THE PRESIDENT, COURTS AND ADMINISTRATIVE AGENCIES STRUGGLE WITH NEW RULES FOR PROJECT LABOR AGREEMENTS

By

JAMES P. WATSON
STANTON, KAY & WATSON, LLP
101 New Montgomery Street, Fifth Floor
San Francisco, CA 94105
(415) 512-3501

Presented at

AGC Labor and Employment Law Council
18th Annual Construction Labor Law Symposium
April 25-26, 2002
Monarch Hotel, Washington, D.C.

THE PRESIDENT, COURTS AND ADMINISTRATIVE AGENCIES STRUGGLE WITH NEW RULES FOR PROJECT LABOR AGREEMENTS

By

James P. Watson
Stanton, Kay & Watson
101 New Montgomery Street, Fifth Floor
San Francisco, CA 94105

In a series of recent developments, it has become obvious that the legal struggle over the enforceability of project labor agreements on public works will continue under the administration of President George W. Bush, despite the new administration's efforts to drastically curtail such agreements. Here is a brief summary of recent developments:

A. The *Boston Harbor* Decision and the Inception of Modern Project Labor Agreements

In *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts,* 113 S.Ct. 1190 (1993), the U.S. Supreme Court held that a government agency, acting as owner of a public works project, could lawfully contract with a labor organization and affiliated unions for a project-wide labor agreement which would require compliance by all contractors working on the Boston Harbor clean-up project.

The Massachusetts Water Resources Authority (MWRA) is a governmental agency charged with the responsibility for providing water supplies, sewage collection and treatment and related services for the eastern half of Massachusetts. 113 S.Ct. 1192. MWRA was sued under the Federal Water Pollution Control Act for its failure to properly protect Boston Harbor from

pollution; see *United States v. Metropolitan Dist. Comm'n*, 757 F.Supp. 121 (Mass. 1991). As a result of this suit, the MWRA was ordered to embark on a massive clean-up program, which was estimated to cost $6.1 billion over ten years. The U.S. District Court in Boston required construction of the project to proceed without interruption. 113 S.Ct. at 1192. MWRA is the public owner of the clean-up project, and is responsible for construction of all aspects of the project; MWRA has contract award authority, and authority to pay and supervise all contractors on the project; 113 S.Ct. at 1193.

In 1988, MWRA selected Kaiser Engineers, Inc. as project manager. Kaiser was asked to advise MWRA about the formulation of a labor relations policy for the clean-up work which would assure labor stability throughout the duration of the project. Kaiser suggested that an agreement be negotiated with the Building and Construction Trades Council (BCTC) which would govern labor relations over the entire project; MWRA agreed to this proposal. The result was the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement. The Agreement provides:

- Recognition of BCTC as the exclusive bargaining agent for all craft employees;
- Use of specified methods for resolving all labor-related disputes;
- Primary use of BCTC's hiring halls to supply labor;
- Mandatory union membership of all covered employees within seven days of their employment (union security provisions);
- A 10-year no-strike commitment;

and

- A requirement that all contractors and subcontractors agree to be bound by the Agreement.

113 S.Ct. at 1193.

After MWRA adopted the Agreement in May, 1989, it directed that all solicitations for bids on the clean-up project include Specification 13.1, which provides:

> "[E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement as executed and effective May 22, 1989, by and between Kaiser . . . on behalf of [MWRA], and [BCTC] . . . and will be bound by the provisions of that agreement in the same manner as any other provision of the contract."

In March, 1990, the Associated Builders and Contractors of Massachusetts (ABC) filed suit against MWRA, Kaiser and BCTC, seeking to enjoin enforcement of Bid Specifications 13.1. ABC asserted that the promulgation of this bid specification violated the National Labor Relations Act by impermissibly interfering in the labor relations policies of individual contractors. The bid specification was also challenged on numerous other grounds, which were rejected in the lower courts.

The U.S. Supreme Court unanimously upheld the validity of the bid specifications. The Court noted that the National Labor Relations Act imposes clear limits on the ability of a state to regulate the labor relations policies of private parties. *Building & Trades Council v. Associated Builders, supra*, 113 S.Ct. at 1195, citing *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 96 S.Ct. 2548 (1976). Thus, NLRA preemption precluded a municipality

from conditioning renewal of a taxicab franchise upon settlement of a labor dispute; see *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 106 S.Ct. 1395 (1986). Similarly, in *Machinists v. Wisconsin Employment Relations Comm'n, supra*, the Supreme Court held that the Wisconsin Employment Relations Commission could not promulgate a rule declaring a concerted refusal by a union and its members to work overtime to be violative of state law, because "Congress did not mean such self-help activity to be regulable by the State." *Machinists, supra*, 427 U.S., at 148-150.

