United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 30, 2008

TO : Frederick Calatrello, Regional Director
Region 8

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: International Brotherhood of Boilermakers, Local Lodge 744, et al. (Industrial Energy Systems, Inc.) Cases 8-CE-92-109 and 8-CC-1761-1778

584-0130
584-1225-2500
584-1250-5000
584-5014
584-5028
584-5056

The Region submitted these cases for advice as to whether the Cleveland Building and Construction Trades Council and its member Unions violated Section 8(e) by executing a project labor agreement with a nonstatutory employer, requiring that employer to subcontract only with contractors that agree to abide by the terms of the crafts' collective-bargaining agreements, and to incorporate the project labor agreement into its construction contracts.

FACTS

MetroHealth System Board of Trustees ("MetroHealth"), formerly Cuyahoga County Hospital System, is a political subdivision established by the Cuyahoga County Commissioners. MetroHealth has no collective-bargaining agreements with the Cleveland Building and Construction Trades Council ("the BCTC") or its constituent Unions, but has a history of negotiating project labor agreements with the BCTC Unions for its construction projects.

In the spring of 2006, MetroHealth's CEO directed its General Counsel to draft its first project labor agreement for a major construction project at the Deaconess Hospital. MetroHealth had used a nonunion contractor to perform demolition work on the site, which produced friction with the building trades unions. The CEO wanted to ensure labor peace during the renovation that would follow the demolition, and thereby also ensure timely completion of the project. Toward these ends, on April 16, 2006, MetroHealth's Board of Trustees authorized the execution of a project labor agreement. The General Counsel modeled that first project labor agreement after an agreement between Cuyahoga County and the BCTC, presented the draft to the BCTC, and quickly came to an agreement. The project

was completed on time and without any labor disputes. Since then, the Board of Trustees has authorized the execution of at least twenty other project labor agreements.

In the summer of 2007,[1] MetroHealth executed a project labor agreement with eighteen unions ("the Unions") in the BCTC, covering three major roofing projects at one of the hospitals in MetroHealth's system. MetroHealth sought this agreement from the Union for the asserted purpose of ensuring labor peace on the project and avoiding work stoppages caused by labor issues. The Board of Trustees adopted a resolution authorizing execution of this project labor agreement in order to, *inter alia*, "ensure the timely and efficient completion of such work without any delay due to labor disputes" and to "establish uniform working conditions for all construction trades and crafts[.]"

On September 5, MetroHealth entered into a construction contract with Charging Party Industrial Energy Systems, Inc. ("IES"), a nonunion roofing and siding contractor. That construction contract incorporated the project labor agreement between MetroHealth and the Unions as an addendum. IES and the Northern Ohio Chapter of Associated Builders & Contractors, Inc. had filed a federal lawsuit against MetroHealth in the U.S. District Court for the Northern District of Ohio, challenging the original PLA, *inter alia*, as preempted under the National Labor Relations Act, because it was not project-specific.[2] In response, MetroHealth and the Union executed an amended project labor agreement ("the PLA"), and the District Court dismissed that lawsuit on mootness grounds.[3] The amended PLA retroactively became an addendum to MetroHealth's contract with IES.

The PLA preamble states that, since "the orderly and uninterrupted completion of the work is of significant interest and importance ...[,] it is therefore the purpose of this Agreement that all work on the Project proceed competitively, efficiently and economically." Consistent with that purpose, Article D contains a no-strike clause, in which the signatory Unions agree not to engage in any

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[1] All dates are in 2007 unless otherwise indicated.

[2] IES relied upon the Supreme Court's decision in Building & Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218 (1993) ("Boston Harbor").

[3] The Sixth Circuit subsequently affirmed the District Court's decision.

strikes, slowdowns, or work stoppages during the term of the Agreement. In addition, Article I grants either party the right to petition in state or federal court for an ex parte injunction in the event of an alleged violation of contractual commitments.

The amendment limits the scope of the PLA to only one roofing project ("the Hamann project"):

> A. The scope of this Agreement will apply to all work done in connection with the construction of the Project, including all site work and building construction for complete occupiable building and structures. ...

