



SHEET METAL & AIR CONDITIONING
CONTRACTORS' NATIONAL ASSOCIATION

Preparing for the NJAB or a Strike

Collective Bargaining Orientation

January 8, 2025 | Tempe, AZ

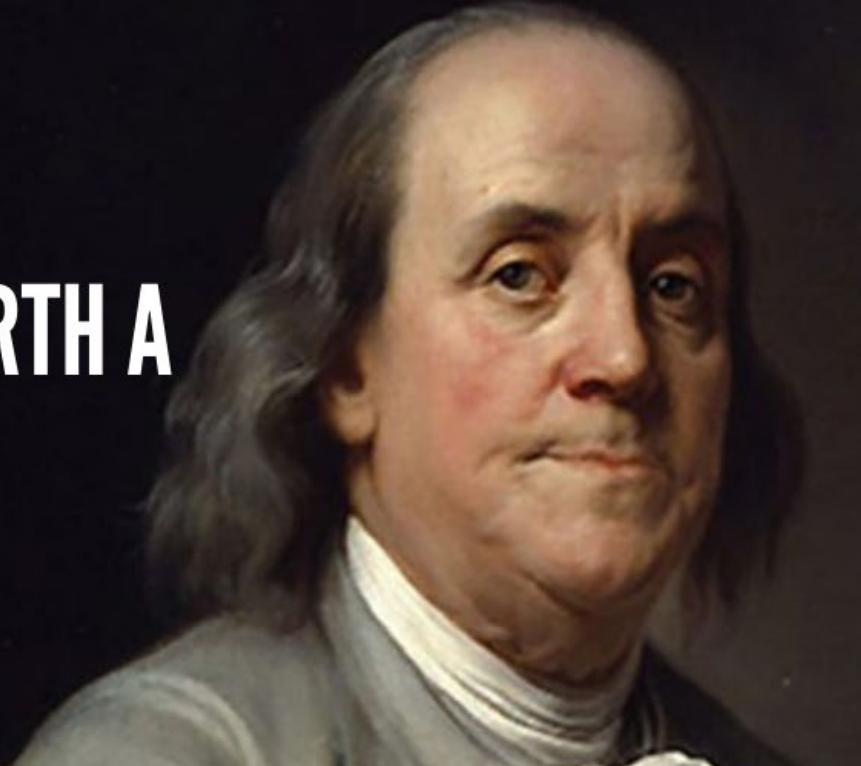
Grant Collins, Felhaber Larson



Be Prepared!

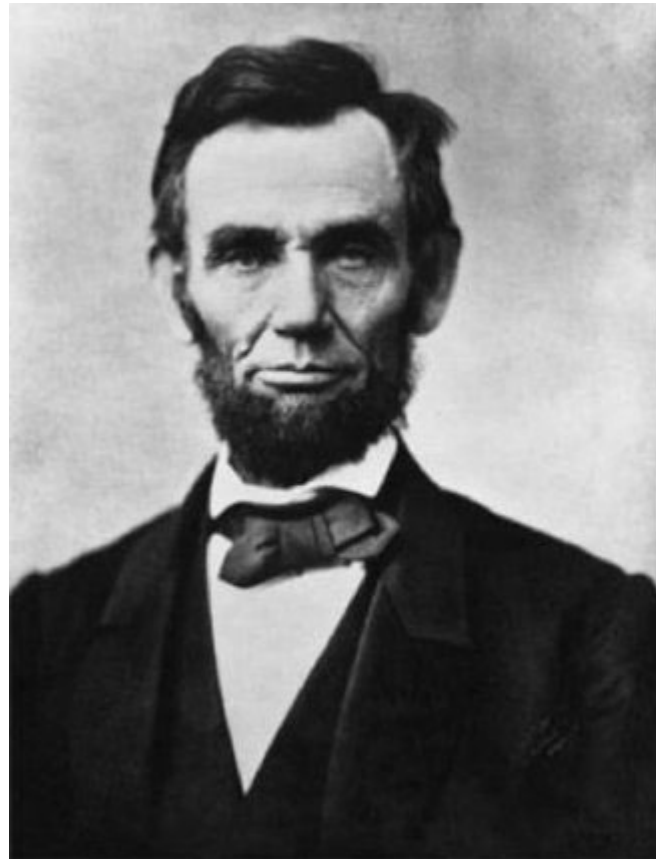
**AN OUNCE OF
PREVENTION IS WORTH A
POUND IN CURE**

Benjamin Franklin





But, remember . . .



**“Don’t believe
everything you
read on the
Internet just
because there’s
a picture with a
quote next to it.”**

—Abraham Lincoln



**Key Question: Do You have
Article X, Section 8?**



Standard Form – Article X, Section 8

SECTION 8. In addition to the settlement of grievances arising out of interpretation or enforcement of this Agreement as set forth in the preceding sections of this Article, any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement shall be settled as hereinafter provided:

(a). Should the negotiations for a renewal of this Agreement or negotiations regarding a wage/fringe reopener become deadlocked in the opinion of the Union representative(s) or of the Employer(s) representative(s), or both, notice to that effect shall be given to the National Joint Adjustment Board.

