Boston Harbor's Unresolved Presumption: Can Owner-Developers Enter into or Enforce a Project Labor Agreement?

*By William Messenger**

A project labor agreement ("PLA") is a union collective bargaining agreement that all contractors must sign to work on a construction project. In *Boston Harbor*, the Supreme Court held that a government entity acting as an owner-developer of a public construction project could lawfully require compliance with a union-only PLA, without running afoul of federal preemption, on the presumption that a private owner-developer could lawfully take the same action.[1] As a result of this 1993 decision, the use of PLAs on public construction projects has dramatically increased.[2]

But *Boston Harbor*'s underlying presumption is highly questionable. Most private owner-developers cannot lawfully enter into or enforce PLAs under §§ 8(e) and (f) of the National Labor Relations Act (NLRA).[3] These sections generally permit only construction companies to enter into the specialized labor agreements used in the construction industry.

Accordingly, *Boston Harbor* may be a tower built without a foundation. If enforcement of PLAs by private owner-developers is unlawful under NLRA, then enforcement of PLAs by public owner-developers is also unlawful under the rationale of *Boston Harbor*. The very decision that opened the door to government use of PLAs should proscribe the practice.

The courts have never squarely addressed *Boston Harbor's* underlying presumption. The resolution of this issue will likely determine the extent to which PLAs can be imposed by state and local governments on public construction projects.

I. Terminology

Construction projects are governed by a series of hierarchical relationships. At the apex is the "owner-developer," which is the owner of the project and the purchaser of the construction services. It is the entity for which something is being built. For example, a manufacturing company that is having a new factory built is the owner-developer of that project. A school district that is building a new school is an example of a public owner-developer.

Below the owner-developer is the "general contractor" (sometimes called a project manager), which is responsible for managing and coordinating work on the construction project. Below the general contractor are "contractors," which perform the actual construction work.

On a typical project, the owner-developer hires a general contractor, which then subcontracts work to contractors, which then often subcontract portions of their work to other contractors. However, sometimes one entity performs more than one function (e.g., a general contractor may perform some construction work itself).

The degree to which owner-developers involve themselves in the actual construction process varies. At one end of the spectrum are those that leave the details of the construction work to their general contractor. At the other end of the spectrum are owner-developers who act as their own general contractor. Typically, owner-developers do not perform construction work or employ construction workers themselves, but instead rely upon contractors.

II. Project Labor Agreements

A "PLA" is a union collective bargaining agreement that covers all work performed on a construction project. Like most collective bargaining agreements, PLAs usually require that signatory employers recognize the union as the exclusive representative of their employees; contribute to union pension and healthcare funds; operate according to union work rules; follow union procedures for hiring, firing, and disciplining employees; and, in non-Right to Work states, force all employees to pay dues to the union as a condition of employment.[4] However, PLAs differ from collective bargaining agreements used outside of the construction industry in two important ways.

First, PLAs are "pre-hire" agreements, in that employers negotiate the agreements with the unions before the employees are hired or exclusively represented by the unions.[5] This is normally unlawful under the NLRA, which permits employers to recognize and contract with a union only after the union has the support of a majority of employees under § 9(a) of the Act.[6] But § 8(f) of the NLRA creates an exception to this rule for "an employer engaged primarily in the building and construction industry."[7]

Second, PLAs contain "subcontracting clauses" that mandate that signatory employers only subcontract with those who also sign the union PLA.[8] In other words, subcontracting with employers who remain nonunion is prohibited. This is normally unlawful under § 8(e) of the NLRA, which mandates that employers cannot enter into agreements with unions to cease doing business with other employers.[9] But the construction industry proviso § 8(e) creates an exception to this prohibition for "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 the construction."[10]

The use of PLAs in both the private and public sectors is controversial. Opponents point out that the agreements serve only to increase construction costs because they exclude from the competitive bidding process all contractors who wish to operate nonunion.[11] In the public sector, PLAs are apt to be required because of union political influence instead of any true pecuniary benefits.[12] These and other concerns led the Bush Administration to ban contracting authorities from requiring use of PLAs on federal and federally funded construction projects.[13]

Proponents of PLAs usually claim that the union agreements ensure timely completion of construction projects by reducing labor strife.[14] This is a somewhat perverse justification,

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as unions themselves threaten to cause the strife that will delay the project. The rationale makes a PLA akin to the payment of protection money. Moreover, operating nonunion is a more obvious means of eliminating union discord than unionizing the entire project. Nevertheless, use of PLAs is not uncommon in jurisdictions in which unions have political influence.

