

Glens Falls¹ Building and Construction Trades Council and International Union of Bricklayers and Allied Craftsmen, Local Union No. 6 and International Brotherhood of Carpenters and Joiners of North America, Local Union No. 229 and International Association of Heat and Frost Insulators and Asbestos Workers, Local Union No. 40 and International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 12 and Laborers International Union of North America, Local Union No. 157 and International Brotherhood of Electrical Workers, Local Union No. 438 and International Union of Operating Engineers, Local Union No. 106 and International Brotherhood of Painters, Allied Trades and Glaziers, Local Union No. 466 and Sheet Metal Workers International Association, Local Union No. 83 and United Association of Journeymen and Apprentices of the Plumbing Industry and Pipefitting Industry of the United States and Canada, Local Union No. 773² and Indeck Energy Services of Corinth, Inc.; Indeck Corinth Limited Partnership; Indeck Energy Services, Inc.³ Case 3–CE–55

July 31, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
SCHAUMBER AND KIRSANOW

A. Introduction

The complaint in this case alleges violations of Section 8(e) of the Act⁴ by the Respondent Unions. Specifically at issue are the Respondents' February 20, 1992 letter agreement with Indeck and a subsequent 1992 agreement with Indeck's contractor, CRS Sirrinc, Inc. (Sirrinc), as they relate to the construction of a power cogeneration

¹ Glens Falls is misspelled as "Glen" Falls in the Board's earlier decision in this proceeding, reported at 325 NLRB 1084 (1998).

² The above-captioned labor organizations (Glens Falls Building and Construction Trades Council and the 10 named local unions) are collectively referred to as the Respondents.

³ The Charging Parties are collectively referred to as Indeck.

⁴ Sec. 8(e) states in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work[.]

facility in Corinth, New York. Both agreements prohibited Indeck's contractor from subcontracting or permitting subcontracting of any work on the Corinth project to a company that was not itself a party to a project labor agreement (PLA) with the Respondents and that did not agree to perform all work on the project under the terms of the PLA.

The Respondents are alleged to have violated Section 8(e) by entering into the union signatory subcontracting provisions of the above agreements and by reaffirming them when filing a civil breach of contract action against Indeck in New York State Supreme Court on November 9, 1993. Under Section 8(e), the subject provisions are unlawful secondary restrictions on doing business unless, as the Respondents contend, they are exempt from the general prohibitions of Section 8(e) under the construction industry proviso to that section. We find the Respondents have failed to prove the affirmative defense of proviso coverage because the subject agreements did not arise in the context of a collective-bargaining relationship between the Respondents and Indeck and were not executed for the purpose of preventing conflict between union and nonunion labor on a common construction situs. We therefore find that the Respondents violated Section 8(e) as alleged.⁵

B. Procedural Background

On August 7, 1996, Administrative Law Judge James F. Morton issued a decision in which he concluded that Indeck is an employer in the construction industry within the meaning of the 8(e) proviso and that the Respondents had not violated Section 8(e). On July 16, 1998, the Board remanded the proceeding to reopen the record for additional evidence, some of which Judge Morton had erroneously excluded. 325 NLRB 1084 (*Indeck I*). In remanding, the Board addressed only the judge's evidentiary rulings. It did not pass on any other issues. *Id.*

Judge Morton having retired, the case was assigned on remand to Administrative Law Judge Eleanor MacDonald. On February 15, 2000, she issued the attached supplemental decision, in which she concluded, like Judge Morton, that Indeck is an employer in the construction industry within the scope of the 8(e) proviso and that the Respondents had not violated Section 8(e) by entering into and reaffirming the letter agreement.⁶

⁵ As further explained below, we find no need to decide whether Indeck was an employer within the construction industry *or* whether a union signatory subcontracting agreement that is not executed in the context of a collective-bargaining relationship may still be protected by the 8(e) proviso if actually intended to prevent common-situs labor friction.

⁶ Thereafter, Indeck filed exceptions and a supporting brief; the Respondents filed a brief in opposition to Indeck's exceptions; the Associ-

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decisions and the record in light of the exceptions and briefs⁷ and has decided to affirm the judges' rulings, findings,⁸ and conclusions only to the extent consistent herewith.

C. Factual Background

Indeck designs, owns, and operates power cogeneration ("cogen") facilities, producing both steam for sale to manufacturers and electricity for sale to public utilities. Most of its work force consists of engineers. It does not employ workers in the building and construction trades. In the early 1990s, Indeck was planning to build cogens in Corinth, Olean, Yonkers, and Kirkwood, New York. The Corinth facility would provide steam power to a nearby International Paper Plant and electricity, transmitted through Niagara Mohawk Power lines, to Consolidated Edison.

In September 1991, the Southwestern New York Building and Construction Trades Council (which is not one of the Respondents here) filed an objection to Indeck's environmental impact statement for the Olean project. In an October 2, 1991 meeting in Olean attended by Indeck President Russell Lindsay, Trades Council Attorney Michael Reilly, and local Trades Council representatives, the union representatives told Lindsay that they had plenty of people available, that those people were out of work, and that they would stop every Indeck project in New York unless it went union. Lindsay told them he had no objection to using a union contractor as long as it was competitive.

In an October 11, 1991 letter, Lindsay told Reilly that Indeck was committed to doing the Olean project with a union contractor who would use union labor in the building and construction trades. In return for these assurances, the Unions agreed to withdraw their environmental objections to the project and to support the project in letters to the New York State Department of Environmental Conservation (DEC). Reilly subsequently

wrote to the DEC, withdrawing the Trades Council's objections to the Olean project and expressing support for it.

Similar discussions took place concerning the planned Corinth cogen construction. Respondent Trades Council President (also Carpenters Local 229 Business Agent) Phil Allen testified that around November 1991 he noticed that environmental impact hearings were scheduled for Indeck's Corinth cogen project. He then called Indeck President Lindsay and told him that in several earlier conversations Lindsay had not given Allen any indication whether or not Indeck wanted to "work with" the Respondents. Allen asked Lindsay, "What side of the table do you want us to sit on?" Lindsay replied that he definitely wanted the Respondents on Indeck's side of the table.

In December 1991, Paul Fingland, business representative of Plumbers & Steamfitters Local 267 and also an official of the New York State Pipe Trades Association (neither of which organizations are respondents in this case⁹), told Lindsay that the Respondents had trained people available to work on Indeck's proposed projects, the Respondents would like to become involved in the projects, and the Respondents would try to do anything they could to help Indeck. Fingland told Lindsay that the Respondents had reservations about the quality of the employees and the safety problems of some of the non-union contractors that were building plants in the area. Lindsay "indicated" to Fingland that it was Indeck's intention that the projected New York cogens would be "built union" or they would not be built at all. Lindsay asked for Fingland's help in "pushing the projects along in local government." A December 13, 1991, letter from Lindsay to Fingland repeated Indeck's commitment to use union labor on the cogen projects.

On January 15, 1992, union attorney Reilly sent Lindsay a copy of a proposed PLA for construction of Indeck's Olean cogen by Stone & Webster Engineering Company. By this time, however, Indeck had selected Serrine as the successful bidder to construct the Olean cogen. On the same day, Lindsay faxed this draft PLA to

ated General Contractors of America, Inc. (AGC) and the Building and Construction Trades Department of the AFL-CIO each filed briefs as amicus curiae; and Indeck filed briefs in reply to the briefs filed by the Respondents and the Building and Construction Trades Department.

⁷ Indeck has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

⁸ Indeck has excepted to some of the judges' credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁹ Fingland testified that in his dealings with Indeck in regard to the Corinth project, he was "speaking on behalf of" the New York State Pipe Trades Association, and he was "working with," but not speaking on behalf of, the Respondents. Nevertheless, he also testified that Respondent Glens Falls Building and Construction Trades Council Vice President James Bulman asked him to contact Indeck, and that the Respondents were aware that he was in contact with Indeck (Tr. 899-901). Fingland subsequently testified that when he was negotiating the language of the February 20 letter agreement, discussed *infra*, with Indeck Vice President Gillick, he was not acting as a "direct representative" of the building trades, but they knew what he was doing and knew that he was working on this matter in conjunction with Bulman; "I was working with them, I guess is the best way to describe it."

Sirrine Vice President Jerry Calloway. In discussions with Calloway, Lindsay told him that “we wanted the projects to be done with union labor and this [draft PLA] was what the union was expecting [Sirrine] to sign, something similar.” Lindsay testified that “[t]his is what the building trades were looking for. That’s the only reason I sent it down though.”

In late January 1992, Lindsay attended, but did not actively participate in, a meeting in which Sirrine and the *Olean* Trades Council negotiated a PLA for the *Olean* cogen. The cogen was eventually built under the terms of this PLA. Also in January, Allen told Indeck Vice President John Gillick that the DEC was going to conduct a public hearing about the Corinth project on February 5, that the building trades were getting “nervous,” and that they wanted something in writing from Indeck stating that the Corinth project would be built with the Respondents’ members. Allen asked Gillick to issue a letter from Indeck “basically laying out [Indeck’s] intentions of how we as the owner were going to have our project at Corinth constructed.”

Gillick wrote back to Allen on January 30, stating in pertinent part that Indeck was committed to perform the construction on the Corinth project utilizing a contractor who would employ the Respondents’ members. Gillick testified that he wrote this letter to indicate Indeck’s commitment to build the project on a union basis, primarily in exchange for the Respondents’ agreement not to intervene to “try to kill the project” and instead to help Indeck in the remaining permitting and clearance procedures before various regulatory bodies, and secondarily in exchange for the Respondents’ help in supplying Indeck’s construction contractor with the labor needed for the project.¹⁰

On February 5, Gillick met with Fingland, Allen, and about 15-20 local union business agents at the Carpenters Union Hall in Glens Falls. Gillick described the Corinth project, assured the Respondents that a PLA would be worked out for the project, and asked for the Respondents’ public support, including at an upcoming public meeting. There was no collective bargaining or discussion of terms and conditions of employment at this meeting. That evening, at a DEC public hearing held in Corinth to consider Indeck’s application, David Kirkpatrick, a member of Respondent Operating Engineers Local 106,

spoke briefly in favor of Indeck’s application to build the Corinth cogen.¹¹

After this meeting, Fingland told Gillick that Indeck’s January 30 commitment letter was not “strong enough,” and he asked Gillick to give the Respondents a firmer commitment for a PLA. Fingland told Gillick that in return for a stronger commitment letter the Respondents would not try to stop the Corinth project but would instead support it in the local community and before the local regulatory and permitting agencies. During several ensuing conversations, Fingland and Gillick discussed revisions sought by Fingland to Indeck’s January 30 commitment letter. Internally, Gillick and Lindsay also discussed revisions.

On February 20, Gillick sent a revised letter agreement, which Fingland found to be an acceptable expression of Indeck’s commitment to use union labor on the Corinth project. Gillick wrote:

In our earlier correspondence, Indeck has committed to construct our project in Corinth utilizing members of the Glens Falls Construction and Building Trades Council.

To further insure our commitment and good faith intentions, Indeck will instruct its contractor to execute the National Construction Stabilization Agreement as the Project Agreement.

In issuing the contractor this direction, it is understood by all parties that it is the Contractor’s and Building and Construction Trades Council’s responsibility to mutually agree on any modifications to this agreement prior to its execution.

We trust this further defines Indeck’s intentions relating to the Building and Construction Trades labor involvement in the execution of our Project.

Gillick testified that in return for the January 30 letter and the February 20 letter agreement, he was assured by Allen and Fingland that the Unions would do all that they could to support the project and that they would not hamper or intervene in regulatory proceedings that were going on at the time in regard to Indeck’s efforts to obtain permits to build the prospective New York State cogens. Gillick also testified that an advantage of a union contractor over a merit shop contractor was that a union contractor could provide a good flow of skilled craftsmen to do the project. He further testified, however,

¹⁰ Similarly, Lindsay testified that the steady supply of skilled labor provided by the Unions under the *Olean* PLA was a benefit for Sirrine, rather than Indeck, and that the principal benefit of the *Olean* PLA for Indeck was that the unions supported the project in local regulatory proceedings.

¹¹ Kirkpatrick’s statement before the DEC, in its entirety, was as follows:

We need a project like this here in Corinth to increase the tax base and employ people both of [sic] long term full-time jobs and a big construction project. So I say let’s go for it. Thank you.

that he had “very little discussion with Fingland about supply of manpower.”

Fingland testified that the language in the letter agreement “seemed to be the best agreement that we were able to get. I thought this would be acceptable to the building trades.” He had told Gillick that if a PLA was not reached on, inter alia, the Corinth project, “we would do everything legally within our power to try to get Indeck’s attention and bring them to the table.” Fingland testified that after Indeck sent the letter agreement, he wrote a letter to the local town board, advising it that the Respondents had reached an agreement with Indeck and that the Respondents were “not planning on moving forward on any comments to the EPC [Environmental Planning Commission] hearing.”

Indeck formally contracted with SIRRINE to build the Corinth cogen on June 8. On July 1, officials for the Respondents and SIRRINE negotiated a PLA for Corinth subcontractors that was modeled on SIRRINE’s existing PLA at Olean rather than the National Construction Stabilization Agreement mentioned in Indeck’s February 20 letter. This was the only meeting between SIRRINE and the Respondents about the Corinth PLA. No one from Indeck attended.

In September, SIRRINE and the Respondents concluded the alleged 8(e) SIRRINE - Trades Council agreement (which is not the PLA itself). This agreement identifies SIRRINE as the “Project Manager” for construction of the Corinth cogen. The agreement states in pertinent part:

SIRRINE agrees that any contractor or subcontractor which is employed on the Project shall be a signatory to and abide by all of the terms contained in the Project Labor Agreement for the Indeck - Corinth Limited Partnership Cogen Project, Corinth, New York (hereinafter “The Project Agreement”). A copy of the Project Agreement negotiated by SIRRINE and the [Respondent Trades Council] is attached. SIRRINE will not be a signatory to the Project Agreement itself.