If the Co-Chairmen of the National Joint Adjustment Board believe the dispute might be adjusted without going to final hearing before the National Joint Adjustment Board, each will then designate a Panel representative who shall proceed to the locale where the dispute exists as soon as convenient, attempt to conciliate the differences between the parties and bring about a mutually acceptable agreement. If such Panel representatives or either of them conclude that they cannot resolve the dispute, the parties thereto and the Co-Chairmen of the National Joint Adjustment Board shall be promptly so notified without recommendation from the Panel representatives. Should the Co-Chairmen of the National Joint Adjustment Board fail or decline to appoint a Panel member or should notice of failure of the Panel representatives to resolve the dispute be given, the parties shall promptly be notified so that either party may submit the dispute to the National Joint Adjustment Board.



Standard Form – Article X, Section 8

In addition to the mediation procedure set forth above or as an alternate thereto, the Co-Chairmen of the National Joint Adjustment Board may each designate a member to serve as a Subcommittee and hear the dispute in the local area. Such Subcommittees shall function as arbitrators and are authorized to resolve all or part of the issues. They are not, however, authorized to deadlock and the matter shall be heard by the National Joint Adjustment Board in the event a Subcommittee is unable to direct an entire resolution of the dispute.

The dispute shall be submitted to the National Joint Adjustment Board pursuant to the rules as established and modified from time to time by the National Joint Adjustment Board. The unanimous decision of said Board shall be final and binding upon the parties, reduced to writing, signed and mailed to the parties as soon as possible after the decision has been reached. There shall be no cessation of work by strike or lockout unless and until said Board fails to reach a unanimous decision and the parties have received written notification of its failure.



Standard Form – Article X, Section 8

(b). Any application to the National Joint Adjustment Board shall be upon forms prepared for that purpose subject to any changes which may be decided by the Board from time to time. The representatives of the parties who appear at the hearing will be given the opportunity to present oral argument and to answer any questions raised by members of the Board. Any briefs filed by either party including copies of pertinent exhibits shall also be exchanged between the parties and filed with the National Joint Adjustment Board at least twenty-four (24) hours in advance of the hearing.

(c). The National Joint Adjustment Board shall have the right to establish time limits which must be met with respect to each and every step or procedure contained in this Section. In addition, the Co-Chairmen of the National Joint Adjustment Board shall have the right to designate time limits which will be applicable to any particular case and any step therein which may be communicated to the parties by mail, facsimile or telephone notification.

(d). Unless a different date is agreed upon mutually between the parties or is directed by the unanimous decision of the National Joint Adjustment Board, all effective dates in the new agreement shall be retroactive to the date immediately following the expiration date of the expiring agreement.



What's the Difference?

- **CBA's with Article X, Section 8**
 - No strikes or lockouts at or after expiration while the NJAB attempts to resolve any disputes
 - “There shall be no cessation of work by strike or lockout unless and until said Board fails to reach a unanimous decision and the parties have received written notification of its failure.”
 - Success depends on convincing SMACNA and SMART panelists to agree on the terms of the successor agreement
 - Agreement is generally retroactive to expiration.



What's the Difference? (cont.)

- CBAs without Article X, Section 8
 - The “no-strike” / “no-lockout” provisions of the CBA continue to apply only until expiration.
 - This means that the Local can strike following expiration.
 - Duty to bargain depends on 9(a) or 8(f) status, but, practically speaking, not reaching a successor agreement is not an option.
 - The parties can agree to use the NJAB procedure via a separate arbitration agreement.



**Yes, we have
Article X, Section 8**



Legal Issues

- NJAB is an arbitral tribunal and is non-instructable
- NJAB decisions do not need to be ratified by Local
- The Local may strike only after written notification that the NJAB “fails to reach a unanimous decision” under X-8
 - If the NJAB deadlocks, then a Local can go on strike and the Chapter can lockout workers.



Legal Issues (cont.)

- As a “non-mandatory” term, X-8 in a new CBA cannot be imposed by the NJAB over the objection of either party.
 - Typically, only an issue if one party is seeking to have it removed from the CBA.
 - Removal may impact terms of the decision.



Preparing for the NJAB

- Article X, Section 8 is not a substitute for good-faith negotiations.
- That said, presence of X-8 should inform your negotiations strategy.
 - Focus on the difference between the Union's demand and your offer.
 - How can you "land the plane"?
 - How will the NJAB view your case?



NJAB Procedural Rules

If negotiations for a new agreement have not been successfully concluded prior to the expiration date of the current agreement, or if either party believes that there has been insufficient progress in negotiations, the parties shall, for the purpose of this procedure, be considered deadlocked within the meaning of Article X, and the services of the NJAB shall be invoked. Notice thereof shall be given by either party or both to the National Joint Adjustment Board. Such notice shall constitute a request for the services of the National Joint Adjustment Board and shall be supplemented with submissions signed jointly by the parties. (See pp. 26-31) In the event one party refuses to sign the submission, the National Joint Adjustment Board will consider a unilateral submission.



