Legal Update Article

# NLRB Construction Rule Change Closes Union-Recognition Loophole, but Avoids Remedying Past Wrongs

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Among the many rule changes recently announced by the National Labor Relations Board (NLRB) was one specifically limited to construction industry employers — and will prospectively rectify a 20-year interpretation that ran roughshod over the rights of employees and employers.

New section 103.22 of the Rules and Regulations of the NLRB, which went into effect on July 31, 2020, eliminates a loophole created by NLRB case law that enabled unions and construction employers to bind employees to (often permanent) union representation without majority employee consent.

### Relevant Sections of National Labor Relations Act (NLRA)

Under Section 9(a) of the NLRA, an employer's obligation to bargain generally arises through a union victory in an NLRB-conducted secret-ballot election among employees or by the employer's voluntary recognition of the labor organization based on a review of union authorization cards signed by a majority of employees. Either way, there must be a manifestation of majority support for the union by employees.

Recognition under Section 9(a) carries significant benefits for a labor organization, and the employer's duty to recognize and bargain with the union continues indefinitely. The employer has no ability to disengage unilaterally from the bargaining obligation. The employees may seek to remove the union at an appropriate time, usually by petitioning the NLRB to conduct a decertification vote. However, NLRB rules shield newly installed unions by barring decertification during a period of time to negotiate a contract, and then, if an agreement is reached, extending that protection for up to three more years.

The Section 9(a) rule applies to all employers. However, Section 8(f) of the NLRA provides employers in the construction industry with an additional option. Many employers in the construction industry (but certainly not all) employ a variable number of workers for intermittent periods. Where there is a high degree of workforce fluidity, it may be difficult for a union to establish majority support in a distinct bargaining unit. Additionally, in some markets, otherwise non-union construction employers may seek access to union hiring halls as a source of qualified labor. In 1959, Congress amended the NLRA to allow construction employers to recognize unions and to adopt collective bargaining agreements without a showing of majority employee support — indeed, without any showing of employee support for the union at all.

Section 8(f) recognition has become a common and expedient practice in the construction industry. While unions benefit from prompt recognition under Section 8(f), they do not have the same protections as found under Section 9(a). Unions recognized through Section 8(f) are not safe from decertification petitions filed at any time by employees (or rival unions). Employers are free to terminate their relationship with the union upon the expiration of the collective bargaining agreement, with no further obligation to continue dealing with the

union.

Thus, unions have a motivation to convert a transient 8(f) affiliation into a more permanent 9(a) relationship.

To accomplish this, under the majority-rule principles of the NLRA, an 8(f) union would need to provide the employer a showing of current employee majority support and persuade the company to voluntarily modify the relationship. Failing that, it could seek an NLRB election.

## Problems Under NLRB Case Law

Through case decisions, the NLRB re-interpreted the requirements of conversion to Section 9(a) recognition, eliminating the requirement of any proof of actual majority support by employees.

The NLRB held, in *Staunton Fuel & Materials, Inc.*, 335 NLRB 717 (2001), that the mere statement in a collective bargaining agreement that the employer recognized the union based on a card majority (without any evidence this actually occurred) would constitute adequate proof of lawful and binding Section 9(a) recognition, thus creating a bar to decertification petitions and unilateral withdrawal by the employer. The NLRB held a contract would be sufficient proof where the agreement unequivocally asserts:

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

Not surprisingly, provisions reflecting these factors became common "boilerplate" in construction collective bargaining agreements. Many construction bargaining relationships are created through one-page pre-hire contracts, project labor agreements, or assent agreements that incorporated, by reference, that particular union's complete "standard" contract, which include Section 9(a) recognition. Often, employers sign these agreements without receiving or reading the full contracts. In practice, the three-factor recognition test described in *Staunton Fuel* often never takes place. Nonetheless, under the rule of *Staunton Fuel*, the NLRB accepted the language of the contract as *fact,* without investigating whether there actually was employee majority support demonstrated.

Section 8(f) reflected an accommodation to the industry and to unions that might otherwise be unable to organize construction workers. The rule of *Staunton Fuel* allowed the NLRA to be used in a manner that ignored the rights of employees — the people the statute was intended to protect. Many unsuspecting employers who believed they were signing a Section 8(f) agreement of limited scope or duration were dismayed to learn they were committed to an all-but-permanent bargaining relationship with the union covering *all* of its employees.

Several court decisions pushed back on *Staunton Fuel*, most recently and significantly the D.C. Circuit Court of Appeals in *Colorado Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031 (2018). In that, the Court vacated an order from the NLRB premising a bargaining relationship solely on *Staunton Fuel*-style language in a contract executed by the parties. The Court focused on the importance of employee free choice in determining when a Section 9(a) relationship

has been established:

> The raison d'être of the National Labor Relations Act's protections for union representation is to vindicate the employees' right to engage in collective activity and to empower employees to freely choose their own labor representatives.

The Court stated:

> Because the statutory objective is to ensure that only unions chosen by a majority of employees enjoy Section 9(a)'s enhanced protections, the Board must faithfully police the presumption of Section 8(f) status and the strict burden of proof to overcome it. Specifically, the Board must demand clear evidence that the employees—not the union and not the employer—have independently chosen to transition away from a Section 8(f) pre-hire arrangement by affirmatively choosing a union as their Section 9(a) representative.

The Court said *Staunton Fuel* "would reduce the requirement of affirmative employee support to a word game controlled entirely by the union and employer. Which is precisely what the law forbids."

## New Section 103.22

In adopting rule §103.22, the NLRB expressly adopted the *Colorado Fire Sprinkler* rationale:

> Section 9(a) recognition in the construction industry must now be based upon a contemporaneous showing of majority employee support. The same showing of majority support that would suffice in non-construction industries now also suffices to establish recognition under Section 9(a) in construction-industry bargaining relationships.

The NLRB noted that construction unions will need to maintain records of majority support in order to prove Section 9(a) status.

However, the NLRB applied the new rule only *prospectively*. It declined to apply the new rule to voluntary § 9(a) recognition extended by a construction employer *prior to* July 31, 2020. Likewise, it has stated that the new rule will not apply to any putative § 9(a) collective bargaining agreement — or successor agreement — premised on sham § 9(a) recognition granted by an employer prior to July 31, 2020. There are many existing construction contracts citing doubtful § 9(a) recognition. The NLRB will allow unsupported past recognition to continue indefinitely. It said, "[T]he rule will not affect or destabilize longstanding bargaining relationships in the construction industry."

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It remains to be seen if the courts will uphold the NLRB's refusal to investigate claims of dubious voluntary recognition prior to July 31, 2020.

Construction employers wishing to assess their options should consult experienced counsel.

If you have any questions, contact the Jackson Lewis attorney with whom you regularly work.