The Corinth PLA, attached to the SIRRINE - Trades Council agreement, states in pertinent part as follows:

Article XIX, SUBCONTRACTING

Section 1. The Employer agrees that neither it nor any of its subcontractors will subcontract any work to be done on the project except to a person, firm, or corporation party to this Agreement. Any contractor or subcontractor working on a project covered by this Agreement shall, as a condition to working on said project, become signatory to and perform all work under the terms of this Agreement.

The PLA was signed by all of the Respondents. Neither SIRRINE nor Indeck were signatories. It was understood that SIRRINE and Indeck would not be employing any workers in the construction and building trades on the Corinth jobsite.

Before any construction work was done on the project, a dispute developed between Indeck and SIRRINE over the size of a contractually-generated escalation in the price that Indeck would pay SIRRINE for a delayed start. In April 1993, Indeck declared SIRRINE in default and canceled its contract for SIRRINE to build the Corinth cogen. In July 1993, Indeck selected CNF Constructors, Inc. (CNF) to replace SIRRINE. Unlike with SIRRINE, Indeck did not require CNF to agree that CNF’s subcontractors would be signatory to a PLA with the Respondents. CNF, itself a merit shop contractor, completed the Corinth cogen construction with a combination of union and nonunion labor.

The Respondents filed a breach-of-agreement lawsuit against Indeck in state court in November 1993, seeking \$12 million in damages. As an affirmative defense to the lawsuit, Indeck alleged that the February 1992 letter agreement was unenforceable and void under Section 8(e) of the Act. Consistent with that defense, Indeck subsequently filed its 8(e) charge in the instant case. The lawsuit was removed to the United States District Court, Northern District of New York, where it was stayed pending resolution of this case.

D. Analysis

Preliminarily, we affirm Judge Morton’s finding, for the reasons set forth in the “Analysis” section of his decision in *Indeck I*, 325 NLRB at 1095, that the complaint is not time-barred under Section 10(b) of the Act, and that the Respondents reaffirmed and reentered into their February 20, 1992 letter agreement with Indeck by filing their state court breach-of-contract lawsuit. We also affirm Judge Morton’s finding that Indeck’s promise to the Respondents in the February 20, 1992 letter agreement, i.e., that Indeck’s contractor on the project in question would deal only with subcontractors who had or would enter into a collective-bargaining agreement with the Respondents, is within the scope of the prohibitions of Section 8(e) because it constitutes an implicit agreement by Indeck not to do business with another person—specifically, any contractor who would subcontract to nonunion subcontractors. *Id.*

We now turn to the central issue in this case, i.e., whether the otherwise prohibited letter agreement and the SIRRINE - Trades Council agreement were protected under the construction industry proviso of 8(e). The Respondents, who bear the affirmative defense burden of proving proviso coverage, contend that the agreements and

the lawsuit to enforce them were protected by the proviso because (1) Indeck is an employer in the construction industry within the scope of the proviso, and (2) the agreements were negotiated within a collective-bargaining context *or* (3) the agreements were specifically negotiated and executed to resolve the problems involved in permitting union and nonunion employees to work side by side at a common construction site.

The first prong of the Respondents' defense relates to the express statutory requirement limiting proviso coverage to agreements "between a labor organization and an employer in the construction industry." Depending on the circumstances, an employer can be in the construction industry for a particular construction project even if it is not primarily engaged in the construction business. See, e.g., *Carpenters Local 743 (Longs Drug)*, 278 NLRB 440 (1986). Both judges in this case have concluded that Indeck was a construction industry employer within the meaning of the proviso for the Corinth cogen project. However, we find no need to pass on this issue and place no reliance on the judges' decisions inasmuch as we find that the Respondents have failed to prove either the second or third prongs of their defense, which relate to the nonstatutory test for proviso coverage set forth by the Supreme Court in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975).

Although *Connell* was an antitrust case brought by nonunion contractors alleging a concerted refusal to deal with them, it was necessary for the Court to decide whether a union signatory subcontracting agreement between a general construction contractor and a "stranger union" that did not represent the signatory contractor's employees was lawful under the 8(e) proviso and therefore entitled to the nonstatutory labor exemption from antitrust law. The Court found that the proviso did not apply. It stated that the proviso "extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well." 421 U.S. at 633.

Neither Indeck's February 20 letter agreement with the Respondents nor the Respondents' subsequent agreement with Sirrinc arose in the context of a present or prehire collective-bargaining relationship. While the Respondents claim an intent to represent Indeck's employees, the record clearly shows that at all relevant times the parties involved understood that Indeck had no employees in the building and construction trades and that Indeck and Sirrinc would not employ anyone in those trades on the Corinth cogen jobsite. Nothing in either agreement purported to relate to terms and conditions of

employment for any Indeck or Sirrinc employees. The sole purpose of those agreements was to bind Indeck to select a contractor who, in turn, would subcontract work only to employers who signed the Corinth PLA. Indeck and Sirrinc were not themselves signatory to the PLA. Accordingly, the Respondents have failed to prove that the challenged agreements and the lawsuit to enforce them are entitled to protection under the 8(e) proviso based on the collective-bargaining relationship prong of the *Connell* test.

In the above-quoted language from *Connell*, the Court suggested, 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.¹² The Board has yet to determine whether an alternative basis for proviso coverage exists under this *Connell* common-situs dictum,¹³ and we find no need to do so here. The Respondents have failed to prove that the Indeck letter agreement and the resultant agreement with Sirrinc were executed for the purpose of avoiding tensions that might arise if union and nonunion workers of different employers were to work side by side on the Corinth cogen site. Nor do they establish any other valid purpose cognizable under the proviso. On the contrary, the record shows that Indeck's purpose was to remove the threat of union opposition to Indeck's efforts to secure regulatory approval of its cogen construction plans, and secondarily, to provide a steady labor source for jobsite subcontractors. The Respondents, for their part, wanted a labor monopoly at a major construction site to provide employment for their out-of-work members.

Based on the foregoing, we conclude that the February 20, 1992 letter agreement between Indeck and the Respondents, the July - September 1992 Sirrinc - Trades Council agreement, and the Respondent's lawsuit seek-

¹² See generally *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951).

¹³ See *Iron Workers Pacific Northwest Council (Hoffman Construction)*, 292 NLRB 562, 580 (1989), *enfd.* 913 F.2d 1470 (9th Cir. 1990), and *Colorado Building & Construction Trades (Utilities Services Engineering)*, 239 NLRB 253, 256 fn. 11 (1978). In both cases, as in *Connell*, the subcontracting clauses at issue were negotiated outside the context of a collective-bargaining relationship, allowed for the possibility of union and nonunion employees working side by side at a jobsite, and were not aimed at avoiding problems raised by common-situs relationships. On the other hand, a secondary union-signatory clause sought or negotiated in the context of a collective-bargaining relationship is protected by the 8(e) proviso even when not limited in application to particular jobsites at which both union and nonunion employees are employed. *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 666 (1982).

ing to compel Indeck's compliance with these agreements were not protected by the construction industry proviso. Consequently, the Respondents violated Section 8(e) as alleged.

CONCLUSIONS OF LAW

1. Each of the Respondents is a labor organization within the meaning of Section 2(5) of the Act.

2. Indeck is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The February 20, 1992 letter agreement between Indeck and the Respondents is within the scope of agreements prohibited by Section 8(e) of the Act, and is not exempt from the prohibition of Section 8(e) of the Act under the first proviso to that section.

4. The Respondents have violated Section 8(e) of the Act by entering into the February 20, 1992 letter agreement and the July - September 1992 SIRRINE - Trades Council agreement pursuant to the February 20, 1992 letter agreement, and by reaffirming the provisions of those agreements and applying them to Indeck by filing a civil action against Indeck in New York State Supreme Court on or about November 9, 1993 (alleging that Indeck breached the February 20, 1992 letter agreement and caused a breach of the July - September 1992 SIRRINE - Trades Council agreement), thus entering into, maintaining, and giving effect to an agreement in which Indeck agreed not to handle or otherwise deal in the products of another employer, or agreed not to do business with another person.

REMEDY

Having found that the Respondents have engaged in unfair labor practices, we shall order that they cease and desist therefrom and that they take certain affirmative action designed to effectuate the policies of the Act.¹⁴

¹⁴ Indeck has requested that the Respondents be ordered not only to withdraw their unlawful civil court suit, but also to reimburse Indeck for its reasonable expenses and legal fees, with interest, incurred in defending against the lawsuit. We shall not order such an extraordinary reimbursement remedy in this case.

Ordering withdrawal of the lawsuit is consistent with cases in which the Board has found the filing of a lawsuit to be a violation of Sec. 8(e). *Sheet Metal Workers Local 27 (AeroSonics)*, 321 NLRB 540 (1996); *Carpenters Local 745 (SC Pacific)*, 312 NLRB 903 (1993), *enfd.* 73 F.3d 370 (9th Cir. 1995); *Teamsters Local 957 (Northwood Stone)*, 298 NLRB 395 (1990), *enfd.* 934 F.2d 732 (6th Cir. 1991). But reimbursement of litigation expenses related to the 8(e) lawsuits was not ordered in those cases, and Indeck has not cited a case in which the Board has ordered reimbursement of litigation expenses incurred in defending against an 8(e) lawsuit. See generally *Shepard v. NLRB*, 459 U.S. 344 (1983) (Board not required to provide make-whole remedy for violation of Sec. 8(e); Board's determination that reimbursement orders are generally overbroad and inappropriate in context of 8(e) violations is within its authority to decide that a reimbursement order would not effectuate the policies of the Act).

ORDER

The National Labor Relations Board orders that the Respondents, Glens Falls Building and Construction Trades Council; International Union of Bricklayers and Allied Craftsmen, Local Union No. 6; International Brotherhood of Carpenters and Joiners of North America, Local Union No. 229; International Association of Heat and Frost Insulators and Asbestos Workers, Local Union No. 40; International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 12; Laborers International Union of North America, Local Union No. 157; International Brotherhood of Electrical Workers, Local Union No. 438; International Union of Operating Engineers, Local Union No. 106; International Brotherhood of Painters, Allied Trades and Glaziers, Local Union No. 466; Sheet Metal Workers International Association, Local Union No. 83; and United Association of Journeymen and Apprentices of the Plumbing Industry and Pipefitting Industry of the United States and Canada, Local Union No. 773, their officers, agents, and representatives, shall

1. Cease and desist from entering into the February 20, 1992 letter agreement and the July - September 1992 SIRRINE - Trades Council agreement pursuant to the February 20, 1992 letter agreement, and from reaffirming the provisions of those agreements and applying them to Indeck by filing a civil action against Indeck in New York State Supreme Court on or about November 9, 1993 (alleging that Indeck breached the February 20, 1992 letter agreement and caused a breach of the July - September 1992 SIRRINE - Trades Council agreement), and thus from entering into, maintaining, and giving effect to an agreement in which Indeck agreed not to handle or otherwise deal in the products of another employer, or agreed not to do business with another person.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Seek dismissal of their action in the United States District Court, Northern District of New York, Civil Action No. 93-CV-1534 (TJM/DJH), seeking an award of damages for Indeck's alleged breach or causation of breach of the above-described agreements.

(b) Within 14 days after service by the Region, post at their respective offices and meeting halls copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondents' author-

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with employers on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT enter into, reaffirm, maintain, or give effect to our February 20, 1992 letter agreement with Indeck Energy Services of Corinth, Inc.; Indeck Corinth Limited Partnership; and Indeck Energy Services, Inc. or our July–September 1992 agreement with CRS Sirrinc Engineers, Inc., and WE WILL NOT reaffirm the provisions of those agreements and apply them to Indeck by maintaining our civil court action against Indeck.

WE WILL seek dismissal of our civil action in the United States District Court, Northern District of New York, Civil Action No. 93-CV-1534 (TJM/DJH), seeking an award of damages for Indeck's alleged breach or causation of breach of the above-described agreements.

GLENS FALLS BUILDING AND CONSTRUCTION TRADES COUNCIL; INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL UNION NO. 6; INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF NORTH AMERICA, LOCAL UNION NO. 229; INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL UNION NO. 40; INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND

ORNAMENTAL IRONWORKERS, LOCAL UNION NO. 12; LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 157; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 438; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 106; INTERNATIONAL BROTHERHOOD OF PAINTERS, ALLIED TRADES AND GLAZIERS, LOCAL UNION NO. 466; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 83; AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING INDUSTRY AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 773

Alfred M. Norek, Esq., for the General Counsel.
Francis J. Martorana, Esq. and *Gerard M. Waites, Esq.* (*O'Donoghue & O'Donoghue*), of Washington, D.C., for the Respondents.

Richard J. Reibstein, Esq. (*Wolf, Block, Schorr and Solis-Cohen LLP*) of New York, New York, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was reopened pursuant to a Remand Order issued by the Board on July 16, 1998 at 325 NLRB 1084. The reopened hearing took place in New York, NY on six days from December 14, 1998 to February 9, 1999. The General Counsel, the Charging Party and the Respondents filed briefs on June 18, 1999. This Supplemental Decision is based on the entire record made before me pursuant to the remand, including my observation of the witnesses who testified before me, and the briefs. In addition, I have examined the exhibits introduced in the prior hearing before Administrative Law Judge James F. Morton and I have read the testimony of some of the witnesses who appeared before Judge Morton where the testimony of those witnesses was relevant to the issue dealt with by the Board's Remand Order.¹

The Board's Remand Order directed the taking of evidence from expert witnesses concerning what it defined as a "central issue" in the case: "whether Indeck is an employer in the con-

¹ The record is hereby corrected so that at numerous points the name "Indeck" should replace the work "index": at page 1862, line 4 the record should read "that Indeck did some procurement on the job; correct?"; at page 2034, line 19 should read "this is common"; on pages 2743 through 2745 where Mr. Reibstein's name is given, the record should show that Mr. Waites was speaking: at page 2769, line 2 should read "activities that are integral"; at page 2791 line 5 and thereafter, whenever the work "Carthage" appears it should instead be "Corinth": at page 2934, line 2, the record should indicate that Counsel for the Respondent objected to Mr. Reibstein's question: at page 2936, lines 15 and 18, the record should show that Mr. Reibstein was speaking.

struction industry within the meaning of the proviso to Section 8(e).² In writing this Supplemental Decision I shall deal only with the issue placed before me by the Board's Order. I shall not repeat the myriad factual findings made by Judge Morton except where necessary to explain my own findings. I shall assume that any reader of this Supplemental Decision has already read Judge Morton's Decision.