By contrast, the Court found that the MWRA was acting in its proprietary capacity in deciding to adopt a project-wide labor agreement for the Boston Harbor clean-up work. The Court stated:

> "Permitting the States to participate freely in the marketplace is not only consistent with NLRA preemption principles generally, but also, in this case, promotes the legislative goals that animated the passage of the §§ 8(e) and 8(f) exceptions for the construction industry. . . . Section 8(f) explicitly permits employers in the construction industry — but no other employers — to enter into pre-hire agreements. Pre-hire agreements are collective bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, prior to the hiring of any employees. . . . It is undisputed that the Agreement between Kaiser and BCTC is a valid labor contract under §§ 8(e) and (f). As noted above, those sections explicitly authorize this type of contract between a union and an employer like Kaiser, which is engaged primarily in the construction industry, covering employees engaged in that industry. . . . It is evident from the face of the statute that in enacting exemptions authorizing certain kinds of project labor agreements in the construction industry, Congress intended to accommodate conditions specific to that industry. Such conditions include, among others, the short-term nature of employment which makes post-hire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long-

> standing custom of pre-hire bargaining in the industry. . . . There is no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contract services. To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a pre-hire agreement, a public entity as purchaser should be permitted to do the same. . . . In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction."

The *Building and Construction Trades Council* decision has extensive potential implications for public works labor relations. It may be anticipated that labor organizations will exert significant pressure on public entities to develop project-wide agreements like the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement. The *Building and Construction Trades Council* opinion indicates that the validity of such agreements will turn on several important factors:

- The public agency's role as owner and proprietor of the project;
- The public agency's legitimate need to insure labor peace and stability on the project;
- The absence of any indication that the project agreement is designed to address labor issues beyond the parameters of the public works project.

There have been many recent efforts by municipalities and local agencies to enact ordinances requiring that all public works be performed by union contractors. It is very doubtful that such broad ordinances enjoy any protection under the *Building and Construction Trades Council* decision. Such ordinances are not project specific, and they would not be limited to

projects on which time constraints may be essential to eliminate delays due to labor disputes. Because such ordinances do not focus on the use of alternative dispute resolution mechanisms to resolve disputes without strikes and stoppages, it would be difficult for a public agency to assert that the union contract requirement was motivated primarily by a concern for expeditious construction of public projects. See discussion, *infra*.

B. The Executive Order

President George W. Bush issued Executive Order No. 13202 on February 17, 2001, and amended it on April 4, 2001. 66 Fed.Reg. 11225 (Feb. 22, 2001) and 66 Fed.Reg. 18717 (April 11, 2001).

In issuing Executive Order No. 13202 ("Executive Order"), the President invoked the "authority vested in [the President] by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. § 471 *et seq*. ..." ("the Procurement Act"). (66 Fed.Reg. at 11225). President Bush did not specify any "law of the United States" other than the Procurement Act as the basis of his authority.

Section One of the Executive Order applies to contracts with the Federal Government, and states:

> any executive agency awarding any construction contract after the date of this order, or obligating funds pursuant to such a contract, shall ensure that neither the awarding Government authority nor any construction manager acting on behalf of the Government shall, in its bid specifications, project agreements, or other controlling documents:
>
> (a) Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or

> more labor organizations, on the same or other related construction project(s); or
>
> (b) Otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction project(s).
>
> (c) Nothing in this section shall prohibit contractors or subcontractors from voluntarily entering into agreements described in subsection (a).
> *Id*.

The Executive Order also applies to federally assisted construction projects, and states in Section Three:

> any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects, shall ensure that neither the bid specifications, project agreements, nor other controlling documents for construction contracts awarded after the date of this order by the recipients of grants or financial assistance or by parties to cooperative agreements, nor those of any construction manager acting on their behalf, shall contain any of the requirements or prohibitions set forth in section 1(a) or (b) of this Order.
> *Id*.

The Executive Order grants federal executive agencies discretion to exempt projects on which a project labor agreement was in effect, and on which at least one construction contract had been awarded prior to the Executive Order's February 17, 2001, effective date. (66 Fed.Reg. at 18718).

The Executive Order also grants federal executive agencies discretion to exempt projects if they find "that special circumstances require an exemption in order to avert an imminent threat to public health or safety or to serve the national security." (66 Fed.Reg. at 11226). The

Executive Order specifically excludes consideration of "the possibility or presence of a labor dispute concerning the use of contractors or subcontractors who are nonsignatories to ... [collective bargaining] agreements ... or concerning employees on the project who are not members of or affiliated with a labor organization" as "special circumstances" warranting an exception. (66 Fed.Reg. at 11226).

The Executive Order directs the heads of executive agencies to comply with its terms for all contracts awarded, and funds obligated, after the date the Executive Order was signed, February 17, 2001. The Executive Order is therefore self-executing. (66 Fed.Reg. at 11225).