Your Objective:

Persuade the SMART
Members of the NJAB



Realities of Article X, Section 8

- NJAB panelists understand that settlements should allow contractors to maintain and grow market share
- Negotiated settlements (SMART and other crafts) remain highly important
- SMART is attentive to the interests of its locals



NJAB Submissions

- Remember:
 - To persuade, your submittal must first be read
 - To persuade, your submittal must be understood



NJAB Procedural Rules

- “Such submission *shall* contain . . . :
 2. A listing of all issues involved in the negotiations which have been settled and those which remain in dispute. Each party should limit its submission of unresolved issues to three (3) items (not counting the wage/fringe package, contract duration, or changes to the SFUA adopted by the sponsoring national associations.) For purposes of counting issues, the party proposing a change to the existing contract language will be responsible for the issue. Regarding items which remain in dispute, the old language will remain in effect, unless otherwise modified by the NJAB decision.



NJAB Procedural Rules (cont.)

- “Such submission *shall* contain:
 4. Tabulation of the journeymen’s hourly wage scale for the past six years and for the next three years in the local area for plumbers, steamfitters, electricians, carpenters and iron workers.
 5. Tabulation of fringe benefits such as health and welfare, vacations and the like for the above trades including cost to employer in cents per hour. It would be helpful in the tabulation to also have the first column list sheet metal workers benefits so that immediate comparison can be afforded.



NJAB Procedural Rules (cont.)

- “Such submission *shall* contain . . . :
 6. Information concerning the wage rates and fringe benefit package for all sheet metal locals or contractual areas immediately adjacent to the area in dispute.
 7. Statistical information reflecting the market share of signatory sheet metal contractors in the geographic area covered by the collective bargaining agreement, for all sheet metal work covered by that agreement. The submittal must explain in sufficient detail how that statistical information was compiled.



NJAB Procedural Rules (cont.)

- “Such submission *shall* contain . . . :
 8. Statement of the anniversary date of agreement.
 9. Negotiating minutes.
 10. The labor agreement.
 11. Such additional data as may be helpful to the NJAB in order to evaluate the issues in dispute.



Key Components of Your NJAB Submittal

- Resolved Issues
- Unresolved Issues
- Other Settlements
 - Surrounding SMART Locals
 - Other Building Trades Unions
- Market Share Data
- Minutes of Negotiating Sessions
- Economic Background Data/Miscellaneous Information



Resolved Issues

- Significance – The NJAB does not have jurisdiction over resolved issues
- However, it reflects
 - Whether true bargaining has occurred
 - Whether both parties have bargained in good faith
 - Whether bargaining has been market responsive
- It gives the NJAB a flavor of the parties, and the dispute



Unresolved Issues

- Significance – The NJAB may settle any unresolved issue
- This section is critically important – it is your case
- Your mission is to educate and persuade - so
 - Succinctly reflect current contract language
 - Clearly reflect what the union wants it to be
 - Clearly reflect what the contractors want it to be
- Educate the NJAB what the impact of the change will be
- Persuasively set forth why your position should be adopted



Other Settlements

- A guide for interest arbitrators generally – not just our industry
- Sheet Metal – Submittal must include every adjacent local
- Other Crafts – Historical emphasis has been on plumbers, pipefitters, electricians




Other Sheet Metal Settlements

- SMACNA's 2024 Bargainers Update Materials
 - <https://www.smacna.org/resources/labor-relations/collective-bargaining/2023-bargainers-update>
- SMACNA's Wage & Fringe Database
 - <https://www.smacna.org/resources/labor-relations/collective-bargaining/wage-fringe-database>



← → ↻ 🏠 🔍 https://www.smacna.org/resources/labor-relations/collective-bargaining/2023-bargainers-update 📄 📱 Ⓜ New Chrome available

 🔍 ☰

HOME > LABOR RELATIONS > COLLECTIVE BARGAINING > 2024 BARGAINERS UPDATE

2024 Bargainers Update



The successful negotiation of a local labor agreement requires both solid preparation and an extensive gathering of relevant data to support management proposals. SMACNA's reference guide provides the timely information needed by Chapter Executives to facilitate their bargaining preparation.

Basic Information

- [2023 Collective Bargaining Orientation Materials](#)



← → ↻ 🏠 🌐 smacna.org/resources/labor-relations/collective-bargaining/sheet-metal-settlements ☆ 📄 📱 📄 New



HOME > LABOR RELATIONS > COLLECTIVE BARGAINING > SHEET METAL SETTLEMENTS

Sheet Metal Settlements

SMACNA tracks local settlements within the sheet metal industry as they are reported. Settlement updates for the current and prior year are available.

- [2023 Sheet Metal Settlements](#)
- [2023 Sheet Metal Settlements by Region](#)
- [2022 Sheet Metal Settlements](#)
- [2022 Sheet Metal Settlements by Region](#)



Other Settlements (cont.)