In addition to directing me to hear the testimony of expert witnesses, the Board also directed that I hear the testimony of Jerry Calloway and the continued testimony of Victor Ranaletta. Their testimony is relevant to the issue whether Indeck is an employer in the construction industry.

I. THE PROVISIO AND ITS LEGISLATIVE HISTORY

The relevant portion of Section 8(e) provides:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

The legislative history of Section 8(e) is based primarily on the statements of two Senators who favored passage of the 8(e) proviso. Senator Morse said:

The case of the building and construction industry represented probably the most flagrant injustice, where a general contractor is, in effect, entirely in control of the kind of labor relations taking place on a jobsite which he runs. He lets subcontracts based upon price, responsibility, and the ability to handle labor relations.

He lets those contracts, very well knowing the kind of labor relations which may exist within any of the subcontractor companies.... He is not innocent of any unfair labor policies on the part of a subcontractor. *Vol. II, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, p. 1425(1).

Senator Kennedy said on page 1433(3):

Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a

² In oral argument to Judge Morton urging the necessity of taking expert testimony, Counsel for the Charging Party had cited *Animated Displays Co.*, 137 NLRB (1962), where the Trial Examiner, ruling on an issue relating to Section 8(f) said at p. 1021, "Although the legislative history is replete with reference to the 'building and construction industry,' it is virtually barren of definition.... This would tend to indicate that Congress had reference to that term in the traditional sense in which it is customarily used in common parlance as well as in the parlance of the industry itself."

nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them.

The legislative history does not contain any discussion of the definition of "an employer in the construction industry."

The comments of Senators Morse and Kennedy indicate that Congress wished to deal with a situation where an employer promised to use union labor on a construction site but then reneged on its promise and had the work done by another contractor using non-union labor. Senator Morse's comment characterized this as a "flagrant injustice" because the first contractor was "entirely in control" of labor relations on the jobsite and had given the work to the second contractor with full awareness of its labor relations. The proviso to Section 8(e) was intended to make the promise to use union labor enforceable. Clearly, the element of control of labor relations was key in the legislative scheme: an employer in the construction industry that controlled labor relations on the jobsite by its ability to select contractors and subcontractors could be held to its promise to employ union labor.³

It seems fair to conclude that Congress used the term "employer in the construction industry" to signify an employer with control over the labor relations of construction site employees.

II. CASE PRECEDENTS

In its remand decision, the Board summarized the state of the law defining what is "an employer in the construction industry" within the meaning of the proviso to Section 8(e) by citing and quoting from *Carpenters Local 743 (Longs Drug)*, 278 NLRB 440, 442 (1986). The Board stated that under its existing precedents resolution of this issue "is dependent on the degree of control over the construction-site labor relations" the employer elected to retain and also "on the circumstances of each situation, rather than on the principal business of the employer." The Board's remand decision observed that "there are only a very limited number of relevant Board decisions and none of them involve the construction of a cogeneration plant or a project of similar magnitude."

The relevant Board decisions begin with *Columbus Bldg. & Construction Trades Council (Kroger Co.)*, 149 NLRB 1224 (1964). Kroger, the operator of a chain of retail food stores and itself an employer of union members, arranged for an investor to build a shopping center which Kroger would lease after it was completed. The investor hired a non-union contractor to construct the shopping center, and the Respondent unions engaged in various types of conduct designed to require Kroger to see to it that the investor used a union general contractor. The record showed that after the non-union contractor completed construction of the shopping center, the Respondent unions continued their picketing and, after an injunction was obtained, Kroger used its own union employees and three union subcontractors to install equipment and fixtures at the store. There

³ There are other references to the Section 8(e) proviso in the legislative history, but they do not shed any light on the issue herein. See pages 943, 966 and 1383.

was no discussion by the Board or the Trial Examiner of the criteria necessary to meet the statutory definition of “an employer in the construction industry.” The Trial Examiner apparently assumed that Kroger was not in the construction industry, and the Board merely stated that Kroger was a prospective lessee and store operator and not an employer in the construction industry.

In *Los Angeles Bldg. Indust. (Church’s Fried Chicken)*, 183 NLRB 1032 (1970), the Board adopted the Trial Examiner’s finding that Church’s Fried Chicken was engaged in the business of operating retail stores and “engaged in the construction, through the use of various specialty contractors and suppliers,” of stores for its own use. There was no dispute that Church’s acted as its own general contractor. A Church’s employee was the construction superintendent who hired the subcontractors, oversaw their performance and approved their bills. The Trial Examiner rejected the General Counsel’s contention that Church’s was not an employer in the construction industry because its primary business was to sell food to its customers and because it did not perform construction work for others. The Trial Examiner analyzed the “meager” legislative history and concluded that Congress was concerned with agreements relating to the subcontracting of work on the construction site. Employers in the construction industry were exempted from the prohibition of Section 8(e) because of the control that contractors have over their subcontractors’ labor relations. Church’s was found to be an employer in the construction industry because it was able to control the labor relations of its subcontractors.

In *Carpenters Local 743 (Longs Drug)*, supra, the Board affirmed without comment the finding of the Administrative Law Judge that the employer was not in the construction industry within the meaning of the proviso to Section 8(e). In *Longs Drug*, the employer operated numerous drug stores of which it was the owner or lessee. The employer engaged a non-union general contractor to construct a new store; it did not select any of the subcontractors used on the project. The employer’s own union employees were used to perform onsite installation of fixtures during the last two weeks of the construction period. The employer engaged an architect to design the project and it used its own project manager and project coordinator to oversee the project. During the eight months it took to complete the work, the employer’s project manager and project coordinator visited the site for a total of 28 days, a frequency which the ALJ termed “sporadic”. The actual day-to-day supervision of the construction was performed by an employee of the general contractor. The ALJ stated that the degree of control over the construction-site labor relations an employer elected to retain determines whether the employer is in the construction industry. If the employer acted as its own general contractor it would retain “absolute control” over construction-site labor relations. If the employer retained a general contractor but nonetheless regularly made “decisions, including the selection of subcontractors, normally within the scope of a general contractor’s duties and authority” the employer would be “tantamount” to a general contractor. Based on the limited scope of the employer’s actual construction work with its own employees and its lack of involvement in labor relations until the final

two weeks of the project, the ALJ found that Longs was not an employer in the construction industry.

The Rowley-Schlimgen company sells office supplies, furniture and draperies and designs office interiors. Included in its services is the sale and installation of contract floor covering at construction and other commercial sites. At the time relevant to the litigation discussed below, the company subcontracted the work of installing the flooring to a non-union contractor owned and operated by a person whom it employed part-time as a scheduler of floor covering installation. The company was a signatory to the Association of General Contractors Commercial Carpenters Agreement. The District Council of Carpenters sought to enforce that part of the agreement mandating union-signatory subcontracting by filing grievances and a court action which resulted in a decision by the 7th Circuit.

In *District Council of Carpenters v. Rowley-Schlimgen*, 2 F.3d 765 (7th Cir. 1993), the court reviewed Board precedents and what it termed the “vague and inconclusive” legislative history. Rejecting the employer’s argument that the proviso is applicable only to employers who act as their own general contractors the court held that

[T]he availability of Sec. 158(e)’s exemption in favor of the construction industry must be driven by its purposes: the desire to reduce construction site tensions and the development of a uniform and ready supply of skilled labor. Accordingly, we conclude that whenever an employer is able to determine the nature of the workers who will be employed at a construction site through its selection of a subcontractor, the employer is, to that extent, an “employer in the construction industry” within the meaning of [the] proviso.⁴ 2 F.3d at 769

After the court’s decision was rendered, the Board decided the unfair labor practice case in *District Council of Carpenters (Rowley-Schlimgen)*, 318 NLRB 714 (1995). Reaffirming its earlier holdings that whether an employer is in the construction industry is dependent on the circumstances of each situation, the Board held that as long as an employer performs more than a *de minimis* amount of construction site work it may be covered by the 8(e) proviso. The employer will be covered if it exercises control over labor relations at the construction site. The Board held that although the company was neither a general contractor nor a direct employer of the construction site employees, it was nevertheless an employer in the construction industry because it controlled the work force through its relationship with the contractor who installed the flooring. Moreover, the company was aware of the labor relations of the contractor because its bids and prices were based in part on the contractor’s labor costs.⁵

⁴ The case was remanded to the District Court for a determination whether the employer was in the construction industry under the standard announced by the Circuit Court.

⁵ I shall not discuss *Carpenters Chicago Council (Polk Bros.)*, 275 NLRB 294 (1985). The Board has disavowed parts of the decision and the Seventh Circuit has characterized the decision as “an aberration.” *District Council of Carpenters v. Rowley-Schlimgen*, supra at 768.

III. INDECK LITERATURE

The Indeck Energy Services, Inc. brochure is directed at its customers: "electric utilities, industrial energy users and communities they serve."⁶ The first page of text in the brochure introduces Indeck as a "developer, owner and operator" of cogeneration plants offering "full scope project development and execution." This page lists the advantages to electric utilities of choosing Indeck: Indeck provides low cost power "and undertakes the construction and operation risks."

The brochure describes Indeck's "Development and Engineering" expertise as being due to "a comprehensive engineering staff at the corporate headquarters covering mechanical, electrical, environmental, chemical and civil/structural disciplines. In fact, 75% of Indeck's professional staff is made up of engineers. . . ."

A section of the brochure entitled "Construction Management" states that "[T]he detailed engineering and construction of Indeck's plants is performed by experienced design/build contractors under the close scrutiny of Indeck's construction management staff." Indeck "prepares the specifications and selects major equipment. . . ." Indeck "assigns site management and headquarters staff to the project throughout its construction to provide overall management." The brochure lauds "Indeck's expertise in construction and construction management" and cites the fact that Indeck's first cogen projects "were also constructed directly by Indeck as the general contractor."

An insert to the brochure describes the Corinth cogen which was apparently in the early stages of construction at the time of printing. The Corinth cogen "will be the first of several projects following Indeck's standard design for gas turbine combined cycle plants in the 125 MW class." The insert states that "Indeck will be constructing a 6.5 mile natural gas line to provide fuel to the facility" and a "3.5 mile transmission line will also be constructed by Indeck for interconnection to the local electric utility. . . ."

IV. SELECTED CONTRACTS

The witnesses for the Charging Party and the Respondents agreed that there were three major components of the Corinth cogen: a power plant, a gas transmission pipeline and an electrical transmission line. Some of the witnesses characterized the modifications to the two Niagara Mohawk substations as another major component of the cogen, but some witnesses regarded these modifications as a lesser part of the project. As described by Judge Morton in his Decision, Indeck entered into numerous contracts for all the major and minor parts of the construction of the cogen. My discussion of the construction contracts is designed only to supplement Judge Morton's detailed description of these contracts.

A. Gas Facilities Interconnection Agreement

The Gas Facilities Interconnection Agreement between Indeck-Corinth Limited Partnership and Niagara Mohawk Power Corporation dated January 27, 1993 obligated Indeck to construct a gas pipeline so that Niagara Mohawk could transport gas to the cogen pursuant to the gas transportation agreement of

⁶ The record does not contain a date for the printing of the brochure.

the same date. Niagara Mohawk was to "own, operate, repair and maintain" the pipeline and related facilities while Indeck was responsible for the "design and construction" subject to Niagara Mohawk's approval. Indeck had to obtain Niagara Mohawk's approval for the selection of consultants and contractors, for the periodic review of design milestones and for the acceptance of calculations and drawings. Indeck was obligated to acquire the rights of way for the pipeline and to conduct soil studies for the presence of hazardous substances on the rights of way. Once Indeck had obtained the required regulatory approvals, the agreement required that the pipeline "shall be constructed . . . by Indeck-Corinth or by a third-party contractor" selected by Indeck and approved by Niagara Mohawk. The agreement provided milestone payments from Niagara Mohawk to Indeck according to a detailed construction schedule. Indeck was responsible for costs it incurred in excess of the payments provided in the agreement. Indeck was responsible for completion of construction by the end of 1993: in the event it was unable to achieve completion Niagara Mohawk had the right to "remove Indeck-Corinth as construction contractor. . . ." If Indeck were removed, and Niagara Mohawk completed the pipeline itself, then Indeck would be responsible for costs and expenses to the extent that they were in excess of Niagara Mohawk's expected costs "if Indeck-Corinth had not been removed as construction contractor." The Interconnection Agreement provided that Indeck had to pay financial penalties to Niagara Mohawk if it failed to achieve completion of construction within 6 months from the start. Niagara Mohawk could terminate the Agreement if construction was not complete by July 5, 1995. Ranaletta testified that Niagara Mohawk paid Indeck a lump sum for the construction of the pipeline. The amount of the payment was redacted out of the Interconnection Agreement as admitted into evidence. Indeck and not Otis Eastern, the contractor which supplied most of the labor to build the pipeline, purchased the over \$400,000 worth of pipe required to construct the pipeline.

