

**COLLECTIVE BARGAINING  
DURING CHALLENGING  
ECONOMIC TIMES**

# WHAT RULES APPLY?

**DIFFERENT BARGAINING**  
**RELATIONSHIPS UNDER THE LAW**

Section 8(f) “Prehire” Relationship

versus

Section 9(a) “Traditional” Relationship

## SECTION 8(f) RELATIONSHIPS

- Available only if the employer is in the construction industry.
- The Union has not been certified by the National Labor Relations Board.
- The contractor has not voluntarily granted the Union majority recognition.

## RECOGNITION LANGUAGE

The contractor acknowledges that the Union has requested recognition as the representative of its employees under Section 9(a) of the National Labor Relations Act, and the contractor has granted such recognition based upon the Union's offer of proof that it has the support and authorization of a majority of employees to act as their exclusive collective bargaining representative.

# WHAT IS NOT SECTION 9(a) RECOGNITION LANGUAGE

“The employer hereby recognizes the union as the exclusive representative of the employees in the classifications covered by this agreement.”

## CHARACTERISTICS OF AN 8(f) RELATIONSHIP

- The contract is enforceable during its term through an unfair labor practice proceeding.
- Upon expiration, neither party is legally obligated to negotiate a new agreement.
- Traditional rules regarding the conduct of bargaining are inapplicable during negotiations for a new agreement.

## SECTION 9(a) RELATIONSHIPS

- The union has been certified as representative by the National Labor Relations Board

or

- There has been sufficient proof of majority status, coupled with an agreement to grant recognition

or

- The employer is not in the construction industry.

## DISTINCTIONS FROM A SECTION 8(f) RELATIONSHIP

- At expiration, each party has an enforceable obligation to bargain toward a new agreement.
- Each party is obligated to bargain in good faith.
- The notice obligations of Section 8(d) apply.
  - 60 day reopening of agreement.
  - Notice to FMCS and state mediation agencies.

# CONSENSUS

- Overall, construction activity will decline significantly
- Some local markets will decline dramatically
- Some niche markets will remain strong
- Cost will be the most important – or determinative – factor

# WHY WE LACK LEVERAGE

- Completion deadlines
- Patterns established by other craft negotiations
- Contracts negotiated outside of the multi-employer unit
- Union leverage from large projects, PLA's
- Ability of union to strike selectively
- Lack of cohesion in multi-employer group

## RESULT

- Significant cost disparity with non-union competition
- Continued decline in market share

# OUR RESPONSE

- Attempts to alter the bargaining process
- Information regarding market decline
  - Dodge reports
  - Yellow page listings
  - Building permits
  - Fringe fund reports
  - Prevailing wage information
  - Union density information
- Attempts to market quality

# POTENTIAL LOCAL UNION RESPONSES

- Minimization of data
- “Race to the bottom” arguments
- De facto market abandonment
- Assurances of organizing
- Reliance upon “full employment” in declining locals
- Reliance on the stimulus package

# DEVELOP REALISTIC GOALS

- Accurate assessment of employment levels
- Impact of other craft settlements, past and future
- Impact of completion deadlines
- Impact of PLA's
- Unity of Group

# APPROACH

- Attempt to take initiative at first meeting
- Maintain momentum
- Effective summarization of market share
- Allocate roles within Bargaining Committee carefully
- Plan events for each meeting
- Deal effectively with data relied upon by union

# POTENTIAL BARGAINING OBJECTIVES AND STRATEGY

- Rollover of current agreement
- Ratios
- Shorter duration contracts
- Targeted market recovery agreements
- Consider implications of EFCA
- Effective, unified, lawful communications of position

**THE IMPACT OF THE  
PENSION PROTECTION ACT  
ON  
COLLECTIVE BARGAINING**

# OVERVIEW OF THE PENSION PROTECTION ACT

- Most significant provisions became effective 1/1/2008.
- The Act mandates improved funding of financially troubled plans.
- The ultimate determination of benefit reductions, versus contribution increases, is left to the bargaining process.

# CLASSIFICATIONS OF PENSION PLANS UNDER THE PPA

- “Green Zone” – Plans that are relatively healthy
- “Yellow Zone” – Plans that fall into “Endangered” status
  - Less than 80% funded
  - or
  - Projected funding deficiency within six years(NOTE: The International Painters and Allied Trades Industry Pension Fund is 72.1% funded, and falls within this category)
- “Orange Zone” – Plans falling within “Seriously Endangered” status
  - Less than 80% funded
  - and
  - Projected funding deficiency within six years
- “Red Zone” – Plans in “Critical” status
  - Less than 65% funded
  - with
  - Certain enumerated financial issues
- Note that under special legislation, a plan may make a one time election in 2009 to “freeze” the status of the plan for one year

# FINANCIAL TIMETABLES

- Critical Plans – The rehabilitation plan must take the fund out of critical status within 10 years, or 13 years if a special election is made.
- Seriously Endangered Plans – Must attain a 1/5 improvement in funding status within 15 years, or 18 years if the election is made.
- Endangered Plans – Must attain a 1/3 improvement in funding status within 10 years, or 13 years if the election is made.

