Federal Labor Laws

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XXIII. Pre-Hire Agreements in the Construction Industry

A. Section 8(f) Agreements

1. Under § 8(f) of the LMRA,[1] a unique set of rules govern the bargaining status of unions representing workers in the construction industry. That section allows construction employers and unions to enter into pre-hire agreements signed before any workers are employed on a construction project or prior to any showing that the union actually represents a majority of the employees of the employer.

2. The § 8(f) rules were added to Taft-Hartley by the Landrum-Griffin Act in 1959. The amendments recognized the inconsistencies between representation case procedures of Taft-Hartley and long standing traditions of organizing and bargaining in the construction industry.

    a. The transient nature of work in the construction industry makes traditional, industrial style organizing difficult. Workers rarely stay on one site long enough for the representation procedures to work, and workers may be employed by a large number of employers in any given year.

    b. Construction unions have traditionally used a top-down form of organization. Under such a system, the union controls a pool of skilled workers which it makes available only to those employers which recognize the union.

    c. Under the top-down organizing system, the employer signs a pre-hire agreement with the union under which it accepts referrals of workers to its projects and agrees to pay union wages and benefits. The agreement becomes "enforceable" only after a majority of the workforce is composed of union members.[2]

3. Until 1987, the legal status of pre-hire agreements was confused. In a long series of cases, the rights of the union and workers under such a contract were uncertain and volatile.

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[1] 29 U.S.C. §158(f).

[2] *Irvin-McKelvy Co.*, 194 NLRB 52 (1971).

a. Section 8(f) agreements were regarded as voidable until they were converted to § 9(a) majority agreements. The employer was free to repudiate a § 8(f) agreement at any time prior to the establishment of majority status by the union.[3] However, monetary obligations under the agreement were enforceable until the contract was repudiated.

b. The extent to which an agreement was converted to § 9(a) majority status depended in part on the nature of the workforce of the employer.

   1) If the employer had a "permanent and stable" workforce, then the agreement, once converted, remained a majority contract for its term.[4]

   2) If the workforce was different on a "project by project" basis, the union had to reestablish majority status on each project.[5]

c. Although the § 8(f) agreements were voidable, there were a number of recognized methods for conversion of the agreement to §9(a) status.[6] Evidence of majority status could be shown by:

   1) Enforcement of the union security agreement,

   2) Employer acceptance of exclusive referrals from the union hiring hall,

   3) Demonstration of an actual majority through membership records or authorization cards,

   4) The merger doctrine, under which an employer which joins a multi-employer unit in which § 9(a) status is achieved becomes subject to the § 9(a) agreement.

d. Picketing to enforce a pre-hire agreement was held to be regulated by §8(b)(7), outlawing recognition picketing unless a petition for a Board election was filed promptly.[7]

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[3] *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983).

[4] *Hageman Underground Construction*, 253 NLRB 60 (1980), *Construction Erectors*, 265 NLRB 786 1046 (1982).

[5] *Dee Cee Floor Covering*, 232 NLRB 421 (1977).

[6] *R.J. Smith Construction Co.*, 191 NLRB 693 (1971).

[7] *NLRB v. Iron Workers Local 103 (Higdon Contracting Co.)*, 434 U.S. 335 (1978).

B. The *Deklewa* Standards for Enforcement of Pre-Hire Agreements

1. In 1987, the NLRB rewrote the rules for enforcement of § 8(f) agreements in a major case addressing several aspects of construction industry labor relations.[8]

2. The *Deklewa* case attempted to develop a uniform method for determining the status of a construction industry agreement.

3. Under Deklewa, all § 8(f) agreements are enforceable for the duration of the agreement. Midterm unilateral repudiation of the agreement is no longer allowed.[9]

4. All § 8(f) relationships may be repudiated at the expiration of the agreement. There is no continued presumption of status from one agreement to the next.

5. The conversion of a § 8(f) relationship to a §9(a) relationship will be shown only be NLRB certification or voluntary recognition.

    a. The conversion doctrine is substantially eliminated, except through established Board procedures.

    b. Single employer units are presumably valid, so the merger doctrine is no longer evidence of majority status. Distinctions between "project by project" and "permanent and stable" units will no longer be as important.

    c. Construction industry collective bargaining agreements are presumed to be § 8(7) agreements. The burden of proving conversion to a § 9(a) relationship falls on the party claiming that status.[10]

    d. Three elements are necessary for showing conversion through voluntary recognition: (1) the union has requested recognition as a majority representative under § 9(a), (2) the employer has recognized the union, and (3) the employer's recognition is based on the union having shown or being prepared to show proof of majority support.[11]

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[8] *John Deklewa & Sons*, 282 NLRB 1375 (1987).

[9] The exception to this rule occurs when the bargaining unit has declined to only include one employee, *see, e.g.*, *Kirkpatrick Electric Co.*, 314 NLRB 1047 (1994).

[10] *H.Y. Floors and Gameline Painting*, 331 NLRB 304 (2000).

[11] *Central Illinois Construction*, 335 NLRB 717 (2001), *adopting standards articulated in NLRB v. Triple C Maintenance, Inc*., 219 F.3d 1147 (10th Cir. 2000), *and NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160 (10th Cir. 2000).

6. A § 8(f) agreement is not a bar to an election conducted by the NLRB. A petition for certification or decertification of the union is timely during the life of the § 8(f) agreement.

   a. If the union wins an election, the relationship is converted to a § 9(a) relationship. Once a § 9(a) relationship is established, normal contract bar rules apply to the timeliness of a petition.

   b. If the union loses an election, the §8(f) agreement is void, and the election bar would prevent the parties from entering into a subsequent § 8(f) relationship for 12 months.

7. Picketing to obtain a § 8(f) agreement is regulated by § 8(b)(7), making such picketing unlawful if conducted for 30 days without a petition being filed for an election. Picketing to enforce a § 8(f) agreement is no longer regarded as recognitional picketing because the § 8(f) agreement is enforceable for its term.

C. Effect of the Deklewa Case on Construction Organizing and Bargaining

1. The *Deklewa* case provides greater stability in construction industry bargaining relationships, but it forced construction unions to make substantial changes in organizing strategies and tactics.

2. The status of any particular agreement is more certain. Construction unions are at least assured that the agreements under which their members work are not repudiated unilaterally during their term. However, the ability to renegotiate agreements may be weakened unless the unions pursue Board certification or recognition.

3. Since *Deklewa*, construction trades unions have pursued more bottom-up organizing activity, showing that workers seek exclusive majority representation. Strategies which include Board election procedures have traditionally been absent in the construction industry.