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THE NEW ERA OF JURISDICTIONAL DISPUTES

This paper provides a discussion of the law respecting jurisdictional disputes in the context of the current climate of the unionized construction industry. Section I provides a brief overview of the NLRA's framework for resolving jurisdictional disputes. Section II discusses the Board's approach to so-called "sham" jurisdictional disputes. Section III addresses the interplay between arbitration awards under signatory subcontracting clauses and 10(k) awards in jurisdictional disputes and discusses the use of signatory subcontracting clauses by unions to prevent contractors from purchasing pre-fabricated building materials.

I. JURISDICTIONAL DISPUTES AND RESOLUTION UNDER THE NLRA

The Taft-Hartley Act, passed in 1947, specifically addressed the problem of jurisdictional disputes. A union involved in a jurisdictional dispute often threatens or engages in picketing or other types of coercive activity with the object of forcing the employer to grant the disputed work to its respective members. Congress recognized that such coercive activities were counterproductive and, therefore, in section 8(b)(4)(D) of the Act, Congress prohibits labor organizations from threatening or engaging in work stoppages or threatening or refusing to handle goods in order to obtain work assigned to another labor organization.

If an employer believes that a union has engaged in activity proscribed by 8(b)(4)(D), it may file a charge with the National Labor Relations Board ("NLRB"). Upon receipt of such a charge, the NLRB will initiate proceedings under 10(k) of the Act so long as it finds:

- competing claims to the work in question;
- reasonable cause to believe that an §8(b)(4)(D) violation has occurred; and,
- no voluntary method for adjustment of the dispute.

The purpose of a 10(k) hearing is to determine which labor organization has a superior claim to the work.¹ The first phase of a 10(k) proceeding is a non-adversarial hearing before a hearing officer who is charged with the duty of incorporating all pertinent facts into the record and preparing a hearing report for the Board. NLRB Rules and Regulations 101.34. The hearing officer forwards the report to the Board² and the parties are granted the right to file briefs with the Board within seven days of the hearing. *Id.* The second phase of a 10(k) proceeding is the Board's review of the hearing officer's report and party briefs, if any. Based upon these materials, the Board will make its final determination with respect to the competing claims for work.

Section 10(k) provides no standards to aid the Board in analyzing the relative merit of competing claims for work. Prior to 1961, the Board accepted an employer's assignment of the work as dispositive unless the assignment conflicted with a Board certification under 9(a) or a collective bargaining agreement. The Supreme Court rejected this approach in *NLRB v. Radio & Television Broadcast Engineers Union Local 212* (Columbia Broadcasting System), 364 U.S. 573 (1961). The Court ruled that the NLRB must decide each jurisdictional dispute on its merits by examining factors similar to those typically relied upon by arbitrators or joint boards in cases where the parties agreed to submit the jurisdictional dispute to voluntary adjustment. The Board responded to the Supreme Court's decision in the *CBS* case by developing a balancing test based upon the following list of factors:

- Collective bargaining agreements and board certifications;
- Employer assignment, preference, and past practice;
- Area and industry practice;
- Relative skills, training, and safety; and,
- Economy and efficiency of operations.

Machinists, Lodge, 135 NLRB 1402, 1962 WL 16752 (1962). The Board has not specified a system of weight or importance with respect to the various factors. However, the Board's opinions overwhelmingly hinge on the employer preference factor. In the Seventh Edition of *How to Take a Case Before the NLRB*, the authors note:

¹ Section 10(k) states:

Whenever it is charged that any person has engaged in an unfair labor practice with the meaning of paragraph (4)(D) of the section 8(b), the Board is empowered and directed to hear and determine the dispute of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

² Under 10(k), the Board makes the final determination rather than the regional director. NLRB Rules and Regulations § 102.90; NLRB Statements of Procedure § 101.34.

In the vast majority of cases, the Board awards work to the group of employees preferred by the employer. In its opinions the Board has emphasized that “an employer’s assignment of disputed work cannot be made the touchstone in determining a jurisdictional dispute.” Nevertheless, the Board has acknowledged that it has consistently placed great weight on the factors of contract coverage and employer preference in making work assignment awards, but that it will give the employer’s assignment of work little weight if the employer subsequently abandons that assignment and if the assignment is contrary to its past practice.