After Indeck selected Otis Eastern to perform construction work on the pipeline, Indeck conducted a preconstruction meeting with representatives of Otis Eastern and Niagara Mohawk on November 12, 1993. At the meeting, David Rubado was designated as the person to receive emergency calls relating to construction of the gas pipeline. Rubado would respond to an emergency call by visiting the site of the complaint. He would also relay information about the calls to Niagara Mohawk and Otis Eastern. Ranaletta testified that Indeck performed the construction management for the pipeline.⁷

B. Electric Interconnection Facility Agreement

The Electric Interconnection Facility Agreement dated June 12, 1992 provided for Niagara Mohawk to transmit electricity produced by Indeck to Con Ed, the purchaser of the electric power. In order for Niagara Mohawk to fulfill this function, Indeck was obligated to "design and construct" an interconnection facility, to be owned, operated and maintained by Niagara

⁷ As described in Judge Morton's Decision, Indeck hired a total of six specialty contractors to perform the various tasks required to build the gas pipeline.

Mohawk. Indeck was required to post a deposit which Niagara Mohawk would retain if Indeck failed “to achieve commencement of construction” by a certain date or failed “to meet the commercial operations date” of the plant. The interconnection facility consisted of a transmission line from the cogen to the Niagara Mohawk Spier Falls Substation, a new breaker at the Spier Falls Substation and modifications to the Mohican substation. The final design of the interconnection facility was subject to Niagara Mohawk’s approval. Indeck was obligated to acquire the rights of way for the transmission line, to conduct soil testing for hazardous materials, and to obtain necessary permits. After completion of the transmission line, Indeck was to convey it to Niagara Mohawk. Niagara Mohawk was to design and construct the modification at its Spier Falls substation at Indeck’s expense. Indeck purchased and arranged for the delivery of some of the major equipment required for this project such as the transmission structures and the relay panels and breakers for the substation modifications.⁸ Indeck attended project meetings with Niagara Mohawk during the construction of the transmission line and the work on the Spier Falls and Mohican substations and it made commitments that were to be executed by Seaward, the contractor supplying the labor for the project. Ranaletta testified that Indeck performed the construction management for the transmission line.

V. OWNERSHIP OF THE COGEN

Indeck was required to file certain documents with the Federal Energy Regulatory Commission in order to maintain its status as a qualifying cogeneration facility under PURPA. The application for recertification filed June 7, 1994 restated and expanded upon information provided in previous filings with FERC. The application set forth the following facts concerning the building of the Corinth cogen: In the 1980’s, International Paper had intended to build a cogen to serve the thermal energy needs of its Corinth plant. Eventually, IP decided not to build the cogen and it reached an understanding whereby Indeck would “construct, own and operate” the cogen. Indeck’s application of 1994 stated that “The Town of Corinth Industrial Development Agency (“IDA”) holds legal title to the Facility, pursuant to a financing transaction in which Indeck sold the Facility to the IDA. The IDA has issued bonds to the construction lenders to the Facility evidencing its obligation to repay the construction loans. . . .” Indeck was committed to repurchase the cogen through fixed periodic installment payments to the IDA. Ranaletta testified that the financial closing for the cogen took place on November 29, 1993. On that date the lender, GE Capital, provided funds to complete the cogen and reimbursed Indeck for money already paid to CNF and other contractors. It would seem that the IDA would have taken title to the cogen on the same date as the financial closing.

VI. INDECK EXERCISE OF CONTROL OVER LABOR RELATIONS

As discussed in Judge Morton’s Decision, Indeck wished to build four cogens in New York State and it entered into planning and preliminary execution for all four of the cogen projects at the same time. As will be shown below, CRS Serrine

(hereafter CRSS), was bidding for work on the Olean and Corinth projects as a lump sum package and it also bid on the Kirkwood and Corinth projects as a lump sum package.

As set forth in detail in Judge Morton’s Decision, Indeck’s president Russell Lindsay conducted two meetings with representatives of the Olean building trades unions during which Lindsay agreed to build the Olean cogen with union labor and the unions agreed to support the cogen before governmental agencies. On October 3, 1991 Michael E. Reilly, Esq., the attorney for the Trades Council, sent Lindsay a sample project labor agreement and a list of wages and benefits for trades relating to the Olean cogen. A few days later, Reilly sent Lindsay a copy of the current collective bargaining agreement for each of the trades relevant to the Olean cogen project. Lindsay testified that he made a business decision to use union contractors on the Olean project. It was understood that the union contractor had to be competitive and the union representatives said that they would work with the contractor to make sure the project was competitive. Contrary to its usual practice, Indeck issued requests for proposals for the Olean project requiring the use of union labor and it sent sample project labor agreements to the various contractors who bid on the project. Lindsay also testified that he conducted a third meeting with the Olean building trades on January 29, 1992 which was attended by Murray Lane of CRS Serrine. Lane and the building trades went over a labor agreement section by section “and when they were all done they had an agreement.”⁹ By that time, Indeck had chosen CRSS to construct the Olean cogen. Lindsay said, “there was no question” that CRSS knew that the job had to be union in order for it to be awarded to CRSS. Lindsay attended the meeting to make sure that the union people and Lane “got along and to show my support to the Union.” Lindsay did not want to “lose the support of the unions through some slipup of Serrine or some misunderstanding between Serrine” and the unions.

Lindsay testified that Indeck had awarded a contract to CRSS for Olean, Kirkwood and Corinth on “the same basis, to use union labor.” Lindsay had instructed CRSS to build all three projects with union labor because “[w]e did not want the unions opposing the projects and we wanted their support.”

As set forth in Judge Morton’s Decision, Lindsay spoke by telephone with Paul Fingland, one of the Respondents’ business representatives. Lindsay told Fingland that all the Indeck projects in New York would be built with union labor and he asked for Fingland’s support in obtaining governmental approval for the projects. Lindsay testified that he recalled speaking to Fingland about the Corinth plant but that he turned over responsibility for dealing with Fingland to John T. Gillick, the Indeck Vice President of Project Management & Construction. Lindsay stated that Gillick reported on the Corinth project mainly to Forsythe.

By letter of January 30, 1992 Gillick wrote to Philip Allen, President of the Glen Falls Building & Construction Trades Council:

As we discussed this morning, Indeck is committed to perform the Construction on our Corinth Project utilizing a con-

⁸ The transmission structures cost \$628,204.

⁹ Lindsay also had a copy of the proposed agreement at this meeting.

tractor who will employ members of the Glen Falls Bldg. and Construction Trades Council.

At this time, we are not able to name our chosen contractor, however, you have our assurance that an Agreement between the parties will be reached.

I look forward to meeting with you and members of the council next week to discuss our project and how we can assist each other.

On February 5, 1992, the New York State Department of Environmental Conservation held a hearing on the Indeck proposal to build the Corinth cogen. A representative of the operating engineers spoke in favor of the project.

Lindsay testified that the building trades in Glen Falls were not satisfied with Gillick's January 30 letter. As a result, Lindsay and Gillick drafted another letter which was sent on February 20, 1992 to James Bulman, the vice president of the Glen Falls Building & Construction Trades Council:

In our earlier correspondence, Indeck has committed to construct our project in Corinth utilizing members of the Glen Falls Construction and Building Trades Council. To further insure our commitment and good faith intentions, Indeck will instruct it's (sic) contractor to execute the National Construction Stabilization Agreement as the Project Agreement.

In issuing the contractor this direction, it is understood by all parties that it is the Contractor's and Building and Construction Trades Council's responsibility, to mutually agree on any modifications to this agreement prior to its execution.

This letter constitutes the alleged unlawful agreement that is the substance of the instant proceeding.

As set forth by Judge Morton, CRSS and the Respondents negotiated a project labor agreement for the Corinth project in July 1992. The Charging Party's witness, CRSS project manager Eli Hine, testified that Lane negotiated with the Glen Falls unions on behalf of CRSS using the recently negotiated Olean Project Labor Agreement as a model. Hine testified that he knew that Lindsay had instructed Calloway that a PLA similar to the one in Olean was to be negotiated for Corinth.

Jerry C. Calloway, the CRSS senior vice president handling the Indeck construction, was called by the Charging Party to testify at the reopened hearing in support of the Charging Party's contention that Indeck did not dictate the use of union labor at Corinth.

Calloway testified that CRSS vigorously and aggressively pursued Indeck as a source of business and was awarded the EPC contracts for both the Olean cogen and the Corinth cogen.¹⁰

The record shows that on January 15, 1992, Lindsay received from union attorney Reilly and then transmitted to Calloway a sample Project Labor Agreement.¹¹ The cover sheet addressed to Calloway from Lindsay stated:

Olean must be done according to this union contract. Similar contracts must be negotiated at Kirkwood and Corinth. Your price shall be based on this condition.

Testifying on December 15, 1998 in response to questions on direct examination by Counsel for Indeck, Calloway stated that he did not recall and had not seen the January 1992 cover sheet from Lindsay. Calloway testified that he recalled the Stone & Webster PLA because CRSS had already done its own labor survey when he received the PLA from Lindsay. Calloway explained that CRSS usually contracts work to local contractors: it hardly ever performs construction using directly hired labor. Calloway stated that the first or second time he spoke with Lindsay about Indeck's upstate New York cogen projects, Lindsay asked him for pricing. In order to begin estimating the cost of the projects CRSS had to know what its labor costs would be. Calloway was aware that Indeck wanted the work to be done under a PLA. CRSS began a labor survey for the Olean and Corinth projects several weeks before receiving the Stone & Webster PLA. Although he could not recall the exact date the labor survey was performed, Calloway said it was in 1992. Calloway testified that by the time the Stone & Webster PLA arrived, Murray Lane, the CRSS vice president of construction, had already done a labor survey of the upstate New York labor market and that CRSS "had determined our labor posture would be a union labor agreement. . . ."¹² Calloway said that he does not normally read fax cover sheets and that his secretary hides them from him. Calloway recalled that after he got the Stone & Webster Olean PLA he gave it to Lane to use as a reference to show that CRSS was doing its own due diligence. Calloway testified that he and Lane decided to use their own format for a PLA but that they would look at the Stone & Webster document to see "if there was something in there that made sense we would also try to live with it as close as we could. . . ." Calloway stated that he took no direction from Indeck as to what should be in the PLA. He testified that he could not recall what he and Lane said to each other when they discussed the Stone & Webster PLA. But Calloway recalled that when he and Lane discussed that PLA they were already pricing the Corinth project and had independently decided to use a PLA.

On cross-examination by Counsel for the Respondent, Calloway stated that a client's preference about whether a job should be done union or non-union was not a primary factor in a CRSS decision whether to use union labor. Calloway made the determination based on what the area provided in terms of the quality of craftsmen. But Calloway acknowledged that if CRSS wanted to get the job, the client's preference would be a primary factor in his decision. Calloway also acknowledged that when he received the PLA from Lindsay the cover sheet may have been attached to it. Calloway recalled that Lindsay told him that Stone & Webster had given him a price for the project and that CRSS had to beat that price. Calloway recalled using the Stone & Webster PLA as a reference.

¹⁰ Calloway left CRSS in 1995 to start his own company.

¹¹ The PLA was entitled "Stone & Webster Engineering Corporation Cogen Project, Olean, New York.

¹² Lane reported to Calloway in the CRSS corporate structure. At the time the hearing was reopened pursuant to the Board's remand, Lane was deceased.

After testifying as described above, Calloway was shown a September 26, 1991 letter to him from Wayne R. Grayczyk, Indeck's vice-president for purchasing. The letter states:

This is to confirm our verbal offer of September 25, 1991 in which Indeck Energy Services, Inc. offers to enter into contract negotiations with CRS Serrine Engineers, Inc., for the engineering-procurement-construction services for the Indeck Olean and Corinth . . . plants for an aggregate total of . . . \$117,000,000.00, utilizing union construction labor.

Calloway maintained despite this letter that CRSS had decided on its own to use union labor and that Indeck did not instruct CRS that it had to use union labor. Calloway did not explain this major inconsistency in his testimony: he maintained that a labor survey done in 1992 had independently convinced him and Lane to utilize union labor while the documentary evidence shows that as early as September 1991 Indeck was instructing him that negotiations would be based on utilizing union labor.

On November 15, 1991 Lindsay wrote to Calloway accepting the lump sum price of \$119,600,000 for the Olean and Corinth plants "for engineering, procurement and construction of said projects, utilizing union construction labor in accordance with Indeck's statement of work for Olean and Corinth, both dated August 19, 1991." The price for the Corinth cogen was set as \$71,200,000. The letter provided that CRSS "understands that the . . . projects are third party financed and agrees that until a Notice to Proceed is issued. . . no obligations, financial or otherwise, are incurred by Indeck to CRSS except as follows: Indeck will immediately issue a Limited Notice to Proceed on the Olean project and a Notice to Proceed for Corinth no later than June 1, 1992."

On February 26, 1992 Indeck sent identical letters to Calloway at CRSS and to another company named Zurn/NEPCO requesting proposals for construction of the Corinth cogen "to furnish equipment, material, labor, tools, permits, licenses, insurance, supervision . . . for the complete design, construction and testing of the facility Price to include union construction labor."¹³

Calloway did not recall this letter.

When pressed again to recall when CRSS began its labor survey, Calloway stated that CRSS did not start its labor survey before Indeck said it wanted the project done with union labor.

On March 16, 1992 Lindsay wrote to Calloway accepting a lump sum price for the Corinth and Kirkwood cogens of \$116,000,000. The Kirkwood project could be cancelled within 90 days for a reduction of \$45,000,000. The letter contained a Limited Notice to Proceed to CRSS for "engineering on the Corinth project." The Kirkwood cogen was never built.

Eventually a dispute arose between CRSS and Indeck as a result of Indeck's failure to obtain financing for the Corinth cogen within the time frame anticipated in the parties' construction agreement. Section 6.1 of the construction agreement set the price for the Corinth cogen at \$71 million and provided that

if Indeck did not give CRSS a notice to proceed by October 31, 1992 the price would be adjusted according to certain indicators for increases in the price of labor, raw material and equipment. It was up to Indeck and CRSS to agree on the proportion of work represented by labor, raw materials and equipment. As it happened, Indeck did not issue the notice to proceed by October 31, 1992. CRSS sought an increase in the \$71 million contract amount. CRSS cited increases in the cost of equipment: for instance, GE raised its quote to CRSS by \$3 million. However, the parties were not able to agree on the size of the escalation due under Section 6.1 of the agreement.

