion of a non mandatory item as a condition of a settlement would be committing an unfair labor practice. Consequently, there are situations where 8(f) status may be considered beneficial. Generally, that is when bargaining must be conducted in a manner dictated more by effective strategy, rather than concerns of unfair labor practice exposure.

However, this advantage also may seem more significant than it really is. If the contractors and union have formed a solid partnership, and have maintained a productive bargaining relationship, the leverage resulting from an 8(f) relationship – to do something that might otherwise be unlawful – is irrelevant. The added leverage resulting from an 8(f) relationship is useful only where the bargaining relationship is adversarial and unproductive.

C. Advantages of a Section 9(a) relationship.

More stability in the multi-employer group – Section 8(f) status may permit some contractors to leave the multi-employer group, either to attempt to negotiate a better agreement, or to go non-union. Although the outcome of such a strategy is unpredictable for the reasons previously discussed, such an exodus of contractors from the multi-employer group, and the potential for them to go non-union, presents a challenge to the Association and the bargaining unit, and to those contractors that remain signatory.

In contrast, under a Section 9(a) relationship, none of the employers have the option of simply going non-union. As those contractors will continue to have a greater stake in the unionized sector the construction industry, it is more likely that there will be group cohesiveness – an important factor in effectively working with a labor partner to address concerns about competitiveness. Indeed, where the Union has been a willing partner in helping contractors to compete with non-union contractors, it is in a good position to argue that contractors should recognize its ongoing representative status through such a provision.

A Section 9(a) relationship makes it more difficult for a rival union to replace the current union – A contractor that has just secured a major construction project through a bid based upon its existing collective bargaining agreement would obviously be seriously impacted if another union replaced the current union, and then demanded to negotiate a new agreement. The contractor would then become enmeshed in negotiations for an entirely new collective bargaining agreement, with the potential for strikes, lost productivity, and legitimate concerns by the construction owner that the contractor may be unable to fulfill its commitments because of the potential for a labor dispute. That situation may occur more easily if the contractor only has a Section 8(f) agreement with its existing union.

In contrast, if the contractor is signatory to a Section 9(a) collective bargaining agreement, that contract will generally bar an election petition by a different union until shortly before the contract expires. For example, if a different union was attempting to organize a contractor's existing employees, and it filed an election petition during the first year of a three year collective bargaining agreement, that petition will be dismissed, on the basis that it is "barred" by the contract.

Unfortunately, a Section 8(f) collective bargaining agreement would not bar such a petition. The union that is party to that contract could file a petition for an election at any time during its term to become the Section 9(a) representative, but so could any other union that seeks to represent the contractor's employees. If a different union were able to successfully file a petition, and won the election, the contractor could no longer give effect to its 8(f) agreement with the previous union.

Although this has not occurred often in the past, the situation may change because of the desire of some unions, such as the carpenters and laborers, to expand their membership base, even by filing petitions to represent employees that are currently represented by other labor organizations.

D. Voluntary recognition language in the collective bargaining agreement -- what do you do when it is proposed?

As previously noted, some unions have responded to the legal principle that a contractor can walk away from a Section 8(f) agreement at contract expiration by seeking 9(a) voluntary recognition language. In other cases, the Association may actually seek to establish a Section 9(a) relationship to enhance stability in the multi-employer unit. That raises the question of whether parties have any legal duty to bargain over such a proposal.

Although there is no case law directly on point, such a proposal very likely is a permissive, non-mandatory topic of negotiations. That means that the parties would likely have no legal obligation to even discuss such a proposal.

Nonetheless, if the union does propose recognition language, the contractor and the Association have to make an important decision. Granting such recognition will end the ability of the contractors or the union to simply walk away from the relationship at contract expiration. Some contractors may view that as a serious limitation on their legal rights. However, as previously noted, if the contractors reject the proposal for recognition language, the union can readily file a petition for an election conducted by the National Labor Relations Board. The union can do so without obtaining the contractor's consent. In the construction industry, it is nearly a foregone conclusion that the union will prevail in such an election, and would attain Section 9(a) status through the Board's election process.

Therefore, contractors and Associations must give very careful thought when considering such a proposal. Rejecting such a proposal out of hand may simply prompt the union to file an election petition, accomplishing little except disrupting the bargaining relationship. Further, such a rejection may do great harm to the labor-management relationship. There also may be a variety of reasons why such language is presented that could benefit both parties, such as holding the multi-employer bargaining unit together, or thwarting the incursion efforts of a rival union.

Where the parties have established a productive relationship that has worked to address industry problems on a joint basis, temporary preservation of the contractor's 8(f) status, at the cost of that relationship, may be a very bad bargain. Accordingly, contractors in some areas have eventually accepted recognition language in exchange for the agreement of the union on other issues that are important to contractors, such as enhancing their ability to compete with non-union contractors.

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