How to Take a Case Before the NLRB 635 (Brent Garren, Elaine S. Fox, & John C. Truesdale, eds., BNA Books 7th ed. 2000)

II. “TRUMPED-UP” JURISDICTIONAL DISPUTES AND THE SHAM ARGUMENT

A jurisdictional dispute is often more (but sometimes less) than meets the eye. A union to which an employer has assigned work (hereinafter “the preferred union”) is likely to benefit from the application of 10(k). In the face of a competing claim for work, a preferred union has an incentive to create facts and circumstances, such as a threat to picket an employer if the work is assigned to another union, upon which an employer may file an 8(b)(4)(D) charge. An employer generally welcomes such a threat because it permits the initiation of a 10(k) proceeding under which the employer’s original work assignment will typically prevail given the preeminence of the employer preference factor.

On the other hand, a union attempting to claim work (hereinafter “the challenging union”) from the preferred union will often attempt to defeat the application of 10(k) in order to escape the employer preference factor. Given the closely aligned interests of the employer and the preferred union, the challenging union often alleges that the preferred union’s threat to strike is a maneuver or a sham undertaken to bring the dispute within the scope of 10(k). The goal of the sham argument is to defeat the application of 10(k) by demonstrating that there is no reasonable cause to believe that the preferred union violated 8(b)(4)(D).

The NLRB has never dismissed a 10(k) proceeding based upon allegations of a sham. However, the Board has suggested that it may do so where there is affirmative evidence establishing collusion between a preferred union and an employer. The Board has stated:

It is well established that as long as a Union’s statement, on its face, constitutes a threat to take proscribed action, the Board will find reasonable cause to believe that the statute has been violated, in the

absence of affirmative evidence that the threat was a sham or was the product of collusion.

C.J.S. Lancaster, 325 NLRB 449, 1998 WL 122065 (1998).

The Board has not specified what constitutes “affirmative evidence” sufficient to sustain a sham argument. However, it appears that the Board requires nothing less than a direct admission of cooperation between the employer and the preferred union. *New England Foundation Co., Inc.*, 341 NLRB No. 70, 2004 WL 724184 (2004).

In *New England Foundation*, the Board rejected the Carpenters’ sham argument because the evidence did not “demonstrate that any individual admitted to collusion.” *New England Foundation Co., Inc.*, 2004 WL 724184 at *3. In that case, the employer awarded the work of building caissons on a bridge project to the Laborers. However, the Carpenters initiated an arbitration in an attempt to obtain the work. The Laborers responded by informing the employer that it would strike if the work was reassigned to the Carpenters. The employer then filed an 8(b)(4)(D) charge against the Laborers initiating 10(k) proceedings. The Carpenters moved to quash the notice of hearing by arguing that the threat to strike was a sham, but, as noted above, the Board rejected this argument because there was no admission of collusion. The Board then awarded the caissons work to the Laborers based in part on employer preference.³

The Board has also rejected the sham argument in situations where the preferred union is barred from striking by a no-strike clause. In *C.J.S. Lancaster*,

³ In a subsequent case, the Board rejected the challenging union’s sham argument even where the employer admitted that it knew the preferred union wanted the employer to initiate 10(k) proceedings. *R&D Thiel*, 345 NLRB No. 94, 2005 WL 2477122 (2005). In that case, the employer was signatory to a collective bargaining agreement with the Teamsters covering the work of transporting by crane truck prefabricated building components (i.e. roof trusses, floor sections, and walls) and placing the components by crane directly onto buildings, scaffolding, or otherwise permanent locations. The Operating Engineers argued that they were entitled to perform the hoisting work pursuant to a jurisdictional agreement with the Teamsters which granted the Teamsters the right to operate crane trucks but reserved the Operating Engineer’s right to perform the hoisting or lowering of materials onto scaffolds or into place. Thiel was not signatory to the jurisdictional agreement. The Operating Engineers attempted to enforce the jurisdictional agreement against Thiel on a jobsite in Aurora, Illinois. Two of Thiel’s drivers were approached by the organizing director for the Operating Engineers who demanded that the drivers cease performing Operating Engineers’ work and remove their trucks from the jobsite. The organizing director stated that if the drivers failed to comply with his request then the Operating Engineers would picket the site. In response to the Operating Engineers’ threat, the Teamsters sent a letter to Thiel threatening to picket if the employer reassigned the hoisting work to the Operating Engineers. Thiel then filed charges with the NLRB alleging that both the Operating Engineers and the Teamsters violated §8(b)(4)(D), and the NLRB initiated 10(k) proceedings. The Operating Engineers moved to quash the notice of hearing by arguing that the threat made by the Teamsters to picket if the work was reassigned was a sham intended to trigger 10(k) and that the Teamsters never intended to picket. The Operating Engineers relied upon the testimony of Thiel’s president who stated that the Teamsters wanted Thiel to initiate 10(k) proceedings and that Thiel was not sure the Teamsters would have followed through on the threat to picket. The Board rejected the Operating Engineers’ sham argument because the president’s testimony was not an admission of collusion and there was no other affirmative evidence that the threat to strike was the product of collusion.