C. The *Allbaugh* Decision

In *Building and Construction Trades Dept. v. Allbaugh*, 160 F.Supp.2d 90, 2001 WL 909155 (D.D.C. 2001), the court issued an injunction prohibiting enforcement of Executive Order 13202, finding that the Order impermissibly encroaches upon the organizational rights of employees under the National Labor Relations Act.

Citing *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1333-34 (D.C. Cir. 1996), the court noted that "no state or federal official or government entity can alter the delicate balance of bargaining and economic power that the NLRA establishes." The court found that the Executive Order conflicted with the preemption principle originally articulated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244, 79 S.Ct. 773 (1959), which forbids regulation of activities that are arguably protected or arguably prohibited by the NLRA. The court found the Executive Order defective because it "strips from construction owners and managers, and from unions seeking to bargain with those entities, the right to negotiate the kind of agreement

expressly protected by [the NLRA], an agreement requiring all the contractors and subcontractors on the site to abide by a master collective bargaining agreement."

The court also found that the executive order conflicted with the decision of the U.S. Supreme Court in *Machinists v. Wisconsin Employee Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548 (1976), which generally holds that the government may not interfere with "Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests" within the collective bargaining process. The D.C. Court of Appeals has agreed to review *Allbaugh* on an expedited basis. Because of the controversy surrounding the decision the Court of Appeals' disposition of the case is being awaited with great anticipation. U.S. Supreme Court review of this case is a distinct possibility. *Allbaugh* has placed federal agencies in a quandary regarding the validity of the President's executive order.

D. *Cuyahoga County* Decision

In sharp contrast to *Allbaugh*, the Ohio Court of Appeals in *Ohio State Building and Construction Trades Council v. Cuyahoga County Board of Commissioners*, Nos. 77242 and 77262 (2001), held that the provisions of the Ohio Open Contracting Act of 1999, which states that a public authority, when engaged in procuring products or services or awarding contracts for a public improvement to which the public authority and a contractor are direct parties, may not require the contractor or its subcontractors to "enter into agreements with any labor organization on the public improvement" or "enter into any agreement that requires the employees of that contractor or subcontractor to" become members of a union or pay dues or fees to a labor organization, is valid under federal law. The Ohio Court of Appeals found that this statute did

not on its face or by application prohibit a public authority from entering into a project labor agreement "but, rather, the public authority is prohibited from entering into a PLA with objectionable terms." The court reasoned that "merely because Section 8(f) of the NLRA provides that it is not an unfair labor practice to include union [membership and dues requirements] terms in a PLA does not mean that these very terms are essential to the agreement and must be included in order to be an effective PLA. On the contrary, a PLA can be drafted without these terms and still be valid and enforceable." The court went on to state that "even were we to find that [this statute] precludes a public authority from entering into a PLA, this statute is not constitutionally infirm on the basis that it is preempted by the NLRA because the State is not acting as a market regulator but rather is acting as a market participant." A dissenting justice argued that the Ohio Open Contracting Act effectively prohibited meaningful project labor agreements and was preempted by the National Labor Relations Act, mirroring the reasoning in *Allbaugh*. This case has been accepted for review by the Ohio Supreme Court

E. The *Huber, Hunt & Nichols* Decision

One of the enduring problems with project labor agreements (including government mandated labor agreements) is that they make "stranger" contractors partners with unions whose members they do not employ and whose practices they do not follow. This exposes the contractors to the potential for unanticipated and expensive claims and grievances.

Project labor agreements may also expose contractors to the risk of conflicting and inconsistent arbitration decisions awarding the same work to two different crafts – in effect,

requiring the contractor to pay "double" for the same work! *See Louisiana Pacific Corporation v. International Brotherhood of Electrical Workers*, 600 F.2d 219 (9th Cir. 1979).

Thanks to a new decision from the U.S. Court of Appeals for the Ninth Circuit, the prospect of double exposure from conflicting crafts has been considerably limited. In *Huber, Hunt & Nichols, Inc. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 38* (March 7, 2002), the Court held that a project labor agreement (called the "Project Stabilization Agreement") for construction of Pac Bell Park in San Francisco did not require the general contractor to assign work to members of a "stranger" union with which it had no relationship other than their joint participation in the Project Stabilization Agreement.

The Pac Bell agreement recited an intent to prevent delays and promote efficiency by establishing grievance procedures for settling "all misunderstandings which might arise" during construction. Jurisdictional disputes were to be decided by discussions between the adverse unions' local leadership; failing that, their international leadership would make a decision on such issues. Article 6 of the Project Stabilization Agreement required that non-jurisdictional disputes concerning application or interpretation of the Project Stabilization Agreement would be decided by a designated project-wide arbitrator.