On April 22, 1993, Indeck declared CRSS in default for failing "to provide any justification" for its revised proposal. An exchange of letters between Calloway and Lindsay ensued. Calloway protested the notice of default. Calloway's letter referred to Section 36 of the construction agreement which conditions all obligations of CRSS on Indeck's having obtained construction financing. To remedy Indeck's failure to obtain the contemplated third party financing CRSS had been urging Indeck to obtain a bridge loan or a corporate guarantee. CRSS believed that any change in the financing would significantly increase the CRSS risk and it used the increased risk to justify its demand that the contract price be increased to \$74,025,000. In a further exchange of letters, Indeck continued to insist that it would pay only \$71 million as amended by some escalation, or it would declare the agreement null and void. Calloway continued to insist on his interpretation of the contract and to argue vehemently that the new price was "consistent with a wholly different contractual scheme for financing." In fact, Calloway's letter noted, Indeck itself might be in default because it had not paid CRSS for work already done pursuant to an interim notice to proceed with engineering.

On June 8, 1993, Calloway wrote to Gerald R. Forsythe, the primary owner of Indeck, expressing his disappointment that CRSS would not go forward on the Corinth project. Calloway wrote, "we believe that our final price of \$74,025,000 has been developed consistent with [the written] agreements." The letter went on to say that CRSS was willing to step aside from the Corinth project in the recognition that Indeck has "found someone else willing to perform the project at a lower price" and because CRSS wished to maintain a good relationship with Indeck during completion of the Olean project. Calloway's letter further reminded Forsythe, "as previously discussed", that if the Corinth cogen were built without a PLA the Corinth project might experience labor difficulties and that such a non-union arrangement might cause difficulties at the Olean project. Calloway testified that he did not recall discussing the PLA with Indeck.

On August 2, 1993 Lindsay wrote to Calloway asking that CRSS assign its PLA to Indeck-Corinth Limited Partnership. Lindsay also asserted that Indeck might incur costs greater than its contract price with CRSS in completing the Corinth cogen and that Indeck expected reimbursement from CRSS for the excess costs.

On August 5, 1993 C. David Bassett, the chief operating officer of CRSS, wrote to Lindsay rejecting his attempt to declare CRSS in default and to claim payment for excess costs. Bassett stated that CRSS had performed the engineering work required

¹³ Zurn/NEPCO was involved in another Indeck project. Apparently, Indeck had not definitively decided to give the Corinth job to CRSS.

under the interim notice to proceed. “In contrast, Indeck-Corinth still has not paid Sirrinc in full for that work, and Indeck-Corinth, for reasons of its own, has not obtained the construction financing for the project.” Bassett asserted that Indeck was in default and that it was attempting to terminate the agreement for its own convenience “for the primary purpose of substituting contractors.” The letter closed with a threat that CRSS would preserve its mechanics lien rights under the law.

On August 12, 1993 Indeck and CRSS confirmed in writing an agreement reached that day to terminate the agreement for the Corinth cogen with a payment of \$155,633 to CRSS.¹⁴

Testifying in 1998 at the instant hearing, Calloway recalled that work on the Corinth cogen was suspended for a few months after Indeck and CRSS had agreed on a price. When the project restarted, Calloway stated, there was a new president at CRSS and he wanted to “go up on the price to the point I couldn’t justify to Forsythe, and Indeck and CRSS split.”

Contrary to Calloway’s recollection, the documentary evidence, including many letters written by Calloway himself, shows that work on the cogen was not suspended. Rather, CRSS was performing preliminary engineering pursuing to an interim notice to proceed and it was urging Indeck-Corinth to obtain third party financing as required by the construction agreement so that the notice to proceed could be issued. Eventually, CRSS realized that Indeck did not want to pay any escalation as required by the construction agreement and that Indeck wished to substitute another contractor. I conclude that Calloway’s recollection of the events of 1991 through 1993 is inaccurate. Calloway could not recall the events that caused CRSS to leave the Corinth project. Further, Calloway could not recall the events relating to the PLA for Corinth. Calloway was confused as to when Indeck directed CRSS to enter into a PLA for the Olean, Corinth and Kirkwood plants. Calloway could not recall when CRSS conducted a labor survey and what relation it had to Indeck’s desire to work with union labor. Calloway could not recall when the PLA was negotiated and he had forgotten many details, confirmed by the documentary record, that showed Indeck’s involvement in deciding that the Corinth project would be built with union labor. I shall not credit any of Calloway’s testimony about the events of 1991 to 1993 unless it is corroborated by documentary evidence.

The departure of CRSS from the Corinth cogen apparently caused difficulties in Indeck’s relations with the unions. On July 28, 1993, Gillick addressed a memorandum to Forsythe, offering a strategy for Indeck to use in an upcoming meeting with the Building Trades Council. The meeting concerned mainly the offsite portion of the Corinth cogen project, namely the gas pipeline and the electrical transmission line.¹⁵ Gillick’s memorandum sought Forsythe’s assent to his strategy of telling “the Building Trades that our position has not changed on the offsite portion of our work and we will build the pipeline and transmission line utilizing union contractors.” Gillick’s memo explained the benefits to Indeck in pursuing this strategy. First,

he stated that agreement to proceed with union labor would be contingent upon the union contractors performing the offsite work at or below Indeck’s budgeted amounts. Indeck would not be obligated to use union labor if the bids were too high. Gillick explained, “This basically is the same reason why we are not using CRS Sirrinc as our contractor.” Second, Gillick said, this “concession will be a little ‘carrot’ so they will not try to get an injunction against Indeck and slow or stop our construction progress during financing. . . . Also by Indeck agreeing to perform the offsite work on a union basis, we are complying with the intent of our letter and lessening their chances of getting an injunction against us.” Third, Gillick said that Niagara Mohawk performed all its work with union labor and that Indeck would be working on Niagara Mohawk property. Finally, Gillick told Forsythe that Indeck was still acquiring easements and that union members were involved in the affected land ownership.

Indeck carried out its promise to build the offsite portions of the cogen with union labor. The March 24, 1994 bid for the electrical transmission line from Seaward Corp, stated three different prices for the work.¹⁶ Two of the bid amounts involved non-union labor with a lower price being bid for a later completion date. The third price of \$3,516,000 was for performing the job with union labor. The bid from Seaward stated that the job had originally been bid non-union but that a union labor alternate was being supplied at Indeck’s request.

VII. EXPERT WITNESS DEFINITION OF THE CONSTRUCTION INDUSTRY

A. Calloway Testimony

On redirect examination, Calloway was asked the definition of the term “construction management” as it is generally understood in the construction industry. Calloway replied that “construction management” is not an exact term and that there is no generally accepted definition in the industry. Companies that offer to provide “construction management” perform many different tasks. Construction management may include soliciting bids, obtaining permits, surveying, developing a statement of work, hiring an engineering firm or hiring an EPC firm or a general contractor.¹⁷ Calloway stated that CRSS is an engineering firm. CRSS has done construction management, that is, it has performed engineering, hired contractors and approved specialty contractors. According to Calloway, a construction manager generally does not assume the risk of profit or loss in construction; an entity that assumes risk has become a general contractor.

B. Lindsay Testimony

Lindsay testified about Indeck’s practices in obtaining financing for and building cogens. He said “we always subcontract the construction to a contractor.” Lindsay explained that lenders and equity investors want a bondable contractor. The lenders look for a firm in the construction industry which has financial resources to put up letters of credit. In the event the

¹⁴ The record shows that this was for engineering work performed by CRSS.

¹⁵ Gillick stated the gas pipeline construction budget as \$2 million and the electrical transmission line construction budget at \$3.2 million.

¹⁶ Seaward installed the electrical transmission line.

¹⁷ An EPC firm contracts to perform engineering, procurement and construction of a project.

plant is not finished on time or does not meet specifications the letters of credit will be drawn by the lenders to satisfy any damages. Thus, Lindsay acknowledged that a contractor or subcontractor bears construction risk and may forfeit a bond or letter of credit in connection with that risk.

C. Walter Testimony

James N. Walter, an expert called by Charging Party Indeck, testified about the construction industry. Walter defined an EPC contract as a construction contract for engineering, purchasing and construction. The term “EPC” is used for large industrial process-type plants. A “design-build” contract is similar to an EPC contract, but this term is used for general building construction. Walter defined the term “turnkey project” as meaning the same as a design-build project. Walter has never participated in a situation where an EPC contract was in effect.

Walter defined a “project developer” as an entity that performs tasks prior to construction in order to make a project viable. Project development includes buying land, obtaining financing and arranging for permits. A project owner can be a project developer. Walter stated that certain activities are usually performed by an owner before obtaining bids from contractors. These include tasks related to land surveys, title insurance, environmental surveys for hazardous waste, preparation of site plan, land acquisition, soil borings and soil compressibility tests to determine feasibility and obtaining governmental permits. Walter said that contractors do not usually perform these activities.¹⁸ Soliciting and reviewing bids is another pre-construction activity performed by owners.

Walter testified that there is not a single definition of construction management. The term means different things according to who is giving the definition. In addition, the same duties may be performed by a person called a construction manager, a project manager and a project superintendent. Since the 1970’s or 1980’s, major industrial contractors have offered their services as either general contractors or as construction management firms.¹⁹ A construction management firm stands in the shoes of the owner, getting the architectural or engineering work done, securing a contractor or contractors (including subcontractors), performing scheduling, coordinating functions, monitoring schedules, monitoring costs, and ordering construction materials and equipment. Walter stated that Indeck was engaged in construction management when it was involved in activities such as running solicitations for contractors, ordering construction materials, reviewing detailed engineering, performing field inspections and coordinating among the contractors and International Paper and Niagara Mohawk. Indeck could have hired a construction management firm to perform these tasks.

¹⁸ I note that the Gas Facilities Interconnection Agreement required Indeck as the “construction contractor” to perform many of these activities.

¹⁹ Indeed, Walter’s last salaried position was as the president and chief operating officer of a diversified general contracting firm in the construction business. This firm hired itself out as a general contractor or a subcontractor or a construction manager.

Walter testified that Indeck entered into three separate contracts for construction of the three major component parts of the Corinth cogen. A contract with CNF for the power plant, a contract with Otis Eastern for the pipeline and a contract with Seaward for the electrical transmission line. In a fourth contract, Indeck agreed to pay for Niagara Mohawk to modify its substations.

Walter defined a “general contractor” as a firm that accepts contracts and the risks for the completion of those contracts to build a structure. The general contractor buys material, contracts with specialty contractors, and uses its own labor forces and/or the forces of others to produce a structure. Project owners may engage more than one EPC or design-build contractor for a project. In an EPC contract the contractor is responsible for the total execution of the design, procurement and construction. However, owners retain some control over the execution of the contract. It is common for a project owner to retain the right to strike the names of proposed subcontractors from lists submitted by the general contractor.²⁰ It is typical for the owner to specify models of key industrial equipment to be purchased from specific vendors. The owner plays a large part in establishing milestone dates for the project.²¹ It is typical for an EPC contractor to send the owner a periodic update of detailed scheduling for the job. It is common for construction contracts to provide that if agreed-upon milestones are not being met, the owner has the right to require the contractor to add shifts and overtime hours.

Walter explained that the same firm can serve as a general contractor and a subcontractor depending on the circumstances. A subcontractor is a firm working for another contractor on a site. Contractors performing specialized trade work on a site are called subcontractors whether they are hired by a general contractor or by the owner directly. Walter testified that when Indeck hired a construction firm directly he would call that firm a “contractor” but when the same firm was hired by CNF it became a “subcontractor.”

Walter defined a “long lead time item” as equipment for which the design or manufacture takes such a long time that the item must be ordered before a construction agreement is signed. Therefore, a long lead-time item may be ordered by an owner before an EPC contractor is selected. In the instant case Indeck itself ordered the steel for the transmission line supports, but Walter did not express his opinion that the steel was an item subject to lengthy delays in design or manufacture.

Walter testified that some project owners require that the construction be performed by union labor. This depends on “geography” and the other obligations of the owner.

The “statement of work” for a project makes clear what the completed project must be. The statement of work contains conceptual engineering and an outline or statements of equipment needs. The statement of work becomes part of the contract to build the project.

²⁰ The construction agreement with CNF gave Indeck the right to strike subcontractors’ names.

²¹ Milestone dates are any dates of essential importance to a specific project, whether the dates pertain to financing, permitting, beginning aspects of construction or completing aspects of construction.

Commenting on the Indeck construction agreement with CNF, Walter stated that it was a lump sum contract that placed the risk of design, construction and start up on CNF. This is a risk that is typically undertaken by a contractor.

During the construction of the Corinth cogen, CNF gave Indeck monthly reports summarizing the progress of the project. The report contained a detailed schedule update which provided information on the status of the work, the sequence of the work, manpower schedules and procurement delivery plans. These reports are commonly provided to owners of projects.

Walter testified that tensions between the owner and the contractor are common on lump sum jobs. There is a divergence of interests concerning cost factors; the owner wants the best possible job and the contractor wants to make a profit. Walter commented that the correspondence between Indeck and CNF showed that both sides were protecting their interests and preparing a record in case a dispute could not be resolved.

Walter testified that almost always the owner of a large industrial project has someone on site during the construction to serve as the owner's representative. This representative may be called a job site coordinator, resident engineer, clerk of the works, project manager or construction manager. The duty of the owner's representative is to check the work directly or through others to see that the contractor is performing the work as specified. This person performs the first line of consultation between the owner and contractor and holds the stop-work authority. Walter said that Indeck was tough minded and demanding and that the extent of its involvement in the construction process was "at the top of the scale" in his experience. But Walter said that Indeck's involvement did not mean that it acted as its own general contractor.

