

# Clean Break From Agreements

## *Knowing The Difference Between Section 8f and 9a Collective Bargaining Pacts*

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Ordinarily, a union may not request recognition by an employer unless the union can prove it is supported by a majority of the employees in the proposed bargaining unit. Similarly, an employer may not recognize a union as the bargaining representative of its employees without being given proof of the union's majority status.

These restrictions stem from Section 9a of the National Labor Relations Act (the "Act"), which provides that employers are compelled to bargain only with unions that have been "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." Under Section 9a, a union becomes the exclusive representative of employees in a bargaining unit either through voluntary recognition by the employer or through an election conducted by the National Labor Relations Board ("NLRB").

Any employer that signs a collective bargaining agreement with a union that does not represent a majority of its employees will have committed an unfair labor practice. Even if an employer and union act in good faith in recognizing a minority union, believing it to represent a majority of employees, such agreements are unenforceable. See *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961).

Because of the unique nature of the construction industry, in which employees frequently work for many different employers for a short period of time, Section 9a would be a serious obstacle to union organizing by construction unions. As a result, Congress carved out an exception to the majority representation rule for employees who work in the construction industry. Under Section 8f of the Act, employers "engaged primarily in the building

and construction industry" can enter into an agreement with a union regardless of the union's majority status.

As a general rule, once an employer recognizes a union as the majority representative of its employees, it can withdraw recognition only if there is a decertification election or there is objective evidence that the union no longer represents a majority of its employees. Therefore, under a Section 9a relationship, the employer must bargain with the union for a new contract even after a collective bargaining agreement ("CBA") expires.

Significantly, the presumption under Section 9a that the union continues to have majority support until there is proof to the contrary does not hold true when the union was recognized under Section 8f. In *John Deklewa & Sons*, 282 NLRB 1375 (1987), the NLRB held that Section 8f agreements could not be unilaterally repudiated during the term of a collective bargaining agreement – but they can be repudiated at the end of the contract term. In other words, even if there is a Section 8f relationship, the employer must continue to abide by a pre-hire agreement until the CBA expires. However, there is no "presumption of majority status" upon the expiration of the contract.

Therefore, after expiration of the CBA, either party can unilaterally repudiate the 8f bargaining relationship and refuse to bargain with the other. The NLRB has also held that a that employer-union bargaining relationships in the construction industry are presumed to be Section 8f relationships unless proved otherwise.

In view of the differences between a bargaining obligation under Section 9a and under Section 8f, the NLRB has applied different rules regarding withdrawal from multiemployer bargaining units and multiemployer CBA's.

Under Section 9a, if an employer wishes to withdraw from a multiemployer bar-

## Libby Tapped As New Carpenters President

Martin C. Umlauf, who has been President and Executive Secretary-Treasurer of the Chicago Regional Council of Carpenters since 2004, has retired after 39 years with the Union.

Umlauf joined the Union in December of 1969 and held several offices within Local 54 before being named District Council Business Representative in 1994. He became Second Vice President in December of 2003 and President seven months after that.



Frank T. Libby (above) was named his replacement October 13 by the Union. Libby has been a member of the Union since 1976 and held positions of Conductor, Recording Secretary, Financial Secretary-Treasurer, Business Representative and President of Local 10 before being named Second Vice President of the Regional Council.

Other recent appointments within the Union included Gary Perinar Jr. (Second Vice President), Keith Jutkins (Assistant to the President) and Ron Culbertson (Executive Board).

gaining unit, it must provide "adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations."

In other words, the employer must

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withdraw from the multiemployer unit in advance of multiemployer negotiations. Mere inaction (e.g., failing to provide notification of withdrawal) can be enough to bind an employer to the new CBA negotiated between the union and the multiemployer association that bargained the previous contract.

Under Section 8f, however, an employer is not automatically bound to a new CBA, nor is it obligated to negotiate with the union upon expiration of the contract. Rather, the NLRB has held in *James Luterbach Construction Co.*, 315 NLRB 976, 979 (1994), that “mere inaction during multiemployer negotiations will not bind an 8f employer to a successor contract reached through those multiemployer negotiations.”