As is typical, each of the unions signatory to the Project Stabilization Agreement had its own grievance procedures for resolution of disputes involving its specific collective bargaining agreement. Pipefitters Local 38 filed a grievance against Huber, Hunt & Nichols, which had no prior contractual relationship with Local 38, contending that work assigned to carpenters and

laborers on the Pac Bell Park project should have been assigned to Local 38. Local 38 sought contract damages (potentially hundreds of thousands of dollars) in the amount of lost wages to its members.

Huber, Hunt & Nichols responded by filing a grievance against Local 38 with the project labor agreement Permanent Arbitrator. Huber claimed that Local 38's grievance violated the Project Stabilization Agreement by bypassing the agreement's procedures for resolving jurisdictional disputes; it asked that Local 38 be ordered to resolve the dispute pursuant to the jurisdictional provisions of the Project Stabilization Agreement.

Not surprisingly, Local 38 refused to recognize the grievance filed by Huber, which in turn refused to recognize the jurisdiction of Local 38's grievance committee.

The Pac Bell Park Permanent Arbitrator issued an award, concluding that he had power to decide Huber's grievance and that the work assignment being challenged constituted a jurisdictional dispute. He ordered Local 38 to use the jurisdictional dispute resolution procedure specified in the Project Stabilization Agreement to resolve the claim.

A week later, the Local 38 grievance committee convened and issued an award, determining that it had power to decide the grievance and that the work assignment was not a jurisdictional dispute. The committee ruled that Huber had violated Local 38's collective bargaining agreement and was liable for tens of thousands of dollars in backpay.

The trial court upheld Local 38's award of work to its own members and set aside the award of the Permanent Arbitrator under the Project Stabilization Agreement. The trial court

found no jurisdictional dispute existed, because Local 38 allegedly did not engage in coercive conduct to enforce its claim.

Unanimously reversing, the Ninth Circuit Court of Appeals found that the Project Stabilization Agreement Arbitrator's decision trumped the contrary decision of the Local 38 grievance committee.

First, the Court noted that the Project Stabilization Agreement Arbitrator had jurisdiction to decide whether the dispute was a "jurisdictional dispute" and thus resolvable under the Project Stabilization Agreement's prescribed procedures for deciding such disputes. The lower court therefore had no jurisdiction to determine the arbitrability of the dispute.

Next, the Court noted that the resolution of the dispute turned on "the application and interpretation" of the Project Stabilization Agreement, not on the text of Local 38's own collective bargaining agreement. The Court stated that "the Project Stabilization Agreement trumps the local agreement. Logic suggests that where, as here, one party seeks to have the Permanent Arbitrator determine whether a certain dispute is jurisdictional and the other seeks to have an arbitrator under a local collective bargaining agreement make the same determination, the Permanent Arbitrator under the Project Stabilization Agreement should have the power to resolve the conflict." The Court went on to note that "only one arbitrator involved with this construction project has power over all the contractors and employees involved: the Permanent Arbitrator."

The Court rejected Local 38's contention that its claim for back pay was a mere contract grievance, noting that the union could not avoid the requirements of the Project Stabilization

Agreement "by artfully wording [its] grievances to define the character of, and therefore the proper forum for, disputes." Strengthening the role of the Permanent Arbitrator under the Project Stabilization Agreement, the Court went on to state that "we must defer to his characterization of what type of dispute [this] is, 'as long as [he is] even arguably construing or applying the contract.'" (Citing *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).)

The Court also noted that earlier conflicting arbitration awards, such as that involved in the *Louisiana Pacific* case, "did not involve overarching, multi-union labor agreements like the Project Stabilization Agreement." In *Louisiana Pacific*, there was no readily available means for reconciling the two conflicting arbitration awards; in the present case, the presence of an arbitrator with jurisdiction over the entire panoply of employers, unions and employees working on the Pac Bell Park project provided a readily available means for avoiding unnecessarily conflicting awards.

This decision is a solid victory for employers, because it eliminates the possibility of employers getting caught in a "crossfire" between competing unions about disputed work performed under project labor agreements. The *Huber, Hunt & Nichols* decision should go a long way toward assuring that employers do not become further embroiled in such jurisdictional conflicts while performing work under project labor agreements.

F. The *Can Am Plumbing* Decision

In *Can Am Plumbing, Inc., and United Association of Journeymen and Apprentices in the Plumbing and Piping Industry*, 335 NLRB No. 93 (2001), the NLRB found a state court lawsuit initiated by a competitor employer against a unionized employer that accepted job targeting

program funds was preempted by the National Labor Relations Act; the defending employer, which was successful in the action, was held entitled to recover its costs and attorneys' fees. The suit itself was found to be an NLRA violation giving rise to the right to recover fees. Although the suit focused on job targeting programs, not project labor agreements, the same arguments used in *Can Am* could be used against those challenging the implementation of project labor agreements in the future.

F:\CASES\JPW\JPWSAVE\2002\AGCARTICLE.WPD