- Make NJAB aware of all relevant factors
- Examples
 - The UA's package is \$5.00 more, but 90% of work is done under market recovery rates.
 - The Pipefitters' 2024 package was \$9.00 over three years, but, historically, the Pipefitters' wages have been "on par" with sheet metal. The Pipefitters' last CBA was negotiated in 2020 and they agreed to a lower wage than the current sheet metal package (which was negotiated in 2021).



Market Share Data

- SMACNA Employment Share numbers
- Industry Fund Reports
 - Work Hour Totals for 2022 and 2023
 - Work Hour Trends
- Data Sources
 - Health Fund may include self-pay
 - Pension Fund may not cover all classifications



Other Sources of Market Share Data

- Construction Labor Resources Center (CLRC)
- Dodge Construction Potentials Bulletin
- <http://www.unionstats.com/>
- Local Economic Development Offices
- Bid tracking by Contractors
- Permit study
- Data on license holders
- Prevailing wage reports



Minutes of Negotiating Sessions

- May be extremely helpful to reflect
 - Nature of bargaining
 - Intent underlying proposals
 - The parties' real "bottom line"



Minutes (cont.)

- Don't abdicate function to the union
- No requirement of jointly prepared minutes
- Avoid inflammatory language
- Recognize the impact of "unofficial" proposals
- Strike an appropriate balance between brevity, and completeness



Take Good Meeting Minutes

- At a minimum, one person should be taking notes for the management team.
 - Consider recording time of day in notes that proposals are exchanged.
 - Record who is in attendance and time when individuals depart.
- Track status of each proposal (use numbering)
- Some Chapters use “joint minutes”
 - Management should take notes and then have the Union sign off.
 - Not a substitute for management taking their own notes.



Sample Meeting Minutes

Chapter and Local __ Negotiations – Meeting on 3/5/21

Start @ 8:30 a.m. in caucus

@9:00 a.m. joint session

Union Non-Economic Proposals *[Received @ 9:05 a.m.]*

1. *Expand Article I (Scope of Work) to include all other work included in the jurisdictional claims of SMART.*

Mr. Smith stated that this change is “necessary” under SMART Constitution.

Union Economic Proposals *[Received @ 9:05 a.m.]*

2. *Add iTi, MENI, and SMOHIT contributions to pre-apprentice classification.*

Mr. Smith stated that the Union wants to “level the playing field.”

3. *Amend Article VI Section 1 to provided for double time for all hours worked in excess of 50 in a work week.*

Mr. Smith stated that “hours worked” would not include self-pay or vacation.

@ 10:35 break for lunch



Sample Proposal Summary

*Chapter and Local __ Negotiations –
Proposal Summary 4/5/21*

Union Proposals

1. *Expand Article I (Scope of Work) to include all other work included in the jurisdictional claims of SMART.*

Dropped on 4/5/21

2. *Add iTi, MENI, and SMOHIT contributions to pre-apprentice classification.*

Open

3. *Amend Article VI Section 1 to provided for double time for all hours worked in excess of 50 in a work week.*

Dropped on 3/29/21



Tentative Agreements or “TAs”

- Typically address non-economic items first
- Once you reach an agreement on a specific issue, it can be considered a “TA.”
 - Try “Drop / Drop” to focus negotiations on key issues.
- Put Everything In Writing
 - Proposals can be short statements, but TAs should be drafted in “legislative format” showing the actual changes to the CBA.
 - Clarify all questions and take good notes.
- Sign Off on all TAs



Sample TAs

TENTATIVE AGREEMENTS REACHED ON APRIL 9, 2021

Tentative Agreement #1 – Modify Article 5(C) (Bulletin Boards)

Modify Article 5(C) (Bulletin Boards) as follows:

(C) Bulletin Boards. The Employer shall provide a bulletin board in the facility for use of the Union provided the Union uses such board only for the posting of notices, such as social functions, meetings, elections, Union appointments, or other material required for legitimate Union business ~~signed by a Union officer~~. Copies of such notices shall be submitted to the Employer prior to ~~for~~ posting, and, provided ~~if~~ such materials comply with the terms of this provision, shall be posted by a steward.

For the Union _____

For the Employer _____



Sample TAs (cont.)

TENTATIVE AGREEMENTS REACHED ON APRIL 30, 2021

Tentative Agreement #5 – Affirm Previous TAs, Withdrawing All Other Proposals, and Committee Recommendation

The parties' reaffirm all TAs that were reached prior to today.

The parties agree to drop all other items still on the table.

The Union's bargaining committee will recommend approval of the new contract.