# CALCULATION FOR INTERNATIONAL PAINTERS AND ALLIED TRADES INDUSTRY PENSION FUND

- Plan is currently 72.1% funded
- PPA funding deficiency –  $(100\% - 72.1\% = 27.9\%)$
- One-third of deficiency (9.3%) must be eliminated within 10, or 13 years

# BARGAINING OBLIGATION REGARDING SCHEDULES

- Collective Bargaining Agreements expiring on, or after 1/1/2008
- Wage/Fringe Reopeners occurring on, or after 1/1/2008

# BARGAINING OVER SCHEDULES

- The bargaining is over default v. alternative(s)
- If no agreement is reached, default will go into effect
- There is no “Bargaining” over the components of the schedule
- By law, either schedule must resolve the funding deficiency within the allotted time

# SCHEDULES

## Alternative:

- Accrual of benefits on hourly contribution reduced from 1% to .5%, effective January 1, 2010
- Accrual of benefits for increased contributions occurring after January 1, 2006 reduced from 2% to 1%
- A 35% increase to the contribution that was in effect March 1, 2009, effective January 1, 2012
- Employees continue to be eligible for disability, early retirement subsidies, as well as death benefits

# SCHEDULES

## Default:

- No accrual of benefits on any contributions made on or after January 1, 2012
- Employees no longer eligible for disability or early retirement subsidies, or death benefits

# BARGAINING OVER SCHEDULE ADOPTION

- Existing CBA, No Wage/Fringe Reopener – Must bargain at contract expiration
- Existing CBA, with Wage/Fringe Reopener – Must bargain over pension benefits upon request of either party
- Adoption by Allocation – If union has unrestricted right of allocation, union could unilaterally adopt schedule through allocation process

# RESTRICTIONS ON THE BARGAINING PROCESS

- The contribution rate may not be reduced below what was in effect March 1, 2009
- Newly hired employees may not be excluded from contributions
- There can be no “moratorium” on contributions

# APPROACHING CONTRACT NEGOTIATIONS

- Potential for future contribution increases
- Specified contribution amount versus allocation from package

**WITHDRAWAL LIABILITY  
FROM UNDERFUNDED  
PENSION PLANS**

# WITHDRAWAL LIABILITY

- Product of the Multiemployer Pension Plan Amendments Act of 1980
- Basic principle – if employer ceases to contribute to an underfunded multiemployer pension plan, it must pay its share of unfunded liability

# TYPES OF WITHDRAWAL

## ■ Complete

- **Employer permanently ceases to have an obligation to contribute**

### Examples

- Employees decertify
- Pension contribution negotiated out of contract
- Employer sells contributing entity

- **Employer permanently ceases all covered operations under plan**

### Examples

- Shut down of only facility
- Employer goes out of business entirely

## ■ Partial

- A 70% decline in contribution base units
- Employer ceases to have obligation to contribute under at least one, but fewer than all, CBA's requiring a contribution  
and  
continues to perform same work
- Employer ceases to have obligation to contribute with respect to at least one, but fewer than all of its facilities  
and  
continues to perform same work at facility

Examples – Employer downsizes  
– Employer shuts down one facility and transfers to another

# CONSTRUCTION INDUSTRY RULE

- Application of the general rule would result in withdrawal liability in unintended circumstances
- Exception to general rule for “work performed” in the building and construction industry
- Exception applies if
  - (1) “Substantially” all of employer’s employees perform work in building and construction industry, and
  - (2) The plan primarily applies to employees in the building and construction industry, or
  - (3) The plan is amended to provide that the exception applies to such employees

# CONSTRUCTION INDUSTRY RULES

1) A withdrawal occurs if:

- The employer ceases to have an obligation to contribute, and
- The employer continues to work in the jurisdiction covered by the CBA, or
- Resumes such work within five years, but does not renew the obligation to contribute

2) A partial withdrawal occurs if:

- The employer's obligation to contribute is for no more than an "insubstantial portion" of its work in the jurisdiction of the CBA

**PRESERVATION OF THE  
MULTI-EMPLOYER  
BARGAINING UNIT**

# PRESERVING GROUP COHESION

- Negotiate appropriate contract language
- Revise provisions of association bylaws
- Revise provisions of bargaining authorization

# KEY PROVISIONS IN BYLAWS AND AUTHORIZATION

- Designation of exclusive authority
- Prohibition and all individual bargaining — including interim agreements
- Prohibit withdrawal of authority near and during negotiations

# KEY PROVISIONS IN BYLAWS AND AUTHORIZATION

- Obligate contractor to abide by group decisions
- Provide for injunctive relief for violations
- Liquidated damages?
- Violation determined by association

# RESPONSE TO LAWFUL ECONOMIC STRIKE

- Replacement employees
- Subcontracting of work

# RESPONSE TO SELECTIVE STRIKES

- Lockout
- Resignation of contractor committee

# INDIVIDUAL NEGOTIATIONS

Individual Agreement

v.

Interim Agreement

# UNLAWFUL STRIKES

- Damage action under §301
- Grievance
- Injunctive relief if dispute is over arbitrable matter