And Section B of the PLA contains a secondary subcontracting clause:

> B. The conditions of this Agreement shall be binding upon all Project contractors and their subcontractors (together referred to as 'Employers'). ... [MetroHealth] shall require that all work be performed by Employers who are bound or agree to abide by the terms and conditions of a collective-bargaining agreement with the appropriate craft union signatory to this Agreement. ...

Sixteen of the BCTC Unions executed the PLA; the Carpenters and Elevator Constructors, who had signed the original PLA, refused to sign the amended version, although the Elevator Constructors agreed to abide by its terms. Only the Roofers, Operating Engineers, and Sheet Metal Workers were expected to perform work on the Hamann project.

IES began work on the project on October 3 but refused to comply with the PLA. On October 5, IES filed RM petitions naming the Roofers and Operating Engineers, asserting that the amended PLA required it to "abide by" the terms of the Unions' collective-bargaining agreements and thereby created a Section 8(f) contract and relationship with these Unions. Then, on October 16, the Roofers filed a Section 8(a)(5) charge in Case 8-CA-37472, alleging that IES had refused to provide the Union with the names, contact information, and job classifications of its employees working on the roofing project. The Roofers asserted that it had a right to enforce the provisions of its collective-bargaining agreement as a third-party beneficiary to IES's contract with MetroHealth, and that it needed the information to monitor IES's compliance with the collective-bargaining agreement. The Operating Engineers

also filed a Section 8(a)(5) charge on October 16, in Case 8-CA-37474, alleging that IES had failed to hire its employees through the Operating Engineers' hiring hall. The Operating Engineers, like the Roofers, claimed a right to enforce its collective-bargaining agreement against IES, since the PLA incorporated in IES's construction contract obligated IES to abide by that agreement. In response to these charges, IES argued that it had no statutory duty under Section 8(a)(5) and that its only reason for filing the RM petitions was to obtain a determination that it did not have a collective-bargaining relationship with the Unions. IES also requested that the Region dismiss the RM petitions.

The Region submitted both Section 8(a)(5) cases to the Division of Advice. We concluded that those charges should be dismissed, because the evidence was insufficient to demonstrate that IES had agreed to enter into a Section 9(a) or 8(f) collective-bargaining relationship with the Unions, and therefore IES had no statutory obligation to either Union under Section 8(a)(5).[4]

On February 8, 2008, IES filed the charges in the instant cases, alleging that the BCTC and each of the Unions that signed the PLA entered into an unlawful Section 8(e) agreement and violated Section 8(b)(4)(ii)(A) by threatening, restraining and coercing contractors with an object of forcing them to enter into a Section 8(e) agreement.

MetroHealth functioned as its own general contractor on the Hamann project site. While work was being performed on the Hamann project, MetroHealth employed a project manager, who met with contractors on a weekly basis to discuss the work to be completed and to verify that an appropriate number of workers would be employed. He also visited the site several times each day to monitor staffing, ensure safety measures were being followed, and assist in delivery issues. In addition, MetroHealth employs a vice-president of facilities and construction to oversee maintenance and construction-related activities at all MetroHealth construction sites. He selects site architects and engineers, receives contract bids, and awards work to contactors. He also hires and supervises construction project managers, meeting weekly with each project manager to discuss budgeting, time tables for work

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[4] Industrial Energy Systems, Inc., Cases 8-CA-37472 & 8-CA-37474, Advice Memorandum dated Apr. 9, 2008, at 6.

completion, and safety issues. He visits each construction site at least twice weekly.

The Hamann project has now been completed.

