EXCERPT FROM "SUMMARY: LAW OF COLLECTIVE BARGAINING IN THE CONSTRUCTION INDUSTRY" HANDOUT FROM AGC OF AMERICA COLLECTIVE BARGAINING COURSE

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A. Majority Status Under §9(a) of the NLRA. The two means of establishing exclusive representative status discussed above apply to the construction industry.

(1) Voluntary recognition requires contemporaneous demand and grant of 9(a) recognition with evidence of majority - may be eroding

(2) Certification after an NLRB election

Each results in recognition of the union as a §9(a) representative. Each of these means is dependent upon the union attaining and proving majority status. However, the NLRB has held that if an employer signs separately, or includes in a collective bargaining agreement, a statement that the employer is satisfied with the union's representation that it has majority status and recognizes the union voluntarily under §9(a), the employer has a §9(a) relationship with that union. If the employer does not contest the union's claim within six (6) months of entering into such an agreement, the §9(a) status of the union will be considered to be established conclusively whether the union ever represented a majority of the contractor's employees or not. Decorative Floors, Inc., 315 NLRB No. 25 (1994). However, the United States Court of Appeals for the District of Columbia Circuit held, in Nova Plumbing, Inc. v. NLRB, 330 F. 3rd 531 (2003) that the NLRB's decision holding that contract language alone may establish the existence of a §9(a) relationship is incorrect as a matter of law. The court held that language asserting the existence of a §9(a) relationship is a factor to be taken into account, but that actual evidence of the Union's support by a majority of the employees is necessary before a §9(a) relationship can be established. It remains to be seen whether the NLRB will modify its position in response to the court of appeals decision.

B. Pre-Hire Agreements Under §8(f) of the NLRA. Section 8(f) of the NLRA specifically permits an employer primarily engaged in the construction industry to enter into a collective bargaining agreement with a union without any showing of majority status by the union. Such agreements:

1. may provide for mandatory union membership after the seventh day of employment;

2. may provide for the employer to give the union advance notice of any vacancies which exist and even provide for exclusive union referral of applicants;

3. may establish minimum training experience, or longevity levels with the employer or in the industry or geographical area which must be met by all applicants for employment.

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4. Unions operating hiring or referral halls may not discriminate on the basis of union membership or non-membership of, and owe a duty of fair representation to, all registrants.

C. Differences between §9(a) and §8(f).

1. Contract bar rule.

a. Contracts signed after negotiations with a §9(a) (recognized or certified) union prevent, or act as a bar to, recognition or certification of another union as representative of those same employees during the term of the contract, or decertification of the union during the term of the contract.

b. Contracts signed pursuant to Section 8(f) with no demonstration of majority status on the part of the union do not prevent the filing of petitions for elections with the NLRB that could lead to certification or decertification.

2. Continuing duty to bargain.

a. If a union has achieved majority recognition or certification under Section 9(a) of the NLRA the employer and the union each have a duty to bargain with each other over the terms of a new agreement once a collective bargaining agreement expires.

b. Upon the expiration of an 8(f) contract, an 8(f) contractor has **no** duty to bargain a new agreement with the union.

c. Despite the fact that an 8(f) contractor has no duty to bargain upon expiration of an 8(f) agreement, an 8(f) contractor may be bound to a new collective bargaining agreement if it had previously delegated bargaining authority to a multi-employer association and fails to timely withdraw such authority prior to the onset of negotiations for a new collective bargaining agreement.

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