III. Can Private Owner-Developers Enter Into or Enforce Project Labor Agreements Under §§ 8(e) and (f) of the NLRA?

An owner-developer and its employees are generally not subject to the substantive terms of PLAs, because the agreements govern only those who perform construction work (i.e., contractors and their employees). An owner-developer's role under a PLA is typically limited to forcing contractors to execute and abide by a PLA as a condition of working on the project.[15] However, owner-developers will often negotiate the substantive terms of the PLA to be imposed on contractors and their employees.

It is doubtful that many owner-developers can lawfully negotiate or enforce a PLA under the NLRA. First, most are not "employer[s] engaged primarily in the building and construction industry" that can lawfully negotiate terms of a pre-hire agreement under § 8(f). Second, most owner-developers cannot agree to make execution of a union PLA a condition of doing business without violating § 8(e) of the NLRA because: (a) they are not an "employer in the construction industry," and (b) they lack a collective bargaining relationship with the construction union.

1. An owner-developer will engage in pre-recognition bargaining if it negotiates the substantive terms of a PLA because most affected employees are not exclusively represented by the union (as they have not yet been hired). Pre-recognition bargaining has long been recognized as an unfair labor practice, as § 9(a) of the NLRA permits unions to act as employees' bargaining representatives only *after* being selected for that purpose by a majority of the employees.[16]

Section 8(f) provides a limited exemption to the NLRA's prohibition on pre-recognition bargaining for the construction industry. It states in pertinent part that:

> It shall not be an unfair labor practice... for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged... in the building and construction industry with a labor organization of which building and construction employees are members... because (1) the majority status of such labor organization has not been established under the provisions of [§ 9 of the NLRA] prior to the making of such agreement.[17]

It is only because of § 8(f) that contractors can negotiate pre-hire agreements with construction unions before employees are hired or represented by the union under § 9(a).

But most owner-developers are not "employer[s] engaged *primarily* in the building and construction industry" who can engage in pre-recognition bargaining under § 8(f). A majority of an entity's overall business must be construction work to satisfy this requirement.[18] With the exception of those few owner-developers whose principal business is construction, owner-developers cannot lawfully negotiate the substantive terms of PLAs under § 8(f).

However, the National Labor Relations Board is currently reviewing the law regarding pre-recognition bargaining in *Dana Corp (Int'l Union, UAW),* a lead case that has been pending before the Board for several years now.[19] But barring a sea change in the law regarding the legality of pre-recognition bargaining, most owner-developers will violate the NLRA if they negotiate the substantive provisions of a PLA.

2. An owner-developer certainly violates the basic prohibition of § 8(e) of the NLRA if it agrees with a union to not do business with contractors that do not sign a union PLA or enforce such a requirement. To be lawful, enforcement of a union-only PLA requirement must fall within the construction industry proviso to § 8(e). There are at least two reasons why many owner-developers will not qualify for this exemption to § 8(e)'s prohibitions.

A. Section 8(e)'s construction industry proviso requires that an employer be an "employer in the construction industry." This requirement excludes owner-developers not directly involved in the specifics of a construction project from the proviso's coverage.

Whether an entity is acting as an "employer in the construction industry" is determined on a project by project basis, rather than by the primary business of the entity (unlike under § 8(f)).[20] The degree of control that an entity exercises over labor relations at the construction site is the determining factor in the analysis.[21] Exactly how much control is needed to be an "employer in the construction industry" is unclear, as "there are only a very limited number of relevant Board decisions" on the issue.[22] These decisions each involved fact intensive inquiries, the results of which varied depending on the circumstances.[23]

An employer's requirement that contractors execute a PLA on a construction project cannot, in and of itself, make an entity an "employer in the construction industry" because that would render this phrase inoperative in § 8(e).[24] Some additional degree of involvement in the construction work is necessary to satisfy the plain text of § 8(e)'s construction proviso.

But irrespective of the proviso's exact parameters, it is clear that an owner-developer uninvolved in the construction process will not qualify as an "employer in the construction industry," and hence cannot enforce a union-only PLA requirement under § 8(e). Most notably, this includes owner-developers whose role is limited to financing a construction project.

B. The Supreme Court held that § 8(e)'s construction industry proviso is inapplicable when an employer lacks a collective bargaining relationship with the union in *Connell Constr. Co. v. Plumbers & Steamfitters, Local 100* and in *Woelke & Romero Framing, Inc. v. NLRB.*[25] This limit further precludes owner-developers from lawfully enforcing PLA requirements, as most do not have a representational relationship with a construction union.