supra, a non-construction industry case with construction industry implications, the Communications International Union Local 160 (“Local 160”) argued that the Lancaster Typographical Union Local 70’s (“Local 70”) threat to strike was not genuine because there was a no-strike, no slowdown clause in Local 70’s cba in the tripartite jurisdictional agreement between CJS, Local 70, and Local 160.

A dispute arose between Local 70 and Local 160 after CJS installed a new electronic duplicating machine called a Docutech and assigned operation of the Docutech to Local 70. The tripartite agreement granted Local 70 exclusive jurisdiction over all pre-press printing work and granted Local 160 exclusive jurisdiction over all presses and platemaking. Local 160 filed a grievance alleging that the operation of the Docutech fell within its jurisdiction under the tripartite agreement. After learning of Local 160’s grievance, the president of Local 70 sent a letter to CJS asserting that Local 70 had jurisdiction over the Docutech and that it would “take such action as necessary including but not limited to refusing to perform certain tasks . . . on certain work if jurisdiction over the Docutech is awarded to Local 160.” In response, CJS filed an 8(b)(4)(D) charge.

Local 160 moved to quash the notice of hearing by arguing that there was no reasonable cause to believe Local 70 violated 8(b)(4)(D) because the president’s letter reflected teamwork between Local 70 and CJS aimed at invoking the Board’s jurisdiction under 10(k). In support of its argument, Local 160 suggested that the coincidental timing of the letter and the existence of a no-strike clause in the tripartite agreement undermined the legitimacy of Local 70’s threat to strike.

The Board rejected Local 160’s argument because Local 70’s letter clearly constitutes a threat to refuse to perform services and there was no evidence that Local 70 colluded with CJS. With respect to the no-strike clause, the Board stated, “The existence of a no-strike clause in a union’s collective-bargaining agreement does not provide a basis for a finding that a threat by the union is a sham.” *C.J.S. Lancaster*, 1998 WL 122065 at *4. The Board then awarded the Docutech work to Local 70 citing employer preference among other factors.

The following is a list of other cases in which the Board rejected the sham argument for lack of affirmative evidence of collusion:

- *Eshbach Brothers*, 344 NLRB No. 4, 2005 WL 263702 (2005): The Board rejected the Operating Engineers’ sham argument due to insufficient evidence where the only evidence presented by the Operating Engineers was the coincidental timing of the Laborers’ threat and the absence of evidence that the Laborers’ threat was genuine.
- *Sea-Land Service*, 322 NLRB 830, 1997 WL 11271 (1997): The Board rejected the Longshoremen’s argument that the Machinists’ threat to strike was a sham because there was no affirmative evidence of collusion and the only evidence presented by the Longshoremen was the

existence of a no-strike clause in the Machinists' collective bargaining agreement.

- *AMPAT/Midwest Corporation*, 266 NLRB 963, 1983 WL 25029 (1983): The Board rejected the Glaziers' argument that the Ironworkers strike was a sham where the only evidence presented by the Glaziers was the fact that the employer did not seek an injunction against the illegal strike, did not post a warning requiring employees to return to work, and did not file a damage suit for the wages ultimately paid to the strikers.

III. SIGNATORY SUBCONTRACTING CLAUSES AND JURISDICTIONAL DISPUTES

Congress permits signatory subcontracting clauses in the construction industry for the purpose of maintaining labor peace. However, the clauses often lead to or exacerbate jurisdictional disputes.⁴ The presence of a signatory subcontracting clause in the context of competing claims for work often results in a grievance by one union against the general contractor for breach of the clause and an 8(b)(4)(D) charge by the subcontractor against another union based upon that union's threat to picket the subcontractor if the work is reassigned to the grieving union.