Walter stated that in his opinion Rubado and Boyle did not engage in construction activity on the site except during the "interim period" after Indeck dismissed and paid off CRSS and before CNF took responsibility for the construction. During this interim period, Indeck directly hired and directed six individual trade contractors to do demolition and excavation work and the like. While these firms reported to Indeck, Walter would call them contractors.²² After CNF took over the firms would have been called subcontractors if they reported to CNF. Although it is possible for an owner to be its own general contractor, Walter did not think that Indeck was its own general contractor for the cogen. Walter stated that Ranalletta was not the project manager and Rubado was not the construction manager for the actual building of the project.

Walter said that an owner generally has the right to observe tests performed at the site by a contractor's employees and to receive the results of the tests. An owner may also hire an outside firm to provide inspections. It is common for an owner to review a contractor's welding procedures.

Walter testified that it is common for an owner to have its operators take part in field testing procedures during construction. In his opinion this is not a construction activity on the part of the owner's employees because the operators work for

²² Walter acknowledged that during the interim period Indeck could have engaged a general contractor to direct the work of these six specialty firms.

the owner and "it doesn't fit the bill for what I consider construction activity." I note that Walter was not able to explain his opinion why an owner taking part in tests conducted during construction for the purpose of determining whether the plant and equipment was being built properly is not part of construction activity. It is clear that the mere fact that a person works for an owner does not mean that the employee is not engaged in construction. Walter did not maintain that owners never engage in construction activity. To the contrary, he stated that some owners do perform construction.

Walter defined field inspection as a review of the construction to see whether it is in compliance with the plans and specifications. Indeck performed field inspections at Corinth. It could have hired a construction management firm to do the inspections. Indeck employed a number of inspectors to review the work done by CNF, it used in-house Indeck employees and it hired outside quality control firms which reported directly to Indeck's construction managers on site. Walter stated that when the contractor itself performs field inspections, this is part of the construction process but when an owner performs field inspections it is not.

Walter stated that owners prepare a punch list of items that remain to be corrected before a project is deemed fully completed. The preparation of a punch list is not a construction activity. However, an entity that performs work correcting the items on a punch list is engaged in construction activity.

Walter's opinion was that general contractors bear the risk of construction. He denied that Indeck bore any construction risk in building the Corinth cogen. However, Walter acknowledged that both the power purchase agreements with Con Ed and International Paper provided that Indeck would lose substantial amounts of money if Indeck did not commence and complete construction of the cogen by certain dates. Similarly, the interconnection agreement with Niagara Mohawk provided that Indeck would forfeit a substantial deposit if it did not commence construction by a date certain. Walter similarly acknowledged but did not explain Indeck's claim in its sales literature that "utilities benefit because Indeck provides power at or below utilities cost and undertakes the construction and operation risk."

D. Rosen Testimony

Marvin S. Rosen testified on behalf of the Charging Party. Rosen agreed with Walters concerning the front end or developmental activities engaged in by an owner before it signs an EPC contract. According to Rosen, obtaining land surveys, environmental surveys governmental permits and title insurance, preparing a site plan, preparing requests for proposals and acquiring land are not construction activities. Rosen stated that in his view an EPC and design-build contract are the same thing.

Rosen stated that site clearing is the first construction activity on a project. He agreed that enclosing the site with a fence is also construction activity.

Rosen defined a general contractor as one that engineers, procures and installs material with either its own labor or with subcontract labor in accordance with plans and specifications provided by the owner. However, a general contractor need not do the detailed engineering. In fact, Rosen does not consider

engineering and procurement to be construction activities. A general contractor can handle a broad spectrum of work. According to Rosen, some owners act as their own general contractors, including companies that build and own cogens.

Rosen said that all owners have an on-site representative; this person may be called project director, project manager, construction manager or site representative. It is common for the on-site representative to have stop work authority.

Rosen stated that normally the owner of a large industrial project wants nothing to do with the labor relations of the people actually building the facility. The contractor is responsible for labor relations. However, if an owner already has a labor force working in an existing facility that is being expanded, then the owner would direct the contractor not to use labor that would conflict with the owner's ongoing operations.

Rosen discussed the types of inspections performed on large industrial projects. He stated that the inspectors hired by the contractor do more detailed inspections on a day-to-day basis. The owner's inspectors only check to make sure that the owner is getting what is called for in the contract. Rosen stated that an owner typically does not have enough of its own forces and so it hires outside inspectors to perform the service. It is common for an owner to have the right to review welding procedures. It is also common for an owner to lend its trainee operating personnel to the contractor for the contractor to use in performing tests as the project is being built.

Contrary to Walter, the other expert called by the Charging Party, Rosen expressed the opinion that Indeck had a normal to less than normal involvement for an owner on a large project.

Rosen stated that long lead items are usually pieces of equipment used in a manufacturing process. Construction items are not usually long lead items, except for high strength specialty steel piping. Rosen said that he did not have an opinion whether Indeck in fact had to procure pieces of equipment or material because they were long lead-time items.

Rosen seemed to define a construction activity according to when it took place. He stated that a change order at a very early stage in the detailed engineering is not a construction activity. But a change order executed later and which has an impact on construction does constitute a construction activity.

Rosen testified that after Indeck declared CRSS in default and hired six contractors to perform work on the site, "You could make the case that they were a general contractor. You could also make the case that they were an owner hiring a number of general contractors to do individual pieces of the work for them." At the completion of the project when Indeck hired a contractor to construct a railroad crossing and grade the road to the intake facility at the river, Indeck had the alternative of telling its EPC contractor to perform the work.

Rosen gave his opinion that, excluding the period after Indeck declared CRSS in default and before CNF came on the site, Indeck did not act as its own general contractor. Rosen said that there was a contractor responsible for construction because it bought the material, hired subcontractors and oversaw the subcontracts. Rosen believed that Indeck engaged three general contractors to construct the three discrete portions of the cogen namely, the power plant, the gas pipeline and the electric transmission line.

Rosen stated that if toward the end of a job an owner engages a contractor directly to finish the job because the EPC contractor can't get back to do it speedily, then the owner is engaged in construction activity. Attending to the items on the punch list is a construction activity.

E. DelVecchio Testimony

Philip DelVecchio was called by the Respondents. He testified that Indeck acted as a general contractor for the Corinth cogen and that Indeck performed construction activities.

DelVecchio defined a general contractor as an entity that has the obligation to construct a facility. The general contractor does the work with its own resources and/or with subcontractors. Some general contractors have no construction employees on their own payroll and all the work is done by subcontractors. General contractors have the responsibility of coordinating and supervising subcontractors in performing their work and they must provide general site facilities on a project. DelVecchio defined a subcontractor as a contractor who is working for a general contractor. There are "basic" subcontractors who perform civil, mechanical and electrical work and there are "specialty" subcontractors who perform such work as insulation, instrumentation, surveying, engineering and inspection.

DelVecchio stated that the project owner has the responsibility of determining the requirements and needs of the project and of paying for the construction. Beyond this simple definition, the role of the owner varies from a very limited one to a situation where the owner acts as its own general contractor. An owner which is its own general contractor hires subcontractors, provides the engineering for the project, and coordinates and supervises the subcontractors' work. Even when an owner is not acting as a general contractor, the extent of its role may vary. If an owner has the forces to do so it may provide construction management.

Noting that all owners have to provide some level of construction management, DelVecchio cautioned that the term is very broad. Construction management ranges from coordinating contractors on a job to procurement, solicitation of bids, inspection services and engineering. Some EPC contractors and some design firms provide a full menu of services in construction management. DelVecchio stated that he defined construction management as relating to the construction of a project. The term project management defines a greater scope of activities encompassing development activities, early permitting activities and the initial scope definition of a project.

DelVecchio pointed out that Indeck had solicited proposals for construction management services but had not ultimately hired a firm to provide the service. Instead, Indeck performed the work itself. In a document dated October 31, 1991 and entitled "Engineering Services for Design and Construction Management" of the electrical transmission line, Indeck set forth details of the construction management services it required. The preliminary statement said that, "the transmission line will be built by Indeck to Niagara Mohawk's standards and transferred to Niagara Mohawk's ownership after completion and testing." Indeck told prospective bidders that the scope of services would include meeting with Niagara Mohawk to establish design criteria and standards, preparing project schedules

and capital cost estimates, developing plan and profile drawings to Niagara Mohawk's standards, preparing specifications and drawings and a long list of other engineering activities. In addition, Indeck sought "construction management activities during construction" which it listed, *inter alia*, as communication and coordination with Niagara Mohawk, consultation with Indeck in bid evaluation and contractor selection, monitoring of costs, inspecting construction and assigning construction manager to inspect work and arrange for receipt of transmission line material at the site.

DelVecchio defined construction labor relations as the rules and procedures employed between the crafts and trades on the job and those who are managing the job. Usually the general contractor participates in construction labor relations. Sometimes the construction manager participates.

DelVecchio defined a design/build contract as one where the owner contracts with a single entity to design and construct a facility. DelVecchio said that a design/build contract is generally not for a lump sum because the detailed engineering for the project is developed as it goes along. Often, the contractor is guaranteed a fixed fee with a fixed maximum. The absence of a fixed lump sum price avoids conflicts between the owner and contractor. Design/build contracts are also used when costs are rising at a rapid rate; the method avoids risk for both the owner and contractor. DelVecchio said that a turnkey project is a type of design/build contract where the contractor has additional responsibilities to develop the property, secure necessary permits and the like. According to DelVecchio, an EPC contract is typically a lump sum contract with a prime contractor or a series of prime contractors. An EPC contract can be used where the owner wants a project similar to one it has built before. The owner has a clear understanding of requirements for the project and it has access to prior drawings and lists of equipment. When the scope of the project is very well defined by the owner, it is easy to get a lump sum EPC contract. An EPC contractor enters into a construction risk in bidding on the job; it wants to make a profit on building the project.

According to DelVecchio, cogens are a subset of industrial construction projects. The major distinguishing feature of a cogen lies in the third party obligations entered into by the owner/developer. Typically, these obligations are the power purchase agreement, the wheeling agreements, the transmission agreements and the gas purchase agreement.

DelVecchio testified that in his opinion Indeck played a variety of roles in the Corinth project. Indeck was the owner, it was the developer and at times it was the general contractor and construction manager. DelVecchio gave extensive testimony illustrated by explanatory charts to support his opinion that Indeck acted as a general contractor. DelVecchio listed the typical general contractor activities as:

- Third Party Commitments
- Multiple Contracts
- Control of Labor Relations
- Establishing Project Team
- Preliminary Sitework
- Control of Second Tier Contractors
- Coordination/Interface Between Owners and Contractors

QA/QC and Field Inspections

In DelVecchio's opinion, the two primary considerations in finding that an entity, in this case Indeck, is a general contractor are the presence of third party commitments and of multiple contracts.

The third party commitments in this case were construction obligations entered into by Indeck in the power purchase agreement with Con Ed, the energy supply agreement with IP, the interconnection agreements with Niagara Mohawk, the wheeling (transmission service) agreement with Niagara Mohawk, the two natural gas supply agreements with Union Pacific and ALTEC, and the natural gas transmission agreement with CNG. The wording of the documents shows that Indeck had an obligation to construct a facility and that it had assumed the construction risk. There are serious default provisions if Indeck does not begin the construction at a certain time or if it does not perform the construction. For example, the power purchase agreement with Con Ed says that Indeck will construct a plant and requires Indeck to place \$1,198,500 on deposit. If Indeck does not follow through it will lose its deposit. The Transmission Services Agreement between Indeck and Niagara Mohawk for the wheeling of electric power to Con Ed requires Indeck to post a deposit which will be forfeit if Indeck fails to commence construction by a certain date. DelVecchio differentiated between a business risk and a construction risk. Any owner building a large project assumes business risk. Whether the owner assumes construction risk depends on the documents for the project. In the instant case, according to DelVecchio, Indeck assumed construction risk.

The multiple contracts that were cited by DelVecchio as evidence that Indeck acted as a general contractor are four prime contracts and 21 specialty contracts. The prime contracts were for construction of the powerplant with CNF, for construction of the electric transmission line with Seaward, for construction of the gas pipeline with Otis Eastern and for the modification of substations with Niagara Mohawk. DelVecchio noted that Niagara Mohawk owned, or would own upon completion, the last three components of the cogen. Thus, Indeck entered into construction obligations for facilities that belonged to another entity. DelVecchio also pointed out that Indeck does not own the power plant. Ownership was transferred to the Corinth Industrial Development Authority in 1994. The IDA issued bonds to GE Capital which then loaned the money to Indeck to construct the cogen. Although the documentary record is incomplete on this point, DelVecchio believed that during construction the powerplant was owned by the IDA.

The 21 specialty contracts entered into by Indeck directly included agreements with contractors who did surveying, soil investigation and remediation, preliminary sitework, engineering, field inspection and additional sitework at the railroad crossing leading to the river intake facility.

DelVecchio testified that surveying is construction work. Surveyors delineate the metes and bounds of the property or the pipe line or transmission rights of way. They lay out the foundation locations and other major components of the plant. Soil investigators evaluate conditions to determine the loading that will be allowed and the size of foundations and footings for

major pieces of equipment. Remediation for the Corinth plant required the removal of soil contaminated by coal tar and the construction of a holding cell for the soil. In DelVecchio's opinion the preliminary sitework contracted for directly by Indeck after it declared CRSS in default was the first step in the actual construction.²³ The six specialty subcontractors employed by Indeck graded the site, fenced it, removed debris and existing structures, and established a "lay down area" on which to place material, equipment and trailers. All six contractors took their direction directly from Rubado. In effect, Rubado acted as the general contractor: he provided coordination, scheduling and specific direction once these specialty contractors were on site. DelVecchio pointed out that under normal circumstances CRSS or CNF would have undertaken the work of these six contractors. Furthermore, Indeck could have hired an entity such as a general contractor or a construction manager to execute the preliminary sitework. Instead, Indeck chose to place Rubado in the position of construction manager.