Instead, the NLRB applies a two part test to determine whether a Section 8f employer has bound itself to the results of a multiemployer bargaining unit:

- Was the employer part of the multiemployer unit prior to the dispute giving rise to the case, and
- If the first inquiry is answered in the affirmative, has the employer, by a distinct affirmative action, recommitted to the union that it will be bound by the upcoming or current multiemployer negotiations.

As a general rule, adhering to the new collective bargaining agreement – such as by paying contributions to the trust funds at the rate set in the new contract – will be considered the type of affirmative act required to adopt the new Section 8f.

Based upon the significant difference in rights between a Section 8f and Section 9a bargaining relationship, employers in the building and construction industry who are interested in changing their relationship with a union must be keenly aware of what type of agreement they have with each union. If they have a Section 9a relationship, it will take extraordinary circumstances before the contractor will have an opportunity to change its relationship with the union representing its employees.

If it is a Section 8f relationship, however, the possibility exists that, prior to the expiration of the CBA, the contractor can:

- Give notice to the union of termination of the CBA
- Give notice to the union, and to any trade association to which it may have assigned bargaining rights, that it is withdrawing all bargaining authority from the trade association, and;
- Give notice to the union that it is repudiating its bargaining obligation and that it does not intend to enter into negotiations for a new CBA. The notice of termination of the CBA must be given during the period set forth in the CBA for giving such notice

Ordinarily, but not always, that period is 60-90 days before contract expiration. The notice of withdrawal of bargaining rights should be given in advance of any negotiations beginning. Although negotiations generally commence 45-75 days before the contract expires, employers who want to repudiate the bargaining relationship should consider sending notice of withdrawal of bargaining rights from the trade association more than 90 days in advance of contract expiration, in order to ensure that it does not unwittingly become bound to a new CBA as a result of negotiations starting early.

Shortly before contract expiration, notice should be provided to the union, and to the employer’s regular employees, that the employer is repudiating its obligations to the union and does not intend to enter into negotiations for a new contract.

## Association Welcomes Davina Ware

Davina Ware is the most recent addition to the Builders Association staff. She joined the Association in October as our Administrative Coordinator and is responsible for Association program assistance and office management.



Davina graduated from Columbia College Chicago in May 2008 with a degree in Marketing. Before joining the Builders Association, she worked at a small market research firm. While pursuing her undergraduate degree, Davina was an intern at PHD Global, and was the Vice President of Membership for the Columbia College Marketing Association.

Of course, repudiation of the bargaining relationship does not necessarily mean the union will walk away and the employer is now non-union. Rather, the employer should expect a variety of union pressures, including picketing. However, the union is not allowed to picket forever in order to convince an employer to sign a new Section 8f agreement. Rather, picketing to “convince” the employer to sign a new Section 8f agreement will be limited to the time period allowed for “recognitional picketing” – i.e., a reasonable period not to exceed 30 days.

A contractor should also expect “informational” picketing, for which there is no time limit. For example, if the employer pays its employees less in wages and benefits than the economic package in the new CBA, the union can put up picket signs at a jobsite that read: “ABC Contractor is not paying area standards.” If the employer is no longer performing jobs within the union’s jurisdiction, however, there will probably not be any immediate consequences.

Contractors that repudiate a bargaining relationship should also expect audits by the Trust Funds – and of course they need to be aware of any “withdrawal liability” that might be assessed by the Pension Fund because of unfunded accrued liabilities. The cost of withdrawal liability may soon become the most significant reason for a contractor deciding not to exercise its Section 8f rights. Many Pension Funds were significantly underfunded even before the recent downturn in the stock market.

### CONCLUSION

Construction industry employers may be bound to a collective bargaining agreement as a result of the union having proven at some point that it represented a majority of the contractor’s employees (a Section 9a agreement) or as a result of a pre-hire agreement (a Section 8f agreement). If the contractor is bound to a Section 9a agreement, it must continue to recognize the union after a contract expires unless, at the end of a contract term, the union loses a decertification election or there is objective proof that the contractor’s employees no longer desire union representation. If the contractor has a Section 8f contract, however, federal labor law would allow him to repudiate the union and try to operate on a non-union basis. Whether or not such a repudiation is practical, however, will depend on a wide variety of factors that will differ for each contractor.