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in this issue:

SEPTEMBER 2007

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Labor Management | A Littler Mendelson Newsletter

National Labor Relations Board Voids Coerced Union Project Labor Agreement

By Lawrence W. Marquess

The National Labor Relations Board (NLRB or "the Board") has released its decision in *Glens Falls Building and Construction Trades Council (Indeck Energy Services, Inc.)*, 350 NLRB No. 42 (2007) that could have a profound effect in slowing the growing use by labor organizations of corporate campaigns to force construction project owners to accept the imposition of costly union-only project labor agreements on their projects.

Union Use of Coercion to Obtain Project Labor Agreements

Over the past decade, building trades unions, faced with diminishing success in organizing construction employees by traditional methods, have expanded their use of corporate campaigns of various types to compel construction project owners to require that the construction contractors building their projects sign union agreements. These corporate campaigns have taken many forms, but among the most successful has been that often referred to as "permit extortion." "Permit extortion" is applied to construction projects requiring various types of regulatory permits and particularly environmental permits, and has resulted in dozens, if not hundreds, of construction projects being performed under costly union contracts. Often, these contracts take the form of project labor agreements, agreements by which all construction contractors performing work on the project are required to sign and perform the work under a union labor agreement negotiated for the project.

The "extortion" occurs when the owner starts to apply for the regulatory permits and approval necessary to allow the project to go forward. Building trades unions begin to oppose the project in those governmental proceedings, filing negative comments in environmental permit proceedings, opposing the project in zoning hearings, and appealing decisions favorable to the owner. Even if the union is ultimately unsuccessful in preventing the issuance of the permits, the delay to the project is often sufficient to cause the owner to agree that the project will be done on a union basis. Once the owner has signed such an agreement, the trade unions withdraw their objections to the permits and often even change sides to support the permits to allow the project to go forward.

The result of this "permit extortion" is that the owner's project is a union project, performed under union wage rates and with union work rules. The added cost can be substantial. Most importantly from a legal standpoint, the owner has agreed not to do business with construction contractors who work on an open shop basis.

The National Labor Relations Act and Project Labor Agreements

Section 8(e) of the National Labor Relations Act (NLRA) makes it an unfair labor practice for a union and an employer "to enter into any contract or agreement … whereby such employer ceases or refrains or agrees … to cease doing business with any other person" and makes any such contract or agreement unenforceable and void. The agreement signed by a construction project owner to require that all contractors who perform work on the project be union-signatory

violates this first sentence of Section 8(e). The owner has agreed not to do business with non-union contractors.

The owner's agreement with the trades unions is saved, if at all, only by the proviso to Section 8(e) which makes the section inapplicable to agreements "between a labor organization and an employer *in the construction industry* relating to the contracting or subcontracting of work to be done at the site of the construction …" The question just addressed by the NLRB in *Indeck* was whether the owner's agreement to use only union-signatory construction contractors and the resulting project labor agreement (PLA) were covered by this proviso. In finding that they were not, the NLRB effectively voided the owner's agreement with the trades unions, allowing the owner to perform the project with either union or non-union contractors or both, at the owner's discretion

Indeck's Union-Only Project Labor Agreement

Indeck develops, owns and operates co-generation plants that produce both steam and electricity for sale. In the early 1990's, Indeck decided to build four co- generation facilities in Upstate New York. When Indeck filed its environmental impact statement and began seeking the permits necessary for the first of the four facilities, the Southwestern New York Building and Construction Trades Council filed an objection to the environmental impact statement. When the president of Indeck met with the trades council's attorney and representatives, the union representatives said they "would stop every Indeck project in New York unless it went union." In response, Indeck's president sent a letter to the unions, committing that the project would be performed only with building trades union labor. In response to similar pressure from other building trades councils and unions in the areas where the other projects were to be built, Indeck ultimately agreed that all of the co-generation facilities in New York would be built with union labor and union-signatory contractors. As a result of these commitments, when Indeck hired another company, CRS Sirrine, Inc., to serve as construction manager, Sirrine was required to negotiate a PLA with the building trades unions and to impose that PLA on all contractors and subcontractors performing work on the project.

Subsequently, when Indeck and Sirrine were unable to reach agreement on an escalation in price on one of the projects based on a delayed start, Indeck canceled its contract with Sirrine and selected CNF Constructors, Inc., a non-union contractor, to replace Sirrine. Indeck did not require CNF or its subcontractors to sign a PLA with the trade unions, and the project was built non-union. The trade unions filed a breach of contract lawsuit against Indeck, seeking $12 million dollars in damages.

In response, Indeck filed a charge with the NLRB, alleging that its agreement with the trade unions violated Section 8(e) and was unenforceable. Ultimately, the NLRB agreed with Indeck, ordering the parties to cease any efforts to enforce the agreement and ordering the unions to dismiss their state court lawsuit for damages.

The NLRB Applies Section 8(e) to the Indeck Agreements

The NLRB's General Counsel investigated Indeck's charge and issued a complaint against the various building trades councils and individual unions involved in the Indeck agreement, alleging that the union-only agreements struck with Indeck were unenforceable as violations of Section 8(e). The administrative law judge (ALJ) concluded that the agreements did not violate Section 8(e), and Indeck filed exceptions with the NLRB. After examining the history of Indeck's dealings with the building trades and the resulting agreements, the NLRB began by holding "that Indeck's promise to the [building trades unions] … that Indeck's contractor on the project in question would deal only with subcontractors who had or would enter into a collective-bargaining agreement with the respondents, is within the scope of the prohibitions of Section 8(e) because it constitutes an implicit agreement by Indeck not to do business with another person—specifically, any contractor who would subcontract to non-union subcontractors." The NLRB then turned to the "central issue" of the case, "whether the otherwise prohibited … agreement[s] … were protected under the construction industry proviso of Section 8(e)."