DelVecchio testified that Indeck entered into contracts with specialty engineering firms to engineer the electric transmission line, the gas pipeline and the electrical substation modifications. This is construction activity. Further, Indeck had five field inspection contracts with specialty inspection subcontractors. The employees of the two firms employed to inspect the electric transmission line reported daily to Rubado about the activities undertaken by the other contractors on the site. DelVecchio noted that these inspections were in addition to those undertaken by Niagara Mohawk with its own personnel. According to DelVecchio, an owner usually does not perform its own X-ray inspection of welds as Indeck did in Corinth. Most owners review the X-rays taken by the contractor's inspector.

DelVecchio discussed the final contract with O'Connor to grade the railroad crossing. This work was undertaken to satisfy fire department requirements for access to the water intake portion of the cogen. According to DelVecchio there were still a few CNF employees on site when the fire department asked for further work at the site. The fact that Indeck was able to step in and subcontract the work rather than ask CNF to do it shows that Indeck was a general contractor with the ability to direct the work itself. Indeck saved money by subcontracting the work directly and avoiding an extra charge from CNF. DelVecchio emphasized that a real design/build or turnkey contract would have included this work in its scope because the cogen could not operate without fire department approval. Thus, DelVecchio concluded that the contract with CNF was not really a design/build or turnkey contract.

DelVecchio testified that a general contractor and not an owner handles labor relations. In the instant case, Indeck made commitments to meet with the building trades. Indeck specified in its requests for proposals to build the cogen that construction would be done with union personnel. Indeck instructed CRSS to enter into a project labor agreement and CRSS complied. In DelVecchio's experience, owners do not

normally give commitments to building trades unions and do not furnish their contractors with a model PLA.

In reaching his conclusion that Indeck acted as a general contractor, DelVecchio considered that Indeck had a sizeable project team on site. There were from six to 12 Indeck employees on the site which he considered a large number of people given the size of the cogen project. The members of this site team bore titles such as construction manager, thereby showing Indeck's intent to manage the construction. Indeck required daily meetings and daily reports from contractors and it was involved in every aspect of the project. Usually an owner requires weekly meetings and reports. Gibson, the eventual manager of the cogen, came to Corinth very early in construction and acted as an inspector on behalf of Indeck. Generally an owner is loath to put operating personnel in the face of the contractor because this has the potential to cause controversy. In fact, DelVecchio pointed out, the record shows that CNF did complain to Indeck about the activities of Indeck employees on the construction site on a number of occasions. DelVecchio stated that the eventual operators of the cogen were people with experience operating submarines for the Navy. These future operators were on site from eight to 12 months during the construction of the cogen. DelVecchio testified that the operators were really being used as inspectors by Indeck; they were not only engaged in a training program as asserted by Indeck. In DelVecchio's experience plant operators are not used to inspect construction work.

DelVecchio testified that although project owners usually reserve the right to strike the names of proposed subcontractors, they seldom exercise this right because they risk assuming responsibility and liability. In DelVecchio's opinion, Indeck struck and added names of subcontractors with more than normal frequency. This showed that Indeck controlled the second tier contractors. I note that the record is incomplete as to the actual total number of times Indeck exercised its right to control the selection of contractors.

DelVecchio testified that an owner does not usually buy equipment for a construction project. The 400,000 feet of pipeline purchased by Indeck directly was not long lead time pipe in DelVecchio's experience. It was readily available from many supply houses. DelVecchio gave his opinion that Indeck made a choice to buy certain equipment and material. Indeck could have let the contractors make the purchases.

F. Kettler Testimony

David Kettler testified on behalf of the Respondents. Kettler defined a general contractor as an entity that takes full responsibility for the construction of a facility and assumes the risks associated with the construction. He defined a subcontractor as an entity that does trade work and specialty work. Typical subcontractors perform in areas such as mechanical, electrical, HVAC, rigging, plumbing, instrumentation and control, soils investigation and quality control.

Kettler stated that when an owner makes a decision to build, it will manage the project itself if it has the in-house expertise. If not, the owner will use a general contractor. When project owners act as their own general contractors they subcontract the trades work. Some general contractors do not directly employ

²³ DelVecchio declared his opinion that CRSS was not in default. He pointed out that Indeck paid CRSS a lot of money to walk away from the Corinth plant.

any trades or craft employees and some owners who act as their own general contractors do not employ any trades or crafts employees directly. If an owner is acting as its own general contractor it will control the subcontracting on the job. If the owner hires a general contractor, that entity will control the subcontracting.

Kettler defined construction labor relations as relating to construction that is performed with union labor. Typically, the general contractor participates in construction labor relations. If the owner already has a facility operated with union labor, then the owner may participate in construction labor relations.

Kettler gave his opinion that Indeck had played a very active role throughout the Corinth project. In Kettler's view, Indeck performed functions including those of a general contractor and construction manager. Before the financial closing, Indeck played the role of developer. Kettler described the four prime factors that formed the basis of his opinion:

First, Indeck undertook major obligations and commitments. The energy supply agreement with IP provided that the cogen would be in operation by June 30, 1993 and that in the event of default IP had the right to recover actual damages. The power supply agreement with ConEd provided an amount of about \$1.2 million that Indeck would forfeit if the cogen were not in operation by a certain time. There were similar commitments with Niagara Mohawk. Kettler stated that these were construction risks because they were tied to the completion of the facility and its operation.

Second, Indeck was active in setting the direction for the type of construction labor to be used on the project. Indeck's request for proposals provided that union labor would be used. Indeck had a letter agreement with the Trades Council. Indeck directed CRSS to use union labor and sign a PLA and Indeck supplied CRSS with a model PLA. When Indeck switched contractors from CRSS to CNF it made a conscious decision to change labor relations by not requiring CNF to use union labor. Kettler cited the internal Indeck memo discussing strategy for dealing with the Trades Council on the prime contracts for the transmission and pipelines as showing an active role by Indeck in labor relations. Indeck was defining what labor would be on the project. Kettler has never known an owner to provide a contractor with a model PLA.

Third, Indeck engaged in construction management. Indeck prepared the preliminary engineering to support the statement of work. Indeck evaluated the bids, it reviewed detailed engineering, it reviewed equipment specifications, it reviewed bid lists of proposed subcontractors, it oversaw the construction process and it reviewed requests for payment. Indeck coordinated among the various contractors and the utilities, it issued change orders, and it prepared a punch list.

Finally, Indeck entered into four prime contracts and about 30 other contracts for construction work to be done for the project and for material and equipment to be purchased directly by Indeck.

Kettler acknowledged that the various contractors and subcontractors on the site directly supervised the employees who provided the labor to build the project. However, Indeck oversaw the work. Indeck contracted directly with firms that supplied the workers. This is typical for a general contractor on a

large project such as the cogen. A general contractor may subcontract all construction work for a large project; it would be unusual for it to employ direct hire labor. The fact that the inspection firms hired by Indeck to inspect the gas and electric transmission lines reported directly to the Indeck construction manager on-site shows that Indeck was directly supervising the inspectors.

Kettler stated that engineering and design, procurement, fabrication and quality control are all different functions of the construction process. But they are all integral to construction activity.

G. Ranaletta Testimony

Indeck project manager Victor Ranaletta oversaw the Corinth cogen.²⁴ Ranaletta is currently the Vice President for Project Management and Construction of Indeck. He succeeded John Gillick in that position. Beginning in February 1993 until July 1995, Ranaletta was the Project Manager for the Corinth cogen. He had responsibilities for obtaining permits from governmental agencies, for dealing with land issues, for dealing with the EPC contractor and for dealing with the utility and the steam host. Ranaletta and Indeck's project engineer reviewed the detailed engineering and the equipment specifications prepared by the EPC contractor. According to Ranaletta, it is the responsibility of the EPC contractor to purchase the equipment and materials. A letter from Ranaletta to CNF prior to a "kick-off meeting" in August 1993 informed CNF that "Indeck is highly involved in plant layouts, selection of equipment, and system design". The letter went on to say that "CNF is responsible for the procurement of equipment [but] Indeck is involved in all meetings with major vendors that discussed the vendor's scope and design." The same letter listed documents that Indeck required CNF to submit. The list included names of key project personnel and their resumes, a detailed project schedule, a drawing distribution and submittal schedule, equipment specifications, and the like. Thus, Indeck was constantly monitoring and limiting CNF in its construction activities at the plant. When CNF did soil borings under the heavy equipment foundations without first showing Indeck the plant layout, Indeck protested that it was entitled to review and approve this step.

David Rubado, the Indeck on-site construction manager at Corinth, reported to Ranaletta and coordinated the Indeck personnel at the construction site. Mike Boyle sent daily detailed reports to Ranaletta and Rubado of activities at the construction site, including the manpower count for each day. Indeck on-site personnel including Rubado and Boyle attended daily start up meetings with CNF in 1994 and 1995 when CNF was starting up the various systems of the plant.²⁵

Boyle assisted Rubado in coordinating the Niagara Mohawk field crews while CNF attempted to start the facility in February 1995. In fact, CNF perceived that Indeck was acting independently to CNF's detriment on the construction site. CNF complained that Indeck excluded CNF from meetings with Niagara about the synchronization of the electric grid system.

²⁴ Ranaletta testified in the hearing before Judge Morton and in the reopened hearing pursuant to the Board's remand.

²⁵ Ranaletta said that both Rubado and Boyle bore the title construction manager in 1993.

CNF also complained that Indeck was communicating with equipment vendors directly concerning equipment that CNF was to purchase pursuant to the EPC contract. Ranaletta stated that Indeck contacted the vendors because it suspected that CNF was misleading it concerning the specifications of the equipment being ordered. CNF also wrote more than a few letters to Indeck complaining that the latter was pressuring it to use suppliers or to purchase equipment contrary to CNF's views on how best to fulfill the EPC contract. I do not view any of these events as crucial to my findings herein.

Ranaletta testified that Indeck did the construction management for the power plant portion of the Corinth cogen.

H. Summary Of Expert Testimony

Construction Management

All the expert witnesses agreed that the term "construction management" is not an exact term. There is no generally accepted definition of construction management in the construction industry. All the witnesses agreed that construction management may include soliciting and evaluating bids, obtaining permits, obtaining surveys, developing a statement of work, hiring an engineering firm and reviewing detailed engineering, hiring an EPC firm or various contractors and subcontractors, performing scheduling, coordinating contractors, monitoring schedules, monitoring costs, ordering construction materials and equipment and performing field inspections. The expert witnesses agreed that a construction manager does not assume the risk of construction. If an entity assumes the risk of profit or loss in construction, it is a general contractor. All of the witnesses agreed that firms in the construction industry, such as engineering firms or EPC firms may also provide construction management services.

Owner Preconstruction Activities

All of the expert witnesses agreed that owners of large projects typically engage in certain activities before actually engaging a general contractor. These activities include obtaining land and environmental surveys, obtaining title insurance, preparing a site plan, acquiring land, obtaining soil tests to determine feasibility of construction and obtaining governmental permits. All of the witnesses agreed that a project owner or developer such as Indeck could have hired a construction management firm to perform these tasks.

EPC Contract

Walter stated that a contract to perform engineering, procurement and construction is used for large industrial process plants. Walter and the Respondent's expert witnesses agreed that the EPC contractor is responsible for the total execution of the design, procurement and construction. However, Charging Party witness Rosen stated that in his opinion engineering and procurement are not construction activities.

DEFINITION OF CONTRACTOR AND SUBCONTRACTOR

The witnesses gave varying definitions of the term "contractor" and "subcontractor". The respective use of these terms seemed to have a semantic significance for some of the participants in the instant case, but I believe that these terms have no

relevance in the ultimate decision of the issues before me. Walter testified that a subcontractor is someone who works for another contractor, but he also said that if an owner directly hired a basic trades contractor, such as an electrical contractor, then that entity would be called a subcontractor. However, Walter also stated that he did not want to call the firms that worked directly for Indeck preparing the site "subcontractors" because he did not want to characterize Indeck's activity as that of a "general contractor" while it directed these entities. Victor Ranaletta, the Indeck project manager for the Corinth cogen, wrote out the text of his affidavit in this case in 1995. He wrote that there was a "six-week period in June-July 1993 between EPC contractors, when Indeck had to line up several subcontractors directly." Ranaletta executed his affidavit on December 18, 1998 the same day he resumed testifying in the re-opened hearing. On that day, Ranaletta testified that all of the companies Indeck hired during this six-week period were "general contractors." Ranaletta thus repudiated the language of the affidavit he had signed just before testifying. Kettler testified that the term subcontractor is applied to an entity that does trade work and specialty work such as mechanical, electrical, HVAC, rigging, plumbing, instrumentation and control, soils investigation and quality control. DelVecchio stated that a subcontractor is nothing more than a contractor who works for a general contractor. There are basic subcontractors who perform civil, mechanical and electrical work and there are specialty subcontractors such as those doing insulation, instrumentation, surveying and engineering inspection.

WHO CONTROLS LABOR RELATIONS

Walter gave the briefest testimony about an owner's involvement in labor relations stating that a project owner would require union labor on a job depending on "geography" and the other obligations of the owner. Rosen and the expert witnesses called by the Respondents said that an owner wants no involvement in labor relations. An owner would only direct a contractor not to use labor that would conflict with the owner's ongoing operations on site if any such existed. Apart from this circumstance, the typical owner leaves construction labor relations to the general contractor. None of the witnesses testified that owners usually give model project labor agreements to contractors for use in negotiations with labor unions.

Extent of Owner Involvement in Project

Charging Party expert witness Walter said that Indeck's involvement in the construction process was at the top of the scale in his experience. In contrast, Charging Party witness Rosen stated that Indeck had a normal to less than normal involvement for an owner on a large project. The Respondent's witnesses stated that Indeck employee Rubado acted as the construction manager for the cogen project.