⁴ An employer in the construction industry may enter into an agreement with a union limiting the employer's freedom to subcontract work to entities who are signatory to the same agreement or to entities signatory to an agreement with the union. Section 8(e) of the NLRA prohibits such signatory subcontracting clauses in every industry other than the construction industry. Section 8(e) states:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: **Provided, That nothing in this subsection (e) shall apply to an agreement 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 construction, alteration, painting, or repair of a building, structure, or other work:** *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: **Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.**

Prior to 1995, the NLRB viewed a union's attempt to enforce a signatory subcontracting clause against a general contractor as a claim for assignment of work with respect to the subcontractor thereby creating a jurisdictional dispute and triggering 10(k) proceedings. *Slattery Associates*, 298 NLRB No. 111 (1990). In 1995, the NLRB overruled *Slattery Associates* in favor of the following rule:

In the construction industry, a union's action through a grievance procedure, arbitration, or judicial process, to enforce an arguably meritorious claim against a general contractor that work has been subcontracted in breach of a lawful union signatory clause, does not constitute a claim to the subcontractor for the work, provided that the union does not seek to enforce its position by engaging in or encouraging strikes, picketing, or boycotting or by threatening such actions.

Capitol Drilling Supplies, Inc., 318 NLRB No. 100, 810 (1995).

In *Capitol Drilling*, E&B Paving subcontracted concrete saw work to Capitol which was signatory to an agreement with the Laborers. The Operating Engineers filed a grievance against E&B pursuant to a signatory subcontracting clause in its agreement with E&B, and, in reaction to the Operating Engineers' grievance, the Laborers threatened to strike Capitol if the company reassigned the work to the Operating Engineers. Capitol then filed a charge with the NLRB thereby triggering 10(k) proceedings. The NLRB dismissed the 10(k) proceedings for lack of competing claims for the work. The Board explained:

This holding proceeds from our recognition that for purposes of Section 10(k), competing claims must be claims made in the same dispute. In circumstances like those in *Slattery Associates* and in this case, however, there are two entirely separate disputes, even though both ultimately concern the same work. First there is the dispute created by the grievance filed by a union under its agreement with the general contractor protesting that contractor's alleged subcontracting of work in breach of the union signatory subcontracting clause, i.e., the contractor's subcontracting to an employer that declines to be bound by the collective bargaining agreement with respect to that work. Second, there is the dispute that typically arises when the union representing the employees of the employer to which the work was subcontracted threatens to take coercive action against that employer if the work is reassigned to any other group of employees. Although the first union's successful prosecution of its grievance may, as a practical matter, induce the general contractor to withdraw the work from the subcontractor or otherwise bring about the removal of the employees represented by the second union, the fact remains that the first union never engaged in any dispute with the subcontractor. And in such a case the general contractor's actions reflect merely its fulfillment of its union signatory subcontracting obligation under the collective bargaining agreement with the first union.

See id.

The *Capitol Drilling* rule rests upon the absence of competing claims for disputed work. The proviso to the rule, however, represents a recognition that the Board will find competing claims for the work where the union pursuing a contractual grievance against the general contractor for violation of a signatory subcontracting clause engages in coercive activity directed toward the subcontractor. *U.S. Information Systems*, 326 NLRB 1382 (1998); *PBM Concrete, Inc.*, 328 NLRB 641, 1999 WL 416186 (1999).

In *PBM Concrete*, Turner Construction subcontracted to PBM Concrete the manufacture and installation of concrete risers on a stadium project in Schaumburg, Illinois. Turner was signatory to an agreement with the Cement Masons which contained a signatory subcontracting clause. PBM was signatory to an agreement with the Laborers. PBM appointed two Laborers to complete the work on the stadium project. The same day the Laborers arrived at the jobsite, Patrick Rizzo, a business manager for the Cement Masons, called the field operations manager for PBM and threatened to picket PBM if the subcontractor failed to replace the two Laborers with Cement Masons. In addition to threatening PBM, the Cement Masons filed a grievance against Turner for violation of the signatory subcontracting clause.

PBM filed an 8(b)(4)(D) charge against the Cement Masons and the Cement Masons responded by filing a motion to quash the notice of hearing under 10(k). The Cement Masons argued that under *Capitol Drilling* it had not made a claim for the subcontractor's work because it was merely pursuing a claim against Turner for breach of the signatory subcontracting clause. PBM countered by arguing that the Cement Masons made a claim for the work directly to the subcontractor and that, in furtherance of this claim, the Cement Masons engaged in activity proscribed by 8(b)(4)(D).