THE PARTIES' POSITIONS

IES contends that the PLA contains an unlawful secondary clause prohibited by Section 8(e) of the Act. IES does not dispute that MetroHealth is a political subdivision and therefore not covered by Section 8(e) but nonetheless argues that: (1) MetroHealth should be treated as a private employer when it engages in its proprietary capacity; and (2) in any event, the Unions have violated the Act based upon their standing as third-party beneficiaries to IES's construction contract with MetroHealth. In support of its third-party beneficiary argument, IES relies upon the Advice memoranda in Asbestos Workers Local No. 3 ("the Parma cases").[5] In the Parma cases, we concluded that although a project labor agreement between the unions and the City of Parma did not itself violate Section 8(e) because Parma was not a statutory employer, the unions arguably violated Section 8(e) when Parma incorporated unlawful secondary clauses into its construction contracts for the unions' intended benefit.[6]

IES also disputes that the PLA is protected under the construction industry proviso to Section 8(e). Applying the Glens Falls[7] analysis, IES contends that MetroHealth is a public hospital engaged in the delivery of health care and not an employer in the construction industry, and that the PLA was not negotiated in the context of a collective-bargaining relationship. IES next argues that the PLA does not reduce common situs friction because there is no "wall-to-wall" coverage on the jobsite. Specifically, IES points

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[5] Asbestos Workers Local No. 3 (Northern Ohio Chapter, Associated Builders & Contractors), Cases 8-CE-38-58, Advice Memoranda dated Nov. 24, 1998 & July 26, 1999.

[6] The PLA covered offsite work. Advice Memorandum dated Nov. 24, 1998 at 3. Advice ultimately directed that the charges be dismissed in these cases, however, because it would not effectuate the purposes and policies of the Act to litigate this novel theory in the absence of evidence that the unions had actually benefited from the clause. Advice Memorandum dated July 26, 1999 at 3.

[7] See Glens Falls' Building & Construction Trades Council, 350 NLRB No. 42 (2007) ("Glens Falls"), slip op. at 4-5.

to the Carpenters' refusal to execute the amended PLA and notes that IES subcontracted carpentry work to a nonunion subcontractor. Finally, IES claims that the subcontracting clause is unlawful on its face because: (1) Article I permits the Unions to engage in "self-help" by petitioning for an ex parte injunction; and (2) Article A does not contain language explicitly limiting its coverage to onsite work. IES apparently subcontracted sheet metal fabrication work to be performed offsite. IES has produced no evidence, however, that the Unions sought to enforce the PLA to this or any other offsite work.

The BCTC and Unions take the position that the instant charges should be dismissed because MetroHealth is not a statutory employer, and the Board has held that Section 8(e) only applies to agreements between statutory labor organizations and statutory employers. In any event, the Unions argue, the PLA is protected under the construction industry proviso. Thus, the Unions contend that MetroHealth functions as a general contractor and therefore constitutes an employer engaged in construction under the proviso. The Unions have essentially conceded that the PLA was not negotiated in the context of a collective-bargaining relationship but assert that the PLA was intended to reduce jobsite friction. The Unions also dispute that Article I of the PLA is a self-help clause, and point out that, under the no-strike clause, they expressly waived any right to take economic action to enforce the terms of their agreements.

The BCTC and the Unions also assert that they are not intended third-party beneficiaries, but, even if they were, they should not be charged with a violation based upon MetroHealth's contract with IES, because a third-party beneficiary has no liability under a contract that it did not execute. Finally, they argue, if they are deemed to have entered into an agreement with IES by virtue of their status as third-party beneficiaries, then they have a collective-bargaining relationship with IES. Therefore, the agreement they entered into is protected by the construction industry proviso.

ACTION

We conclude that the Region should dismiss the charges, because the underlying PLA, whether viewed as an agreement between the Unions and MetroHealth, a public

entity,[8] or as an agreement between the Unions and IES,[9] would be protected by the construction industry proviso.[10]

I. THE UNIONS' PLA WITH METROHEALTH

A. MetroHealth's Status As A Political Subdivision

The Region has determined, and IES does not dispute, that MetroHealth is a political subdivision and therefore does not constitute a Section 2(2) employer under the Act. The Board has long held that Section 8(e) only applies to

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[8] [*FOIA Exemptions 2 and 5*

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[9] [*FOIA Exemptions 2 and 5*

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[10] [*FOIA Exemptions 2 and 5*