Many similar cases have turned on the question of whether or not the owner who signed the union-only agreement was an "employer *in the construction industry*" within the meaning of the proviso. If the owner was not "*in the construction industry*," then the proviso could not apply to an agreement between the trades unions and the owner. Cases that have addressed this issue have generally turned on an examination of the owner's involvement in the construction of its project. If the owner actually employed construction workers on the project, even if only a few, the owner was likely to be found to be in the construction industry for the purposes of the project, even if its business was otherwise totally unrelated to construction. Other decisions, including those of the ALJs in the *Indeck* case, have turned on the examination of the level and extent of control exercised by the owner and especially over labor relations on the construction project.

In *Indeck*, however, the NLRB announced that it did not have to decide that issue and that it would place no reliance on the administrative law judge's decisions on that point. Instead, the NLRB examined only what it announced to be two other non-statutory tests under the construction industry proviso, tests that are not found in the language of Section 8(e).

The NLRB found these tests in the Supreme Court's decision in an anti-trust case, *Connell Construction Co. v. Plumbers Local 100*, 421 US 616 (1975). Although *Connell* was decided under the anti-trust laws, an essential element of its decision was the application of Section 8(e) to the agreement between the building trades union and a construction contractor that was alleged to be part of the anti-competitive behavior. Analyzing the Section 8(e) proviso, the Court discussed two non-statutory tests by which the proviso would apply only: (1) to agreements signed between labor organizations and employers "in the context of collective-bargaining relationships;" or (2) even in the absence of a collective bargaining relationship, to agreements motivated by "the reduction of friction that may be caused when union and non-union employees of different employers

are required to work together at the same job site." The Court adopted and applied only the first test but observed that some lower courts had mentioned the second.

Addressing the first of these two tests in *Indeck*, the Board noted that neither Indeck nor Sirrine, with whom the building trades had negotiated the union-only agreement and the PLA, employed or intended to employ construction industry employees on the projects. Nothing in the agreements dealt with the terms and conditions of employment of Indeck or Sirrine employees. Accordingly, said the Board, there was no basis for finding that the agreements were negotiated in the context of a collective bargaining relationship between the building trades and either Indeck or Sirrine.

Finding that the first test was not satisfied, the Board then addressed the second test, whether the agreements were intended to avoid friction between union and non-union employees working together at the same job site. The PLA contained language stating that friction between union and non-union employees on the worksite was one of the reasons for the PLA. Nevertheless, after looking at the history of the relationship between the building trades and Indeck, the Board concluded that avoiding friction between union and non-union employees was not the motivation of either Indeck or the building trades. According to the Board, the evidence demonstrated that Indeck's sole motivation was to avoid having its projects delayed or derailed by union opposition, and the building trades' sole motivation was to monopolize the construction jobs on these projects for union labor.

Perhaps more important as to this second test is that the Board was careful to note that it has never been decided that this second test for proviso coverage is actually *valid*. Because the facts in *Indeck* would not satisfy that test, the Board decided it was unnecessary to decide whether the test is valid. Accordingly, it remains to be seen whether the fact that a PLA is actually motivated by the desire to avoid friction between union and non-union employees will save an otherwise unlawful PLA.

Having found that the agreements met neither of these non-statutory tests for the Section 8(e) construction proviso, the Board held that there was no reason to address whether Indeck was an "employer in the construction industry." Indeck's agreement and the PLA violated Section 8(e) and could not be enforced.

Potential Meaning of the Indeck Decision

It is almost certain that the Indeck decision will be appealed to one of the United States Circuit Courts of Appeals, probably either the Second Circuit in New York or the District of Columbia Circuit in Washington, D.C. Unless and until the NLRB's decision is overturned, the Indeck decision is governing law, and faced with similar facts, the NLRB's General Counsel should issue a complaint on a charge concerning a similar agreement.

The *Indeck* decision opens wider the door for attacks on union-only agreements between construction owners and building trades unions that require that all contractors on the project be union signatory, either through a PLA or through other agreements. An owner who has been coerced into signing such an agreement by a union's corporate campaign may be able to subsequently attack the PLA. Moreover, because an NLRA charge can be filed by any "person," even one who has no direct interest in the subject of the charge, such union-only agreements and PLAs can be attacked by construction contractors, organizations opposed to PLAs, and other third parties.

Moreover, this broadened avenue for attack on an existing agreement or PLA supplements the avenue open to the owner to attack the union's "permit extortion." The NLRB's general counsel has been amenable, in the past, to issuing complaints under Section 8(b)(4) against unions that have initiated objections to environmental permits when coupled with the promise, stated or implied, that those actions will end when the owner has agreed to make the project a union-only project. Thus, with the right evidence, the owner may be able to avoid signing such an agreement in the first place.

Because in these cases, the outcome is going to be dependent on the evidence and because the owner of a construction project, faced with union coercion, can help identify and preserve favorable evidence, consulting with knowledgeable labor counsel when a union first becomes involved can help maximize the likelihood of avoiding or setting aside a union-only agreement or PLA.

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