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CONSTRUCTION INDUSTRY BARGAINING

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I. GENERAL LEGAL FRAMEWORK: *DEKLEWA*

A. CONTRACT BARGAINING IN THE CONSTRUCTION INDUSTRY IS GOVERNED BY ITS OWN SET OF SPECIAL RULES DEVELOPED BY THE NATIONAL LABOR RELATIONS BOARD.

B. IN *JOHN DEKLEWA & SONS*, 282 NLRB 1375 (1987), THE BOARD ANNOUNCED THE RULES IT WILL APPLY TO CONTRACTS AND THE OBLIGATION TO BARGAIN IN THE CONSTRUCTION INDUSTRY, IN THE ABSENCE OF AN NLRB ELECTION. THESE PRINCIPLES APPLY UNDER SECTION 8(f) OF THE LMRA.

1. A labor agreement will be enforceable for its duration (but it will not be a bar to a Board election).

2. At the end of the agreement, there are no obligations; each party can go its separate way.

   a. No obligation to bargain a new agreement.

   b. No obligation as a matter of bargaining law to honor the expired terms of the agreement (i.e., maintain the status quo).

   c. While the agreement remains in effect, the parties are obligated to honor it and normal bargaining obligations, such as providing relevant requested information and the bargaining rules that apply for terms and conditions of employment of the unit employees that are not contained in the agreement.

II. MULTI-EMPLOYER BARGAINING RULES: *LUTERBACH*

A. BECAUSE DIFFERENT LEGAL OBLIGATIONS APPLY UNDER *DEKLEWA*, LONGSTANDING RULES GOVERNING MULTI-EMPLOYER BARGAINING NO LONGER ARE APPLICABLE TO CONSTRUCTION INDUSTRY BARGAINING UNDER SECTION 8(f).

B. IN *JAMES LUTERBACH CONSTRUCTION CO.*, 315 NLRB 976 (1994), THE BOARD RULED THAT THE NORMAL PRINCIPLES OF MULTI-EMPLOYER BARGAINING DO NOT APPLY IN THE CONSTRUCTION INDUSTRY UNDER 8(f) AGREEMENTS.

1. Since an employer has no obligation to negotiate for a successor agreement to an 8(f) agreement, it will not be bound to participate in multi-employer bargaining unless there is some affirmative representation that it has authorized the Association to bargain on its behalf.

    a. Inclusion of the employer's name on a list submitted by the Association without more evidence that it designated the Association as its agent, is not sufficient.

    b. Once an affirmative representation of authorization has been made and bargaining has started, only "unusual circumstances" justify withdrawal (such as, so many employers timely withdraw that the Association has effectively ceased to exist).

    c. In *Laborers Local 169* (*Frehner Constr. Co., Inc.*), 352 NLRB 33 n.1 (2008), the remaining Board Members Liebman and Schaumber reaffirmed *Luterbach*. They held that for an employer to be bound by an 8(f) Association agreement, "there must be affirmative conduct that recommits an employer to multiemployer bargaining."

    d. The safest way to handle it? Get the employers' designations of the Association as their agent for bargaining for the particular negotiations.

    e. Alternatively, obtain individual employers' signatures to a written commitment to be bound to future contracts negotiated by the Union and the Association. <u>But the language is key</u>.

        (1) The Board will still enforce under Section 8(f) an employer's agreement <u>to be bound by future agreements negotiated by the Union with another entity</u>, whether that commitment is contained in the signed current contract or in a separate signed letter agreement. *Rome Electrical Systems, Inc.*, 349 NLRB 745 (2007) ("letter of assent"); *HCL, Inc.*, 343 NLRB 981 (2004) ("letter of intent").

(2) A separate letter agreement is preferable because it can be interpreted to require a separate notice of termination of the letter of agreement, separate from a notice terminating the current contract, in order to terminate the commitment to be bound. *See Rome Electrical*, 349 NLRB at 748-749, where the Board carefully scrutinized the contract termination language and the letter of assent termination language, and concluded they were independent of each other. So even though the old contract was terminated, the employer was bound to the new contract.