For the Union _____

For the Employer _____



Supporting Economic Data

- Remember “less is more” – make it concise, compelling
- Unemployment levels
- Size of Local over time
- Union’s share of total construction volume
- Hours trends over time
- Number of signatory contractors over time



Other Data

- Economic Forecasts
 - AGC “Data DIGest” – a weekly one-page summary of economic news relevant to construction.
- Competitor Data
 - State Licensing Department Database
 - State-FOIA data requests
 - Internet Listings
 - Contractor Input



Your NJAB Appearance

- Private meeting with SMACNA Labor Committee
- Meeting with Business Manager?
- Participation in mediation process, if requested/directed
- Presentation to the NJAB



Private Meeting with SMACNA Labor Committee

- Always request one
- Be candid – don't allow the Committee to be surprised
- Give careful consideration to their suggestions
- Keep focused on your objective – to persuade the union members



Continue Meeting with Business Manager?

- What is the nature of your relationship with the Business Manager?
- Will there be “watchdogs” present?
 - Fewer is always better
- Failed ratification situations
 - Don’t “open the door”
- Traditional proceedings vs. “baptisms” of on-site agreements



On Site Mediation

- Directed if
 - Excessive number of issues
 - Co-chairs determine it may be beneficial
 - Parties request it
- Remember potential for agreed upon orders
- Remember – Your conduct in mediation is in front of two NJAB members



NJAB Procedural Rules

If there are more than three (3) unresolved issues, proposed by either party, not counting the wage/fringe package and contract duration or changes to the SFUA adopted by the sponsoring national associations, the parties must be prepared to negotiate on site. The Co-Chairs may require the parties to negotiate onsite at any time the Co-Chairs jointly determine that it may facilitate resolution of the dispute. The Co-Chairs may assign a management and a union member of the NJAB to facilitate such discussions between the parties.

While the above language is designed to encourage local bargaining, the Co-Chairs may jointly decide to hear a case regardless of the number of issues.



Presentation to the NJAB

- Select an appropriate spokesperson
- Be prepared, concise and candid
- Consider the value of a purely verbal presentation
- Make certain the record is crystal clear on
 - the unresolved issues
 - your position on those issues
- Remember that to be effective, any point must be presented to the NJAB



**No, we don't have
Article X, Section 8**

Or, . . . *the NJAB deadlocked*



Contingency Planning

- Contingency planning should start **before** bargaining – not when the union calls for a strike vote.
- Communicate with SMACNA National as soon as possible if it looks like a work stoppage is possible.
- Assistance with Avoiding a Work Stoppage
 - Help with engaging a federal mediator
 - Did the Union file any required statutory notices?
 - Would the voluntarily parties agree to NJAB resolution?



Contingency Planning (cont.)

- Communication with Contractors Is Key
 - Who is the point person (chapter executive or the bargaining chair)?
 - How to “land the plane” and who decides whether to make a move (chapter, bargaining committee, bargaining chair, etc.)?
- Must Present a Unified Front
 - No interim agreements
 - All contractors need to stand behind the final proposal



Interim Agreements

- Operates to bind the contractor to whatever agreement is reached between the union and the Association
 - In exchange, the union agrees to not strike that contractor
- At first blush, signing an interim agreement seems harmless, since the contractor will, in the end, be covered by the multi-employer agreement
- In actuality, interim agreements negatively impact the multi-employer bargaining process, since they operate to enhance the union's bargaining leverage



Preparation Prior to Negotiations

Bylaws and Bargaining Authorization Documents

- Authority may only be revoked before bargaining has commenced (150 days)
- Prohibition on any separate bargaining, including interim agreements
- Abide by call for group action (i.e. lockout)
- Violation of obligations decided by the Association's Board of Directors, not through arbitration or the courts
- Board authorized to impose remedies (liquidated damages, cease offending conduct, etc.)



Bylaws – Example (SMARCA)

Article XIV – Authority to Negotiate

Section 1. AUTHORITY. *The authority to negotiate labor agreements on behalf of all Members of the Association with [the Union], or its successors, where the Union(s) represent the sheet metal and/or roofing employers of those Members of this Association, is exclusively delegated to the Association by each member.* The Association may exercise this authority directly or through its duly authorized representatives; or the Board of Directors may elect to allow the Members in specific geographic areas to bargain individually and not as part of a multi-employer group, but with the Association's assistance.



Bargaining Authorization Example – (SMARCA)

The ***undersigned company*** hereby designates [Local Area Chapter], as its ***exclusive bargaining agent*** in labor negotiations for a Commercial/Specialty/Manufacturing Labor Agreement with [SMART], Local __, (“Union”) to act for its benefit and the benefit of [Local Area Chapter] (“Association”) and its members and contributors. . . .

It is specifically agreed as follows: (1) that ***the undersigned will be bound by any and all actions taken by the designated negotiating committee(s) and/or the Association concerning or arising out of the negotiations with the Union***, which actions are taken for or on behalf of the designated negotiation committee(s) and the Association, including its members and its contributors who have authorized the above-designated negotiating committee(s) to act as their bargaining agent during these negotiations; (2) ***the undersigned will honor, abide by and be bound by any contract(s)*** agree to and entered into by and between the indicated negotiating committee(s) of the Association and the Union; and (3) that with respect to the contract(s), the undersigned shall be considered, for all purposes, to be ***a party to that agreement*** just as if it had executed the contract with the Union individually.