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agreements between statutory labor organizations and statutory employers.[11] The Board based this interpretation upon the statutory language and legislative history of Section 8(e).[12] [*FOIA Exemptions 2 and 5*

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B. Proviso Protection for the PLA

The construction industry proviso to Section 8(e) applies by its terms to protect secondary agreements between unions and employers "in the construction industry" regarding the subcontracting of work "to be done at the site of the construction[.]" In addition, in Connell Construction the Supreme Court applied the proviso to "agreements in the context of collective-bargaining relationships and ... possibly to common-situs relationships on particular jobsites as well."[13]

The Board has since applied this language from Connell Construction to hold that a clause loses its proviso protection if negotiated outside the context of a collective-bargaining relationship "unless, possibly," the clause is addressed to common-situs problems on a particular jobsite.[14] However, it has never been necessary to determine whether proviso protection exists in the absence of a collective-bargaining relationship, because in prior cases the evidence demonstrated that the secondary clauses were not in fact executed to reduce jobsite friction.[15] The Board continues to interpret Connell as

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[11] Local 3, IBEW, 244 NLRB 357, 359 (1979).

[12] Id. at 357-59.

[13] Connell Construction Co. v. Plumbers Local 100, 421 U.S. at 633.

[14] E.g., Pacific Northwest Council (Hoffman Construction), 292 NLRB 562, 580 (1989), quoting Colorado Building & Construction Trades Iron Workers, 239 NLRB 253, 256 (1978).

[15] See, e.g., Glens Falls, 350 NLRB No. 42, slip op. at 5 (secondary clauses were executed in order to remove union opposition to regulatory approval of the project and not to reduce jobsite friction); St. Joseph Equipment Corp., 302 NLRB 47, 48 (1991) (agreement for the limited purpose of

"suggest[ing], in dicta, that secondary union-signatory clauses might be protected by the proviso *even without a collective-bargaining relationship* if they were directed toward the reduction of friction that may be caused when union and nonunion employees of different employers are required to work together at the same jobsite."[16] Moreover, the Division of Advice, based on those Board cases, continues to apply this analysis as well.[17]

Thus, the PLA is protected under the construction industry proviso if: (1) MetroHealth is "an employer in the construction industry"; and (2) the PLA was negotiated in the context of a collective-bargaining relationship, or "directed toward the reduction of [jobsite] friction";[18] and (3) the subcontracting clause applies only to work performed at the construction worksite.

First, the question of whether an employer is "in the construction industry" for the purposes of proviso protection turns on "the circumstances of each situation, rather than upon the principal business of the employer."[19] Thus, in Los Angeles Building and Construction Trades Council (Church's Fried Chicken, Inc.), the owner of a retail food business that acted as its own general contractor in the construction of new stores was found to be an employer engaged in the construction industry.[20] Church's employed a construction superintendent who hired all of the subcontractors, supervised their performance,

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obtaining general contractor's guarantee of subcontractor's benefit fund contributions).

[16] Glens Falls, 350 NLRB No. 42, slip op. at 5 (footnote omitted) (emphasis in original).

[17] See, e.g., Tri-Counties Building & Construction Trades Council (Shea Properties, LLC), Cases 31-CE-224 & 31-CC-2156, Advice Memorandum dated Oct. 18, 2007 at 1 ("further investigation is needed to determine whether the PLA was negotiated in the context of a collective bargaining relationship and, if not, whether the PLA is otherwise lawful because it was negotiated for the purpose of reducing jobsite friction.") (citing Connell Construction Co. v. Plumbers Local 100, 421 U.S. at 633).

[18] See Glens Falls, 350 NLRB No. 42, slip op. at 5.

[19] Carpenters Local 743 (Longs Drug), 278 NLRB 440, 442 (1986).

