

MOORE, COSTELLO & HART, P.L.L.P.

MEMORANDUM

TO: Associated General Contractors of Minnesota
FROM: Phyllis Karasov
DATE: March 11, 2010
SUBJECT: 8(f) and 9(a) Collective Bargaining Agreements

Increasingly, construction labor unions are proposing during negotiations that a provision be added to the collective bargaining agreement which states that the bargaining relations is a “Section 9(a) relationship.” The provision includes language to the effect that that the contractor recognizes the union as the collective bargaining representative for all employees in the bargaining unit. Contractors wonder if there is a problem if they agree to this kind of provision.

What Does It Mean to Have a Section 9(a) Relationship with a Union?

There are two types of collective bargaining agreements:

- 9(a) Agreement: A collective bargaining agreement between a union and an employer which usually concludes after an election certifying the union as the representative of the majority of the contractor’s employees in a particular classification. When a Section 9(a) agreement expires, the contractor is obligated, upon request by the union, to meet and negotiate in good faith over the terms of a successor agreement. If neither party gives notice of intent to terminate the agreement then the previous agreement continues in effect. While negotiations are occurring, the terms and conditions

of the expired collective bargaining agreement remain in place unless and until changed by a new contract or the contractor's lawful unilateral implementation of changes after reaching an impasse.

- 8(f) Agreement: A collective bargaining agreement between a union and a construction contractor when there never was an election certifying the union as the representative of the majority of the contractor's employees in a certain classification. Often the collective bargaining agreement is reached at a time the contractor employs no employees whatsoever and/or the current employees have never voted that the union represents the majority of the employees. Under a Section 8(f) agreement, there is no duty to bargain a successor agreement. A contractor can "walk away" from both the collective bargaining agreement and the relationship with the union when the contract expires. Of course, an 8(f) contractor must comply with the terms of the contract during its term. A Section 8(f) agreement is only available for employers in the construction industry.

Can a Section 8(f) Relationship be Converted to a Section 9(a) Relationship?

An 8(f) relationship can be converted to a Section 9(a) relationship in at least four ways:

1. The contractor signs a contract with a provision in which the contractor agrees that the relationship with the union is a 9(a) relationship.
2. The union wins a majority of the votes of employees in the classification in issue in an NLRB-conducted secret ballot election.
3. The contractor polls its employees on their desire to be represented by the union, and the results indicate the union represents a majority of the employees.

4. The contractor, at the request of the union, reviews signed authority cards and a majority of the employees signed the cards.

Once an 8(f) relationship is converted to a 9(a) relationship, the contractor is obligated to meet and bargain with the union. Further, if the union establishes a 9(a) relationship while a Section 8(f) agreement is still in effect, the contractor is obligated to maintain the terms and conditions of an expired collective bargaining agreement while negotiations are pending.

Should a Contractor Agree to a Contract Provision in Which the Contractor Recognizes the Union as The Collective Bargaining Representative of a Majority of Its Employees?

Section 8(f) status is unique to the construction industry. Although an 8(f) contractor may believe that it will always want to be a union contractor, and therefore it is not disadvantageous to add a majority representation recognition clause, it is not impossible that at some point in the future the contractor may wish to be nonunion. Retaining 8(f) status is important. A Section 8(f) relationship allows the contractor to become nonunion when the union contract expires, and the contractor has no obligation to negotiate with the union. Contractors should not agree to union proposals which include provisions which state that the contractor acknowledges that the relationship is a 9(a) relationship.

If a Contractor Decides to be Nonunion, Allows an 8(f) Contract to Expire and Refuses to Negotiate a Successor Contract, Can the Union Strike or Picket?

A union has the right to picket or strike for a new 8(f) agreement. However, it is unlawful for a union to picket without a petition being filed within a reasonable period of time, not to exceed 30 days, from the commencement of the picketing, when the object of the picketing is to force or require the contractor to recognize or bargain with the labor

organization as the representative of its employees. It is usually the union which files a petition requesting an election, but a contractor also has the right to file a petition.

What if a Contractor Refuses to Negotiate a Successor Contract to a Section 8(f) Agreement, the Union Requests an NLRB Election, and the Union Loses the Election?

If an 8(f) contractor refuses to negotiate a successor agreement, the union seeks an NLRB election, and the employees vote against being represented by the union, it is unlawful for the contractor to enter into any agreement with the union for at least a one-year period.

This may be difficult for the contractor if the contractor wishes to continue to employ union employees but cannot do so without a collective bargaining agreement.

Can Language in a Recognition Clause of a “Me-Too” Agreement, on its Own, Convert the Union’s Bargaining Relationship from a Section 8(f) Relationship to a Section 9(a) Relationship?

Contract language which is sufficient to establish a Section 9(a) relationship must satisfy a three-part test. This three-part test requires language that unequivocally indicates:

- (1) the union requested recognition as the majority or 9(a) representative of the unit employees;
- (2) the contractor recognized the union as the majority or 9(a) bargaining representative; and
- (3) the contractor’s recognition was based on the union having shown, or having offered to show, evidence of its majority support.

Many clauses in multi-employer bargaining unit contracts fail to satisfy the first or third prongs of this test. Often, the clause does not unequivocally indicate that the union

requested recognition as the unit employees' Section 9(a) representative. The clause merely states that the contractor/association would recognize the union as the employees' collective bargaining representative.

Nonetheless, we recommend that a contractor or industry association never agree to these recognition provisions. The NLRB is a politically appointed board and as its members change the NLRB overrules or departs from past decisions made from previous boards. It is unwise to rely on the current law in agreeing to these types of recognition clauses. An 8(f) relationship is a precious status and should not be given away without careful thought as to the consequences.

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