The undersigned further agrees that ***it will not enter into any individual negotiations or a separate contract or agreement with the Union*** (except as part of an [Association] group) while this authorization remains in effect, without specific written authorization by the Association.



Preparation Prior to Negotiations (cont.)

Continued Financial Support – Bylaw Revision

- Provides for financial support if industry fund eliminated through term of next collective bargaining agreement

Continuation of Service Agreements

- Provides for financial support, even if industry fund eliminated

Setting Realistic Objectives, Contractor Unity

- An entirely separate presentation



Issues During a Strike

1. Potential implementation of the Association's contract offer
2. Performance of work during strike by replacement employees, or employees that abandon strike
3. Subcontracting of work
4. Lockouts
5. Reserved Gates
6. Miscellaneous Issues – Communications to employees, sympathy strikes, etc.



Implementation of Final Contract Offer – Why?

- Usually, because your offer includes concessions
- Implementation may prompt/hasten a favorable resolution
- Reality – In many cases, there is no advantage to implementation, with many risks in a 9(a) relationship



What Is Implementation?

- You impose whatever terms are contemplated in your final offer, and pay in conformity with them
- Implementation is **not** the same as obtaining a contract – you cannot “implement” a contract



8(f) Bargaining Relationships

- Employer is in the construction industry (for example, not a duct manufacturer)
- No election has been conducted by the NLRB
- No “recognition” language converting the relationship to 9(a)
 - Standard Form – Article V, Section 2



Standard Form – Article V, Section 2

SECTION 2. The Union may request recognition as the exclusive collective bargaining agent for all employees employed by the Employer in the classifications and geographic jurisdiction covered by this Agreement, whether or not they are members of the Union. In determining whether the union has the support of a majority of the Employer's employees, such showing may be based upon either a majority of those employed at the time such recognition is requested, or, a majority of those eligible to vote under the National Labor Relations Board's Steiny-Daniel formula. No later than 10 days following the Union's request, the Employer shall review employees' authorization cards submitted by the Union in support of its claim to represent and have the support of a majority of such employees. If a majority of the employees has designated the Union as their exclusive collective bargaining representative, the Employer will recognize the Union as such majority representative of all employees in the classifications and geographic jurisdiction covered by this Agreement. The Employer shall not file or cause the filing of a petition for election or unfair labor practice charge with the National Labor Relations Board in connection with any demands for recognition provided for here. Article X of this Agreement shall be the sole and exclusive means of resolving any dispute concerning this provision.



9(a) Bargaining Relationships

- The employer is not a construction industry employer
- The union previously received a majority of votes cast in an NLRB supervised election
- Recognition language in contract, meeting NLRB standards
 - In November 2022, the NLRB announced a NPRM rescinding 29 C.F.R. § 103.22, which was adopted on April 1, 2020.
 - Will the regulation be re-published under President Trump?



CAUTIONARY NOTE

- If 8(f)/9(a) status makes a difference, then verify before you act
- Some members of a multi-employer unit may be 8(f), others 9(a)
- Lawful conduct in an 8(f) may be a serious ULP in a 9(a) relationship



Implementation in an 8(f) Relationship

- May occur only after the contract has expired
- And, satisfaction of Article XVII, Section 1 requirements concerning termination of “conferences” relating to new agreement



Standard Form – Article XVII, Section 1

ARTICLE XVII

SECTION 1. This Agreement and Addenda Numbers _____ through _____

attached hereto shall become effective on the _____ day of _____, _____
(Month) (Year)

and remain in full force and effect until the _____ day of _____, _____
(Month) (Year)

and shall continue in force from year to year thereafter unless written notice of reopening is given not less than ninety (90) days prior to the expiration date. In the event such notice of reopening is served, this Agreement shall continue in force and effect until conferences relating thereto have been terminated by either party by written notice, provided, however, that, if this Agreement contains Article X, Section 8, it shall continue in full force and effect until modified by order of the National Joint Adjustment Board or until the procedures under Article X, Section 8 have been otherwise completed.



Implementation in an 8(f) Relationship (cont.)

- If Article X, Section 8 is in agreement, written notification of deadlock
- Notices to federal and state mediation agencies – arguably not a requirement, but a very prudent step
- No requirement that the parties be at “impasse”



Implementation in a 9(a) Relationship

- May occur only after the contract has expired
- Satisfaction of Article XVII, Section 1 notices
- Written notice that NJAB proceedings have deadlocked
- Notices to federal and state mediation agencies – a statutory requirement
- The parties must be at a lawful “impasse” in negotiations



Impasse

- Definition:
 - An overall breakdown in negotiations – good faith negotiations have been exhausted, no prospect of an agreement
- Not the same as a “deadlock” under Article X, Section 8
- Must be in context of good faith bargaining
- Multiple factors are considered for determining whether an “impasse” exists



Impasse Factors

- A strike is not determinative
- Fluidity of position.
- Continuation of bargaining.
- Statements or understandings of the parties concerning impasse.
- Union animus evidenced by prior or concurrent events.
- The nature and importance of issues and the extent of difference or opposition.