The facts in *Connell* mirror a typical owner-developer's role in a PLA. The employer at issue (Connell) was a "stranger" employer, in that the union did not represent or seek to represent any of its employees. [26] Connell's only obligation to the union was its agreement to force contractors with which it did business to execute a contract with the union.

The Supreme Court found that the agreement did not

satisfy the construction industry proviso of § 8(e)—even though Connell was an "employer in the construction industry"—because top-down organizing pressure from stranger employers is repugnant to the statute's legislative purpose. The Court held that the purpose of § 8(e) and related provisions is "to limit 'top-down' organizing campaigns,"[27] and concluded that the "careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso of § 8(e) were construed to allow unions to seek subcontracting agreements" with stranger employers.[28] Thus, as the Court later reiterated in *Woelke & Romero*, the *Connell* "Court decided that the proviso did not exempt subcontracting agreements that were not sought or obtained in the context of a collective-bargaining relationship."[29]

Connell precludes many (if not most) owner-developers from requiring execution of a PLA because most do not have representational relationships with a construction union. Owner-developers generally do not employ construction workers for a construction union to represent under § 9 of the NLRA.[30] An owner-developer cannot enter into a pre-hire relationship with a construction union under § 8(f) unless "engaged primarily in the building and construction industry." Thus, only those few owner-developers whose principal business is construction work can potentially satisfy *Connell* and enforce a union-only PLA requirement.

However, some argue that § 8(e)'s construction industry proviso may also apply outside of a representational relationship if the agreement is aimed at the so-called "common-situs" problem, i.e. reducing friction between union and nonunion employees at a jobsite.[31] The argument is based on dicta in *Connell* that the proviso might extend "possibly to common-situs relationships on particular jobsites as well" due to congressional concern about the issue.[32]

The argument is unpersuasive. The Court in *Woelke & Romero* later construed *Connell* as permitting subcontracting clauses only in the context of a bargaining relationship,[33] and disavowed the proposition that § 8(e)'s proviso was aimed primarily at the common-situs problem.[34] Moreover, a "common-situs" exception would render *Connell's* prohibition against top-down organizing pressure from stranger employers meaningless, as any subcontracting clause could be justified with a rote incantation that its ostensible purpose is to reduce jobsite friction by excluding nonunion contractors from the project.

Even though *Connell* was decided in 1975, the Board "has yet to determine whether an alternative basis for proviso coverage exists under this *Connell* common-situs dictum."[35] The Board has repeatedly avoided resolving the issue by deciding cases on other grounds, most recently in its 2007 decision in *Indeck Construction* (which had been pending before the Board for 6 years).[36] However, absent a determination that the *Connell* dicta created an alternative basis for satisfying § 8(e)'s construction proviso, the representational relationship required by *Connell* and *Woelke & Romero* precludes most owner-developers from lawfully enforcing PLA requirements.

IV. The Supreme Court in Boston Harbor Holds that Public Owner Developers can Enforce PLAs on the Presumption that Private Owner-Developers can do the Same

In *Boston Harbor*, the Supreme Court addressed the issue of whether a public owner-developer (the Massachusetts Water Resources Authority) could lawfully make execution of a PLA negotiated by its general contractor (Kaiser Engineers, Inc.) a condition of obtaining work on a public construction project.[37] Interference by state or local governments in private sector labor relations is generally preempted by the NLRA.[38] However, the Supreme Court held that the Water Authority's action was not preempted because it was not acting as a government regulator, but rather as a participant in the marketplace.[39]

The crux of the Court's decision was that, "[t]o the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity as purchaser should be permitted to do the same."[40] Without analysis, the Court presumed that a private purchaser of construction services (i.e., an owner-developer) could lawfully agree to choose contractors based on their willingness to execute an agreement with a union.

But as explained above, private purchasers cannot lawfully agree with unions to cease doing business with nonunion contractors, or enforce such requirements, without violating § 8(e) of the NLRA unless they satisfy the statute's construction industry proviso. Most purchasers do not qualify for this exemption to § 8(e) because they are not "employer[s] in the construction industry" and/or lack a representational relationship with a construction union.

Indeed, a private purchaser enforcing a union-only PLA requirement would be imposing exactly the type of top-down organizing pressure from stranger employers that the Supreme Court held unlawful under § 8(e) in *Connell*. Yet, the Court did not mention (much less consider) *Connell* in its *Boston Harbor* opinion.

