Legal Update Article

Construction Employers Take Note: Union Loophole in Labor Board's Fair Choice-Employee Voice Rule

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Takeaways

- Under the Fair Choice-Employee Voice rule, construction unions may seek to remain the bargaining representative for a construction employer's workers by relying solely on contract language, without evidence that employees ever supported the union.
- To avoid unionization, construction employers should be wary of any proposed union agreement and review it carefully.
- A National Labor Relations Board with a Republican majority is expected under the Trump Administration to re-evaluate the rule.

Related link

- Language Matters: How the New Fair Choice Rule Is Shaping the Construction Industry (Podcast)

Article

Typically, a union becomes the exclusive bargaining representative for an appropriate group of an employer's employees under Section 9(a) of the National Labor Relations Act (NLRA) when the union proves that a majority of those employees support the union. This proof can be through a National Labor Relations Board-conducted secret ballot election or, if the employer agrees, through voluntary avenues such as a card check. Once a union becomes the employees' Section 9(a) representative, the employer must bargain with the union over any changes to the employees' terms and conditions of employment. This obligation is ongoing and survives even after the parties' collective bargaining agreement expires. Additionally, it is difficult for employees to decertify an incumbent union with representation rights under Section 9(a).

Construction Industry Section 8(f) Recognition

In 1959, Congress created an exception to Section 9(a)'s proof of majority support requirement for the construction industry. Section 8(f) allowed employers in the construction industry to recognize a union as the exclusive bargaining representative for its employees without proof of majority support. These agreements, known as "pre-hire agreements," can be short-term and project specific, reflecting the transient nature of construction work.

Unlike a Section 9(a) bargaining relationship, once the 8(f) agreement expires, the relationship is over. An employer is not required to maintain the agreement's terms or

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conditions of employment or to bargain with the union for a new agreement. After the agreement expires, the employer is free to withdraw recognition and walk away.

Staunton Fuel Language

Because Section 8(f) agreements are less secure for them than Section 9(a) agreements, unions frequently try to "convert" 8(f) agreements to 9(a) agreements.

In 2001, the National Labor Relations Board (NLRB) held in *Staunton Fuel,* 335 NLRB 717, that unions could achieve this conversion by relying solely on contract language in an agreement without a shred of evidence that the affected employees ever supported the union. The "Staunton Fuel language" in a contract typically states that the union sought recognition as the majority representative, it showed or offered to show proof of majority status, and the employer granted recognition. Consequently, unions adjusted their contracts to meet this low bar, effectively eliminating employee choice.

Although the U.S. Court of Appeals for the D.C. Circuit rebuked the NLRB's *Staunton Fuel* in 2001 and 2018, the NLRB continued to apply it and unions, for the most part, continued to seek to convert Section 8(f) relationship into 9(f) relationship by inserting the Staunton Fuel language in agreements.

That changed in 2020, when the NLRB enacted a rule (29 C.F.R. § 103.22) providing that, to convert a Section 8(f) relationship to a 9(a) relationship, the union had to present "positive evidence" of majority status. This change, however, was short-lived.

Fair Choice-Employee Voice Rule

In 2024, the Biden NLRB enacted the so-called Fair Choice-Employee Voice rule, which eliminated the 2020 rule and returned to the *Staunton Fuel* standard, among other things.

Not surprisingly, courts remain hostile to *Staunton Fuel* conversions. In a case that arose before the 2024 rule was finalized, the U.S. Court of Appeals for the Eighth Circuit determined that boilerplate Staunton Fuel language was insufficient to establish a Section 9(a) agreement where the record lacked any additional evidence, such as authorization cards or votes, confirming the union's majority support. *NLRB v. Enright Seeding, Inc.,* 109 F.4th 1012 (8th Cir. 2024).

We anticipate further legal challenges to the rule, especially in light of the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo,* 144 S.Ct. 2244 (2024), which overturned the decades-old doctrine of judicial deference to a federal agency's interpretation of an ambiguous statute. We also expect there will soon be a Republican majority on the NLRB that will re-evaluate the Fair Choice-Employee Voice rule.

Meanwhile, employers in the construction industry would be well-advised to consider whether any language in a proposed 8(f) contract includes the Staunton Fuel language that would support conversion to a 9(f) agreement.

If you have questions or need assistance, please reach out to a Jackson Lewis attorney.

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