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NLRB decision puts work-Preservation provisions in question

Developers and general contractors, beware: The National Labor Relations Board (NLRB) has signaled it will take a closer look at work-preservation clauses. Work-preservation clauses typically limit subcontracting on construction projects to those companies that have signed on to a project labor agreement (PLA).

In an important new case, the NLRB said there was insufficient evidence that the clause was intended mainly to advance labor harmony at project sites.

The case—*Glens Falls Building & Construction Trades Council,* 350 NLRB No. 42—does not mean that work-preservation agreements in all PLAs are illegal. When the agreement to limit subcontracting to signatory contractors arises in the context of a classic collective bargaining relationship between the employer of the labor force and the unions representing the labor force, this type of work-preservation clause will survive scrutiny under an express exception in Section 8(e), according to the NLRB.

The classic Section 8(e) analysis rarely applies to PLAs, since they are typically negotiated by developers or general contractors who rely on subcontractors to provide labor and therefore are not covered employers under the National Labor Relations Act (NLRA).

However, work-preservation provisions may still survive challenge if they are intended primarily to promote labor harmony on the project site. That was not true in the *Glens Falls* case.

A tale of two contractors

Glens Falls involved a PLA covering the construction of power cogeneration facilities in Corinth, N.Y. The owner, Indeck Corinth Ltd., agreed to use a PLA in return for the construction unions' agreement not to oppose the project in upcoming environmental impact hearings and their assurance to help in "pushing the projects along in local government."

The PLA for the Corinth project prohibited subcontracting any project work except to firms that agreed to be bound by the PLA. Although Indeck's general contractor, Sirrine, did not sign the PLA, Sirrine did agree to a similar provision in a separate agreement with the construction unions.

Eventually, Sirrine was dismissed as the general contractor. Sirrine's replacement completed the project with some nonunion labor. When the unions sued Indeck for breach of the PLA, Indeck argued that the work-preservation language was unenforceable on grounds it violated Section 8(e) of the NLRA, and filed a charge with the NLRB.

Hot cargo agreements

Section 8(e) of the NLRA prohibits an employer and a union from agreeing that the employer will stop doing business with another employer. Such agreements are commonly referred to as "hot cargo" agreements, and

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typically involve an employer's agreement to cease handling the goods—the hot cargo—of another employer accused by a union of being unfair.

Section 8(e) carves out an exception to this rule for the construction industry. Known as the construction industry proviso, an employer and a union may lawfully restrict the contracting or subcontracting of work to be performed on a construction site to employers that have agreements with trade unions.

In *Glens Falls,* the NLRB found that the PLA's work-preservation agreement and Sirrine's agreement with the construction unions fell within the general prohibition of Section 8(e). The NLRB then turned to the issue of whether PLAs were nevertheless lawful under the construction industry proviso. It found they were not.

The NLRB applied the test developed by the U.S. Supreme Court in its 1975 decision in *Connell Construction Co. v. Plumbers Local 100*. There, the high court held that the construction industry proviso "extends only to agreements in the context of collective-bargaining relationships and … possibly to common-situs relationships on particular job sites as well."

The board concluded that Indeck's and Sirrine's agreements with the construction unions did not satisfy the *Connell* test, since these agreements did not arise in the context of a present or pre-hire collective bargaining relationship and did not set the terms and conditions of employment for their own employees.

The NLRB noted the Supreme Court's suggestion in *Connell* that there may be an alternative basis for invoking the construction industry proviso "if they were directed toward the reduction of friction" on job sites where union and nonunion employees work.

However, the NLRB did not apply the *Connell* alternative basis in *Glens Falls* since the unions failed to demonstrate that the work-preservation agreements in question were executed for the purpose of avoiding labor tensions on the Corinth job site.

What employers can do

Glens Falls signals that PLA provisions that preserve work for signatory contractors and their union-represented employees may be problematic when they arise apart from the normal collective bargaining process. Subcontracting limitations in PLAs may still be valid under the alternative basis mentioned by the Supreme Court in the *Connell* case.

In view of the holdings in *Glens Falls,* developers and contractors considering a PLA containing work-preservation language should ensure that the record of discussions with the trade unions reflects the parties' goal of promoting labor harmony, as opposed to concessions to appease unions that oppose the use of nonunion labor.