The Board rejected the Cement Masons' argument and accepted PBM's argument. The Board stated:

Here, as in *U.S. Information Systems* [*supra*], the Cement Masons did not confine its action to a peaceful pursuit of a contractual claim against Turner Construction. Instead, Rizzo approached the subcontractor, PBM Concrete, directly and stated that the disputed work was Cement Masons' work. Cement Masons thereby made a clear and direct claim to the subcontractor for the disputed work. Further, Cement Masons, through Rizzo, used a threat of picketing to attempt to enforce the claim. In these circumstances, as in *U.S. Information Systems*, we find that there are competing claims for the work, and we agree with the hearing officer that the Cement Masons' motion to quash the notice of hearing on this basis should be denied.

PBM Concrete, Inc., 1999 WL 416186 at *5.

It is noteworthy that, in cases such as *PBM Concrete*, the Board's 10(k) award will resolve the competing claims for the subcontractor's work, but the 10(k) award will not preclude a union from recovering damages against the general contractor for violation of the signatory subcontracting clause. The Seventh Circuit has held that the NLRB's 10(k) ruling in favor of one union claiming the subcontractor's work does not conflict with an arbitrator's decision awarding damages to a second union based upon the general contractor's breach of a signatory subcontracting clause. *Hutter Construction Co. et al. v. International Union of Operating Engineers, Local 139*, 862 F.2d 641 (7th Cir. 1988); *Capitol Drilling*, 318 NLRB at 810, fn. 4 (referencing the Seventh Circuit's analysis in *Hutter*). The court concluded that because there was no conflict between the arbitration award and the 10(k) award, the 10(k) award did not take precedence over the arbitration award as required in the case of conflict under *Carey v. Westinghouse*, 375 U.S. 261 (1964).

In *Hutter*, the state of Wisconsin awarded Hutter the contract to build a prison in Oshkosh, Wisconsin. Hutter, through its membership in the local AGC affiliate, was party to a collective bargaining agreement with the International Union of Operating Engineers Local 139 ("Operators") which granted the Operators the exclusive right to operate forklift trucks on construction projects throughout most of Wisconsin and which specified that bargaining unit work could only be subcontracted to signatories of the agreement.

Hutter failed to comply with the signatory subcontracting clause when it subcontracted the masonry work on the project to Bill Dentinger, Inc. ("BDI"). BDI was a party to a collective bargaining agreement with the Wisconsin Laborers District Council and Laborers Local 1086 (collectively referred to as "Laborers"). In accordance with its contract and longstanding practice, BDI assigned the forklift work relating to the masonry work to the Laborers.

In response, the Operators filed a grievance alleging that Hutter violated its agreement with the Operators by subcontracting to BDI. The grievance reached arbitration and the arbitrator ruled that Hutter had violated the signatory subcontracting clause and ordered Hutter to provide backpay to members of the Operators who were prevented from working on the project due to the subcontract with BDI. Operators then filed an action against it the district court to enforce the arbitration award.

Hutter responded to the adverse award by asking BDI to replace members of the Laborers with members of the Operators. This request prompted the Laborers to threaten legal and economic action against BDI which, in turn, prompted BDI to file a § 8(b)(4)(D) charge against the Laborers. Subsequently, the Laborers staged a one day work stoppage which prompted Hutter to file its own §8(b)(4)(D) charge against the Laborers. Despite the morass of threats, work stoppages, and unfair labor practice charges, BDI continued to use Laborers on the project until its completion.

The NLRB consolidated the two §8(b)(4)(D) charges into a single §10(k) proceeding and ruled that the Laborers had the superior claim to the forklift work.

Subsequent to the NLRB's ruling, the district court granted summary judgment in favor of the Operators on its claim to enforce the arbitration award.

The Laborers appealed the grant of summary judgment by the district court arguing that the district court erred in affirming the arbitrator's decision because the arbitration was a disguised jurisdictional dispute and therefore the NLRB resolved the dispute at the §10(k) hearing.

The Seventh Circuit rejected the Laborers argument and affirmed the arbitrator's decision stating that the Operators' grievance arose the moment Hutter subcontracted with BDI rather than when BDI assigned the work to the Laborers. The court noted that, even if BDI had assigned the work to the Operators, the Operators would have nonetheless retained a legitimate argument that Hutter violated the agreement because Hutter assigned work to a non-signatory in violation of the signatory subcontracting clause.