Long Lead Items

None of the expert witnesses herein testified that the particular nature of the specific items of material or equipment ordered directly by Indeck required that they be purchased by Indeck before a general contractor was engaged to build the cogen. Thus, none of the witnesses called by Indeck itself supported Indeck's contention that it had procured a significant amount of

supplies because the supplies were long lead items and if Indeck had waited for CNF to order them it would have held up the progress of the Corinth project.

Was Indeck a Contractor

All of the expert witnesses agreed that after CRSS ceased performing the detailed engineering and before CNF arrived, Indeck had engaged in construction activity with respect to the Corinth cogen project. Thus, when Indeck hired six specialty contractors to perform site clearing, grading, soil remediation and fencing it was without a doubt performing construction as that term was interpreted by all of the witnesses herein.

Charging Party witness Rosen and the witnesses called by the Respondents agreed that when Indeck directly hired a contractor to grade the road to the river intake structure it was engaged in construction activity.

The Charging Party's experts held the opinion that, apart from the construction activities discussed above, Indeck had not acted as its own general contractor. They testified that Indeck entered into three separate contracts with three general contractors to build the power plant, the pipeline and the electrical transmission line. The witnesses called by the Respondents testified that Indeck had acted as its own general contractor.

VIII. DISCUSSION AND CONCLUSIONS

Indeck's own literature proclaims that Indeck does "full scope project development and execution" and "undertakes the construction and operation risks" of cogeneration plants such as the Corinth cogen. Indeck provides expertise in "construction and construction management" and its staff engages in "close scrutiny" of the detailed engineering and construction phases of its cogens.

This self-description by Indeck sums up my own findings. The record makes clear that from the moment Indeck management believed that it had a viable project in the Corinth cogen, Indeck closely controlled every aspect of the construction.

As set forth by Judge Morton, Indeck's employees prepared an extremely detailed Statement of Work which was used to solicit bids from potential contractors for the power plant.²⁶

During the entire time from planning to completion of the Corinth cogeneration plant Indeck demonstrated its control of the labor relations at the project. First, Indeck met with and negotiated an agreement for the Respondent unions to support the Corinth cogen and the other contemplated cogens before various governmental agencies in return for Indeck's promise to use union construction labor. Indeck instructed bidders to base their prices on union labor when submitting proposals for the Corinth, Olean and Kirkwood cogens. Indeck's president provided a model project labor agreement to bidders for the Corinth, Olean and Kirkwood projects. Indeck's president sat in on the negotiation of the Olean PLA and directed bidders that a similar PLA must be used for the Corinth cogen. Indeck awarded the contract to build the Corinth power plant to CRSS with a price based on union labor. When Indeck's delay in obtaining financing caused equipment and other costs to rise and the power plant seemed likely to be more expensive than

²⁶ The Statement of Work was incorporated into the construction agreements with CRSS and later with CNF for the power plant.

the budgeted amount, Indeck abandoned in part its promise to use union labor. Indeck then awarded the construction of the power plant to CNF based on non-union labor, but it continued to use union labor to build other components of the cogen in order to prevent further conflict with the Respondents. Indeck made all of its choices based on the cost of union labor to the various contractors with which it was dealing. Thus Indeck fulfilled the factual situation posited by Senator Morse: Indeck let the contract to CRSS, CNF and its other contractors based on price and with knowledge of the labor relations of all of these contractors.²⁷

All of the experts herein agreed that construction contractors control labor relations. The record shows that mere owners do not generally express a preference as to labor relations unless operating personnel already on the site of an existing facility are union members. I conclude that Indeck acted as an employer in the construction industry by its demonstrated control of labor relations at every step in building the Corinth cogen. *Church's Fried Chicken*, supra; *District Council of Carpenters (Rowley-Schlimgen)*, supra; *District Council of Carpenters v. Rowley-Schlimgen*, supra at 2 F. 3d 769.

Indeck controlled many aspects of the day-to-day construction. The record amply demonstrates that Ranaletta, Rubado and Boyle were involved in every aspect of the construction of the Corinth cogen and made all the important decisions concerning the construction. As set forth by Judge Morton, the record shows that Indeck insisted on daily meetings with CNF in 1994 and 1995 as various components of the cogen were tested and started up. Indeck directly hired many inspectorial services to monitor the construction and Rubado received direct reports on the various contractors' activities from these inspectors. Beginning one year before completion of construction Indeck employees who were destined to run the plant, from the plant manager down to the operators, were placed on site. Although Indeck characterized their mission as primarily "training", it is clear that these employees were used as inspectors for the last year of construction. Respondents' expert DelVecchio testified persuasively that the typical owner avoids bringing its own employees to the construction site for fear of causing conflict with the general contractor. In addition an owner may be saddled with more responsibility for the construction than it bargained for if it is too involved in the day to day running of the site. By bringing a significant number of its own employees to the construction site, Indeck far exceeded the "sporadic" involvement cited in *Longs Drug*, supra.

Indeck purchased much of the equipment and material itself rather than relying on the contractors. Although Ranaletta testified that Indeck purchased long lead items when necessary, no documentary proof was presented to show that the breakers, the

²⁷ Indeck used the unions to gain the necessary governmental approvals and permits. It agreed to use union labor to build the Corinth cogen, never cautioning the unions that it was entering into an illegal agreement because it was not an employer in the construction industry. As soon as it was convenient to do so, Indeck did exactly what Senators Morse and Kennedy thought was unfair and what they sought to prevent by their legislation; Indeck then contracted with a firm that used nonunion labor because it was cheaper than the bargain previously made.

pipng and the transmission towers were subject to delivery delays. The Respondents' expert DelVecchio testified that many of the materials purchased directly by Indeck were not long lead items but were readily available from many supply houses. Significantly, although all of Indeck's expert witnesses herein testified as to the definition of a long lead item, not one of these experts gave an opinion that the specific goods purchased directly by Indeck were in fact long lead time items. The record shows that Counsel for the Charging Party was assiduous in obtaining every shred of favorable evidence on behalf of Indeck. Therefore, the failure of Indeck's experts to support its argument in this area is determinative. I do not find that the record supports a finding that any of the equipment and material purchased directly by Indeck was subject to a long lead time. I find that contrary to the usual practice where a general contractor, and not the owner, is responsible for procurement, Indeck made large and significant purchases directly for the Corinth cogen. Indeck thereby assumed duties of a contractor and not an owner.

Indeck's witness Ranaletta acknowledged that Indeck performed the construction management for the power plant, the gas pipeline and the electric transmission line. All of the expert witnesses herein agreed that construction firms enter into contracts to provide construction management services. No extended discussion is required to find that a firm that provides construction management services for owners of building projects is in the construction industry. Indeck provided construction management services for components of the cogen which it did not own and which it would never own. Thus, Indeck was not performing the functions of a typical owner. Rather, Indeck assumed the duties of an entity in the construction industry.

As Indeck acknowledged in its brochure which described its various projects, Indeck assumed the construction risk in building the Corinth cogen. All of the experts who testified herein agreed that a contractor assumes the risk of construction. As set forth in detail by Judge Morton and as explained by the Respondents' expert witnesses, Indeck was subject to default payments to Niagara Mohawk, ConEd and International Paper if it did not meet certain milestone dates in the process of construction. Indeed, the January 27, 1993 Gas Facilities Interconnection Agreement with Niagara Mohawk specifically names Indeck as the "construction contractor" for the pipeline. Indeck was paid a lump sum by Niagara Mohawk to build the pipeline and was responsible for costs above this sum. In effect, Indeck was the general contractor for an EPC type of contract for the pipeline to be owned by Niagara Mohawk. This fact is shown by all the duties Indeck undertook as well as the contract provisions that called for late penalties and for any cost overruns to be paid by Indeck if it were "removed as construction contractor." Although Indeck's expert witnesses attempted to analogize Indeck's assumption of risk to a supplier who agrees to pay a penalty if the goods being supplied are not timely delivered, this analogy is not precise enough. We all accept risks in our undertakings, but these are not necessarily construction risks. The experts agreed that construction risk is defined as the risk that a structure will not meet various milestones in the construction process or that it will exceed its budget. Indeck assumed both of these facets of the construction risk in building

the cogen. Construction risk is a specific concept in the construction industry and Indeck's actions clearly met the definition given by the experts.

Moreover, as shown above, Indeck does not own the power plant and did not own it while most of the construction work was going on. In effect, Indeck proposed the construction of the Corinth cogen and oversaw its construction and Indeck assumed the construction risks for the components of the cogen without retaining ownership in any part of the cogen. Although Indeck has the right to buy back the power plant component of the cogen, this will take many years, if it occurs at all. It is fair to conclude that Indeck has built the cogen for the benefit of other owners. Indeck is making its profit, if any, from payments it received for construction costs and construction management and from the sale of energy to IP and Con Ed.

All of the expert witnesses testified that it is typical of a general contractor to enter into multiple contracts for the construction of a project. Indeck attempted to cast the facts herein as though it had entered into three contracts with three general contractors for the construction of the power plant, the pipeline and the electric transmission line but the facts do not support this argument. As detailed by Judge Morton and by the expert witnesses herein, Indeck entered into 25 separate contracts for construction of the Corinth cogen. All of the witnesses herein agreed that Indeck could have engaged a general contractor to bid and supervise these individual contracts.

As shown above, the terms "contractor" and "subcontractor" do not have generally accepted meanings in the construction industry. Indeck's own witnesses, although attempting to use the terms in such a manner that Indeck would be seen to deal only with "contractors," were not uniform in testifying that Indeck dealt with contractors but not with subcontractors. As noted above, both Lindsay and Ranaletta were not consistent in this use. I conclude that the distinction between the terms "contractor" and "subcontractor" is not material to a decision whether Indeck is an employer in the construction industry. It is not necessary that Indeck fit within some generally accepted definition of "general contractor" for the 8(e) proviso to apply to Indeck's construction of the Corinth cogen. *District Council of Carpenters (Rowley-Schlimgen)*, supra. Indeed, the construction of a large project such as the Corinth cogen involves so many different activities that it is fruitless to attempt to pigeonhole Indeck's involvement in the project. When Indeck first conceived the project, it may have seen itself as a "developer" and as a prospective "owner" rather than as a "general contractor." Indeck intended for others to perform construction management, but Indeck became the construction manager for the power plant, the gas pipeline and the electric transmission line. And, as was conceded by Indeck's own witnesses, during the time that Indeck directly contracted with six contractors to put up a fence and clear the power plant property, Indeck would surely be viewed as a "general contractor" dealing with a number of small specialty subcontractors. And the witnesses agreed that Indeck stepped into a general contractor's shoes when it hired one of these same specialty contractors to grade the railroad crossing to the river intake facility. Surely, the contract whereby Indeck was obligated as a "construction contractor" to build the gas pipeline for Niagara Mohawk placed Indeck in the

position of a general contractor. When Indeck built the electric interconnection facility under the supervision of Niagara Mohawk and when Indeck purchased the major equipment and material for the construction, Indeck was assuming the role of a contractor.

I believe Indeck's activities in building the Corinth cogen must be viewed in their totality as part of a lengthy continuum of actions. Thus, although Indeck expert witness Rosen stated his view that engineering is not a construction activity, in the instant case Indeck's intensive involvement in detailed engineering for the power plant must be seen in context. The evidence shows that preparation and review of detailed engineering goes on for a lengthy period of time and that it evolves based on feedback from the construction site as the project progresses. Indeck's expert witnesses maintained that when field inspections are performed by a contractor the inspections constitute a construction activity, but when an "owner" performs inspections it is not engaged in construction activity. The distinction, if it exists at all, is purely semantic. Not even the Charging Party maintains that owners may never come within the Section 8(e) proviso. The inspections performed by Indeck must be viewed as part of its ongoing effort to complete the Corinth cogen. The record shows that Indeck had operating employees and independent contractors on the construction site inspecting the cogen as it was built. It is foolish to maintain that when a weld is X-rayed on behalf of the entity installing the welded pipe that is a construction activity, but when the same weld is X-rayed by someone hired by an "owner" the identical activity is not part of the construction process. The purpose of the inspection in both cases is to see whether technical specifications have been met. Thus, all of Indeck's inspection activities at the cogen must be seen as an integral part of the construction process.

Indeck's attempt to analogize its undertaking in a complicated project such as the Corinth cogen to the effort of a householder building the family home is a procrustean task that is not helpful to the resolution of this case. Nor is it helpful to insist that Indeck's actions herein can all be classified as typical activities of owners of large industrial projects. The Section 8(e)

proviso applies to employers in the construction industry; significantly, it does not exclude owners of building projects. If owners engage in the type of activity Indeck undertook in the instant case, then the owners may also be employers in the construction industry. Merely calling a company an "owner" does not debar it from being an employer in the construction industry.

Viewed from beginning to end, Indeck's involvement in the construction of the Corinth cogen shows Indeck's control over labor relations, Indeck's control over many individual specialty contractors, Indeck's control of the daily workings of the various construction sites, the presence of large numbers of Indeck employees regularly at the sites, Indeck's direct purchasing of significant amounts of equipment and building materials and Indeck's assumption of substantial construction risk. Based on these factors, I conclude that Indeck is an employer in the construction industry within the meaning of Section 8(e) of the Act.

CONCLUSIONS OF LAW

1. Indeck is an employer in the construction industry within the meaning of the first proviso of Section 8(e) of the Act.

2. Section 8(e) of the Act is not applicable to the agreement of February 20, 1992 between Indeck and the Respondents.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁸

ORDER

[Recommended Order for dismissal is omitted from publication].

²⁸ Indeck used the unions to gain the necessary governmental approvals and permits. It agreed to use union labor to build the Corinth cogen, never cautioning the unions that it was entering into an illegal agreement because it was not an employer in the construction industry. As soon as it was convenient to do so, Indeck did exactly what Senators Morse and Kennedy thought was unfair and what they sought to prevent by their legislation; Indeck then contracted with a firm that used nonunion labor because it was cheaper than the bargain previously made.