Snell & Wilmer

UNDER CONSTRUCTION

James J. Sienicki
602.382.6351
jsienicki@swlaw.com
vCard

Timothy J. Toohey
213.929.2637
ttoohey@swlaw.com
vCard

Scott C. Sandberg
303.634.2010
ssandberg@swlaw.com
vCard

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Ready-Mix Delivery Companies and Their Drivers Are Not Engaged In The Building and Construction Industry Under Labor Law

By Gerard Morales

Under the National Labor Relations Act (NLRA or labor law), employers engaged in the building and construction industry are privileged to enter into a limited type of collective bargaining relationship with labor unions, whereby either party is free to repudiate the relationship upon the expiration of the contract. The employer and the union may also decline to negotiate or adopt a successor agreement once their contract expires. Construction employers and labor unions may enter into this limited collective bargaining relationship, commonly referred to as an 8(f) relationship (in reference to the section of the NLRA) even before employees have been hired.


Shawn M. Rodda
303.634.2036
srodda@swlaw.com
vCard


Michael J. Yates
602.382.6246
myates@swlaw.com
vCard


Gerard Morales
602.382.6362
jmorales@swlaw.com
vCard


Marc A. Erpenbeck
602.382.6512
merpenbeck@swlaw.com
vCard


Christopher P. Colyer
602.382.6579
ccolyer@swlaw.com
vCard


Jason Ebe
602.382.6240
jebe@swlaw.com
vCard

A Section 8(f) relationship is less burdensome on the employer than a regular collective bargaining relationship (also referred to a Section 9(a) relationship, in reference to the section of the NLRA), which can lawfully be entered into only upon some showing that a majority of the employees want to be represented by the union. Under a regular collective bargaining relationship the employer is obligated to refrain from making unilateral changes in terms and conditions of employment, even after the expiration of the contract, absent an overall impasse in bargaining. (Similarly, the presumption of union majority status continues after the contract expires.) In contrast with a section 8(f) contract, a section 9(a) contract, in effect, survives its expiration.

Section 8(f) was included in the NLRA in order to permit employers and labor organizations in the building and construction industry to maintain stability in their relationship, by permitting the signing of contracts even before employees were hired. This provision was an attempt to accommodate the fact that the "construction industry is peculiarly marked by sporadic employment at locations that are continually changing." Construction employers and unions can therefore enter into contractual bargaining relationships at a time when the union cannot show that it has majority status among the employees.

In order to lawfully enter into an 8(f) bargaining relationship, the following requirements must be met: 1) the employer must be engaged primarily in the building and construction industry; 2) the agreement must be with a union of which building and construction employees are members and; 3) the agreement must cover employees who are engaged in the building and construction industry. *Hudson River Aggregates Inc.*, 246 NLRB 192 (1979), enf. 639 F. 2d 865 (2d Cir. 1981)

An employer who seeks to show that its collective bargaining relationship is an 8(f) relationship bears the burden of showing that it is an employer "engaged

primarily in the building and construction industry." *Engineered Steel,* 352 NLRB 589 (2008). In this regard, the National Labor Relations Board (NLRB or Labor Board) has long held that the "building and construction concept subsumes the provision of labor, whereby materials and constituent parts may be combined on the building site to form, make or build a structure." *Indio Paint,* 156 NLRB 951 (1966).

Many ready-mix and other suppliers to construction companies continue to believe that they are employers engaged primarily in the building and construction industry and therefore are privileged to enter into 8(f) collective bargaining relationships. The NLRB has consistently rejected those contentions and held that union contracts with those employers are 9(a) contracts, based upon regular collective bargaining relationships.

Most recently, a ready-mix company sought to repudiate its collective bargaining relationship and make changes in terms and conditions of employment upon the expiration of its union contract covering its drivers and helpers. The union filed unfair labor practice charges against the ready-mix company. The NLRB held that such repudiation and unilateral changes constituted unfair labor practices, because the ready-mix company was a supplier to customers engaged in the building and construction industry and not an employer in that industry itself. The ready-mix company was like a hardware store that provided supplies to customers in the building and construction industry. The NLRB emphasized in its decision that the ready-mix drivers and helpers covered by the union contract spent most of their time driving to and from the customer job sites and while at the job sites generally remained in their trucks, except to hose off their equipment. *Irving Ready Mix Inc.*, 357 NLRB No. 105 (10/31/2011).

Like all employers, suppliers to construction contractors should consider consulting with labor counsel before entering into collective bargaining relationships, in order to determine with certainty the scope of the

relationship. They should not assume that their collective bargaining relationships would be of the same scope as that of their customers, simply because the same labor unions are involved.

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