The Seventh Circuit then addressed the question of whether the arbitrator's backpay award conflicted with the NLRB decision awarding the forklift work to the Laborers. The court found no conflict, stating:

The essential distinction in this case is the distinction between a legitimate 'contractual' claim and a superior 'overall' claim. The Area II Agreement [between Hutter and the Operators] explicitly authorized the arbitrator to award backpay for violations of its provisions. To find such a violation, the arbitrator had to determine that the aggrieved party had a *legitimate contractual* claim against the contractor. To establish the *legitimacy* of the Operators' subcontracting grievance against Hutter, the arbitrator had to find that the forklift work was covered by the Area II Agreement and that Hutter subcontracted the work to a non-signatory to the Agreement. . . . The NLRB's task and frame of reference at the §10(k) hearing was far different from the arbitrator's. The Board had to determine the relative merit of the Operators' claim to the forklift work when compared with the claims of another union, not the merits of the Operators' claim against Hutter. In reaching its decision, the Board analyzed a variety of contractual and non-contractual factors. Initially, the Board had to determine whether both unions had legitimate contractual claims to the work. To conclude that both unions had legitimate contractual claims, the Board had to find that the forklift work was within the work jurisdiction of both unions based on the respective collective bargaining agreements. The Board, in fact, like the arbitrator found that the forklift work was within the Operators' work jurisdiction, but concluded that based on a number of non-contractual factors, the Operators were not entitled to the work.

Hutter, 862 F.2d at 645-46.⁵

⁵ In an earlier case out of the Ninth Circuit, the court ruled that the NLRB's 10(k) ruling in favor of the Teamsters did not preclude the Operating Engineers from pursuing damages for a breach of the

Hutter is not applicable outside of the context of the interplay between 10(k) and the signatory subcontracting clauses. *T. Equipment Corp. and C.R.C. Co. Inc. v. Mass. Laborers' D.C.*, 166 F.3d 11 (1st Cir. 1999); *Local 513, International Union of Operating Engineers v. Alberici*, 936 F.2d 390 (8th Cir. 1991); *Local 30, United Slate, Tile and Composition Roofers v. N.L.R.B. and Gundle Lining Construction Corp.*, 1 F.3d 1419 (3rd Cir. 1993).

The First Circuit declined to follow *Hutter* in *T. Equipment Corp.*, *supra*. The facts of that case are distinguishable from *Hutter* because the case did not involve a signatory subcontracting clause and, therefore, did not involve two distinct disputes as

signatory subcontracting clause by a contractor who subcontracted to an entity signatory to an agreement with the Teamsters. *AGC, Oregon-Columbia Chapter v. International Union of Operating Engineers, Local 701*, 529 F.2d 1395 (9th Cir. 1976). Western Pacific Piledriving ("Western"), a member of the AGC Chapter and signatory to an agreement with the Operating Engineers, subcontracted concrete pumping work on a nuclear power plant project to Pump-Con, a member of Northwest Concrete Pumping Association ("NWCA") and signatory to an agreement with the Teamsters. The agreement between the AGC Chapter (covering Western as a member of the AGC) and the Operating Engineers contained a signatory subcontracting clause requiring Western to subcontract to employers who were signatory to the Operating Engineers' agreement. The agreement between the NWCA (covering Pump-Con as a member of the NWCA) and the Teamsters contained a similar signatory subcontracting clause for the benefit of the Teamsters. In accordance with its agreement, Pump-Con assigned a Teamster to perform the concrete pumping work on the nuclear power plant project. The Board of Adjustment ruled that an Operating Engineer should perform the work, but, in response to this ruling, the Teamsters threatened to strike and Western filed an unfair labor practice charge under 8(b)(4)(D). The NLRB conducted 10(k) proceedings and determined that the work belonged to the Teamsters. After the 10(k) proceedings, the Operating Engineers continued to file grievances against AGC members who subcontracted pumping work to members of NWCA. The AGC filed a suit for declaratory and injunctive relief seeking to enjoin the Operating Engineers from filing such grievances because they conflicted with the 10(k) order. The Operating Engineers counterclaimed seeking damages under section 301 of the LMRA for breach of the signatory subcontracting clause. The Operating Engineers maintained that the NLRB order merely required NWCA members to use Teamsters on their concrete pumps but did not relieve AGC members of their obligation to subcontract with signatories of the Operating Engineers' agreement. The district court ruled in favor of the AGC stating that the 10(k) order barred the Operating Engineers' defenses and counterclaim to the AGC complaint. The Ninth Circuit reversed and ruled in favor of the Operating Engineers. The court stated:

