LABOR Issues

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UNION-EMPLOYER MARKET RECOVERY PROGRAMS TARGETED

Union Market Recovery Plans, in their various forms, have been suspect tools used by unions to maintain high prevailing wages and attempt to retain a significant share of private sector work.

Five (5) non-union contractors alleged that the Ironworkers' Local 7 Market Recovery Program (MRP) and their tactics were a violation of Federal Anti-Trust Laws and the Labor Management Relations Act (LMRA).

The United States District Court dismissed this claim...however, on August 1, 2008, the United States First Circuit Court of Appeals reversed and remanded the case to the United States District Court for further findings of fact. The plaintiffs appeared well financed, as their cause was supported by the national Associated Builders and Contractors and the National Right to Work League, both of whom filed briefs amicus curiae.

The Plaintiffs' Complaint alleges that Local 7 conspired with the Building Trades Employers' Association (BTEA) and various named and unnamed union contractors to shut non-union contractors out of the structural steel industry in Greater Boston by:

1. use of its MRP;
2. in combination with union employers;
3. Local 7 threats and coercion directed at non-union subcontractors and owners, fabricators, and general contractors; and,
4. by the means of unlawful deductions from the wages of union employees in alleged violation of the Davis-Bacon Act to fund the MRP.

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In deciding this case, the Court preliminarily found competition among union and non-union erectors is "fierce." Union erectors are subject to burdensome collective bargaining agreements, while non-union erectors have significantly more flexibility.

To gain an unfair advantage, Plaintiffs alleged Local 7 negotiated a collective bargaining agreement requiring signatory employers to deduct money from "wages" to fund the MRP. Plaintiffs alleged Local 7's use of the MRP amounted to a conspiracy by Local 7 and union employers to monopolize the steel erection (and fabrication) industry in Greater Boston. Plaintiffs claimed the MRP was used to subsidize signatory employers to underbid Plaintiffs on erection jobs and that Local 7 used not only subsidies, but threats, picketing and malicious destruction of property to pressure fabricators, developers, owners, and general contractors, to either not hire or to breach contracts to exclude Plaintiffs from the Boston Market. Plaintiffs claimed this conduct violated the Sherman Anti-Trust Act, Clayton Anti Trust Act, Norris-LaGuardia Act, LMRA and Davis-Bacon and collectively was an unlawful restraint of trade. In addition, the Plaintiffs argued that some of the foregoing tactics were unprotected secondary activity in violation of the LMRA.

Local 7 responded that it alone chose "target projects" and solely directed MRP funds to subsidize signatory employers. Local 7 claimed its administration of the MRP was sheltered from anti-trust liability by its collective bargaining agreement, the statutory and non-statutory labor exemptions to the anti-trust laws and their threats and alleged coercive conduct was not in violation of the LMRA. Local 7 argued the Plaintiffs had no standing to raise an alleged violation of Davis-Bacon.

In reversing and remanding, the United States District Court's decision, the Court of Appeals found insufficient facts to uphold the District Court finding that the labor exemptions to the anti-trust laws apply because it found a dispute of fact as to the union-union employer relationship in regard to the workings of the MRP and seriously questioned whether the union unilaterally administered the MRP or was in an unlawful combination with union signatory employers, to undermine fair competition. The Court stated, "it is a thin fiction to pretend the (MRP) does not represent a combination of union and non-union groups; i.e. Local 7 and Local 7 signatory employers. Finding, "The MRP could not operate except in tandem with signatory contractors," the Court found because of this labor-management combination, the MRP would not be entitled to the statutory labor anti-trust exemption.

As to the "non-statutory anti-trust exemption", the Court found it is seldom applicable to fact patterns where an employer is a beneficiary of the challenged agreement; and that the Plaintiffs argument of a wider conspiracy involving threats and coercion to shut non-union persons out of the marketplace made this case different from other Circuit Court decisions that had found MRPs lawful. The Court was not satisfied with the lower court's fact finding relative to extent of collaboration between Local 7 and the employers that hired its members, and benefited from the MRP.

As to the alleged Davis-Bacon violation (alleged unlawful kickbacks from employee wages to fund the MRP), the Court found the Plaintiffs did not have standing, but could argue this issue, as evidence of an anti-trust violation. Likewise, as to the alleged violation of the LMRA, the Court stated while Plaintiffs had stated their claim, the issue was ripe for further review to determine whether Local 7 used coercive tactics to force neutral employers to refrain from using non-union contractors.

While MRPs are regularly used in the Boston construction industry to target projects and undercut non-union contractor bids, MRPs are now themselves a target. Employers found in unlawful combination with a union in violation of anti-trust laws may be subject to treble damages and attorneys' fees. ■