Impasse Factors (cont.)

- Bargaining history.
- Demonstrated willingness to consider the issue further.
- Duration of hiatus between bargaining meetings.
- Number and duration of bargaining sessions.
- Other actions inconsistent with impasse.



Restrictions on Implementation

- Whatever is implemented must be “*reasonably comprehended*” by pre-impasse offer
- A waiver of a statutory right may *not* be implemented
- A permissive item may *not* be implemented
- May only occur in the context of good faith negotiations – no independent unfair labor practices



Performance of Work During a Strike

1. Non-Unit Employees

- Other employees, managers, supervisors.
- Remember, non-unit employees that do not meet the definition of a “supervisor” cannot be forced to perform bargaining unit work during a strike under threat of discharge.
- Also, such non-union employees have a legal right to honor the union’s picket line, if they choose, and they may not be disciplined or discharged for doing so.



Performance of Work During a Strike (cont.)

2. Permanent Strike Replacements (not recommended)

- Not permitted if a ULP strike.
- Must be paid in conformity with the expired agreement, or, whatever offer the employer has lawfully implemented at contract expiration.
- Almost never a realistic option in the construction industry, as it makes the strike virtually unresolvable, resulting in additional issues such as the potential for withdrawal liability.



Performance of Work During a Strike (cont.)

3. Temporary Strike Replacements

- Such employees should be clearly advised of their temporary status at the time that they are hired.
- Although there is conflicting case law, it appears that such employees need not be paid in conformity with the expired CBA, nor does the employer have to make fringe contributions on their behalf.



Performance of Work During a Strike (cont.)

4. Use of a Temp Agency

- The temporary agency establishes rates of pay and fringe benefits for such employees, and pays those amounts to the employees.
- The NLRB has held that a contractual commitment to retain temporary employee strike replacements for a specific period of time, where such a requirement is a condition of obtaining the replacements, may be a substantial business justification for delaying reinstatement.



Performance of Work During a Strike (cont.)

5. Regular Unit Employees that Choose to Work during the Strike
 - Such individuals must be paid consistent with the terms of the expired contract, including fringe benefit contributions, or, consistent with the terms of any final offer that has been lawfully implemented by the contractor.



Authorizing a Strike

- Local Union must authorize a strike consistent with SMART's constitution and the Local's bylaws.
- SMART's constitution requires a 2/3 vote by secret ballot election in order to authorize a strike.
- Local Union's bylaws may provide additional requirements.



SMART Constitution – Article 30, Section 3(a)

SEC. 3(a). The authority or consent of the International Association shall not be required for a local union to call a strike following the termination or expiration of a collective bargaining agreement.

No cessation of work through strike or otherwise shall be permitted or ordered by a local union or any officer or officers thereof unless it is authorized and approved at a special meeting called for the purpose of voting on the question of whether such strike is advisable or desirable. Notice of the time and place and purpose of such meeting shall be given to each member and it shall require two-thirds ($\frac{2}{3}$) vote by secret ballot of all members present at such meeting to legally declare a strike.

In any dispute which does not arise out of a notice to terminate or to reopen an existing collective bargaining agreement, the General President may order and direct the local union and the members thereof to refrain from cessation of work, or in the event of a strike, to direct the members to return to work if, in their judgment, such strike or threatened strike is a violation of an existing collective bargaining agreement or this Constitution or the policies of this International Association.



Unemployment and Strike Benefits

- In most states, striking employees are ineligible for unemployment benefits.
 - But, this is state law dependent.
- Striking workers may be eligible for up to \$300 in strike benefits from SMART after a work stoppage lasts more than two weeks.



SMART Constitution – Article 30, Section 4(a), (b)

SEC. 4(a). In the event a local union desires to seek strike benefits, application therefore shall be filed with the General President in sufficient time prior to the strike date to permit them to approve or disapprove such application before the strike occurs. No strike benefits shall be paid if a strike occurs prior to the approval of the payments of such benefits by the General President.

SEC. 4(b). This Association shall not be under obligation to pay strike benefits in any particular strike. Such benefits shall be paid solely in the discretion of the General President and then only subject to the terms and conditions provided for in this Article, except that the General President may in extenuating circumstances waive the requirements of Section 4(c) of this Article concerning when strike benefits begin and payment of benefits for fractional weeks.



SMART Constitution – Article 30, Section 4(c)

SEC. 4(c). If the strike is approved by the General President for the purpose of strike benefits, such benefits shall be paid through the local union involved on the basis of not more than Three Hundred Dollars (\$300.00) per week for each good standing member actually participating in the strike. Benefits shall begin at the end of the second full week of the strike and continue thereafter for such period as may be determined by the General President or General Executive Council. No strike benefits shall be paid for any fractional part of a week.