If an AGC member subcontracts the concrete pump work with a member of Northwest, the Teamsters will be entitled to man the pumps. But there is no legal obligation upon an AGC member to contract with a member of Northwest. By refraining from doing so, and contracting with a subcontractor who is a party to the AGC-Local 701 agreement, the AGC member avoids any breach of the contract with Local 701. Nothing in the NLRB decision purports to prevent AGC members from complying with the AGC-Local 701 Agreement. All that the Board held is that if an AGC member does breach the AGC-Local 701 agreement by subcontracting with a member of Northwest, the Teamsters will get the work. It is the making of such a subcontract which breaches the AGC-Local 701 contract. In such a case, because of the Board decision, Local 701 cannot force the employer of its members on the job. The Board's decision to that extent does preempt the AGC-Local 701 agreement. But this does not mean that Local 701 cannot get damages for the breach. That question was not before the Board and was not decided by it.

AGC, Oregon-Columbia Chapter, 529 F.2d 1395 at 1398.

described in *Capitol Drilling*. Rather, the *T. Equipment Corp.* involved a single dispute which centered upon the employer's breach of a contractual clause whereby the employer, Laborers and Carpenters agreed that the Laborers and the Carpenters would share concrete stripping work by working in crews comprised of equal parts Laborers and Carpenters. The First Circuit ruled that an arbitration award in favor of the Laborers under the concrete stripping clause conflicted with an earlier 10(k) award in favor of the Carpenters under the same clause. Thus, given the conflict of the awards in the context of a single dispute, the court was bound to follow *Carey v. Westinghouse, supra*, in finding that the 10(k) award took precedence over the conflicting arbitration award.

The Eighth Circuit declined to follow *Hutter* in *Alberici, supra*. Once again, the facts in that case are distinguishable from *Hutter* because *Alberici* did not involve 10(k). Rather, *Alberici* was a wholly contractual dispute in which Alberici Construction Company claimed that its decision to subcontract painting and sandblasting work to Shield Painting Company created a jurisdictional dispute subject to voluntary resolution under the AFL-CIO National Joint Board for the Settlement of Jurisdictional Disputes (as stipulated by agreement) and the Operating Engineers claimed that Alberici violated the signatory subcontracting clause and, therefore, the dispute was subject to the contractual grievance process. Although the Eighth Circuit analyzed much of the jurisprudence addressing the interaction of 10(k) and arbitration awards, the case did not involve an employer caught between contractual and statutory remedies because all remedies arose under the contract.

The Third Circuit declined to follow *Hutter* in *Gundle, supra*. The facts of *Gundle* are distinguishable from *Hutter* because *Gundle* did not involve a signatory subcontracting clause. Rather, *Gundle* involved an employer who entered two conflicting agreements – one with the Roofers and one with the Laborers – for lining work at a landfill. In *Gundle*, the Roofers initially picketed the job site where the Laborers were performing the lining work but the Roofers subsequently withdrew their pickets and filed a grievance claiming damages on the ground that Gundle failed to hire through the Roofers' hiring hall. The arbitrator awarded damages to the Roofers. Gundle filed an 8(b)(4)(D) charge based upon the Roofers' brief picketing. The NLRB awarded the work to the Laborers under 10(k) and ordered the Roofers to return any payments made pursuant to the arbitration award. The Roofers filed a petition for review of the Board's decision but the Third Circuit upheld the Board's decision. The Board argued that *Hutter* did not save the arbitration award in favor of the Roofers because *Hutter* was distinguishable from the facts in *Gundle*, however, the Third Circuit dismissed the need to distinguish *Hutter* by stating:

Whether or not the holding in *Hutter* is distinguishable from the issue presented here, as the Board suggests, we do not accept the distinction made in that case between a 10(k) award based on noncontractual factors and an arbitral award of damages based on contractual claim to work. . . . If in **every case** where the section 10(k) decision was based on noncontractual factors the disappointed union could still seek a contractual remedy, the section 10(k) hearing would not be serving its

intended purpose of preventing work disruption by quickly and finally resolving jurisdictional disputes.

