2024 West Coast Regional Field Meeting

Union Recognition in the Construction Industry: The Basics

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Union Recognition in the Construction Industry: The Basics

- **Section 8(f)**
  - Enables building trades unions to sign with contractors and dispatch workers from the hiring hall, without a showing of majority status
  - An employer can walk away from an 8(f) CBA at the termination of the agreement; no ongoing duty to bargain for a new CBA. *John Deklewa & Sons*, 282 NLRB 1375 (1987).
  - No contract bar
  - Rebuttable presumption that construction industry CBAs are governed by 8(f), not 9(a)

Section 9(a)

- Requires showing of majority status to create a bargaining relationship
- Employer cannot walk away upon termination of the CBA; must bargain a new contract
- Contract bar

§ 8(f) → § 9(a) conversions

- *Staunton Fuel & Material, Inc.*, 335 NLRB 717 (2001)
  - Contract language alone can support conversion
  - "**[A] written agreement** will establish a 9(a) relationship if its language unequivocally indicates that the union requested recognition as majority representative, the employer recognized the union as majority representative, and *the employer's recognition was **based on the union's having shown, or having offered to show***, an evidentiary basis of its majority support."
  - Can also convert CBA to 9(a) by election or voluntary recognition
- *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003)
  - Contract language alone was not sufficient for conversion, especially where no evidence of an actual showing of majority support
- *NLRB v. Enright Seeding, Inc.*, 109 F.4th 1012 (8th Cir. 2024)
  - 2022 Board decision had reaffirmed *Staunton Fuel*; 8th Cir. reverses
  - Union must be able to show written evidence of majority support, not just contract language

The Trump Board Election Rule

- The 2020 Trump Board Election Rule unequivocally overruled *Staunton Fuel* in the contract bar context:

A voluntary recognition or collective-bargaining agreement between an employer primarily engaged in the building and construction industry and a labor organization will not bar any election petition filed pursuant to section 9(c) or 9(e) of the Act absent positive evidence that the union unequivocally demanded recognition as the section 9(a) exclusive bargaining representative of employees in an appropriate bargaining unit, and that the employer unequivocally accepted it as such, based on a **contemporaneous** showing of support from a majority of employees in an appropriate unit. Collective-bargaining agreement language, standing alone, will not be sufficient to provide the showing of majority support. (29 CFR § 103.22(a)).

Sample Contract Language for Conversions

If at any time during the term of this Agreement ***the Union presents the Employer*** with proof that ***a majority of the Employer's employees performing work covered by this Agreement have authorized the Union to act as their exclusive representative for purposes of collective bargaining***, the ***Employer shall immediately and unconditionally, in writing, recognize the Union***, pursuant to Section 9(a) of the National Labor Relations Act, as the exclusive representative of its employees who perform such work. ***Proof of majority status shall consist of signed authorization cards*** demonstrating that not less than fifty percent (50%) plus one (1) of those employees have authorized the Union to act as their exclusive collective bargaining representative. After recognizing the Union as set forth above, the ***Employer waives its right to challenge the Union's status as the Section 9(a) exclusive representative*** before the National Labor Relations Board or before any court or arbitrator.

Best Practices

- CBA language to facilitate 8(f) → 9(a) conversions
- Sign the employer and dispatch a complement of workers from your hiring hall
- Distribute new cards for the employer's current employees to sign (i.e., the workers dispatched from your hall)
- **Show the signed cards to the employer; Prove majority support**
- Sign 9(a) recognition agreement
- Document and save everything
  - Disputes may arise many contract cycles after the conversion

Salting 1.0: Salts Are Employees

- *NLRB v. Town & Country Electric, Inc.,* 516 U.S. 85 (1995)
  - "The term *employee* does not exclude paid union organizers."
  - Job applicants have §7 rights even if they are salts.
- FES, 331 NLRB 9 (2000)
  - Refusal to hire: If (1) the employer is hiring, (2) the salt is qualified for the job, and (3) antiunion animus contributed to the decision not to hire the salt, the employer's refusal to hire violates §8(a)(3) unless the employer can show that it would have made the same hiring decision in the absence of the applicant's union activity or affiliation.
  - Refusal to consider: If the employer refuses to consider applicants (regardless of whether positions are available) and antiunion animus contributed to that decision, the employer's refusal to consider violates §8(a)(3) unless the employer shows it would not have considered them regardless of their union activity or affiliation.

Salting 2.0: Salts Are Not Employees

- *Toering Electric*, 351 NLRB 225 (2007)
  - Applicant is entitled to remedy only if they are "genuinely interested in seeking to establish an employment relationship with the employer," not just trying to generate ULPs or litigation costs for the employer

- *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007)
  - Where employer refused to hire a salt, GC must prove, for backpay purposes, the time period that the applicant would have stayed with the employer, including whether applicant would have been transferred to other jobsites

Salting 2024: Back to the Future

- *Ark Fabricators, Inc.,* 373 NLRB No. 103 (9/26/2024)
  - Board affirms ALJ's finding that employer's refusal to hire salts violated 8(a)(3) under the *Toering Electric* test and ALJ's order of backpay under *Oil Capitol* (McFerran, Prouty, and Wilcox)
  - Board declines GC request to overrule *Toering Electric* and *Oil Capitol (*and *Electrolux* and *United Site Services)*
  - [Only] Member Prouty expressed interest in overruling *Toering Electric* and *Oil Capitol*