Employees' Right to Work During a Strike

- Federal law guarantees the employee's right to work, if he or she chooses to do so
- However, the union may discipline members who choose to do so
- The employee may resign his union membership, ending the union's ability to discipline
- Employers may inform employees of their right to resign



Subcontracting the Work

In an 8(f) Bargaining Relationship

- Upon expiration, work may be subcontracted to any employer, union or non-union

But –

- Consider likely contractual restrictions on subcontracting in the next collective bargaining agreement
- Consider negotiating a subcontracting arrangement that is terminable “at will”



Subcontracting the Work (cont.)

In an 9(a) Bargaining Relationship

- Upon the commencement of a strike, work may be subcontracted to any employer
- Consult with counsel if subcontracting may extend into the next contract term or if utilizing a temporary employment agency



Subcontracting the Work (cont.)

Other Issues

- Subcontracting work to a non-signatory contractor during a strike may create an issue with respect to fringe fund contributions
- If PLA is involved, it may be necessary to seek the consent of the parties prior to subcontracting



Lockouts

- In virtually all states, locked out employees receive unemployment compensation
- An unlawful lockout has the potential for significant financial liability to employees
- The law governing related issues can be very complex



Sympathy Strikes

- Union Employees
 - Whether employees in a different collective bargaining unit – for example, plumbers – may honor the picket line of sheet metal workers depends on the contents of a no-strike clause in the collective bargaining agreement of the other craft
 - A general “no-strike” clause may encompass sympathy strikes
- Non-Union Employees
 - Non-supervisors have the right to honor a union’s picket lines



Reserved Gates

- Basic Requirements
 - 1) Have an entrance to the construction site that is separate from other entrances (there need not be any “gate” in the literal sense); and
 - 2) Clearly mark that entrance as being for the exclusive use of the primary employer, its employees, material suppliers, and subcontractors.
- SMACNA Labor Relations can provide you with, “A Guide to Reserved Gates in the Construction Industry.”



RESERVED GATE

NOTICE: THIS GATE IS RESERVED FOR THE SEPARATE AND EXCLUSIVE USE OF [insert name of struck contractor, e.g., ABC Electrical Contractors, Inc.], ITS EMPLOYEES, MATERIAL SUPPLIERS, AND SUBCONTRACTORS.

ALL OTHER INDIVIDUALS MUST USE THE GATE THAT HAS BEEN RESERVED FOR THEIR SEPARATE AND EXCLUSIVE USE.



NEUTRAL GATE

NOTICE: THIS GATE IS RESERVED FOR THE SEPARATE AND EXCLUSIVE USE OF [INSERT NAMES OF NEUTRAL CONTRACTORS], THEIR EMPLOYEES, MATERIAL SUPPLIERS, AND SUBCONTRACTORS.

NO OTHER PERSONS ARE PERMITTED TO USE THIS GATE.



Reserved Gates (cont.)

- Contractor must notify picketing union
 - It is essential that the union be given written notice that the reserved gate has been established and its location, prior to the system becoming effective
- Other Unions
 - Although not legally required, in some cases, it may also be helpful for the appropriate contractor to notify other job site unions that a reserved gate system has been established, and that, as a consequence, members of those unions will be expected to report to work as scheduled



[GENERAL CONTRACTOR OR OWNER LETTERHEAD]

[Date]

Dear [Name]:

This is to notify you that a reserved gate system has been established at [address of construction site]. A reserved gate has been marked for the separate and exclusive use of [struck contractor] and its subcontractors, employees, suppliers/vendors, and delivery persons. The reserved gate is located at [describe the location of the reserved gate].

All other contractors, their subcontractors, employees, suppliers/vendors, and delivery persons will utilize the neutral gate(s), which is/are located at [describe the location of the neutral gate(s)].

We expect that the Union will not picket at or near the neutral gate(s).

If you have any questions, please contact [contact person].

/s/ [signed]



Reserved Gates (cont.)

- No requirement to wait for picketing
- Avoid “contamination”
 - A neutral gate will become contaminated if the primary employer, its materials suppliers, employees, or subcontractors use a gate other than what was established for the primary employer (i.e., a neutral gate)
 - Note, however, that the reverse is not true
- Because of the possibility of contamination, it is critically important that everyone at the job site use the appropriate gate



Communications to Unit Employees

- In general, there is no prohibition on communicating the contents of an offer that has been previously made to the union to rank and file employees
- Contractors have the right to explain the basis for their offer, so long as the contractors do not appear to be initiating direct bargaining between the contractors and the employees



Other Strike Issues

- Health insurance benefits
 - A strike is a qualifying event under COBRA.
 - Short duration strike vs. open-ended strike.
- Fringe Contributions
 - CBA, Participation Agreement, etc.
- Single employee bargaining units



Other Strike Issues (cont.)

- Injunctive Relief for Unlawful Conduct
 - The blocking or obstruction of entrances to or exits from the facility by mass picketing or other acts.
 - Acts of property destruction.
 - Threatening or assaulting persons.
 - Interfering with the operation of motor vehicles in the vicinity of the strike.



THANK YOU!

