

Management Alert



Thomas A. Lenz
Cerritos
562-653-3200
tlenz@aalrr.com



Jonathan Judge
Cerritos
562-653-3200
jjudge@aalrr.com

Project Labor Agreement Struck Down By NLRB

On July 31, 2007, the National Labor Relations Board (NLRB) pounded a stake into the heart of construction unions' control of major construction projects. Using an obscure rule of federal labor law in the case of *Glen Falls Building and Construction Trades Council*, the Board ruled that a Project Labor Agreement (PLA), related correspondence, and a lawsuit to enforce the PLA, were unlawful under Section 8(e) of the National Labor Relations Act. Section 8(e) forbids agreements that prevent employers from doing business with each other.

Unions campaign for PLAs on significant construction projects to restrict eligibility to work to only those contractors who will follow union contract terms on the project. Unions seeking PLAs typically claim that Section 8(e) does not affect PLAs, because Section 8(e) contains an exception for the construction industry.

Unions often insist upon PLAs using a tactic known as "greenmail." Using

greenmail, a union claims that a PLA protects the environment or that non-union contractors will harm the environment without a PLA in place. While the truth of such environmental claims rarely surfaces, the threat of environmental entanglements delaying or harming a project has caused those in a union's sights to give strong consideration to PLA proposals.

In *Glen Falls*, a contractor, Indeck, proposed a project to build a new cogeneration facility. However, due to impending greenmail tactics by a union council, Indeck agreed by letter with the union council to subcontract project work only to those contractors who would build under union agreement terms. Indeck hired a contractor, Sirrinc, to oversee the work under the PLA. The union council and the subcontractors performing the actual work then signed the PLA. Neither Indeck nor Sirrinc employed job-site workers or signed the PLA themselves.

When Indeck and Sirrinc had a

pricing dispute, Indeck replaced Sirrinc with a non-union contractor, CNF, which finished the cogeneration project with a mix of unionized and non-union workers. Due to CNF's use of non-union workers, the union council sued Indeck for breach of the PLA. Indeck challenged the lawsuit with an allegation that the PLA was unlawful under Section 8(e), leading to an NLRB charge and this ruling. The lawsuit was stayed during the NLRB proceedings.

The NLRB, by a panel decision, read Section 8(e) in what will likely provoke significant controversy. The central issue in the case was whether Indeck's letter agreement was protected under the construction industry exception to Section 8(e). The NLRB panel did not address

...> For the future, the ruling will cause reassessment of how PLAs are negotiated and who participates in the negotiations.

whether Indeck itself was an employer within the construction industry. Instead, the panel looked to factors under a federal antitrust law ruling from the Supreme Court that the panel considered more significant. In particular, the panel found that the PLA did not arise in a collective bargaining relationship or with an employer that employed construction workers on the project. Indeed, Indeck did not sign the PLA. Ultimately, the agreement served to bind Indeck to select a contractor who would subcontract only with contractors who agreed to the PLA. The panel found that the PLA did not serve to avoid tensions that could arise if union and nonunion workers worked side-by-side. Rather, Indeck agreed to the PLA to prevent the regulatory challenge by the union council and to give the unions a monopoly on project work. The NLRB panel did not consider these appropriate objectives.

Impact For Employers

The NLRB has suddenly emerged as a potential force to review the legality of PLAs involving private sector construction projects. While State and local government-funded PLAs are probably not affected, federally-funded construction projects have faced PLA prohibitions by Executive Order. The ruling opens a door for future challenges to privately-funded PLAs at the NLRB.

That being said, the ruling was over 13 years in the making. Justice delayed is typically justice denied. This is a frequently heard theme at the NLRB. The finding that the PLA is unlawful came long after construction work finished and at a point where there is only a lingering

breach of contract lawsuit which stands to boil the dispute down purely to dollars and cents.

For the future, the ruling will cause reassessment of how PLAs are negotiated and who participates in the negotiations. Use of greenmail, monopolistic goals, and demands unrelated to wages, hours, and working conditions for project workers will face greater scrutiny in assessing the validity of a PLA.

The ruling emphasizes that employers may not enter into an agreement with unions to require subcontractors to follow a PLA unless the employer is an employer in the construction industry and will, itself, employ craft workers on the project. In reaching this result, the decision casts a doubtful eye on union claims to eliminate opposition to building permits or to secure a steady workforce in order to justify a PLA.

The decision leaves open the question whether a contractor that is an employer in the construction industry, but employs no craft workers on a project, may agree with a union to PLA terms for subcontractors in order to avoid job-site friction between union and nonunion workers. The decision also leaves open whether a contractor may lawfully agree to a subcontracting restriction covering a project where it does not employ craft workers, but where the contractor employs workers under union agreements on other projects.

Section 8(e) contemplates two-sided enforcement. A union, an employer, or both could violate the law through an agreement under

this new ruling. That unstated point probably warrants consideration in that the Board refused to award attorneys fees to Indeck for having to defend the union lawsuit to enforce the PLA. The decision not to award fees signals that the Board may be unwilling to reward a wrongdoing employer that elected to enter into an unlawful agreement.

The ruling stands to trigger broader examination of PLAs. In Indeck's case, an appellate court may reject the NLRB's reasoning. Beyond Indeck's case, the NLRB typically decides new and controversial issues with a full panel of the five Board members appointed by the President. This case was decided upon by only three Board members, all Republicans. Based on growing political tensions within the NLRB, this is likely to offend Democrats and unions who may seek to modify the impact of this and other rulings in a future administration.