Moreover, a private purchaser also cannot negotiate the substantive terms of a PLA unless it is an "employer engaged primarily in the building and construction industry" that can lawfully engage in pre-recognition bargaining under § 8(f) of the NLRA. However, this was not an issue in *Boston Harbor* because the general contractor (Kaiser) negotiated the PLA, not the owner-developer (the Water Authority).[41]

The *Boston Harbor* Court did find that the agreement between the *general contractor* (Kaiser) and the union was "a valid labor contract under §§ 8(e) and (f)," because "an employer like Kaiser is engaged primarily in the construction industry."[42] But the Court did not address whether an *owner-developer* analogous to the Water Authority could enforce such an agreement. That a construction contractor like Kaiser can enter into a PLA has no bearing on whether an owner-developer can lawfully do the same under §§ 8(e) and (f) of the NLRA.

There has been significant litigation regarding the use of PLAs by state and local public entities since *Boston Harbor*. Yet, *Boston Harbor's* underlying presumption has not been directly addressed by the courts: whether private owner-developers can lawfully enter into or enforce a union only PLA.[43]

The ultimate resolution of this issue will likely determine the extent to which PLAs can be used in the public sector. *Boston Harbor* holds that a public owner-developer lawfully acts as a "market participant" when it acts as an analogous private owner-developer could lawfully act.[44] It is clear that many (if not most) private owner-developers cannot lawfully negotiate or

enforce PLAs under §§ 8(e) and (f) of the NLRA. Accordingly, the use of PLAs in the public sector is preempted to this extent under the rationale of *Boston Harbor*.

Endnotes

1 Building Trades Council v. Associated Builders and Contractors of Massachusetts, Inc., 507 U.S. 218 (1993) ("Boston Harbor").

2 *See* Dr. Herbert R. Northrup & Linada E. Alario, *Government-Mandated Project Labor Agreements in Construction, The Institutional Facts and Issues and Key Litigation*, 19 Gov. Union Rev. 3, 22-25 (2000).

3 29 U.S.C. §§ 158(e) and (f).

4 *See* Building & Const. Trades Dept., v. Allbaugh, 295 F.3d 28, 30 (D.C. Cir. 2002); *Boston Harbor*, 507 U.S. at 230; Jim McNeff, Inc. v. Todd, 461 U.S. 260, 265-266 (1983).

5 *See supra,* note 4.

6 *See* Ladies Garment Workers v. NLRB, 366 U.S. 731, 736 (1961); Nova Plumbing, Inc. v. NLRB, 330 F.3d 531, 533-34 (D.C. Cir. 2003); Majestic Weaving Co., 147 NLRB 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2d Cir. 1966).

7 29 U.S.C. § 158(f).

8 *See* Allbaugh, 295 F.3d at 30; Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 656-57 (1982).

9 "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 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 the construction, alteration, painting, or repair of a building, structure, or other work." 29 U.S.C. § 158(e).

10 *See supra* note 9.

11 *See* Vincent E. McGeary & Michael G. Pellegrino, *Project Agreements and Competitive Bidding: Monitoring the Back Room Deal*, 19 Seton Hall Legis. J. 423, 449-50 (1995) ("It is axiomatic that reducing the pool of eligible bidders will increase costs," and "[s]tudies show that union labor increases costs over open shop contractors by twenty to sixty percent"); *see also* Northrup & Alario, *supra* note 2, at 35-37; Maurice Baskin, *The Case Against Union-Only Labor Project Agreements*, 19 Construction Law 14 (Jan. 1999).

12 *See* McGeary & Pellegrino, *supra* note 11, at 431-34; Northrup & Alario, *supra* note 2, at 22, 57-58.

13 *See* Allbaugh, 295 F.3d at 30 (discussing and upholding Executive Order 13202).

14 *See* Northrup & Alario, *supra* note 2, at 28-30.

15 *Allbaugh*, 295 F.3d at 30.

16 *See supra,* note 6; *see also* Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 Lab. Law. 165, 176-77 (1996) (General Counsel for AFL-CIO acknowledging that "discussing the terms of a future collective bargaining agreement, should the union demonstrate majority support" is an unfair labor practice "[u]nder *Majestic Weaving*").

17 29 U.S.C. § 158(f).

18 *See* Pekowski Enterprises, Inc. d/b/a the Expo Group, 327 NLRB 413, 428-29 (1999); C.I.M. Mechanical, 275 N.L.R.B. 685, 689 (1985); Carpet, Linoleum and Soft Tile Local 1247 (Indio Paint and Rug Center), 156 NLRB 951, 960-61 (1966); Frick Co., 141 NLRB 1204, 1209 (1963); *but see* A. L. Adams Construction v. Georgia Power, 733, F.2d 853, 857 (11th Cir. 1984) (analyzing § 8(f) on a project by project basis).