[20] 183 NLRB 1032, 1037 (1970).

and approved their bills and disbursed payments.[21] On the other hand, a retail employer who did not function as its own general contractor, made only sporadic visits to the jobsite, and used its own employees for the limited purpose of installing fixtures during the last two weeks of an eight-month project, was not an employer in the construction industry.[22]

Here, the evidence demonstrates that MetroHealth functions as its own general contractor. Through its vice president of facilities and construction and its project manager, MetroHealth selected site architects and engineers, accepted contract bids and awarded work to subcontractors, supervised staffing and scheduling, and oversaw safety on the site. Accordingly, we agree with the Region that MetroHealth is "in the construction industry" within the meaning of the proviso.

Second, in Connell Construction, the Supreme Court held that a union signatory subcontracting clause with "stranger" contractors, outside a collective-bargaining relationship and not limited to any particular jobsite, is not protected by the construction industry proviso.[23] In that case, the union had disclaimed any interest in representing the general contractors' employees and insisted upon the subcontracting clause as a tool to organize mechanical subcontractors in the Dallas area.[24] The Board's recent decision in Glens Falls is consistent with Board cases holding that an agreement is not negotiated in the context of a collective-bargaining relationship where the employer does not employ or intend to employ workers represented by the signatory union.[25]

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[21] Id. at 1033. Cf. Carpenters (Rowley-Schlimgen), 318 NLRB 714, 716 (1995) (office supply retailer that subcontracted for the installation of floor covering was engaged in the construction industry because it employed the principal of the subcontractor and, through him, retained control over labor relations and work performed at the job sites).

[22] Carpenters Local 743 (Longs Drug), 278 NLRB at 442.

[23] Connell Construction Co. v. Plumbers Local 100, 421 U.S. at 631-33.

[24] Id. at 619, 631.

[25] Glens Falls, 350 NLRB No. 42, slip op. at 5 (union's agreements with Indeck, the owner-operator of a power facility, and its general contractor were not negotiated in the context of collective-bargaining relationships, because Indeck had no employees in the building and construction

Here also, MetroHealth does not employ any construction employees other than management or supervisory personnel and does not have a collective-bargaining agreement with any of the Unions. There simply is no evidence of any collective-bargaining relationship between MetroHealth and any of the Unions or an intent to enter into one, either under Section 8(f) or Section 9, and the Unions do not contend otherwise.

As to whether the PLA reduces jobsite friction, IES argues that the PLA here cannot reduce jobsite friction because the Carpenters did not sign the amended version, citing Iron Workers Pacific Northwest Council (Hoffman Construction)[26] and Colorado Building & Construction Trades.[27] In Hoffman Construction, the Ironworkers sought an agreement with a general contractor that would have required it to subcontract its iron work only to union contractors. The Administrative Law Judge, in a decision adopted by the Board, found that the agreement "allow[ed] for the possibility of union and nonunion employees working side by side at a jobsite" and therefore was not "meant to" reduce jobsite friction.[28] The judge also relied upon the fact that the agreement did not "address problems caused by common situs relationships on a particular jobsite."[29] Likewise, in Colorado Building & Construction Trades, the subcontracting clause did "not restrict the subcontracting of other types of work at the jobsite, nor does it apply

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trades and neither Indeck nor its general contractor intended to employ any trade employees on the jobsite); St. Joseph Equipment Corp., 302 NLRB at 48 (neither general contractor nor its affiliate employed workers represented by the union either before or after the project); Iron Workers Pacific Northwest Council (Hoffman Construction), 292 NLRB 562, 580-81 (1989), enfd. 913 F.2d 1470 (9th Cir. 1990) (general contractor that formerly had a collective-bargaining relationship with the union no longer employed any unit employees and did not intend to employ any in the future); Construction and General Laborers Union, Local 185, 255 NLRB 53, 61 (1981) (general contractor had no employees at the jobsite except two members of management).

[26] 292 NLRB 562.

[27] 239 NLRB 253.