Local 30, United Slate, Tile and Composition Roofers v. N.L.R.B. and Gundle Lining Construction Corp., 1 F.3d at 1428 (emphasis added). Interestingly, the court's reference to "every case" demonstrates a fundamental misunderstanding of the fact that *Hutter* is limited to situations where two separate and distinct disputes arise – one concerning a general contractor's violation of a signatory subcontracting clause and a second concerning a threat to picket the subcontractor if certain work is reassigned to another union.

It should be noted that, even where *Hutter* controls, a 10(k) award does not strip a general contractor of any defenses otherwise available with respect to an alleged violation of a signatory subcontracting clause. For example, a general contractor could argue that it committed no violation of the signatory subcontracting clause because the union traditionally has not performed the work subcontracted to a non-signatory entity.

Contractors should also be aware that a union may argue that a signatory subcontracting clause bars contractors from purchasing from non-signatory manufacturers certain non-custom building components, such as pre-hung doors, millwork, or standing seam metal roofs. In such a case, the union's claim must be based on work preservation otherwise the union's effort to enforce the signatory subcontracting clause essentially converts the clause to an unlawful "hot cargo" clause in violation of 8(e) and 8(b)(4)(B).⁶

In *Local 27, SMWIA (Aerosonics, Inc. and Thomas Roofing and Sheet Metal)*, 321 NLRB No. 79 (1996), the NLRB ruled that Local 27's successful prosecution of a subcontracting grievance protesting the contractor's purchase of nonunion custom fabricated kitchen equipment violated sections 8(e) and 8(b)(4)(B) of the NLRA.

The Board relied upon *National Woodwork Manufacturers Assoc. v. NLRB*, 386 U.S. 612, 87 S.Ct. 1250 (1967) in reaching its conclusion in *SMWIA*. At issue in *National Woodwork* was a clause stating:

No employee shall work on any job on which cabinet work, fixtures, millwork, sash, doors, trim or other detailed millwork is used unless the same is Union made and bears the Union label of the United Brotherhood of Carpenters and Joiners of America. No member of this Council will handle material coming from a mill where cutting out and fitting has been done for butts, lock,

⁶ As stated in footnote 4, section 8(e) prohibits an employer and a union from agreeing to cease or refrain from "handling, using, selling, transporting or otherwise dealing in any of the products of any other employer" or to cease doing business with any other employer. Section 8(b)(4)(B) prohibits union sponsored or instigated strikes, refusals to deal, threats or other coercive acts against a neutral employer who is doing business with an employer with whom the union has a dispute (the "primary" employer), all with an object of forcing the primary employer to accede to the union's demands.

letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on the job, including base, chair, rail (sic), picture moulding which has been previously fitted. This section to exempt partition work furnished in sections, and is not applicable to metal doors and transoms.

The Metropolitan District Council of Carpenters (“MDC”) relied on this language to justify the refusal of jobsite employees covered by the agreement to handle doors that were pre-cut and pre-hung by a non-signatory manufacturer. Accordingly, the contractor that was signatory to the MDC Agreement withdrew the doors and purchased blank doors to be fitted and hung at the jobsite. The manufacturer of the pre-hung doors filed an unfair labor practice charge against the MDC, claiming that language violated section 8(e) and that the employees’ refusal to handle the doors violated section 8(b)(4)(B).

The NLRB ruled that the first sentence in the above language violated section 8(e) of the NLRA. The MDC did not appeal that decision to the Supreme Court and thereafter, the first sentence was deleted. The NLRB ruled that the second sentence did not violate 8(e) and maintenance of the provision was not a violation of 8(b)(4)(B) because the union’s objective was preservation of work traditionally performed by jobsite carpenters.

The Supreme Court affirmed the ruling of the NLRB. Thus, the Supreme Court broadly pronounced in *National Woodwork* that any agreement by a contractor with a union whereby the contractor agreed not to purchase prefabricated products violates section 8(e) of the Act unless the agreement is aimed at preserving work that is normally performed by the contractor’s union-represented jobsite employees.

In light of *National Woodwork*, the NLRB, in *SMWIA*, ruled that Local 27 violated sections 8(e) and 8(b)(4)(B) because it failed to establish a valid work preservation claim to justify its interpretation of the subcontracting clause vis-à-vis the contractor’s purchase of nonunion custom fabricated kitchen equipment.

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