19 Dana Corp. (Int'l Union, UAW), NLRB Case No. 7-CA-46965 *et seq*.; *see* William L. Messenger, "Pre-Recognition Agreements: Can Employers Lawfully Acquire Control over the Future Representative of their Employees under § 8(A)(2) of the NLRA?," 7 Engage 2, 131 (October 2006) (discussing issues presented in Dana).

20 Los Angeles Bldg. & Constr. Trades Council (Church's Fried Chicken), 183 NLRB 1032, 1036-37 (1970); Carpenters Local 743 (Longs Drug), 278 NLRB 440, 442 (1986).

21 *See supra,* note 20.

22 Glens Falls Building & Constr. Trades Council (Indeck Const.), 325 NLRB 1084, 1087 (1998) ("Indeck I"), further proceedings, 350 N.L.R.B. No. 42 (2007) ("Indeck II").

23 Compare Longs Drug, 278 NLRB at 442; Carpenters Chicago Council (Polk Bros.), 275 NLRB 294 (1985); Columbus Bldg. & Constr. Trades Council (Kroger Co.), 149 NLRB 1224 (1964), *with* Church's Fried Chicken, 183 NLRB at 1036-37; Carpenters (Rowley-Schlimgen), 318 NLRB 714 (1995).

24 The construction industry proviso to § 8(e) exempts agreements by an "employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction." If an agreement "relating to the contracting or subcontracting of work... at the site of the construction" was itself sufficient to make an entity an "employer in the construction industry," this phrase would be superfluous. The statute would operate the same if the words "in the construction industry" were excluded. This is contrary to the settled rule that every word in a statute have operative effect. Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157, 167 (2004).

25 Connell Constr. Co. v. Plumbers & Steamfitters, Local 100, 421 U.S. 616, 633 (1975); Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 653 & n.8 (1982).

26 *Connell*, 421 U.S. at 620.

27 *Id*. at 632

28 *Id*.

29 Woelke & Romero, 456 U.S. at 653 (discussing Connell, 421 U.S. at 633).

30 *See* Indeck II, 350 NLRB No. 42 at * 5 (holding that owner-developer of cogeneration power plant did not have representational relationship under Connell because it employed no employees on the construction project).

31 *See*, e.g., Indeck I, 325 NLRB at 1087-91 (Member Gould, concurring).

32 *Connell*, 421 U.S. at 633.

33 Woelke & Romero, 456 U.S. at 653 & n.8; *see also* id. at 663 ("we believe that Congress endorsed subcontracting agreements obtained in the context of a collective-bargaining relationship").

34 *Id*. at 662.

35 Indeck II, 350 NLRB No. 42, at *5.

36 *See* Indeck II, 350 NLRB No. 42, at *5 (not resolving whether subcontracting clause entered into outside of representational relationship is saved by common-situs justification by finding that clause was not intended to address common-situs issue); Iron Workers Pacific Northwest Council (Hoffman Construction), 292 NLRB 562, 580-81 (1989) (same); Colorado Building & Construction Trades Council (Utilities Services Engineering), 239 N.L.R.B. 253, 255-56 (1978) (same).

37 *Boston Harbor*, 507 U.S. at 221-22.

38 *See, e.g.,* Chamber of Commerce of U.S. v. Brown, 554 U.S. ___, 128 S. Ct. 2408, 2412 (2008); Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 618-19 (1993).

39 *Boston Harbor*, 507 U.S. at 232-33; *see also* Brown, 128 S. Ct. at 2415.

40 *Boston Harbor*, 507 U.S. at 231; *see also id*. at 231-32 ("where analogous private conduct would be permitted, this Court will not infer such a restriction"); *id*. at 233 ("when the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act... it does not 'regulate' the workings of the market forces") (quotation omitted).

41 *Boston Harbor*, 507 U.S. at 221-22.

42 *Id*. at 231.

43 Research did not reveal any federal decisions that analyzed whether a PLA imposed by a public owner-developer is not saved by the market participant doctrine because an analogous private developer could not lawfully take the same action, other than a recent unreported opinion by the District Court for the Central District of California in *Johnso v. Rancho Santiago Community College District*, Case No. 04-cv-00280 (Oct. 23, 2008), on appeal, Case No. 08-5693 (9th Cir. 2008). Note that *Colfax Corp. v. Illinois State Toll Highway Authority*, 79 F.3d 631, 634-35 (7th Cir. 1996), did not analyze this issue, but instead whether a contractor could enter into a pre-hire agreement under the NLRA (which was conceded by the appellant).

44 *See supra,* note 40.