[28] 292 NLRB at 563, n.5, 580

[29] Ibid.

only to jobsites where the Union's members are working."[30] And in Sun Ridge LLC, also cited by IES, the secondary agreement covered only three trades at the jobsite and allowed for the possibility of nonunion subcontracting even in those trades if there was a sufficient differential in subcontractors' bid prices.[31]

Each of these cases is distinguishable from the instant cases. Here, although the Carpenters ultimately opted out of the amended PLA, the parties' intent was to negotiate an agreement that would cover all of the unions that had jurisdiction over the work to be performed, not just a single trade as in Hoffman Construction or limited trades as in Colorado Building & Construction Trades and Sun Ridge. Moreover, unlike in Hoffman Construction, the PLA here is limited to a particular jobsite – a jobsite where union members would be working. Finally, unlike these other cases, there is evidence here supporting the contention that the PLA was intended to reduce jobsite friction. MetroHealth's CEO directed its General Counsel to negotiate PLAs to reduce jobsite friction; the Board of Trustees passed a resolution authorizing the execution of this PLA to ensure the timely completion of work without labor disputes; and the PLA expressly reflects this interest in ensuring "the orderly and uninterrupted completion of work." Therefore, the PLA is directed toward the reduction of common situs friction.

Third, the PLA is limited to onsite work. Pursuant to Section A, the PLA applies to "all work done in connection with the construction of the Project, including all site work and building construction for complete occupiable buildings and structures." IES contends that this language does not limit the PLA's coverage to onsite work and IES actually subcontracted sheet metal fabrication work that was completed offsite. IES has presented no evidence, however, that the Unions sought to apply the PLA to this or any other offsite work.

IES contends that the language of Section A of the PLA is ambiguous, because it applies to "all work done in connection with" the project. Although Section A is arguably broad enough to apply to offsite work, Section A can easily be interpreted "to require no more than what is

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[30] 239 NLRB at 256.

[31] Sun Ridge LLC, Cases 32-CE-77-79, Advice Memorandum dated Apr. 5, 2004 at 11.

allowed by law."[32] More importantly, there is no evidence that the PLA was either intended to be applied to offsite work or that the Unions ever sought to apply it to offsite work -- work that IES moved offsite.[33] Thus, as in Southwestern Materials, based upon its bargaining history the PLA should be construed in a manner that places it within the construction industry proviso.[34]

Accordingly, even if MetroHealth were a statutory employer, the PLA would be protected by the construction industry proviso to Section 8(e).

II. THE UNIONS' "AGREEMENT" WITH IES

A. Third-Party Beneficiary Theory

Even though we conclude that the PLA between the Unions and MetroHealth is lawful, there is a question as to whether the incorporation of the PLA into MetroHealth's contract with IES gives rise to a Section 8(e) violation. In the Parma cases, we relied upon a third-party beneficiary theory to authorize issuance of a Section 8(e)

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[32] General Teamsters, Local 982 (J.K. Barker Trucking Co.), 181 NLRB 515, 517 (1970), aff'd. 450 F.2d 1322 (D.C. Cir. 1971) (in construing a Section 8(e) agreement, the Board will interpret it "to require no more than what is allowed by law" if it is not clearly unlawful).

[33] See Iron Workers (Southwestern Materials), 328 NLRB 934, 937 (1999) (Board held that a secondary clause that was not limited to onsite work on its face was nevertheless proviso-protected, in the absence of evidence that the clause had been or was intended to be applied to offsite work).

[34] IES also argues that the PLA is facially unlawful because Section I, which grants either party the right to enforcement by an ex parte injunction, is an unlawful "self-help" provision. Access to judicial remedies, however, is neither "*self*-help" nor the type of enforcement found unlawful by the Board in the cases cited by IES. See Los Angeles Building & Construction Trades Council (Donald Schriver, Inc.), 239 NLRB 264, 270-71 (1978), enfd. 635 F.2d 859 (D.C. Cir. 1980), cert. denied 451 U.S. 976 (1981) (contract term permitting economic action, such as "strikes or other economic pressure," to enforce secondary provisions); Muskegon Bricklayers Union No. 5, 152 NLRB 360, 366 (1965), enfd. in pert. part 378 F.2d 859 (6th Cir. 1967) (provision permitting "such self-help as striking or otherwise refusing to perform services").

complaint based upon a project labor agreement that required a municipality to incorporate into its contracts with its subcontractors a secondary clause restricting the use of nonunion cartage contractors that was clearly applicable to off-site work.[35] We reasoned that the unions could be considered to have "enter[ed] into" the construction contracts, since, under Ohio law, they had a right to enforce those contracts as intended third-party beneficiaries.[36]

Here, the three unions that signed the PLA and are involved in the Hamann project -- the Roofers, Operating Engineers, and Sheet Metal Workers -- are the intended beneficiaries of MetroHealth's contract with IES. MetroHealth, the promisee in the construction contract, intended to give these unions the benefit of IES's promised adherence to their collective-bargaining agreements.[37] As a result, the Roofers, Operating Engineers, and Sheet Metal Workers arguably "enter[ed] into" the construction contract with IES by virtue of MetroHealth and IES' incorporation of the PLA into that contract. Moreover, when the Roofers and the Operating Engineers filed their Section 8(a)(5) charges against IES, they sought to enforce MetroHealth's contract with the IES.[38] These Unions therefore also arguably "enter[ed] into" MetroHealth's contract with IES by seeking to enforce that contract.[39]

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[35] Asbestos Workers Local No. 3 (Northern Ohio Chapter, Associated Builders & Contractors), Cases 8-CE-38-58, Advice Memorandum dated Nov. 24, 1998.

[36] Id. at 4-5. Subsequently, however, we concluded that the purposes and policies of the Act would not be effectuated by litigating that novel theory in those cases and directed dismissal of the charges, because there was almost a complete absence of benefit to the unions. Asbestos Workers Local No. 3 (Northern Ohio Chapter, Associated Builders & Contractors), Cases 8-CE-38-58, Advice Memorandum dated July 26, 1999 at 3.

[37] However, the other Unions derived no benefit from MetroHealth's construction contract and, thus, should not be the subject of any Section 8(e) or 8(b)(4)(A) complaint based upon a third-party beneficiary theory.

[38] See Industrial Energy Systems, Inc., Cases 8-CA-37472 & 37474, Advice Memorandum at 3.

[39] Cf. Painters Orange Belt District Council 48 (Maloney Specialties), 276 NLRB 1372, 1385-86 (1985) (when a contracting party seeks to enforce contractual commitments or requests another party's compliance, that constitutes a

Therefore, under this theory the Unions effectively step into MetroHealth's place as a party to the construction contract, and the Board is then not jurisdictionally precluded from assessing the lawfulness of the PLA as if it were an agreement between the Unions and IES.

B. Proviso Protection for the PLA Between the Unions and IES

[*FOIA Exemptions 2 and 5*

.] First, there is no question that IES is an employer in the construction industry.

Second, if the PLA is viewed as an agreement between the Unions and IES, then the agreement itself arguably gives rise to a collective-bargaining relationship within the meaning of Connell Construction. These cases present a far different set of facts than the "stranger" situation in Connell, where the signatory union had disclaimed an interest in representing the general contractors' employees.[40] Similarly, the Board typically has found that a secondary clause is negotiated outside the context of a collective-bargaining relationship where the general contractor had no employees performing construction work and had no intention of hiring any such employees.[41] This is not the case here. IES is a construction contractor who hires craft employees and agreed to abide by the terms and conditions of the Unions' collective-bargaining agreements while performing work on the Hamann project.

Finally, the PLA, as drafted by MetroHealth, was directed at reducing job-site friction, for the reasons already stated. In any event, since the agreement arguably gave rise to a collective-bargaining relationship under Connell, regardless of whether the agreement was intended to reduce job-site friction, the PLA may well be protected by the construction industry proviso to Section 8(e).

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reaffirmation sufficient to satisfy the "enter into" language of Section 8(e)).

[40] Id. at 619.

[41] See cases cited at n.25, supra.

[*FOIA Exemptions 2 and 5*

.] The Region should therefore dismiss the charges in these cases, absent withdrawal.[42]

B.J.K.

[42] Since we conclude that the Region should dismiss the Section 8(e) charges, the Section 8(b)(4)(ii)(A) charges should also be dismissed.