

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

# Advice Memorandum

DATE: August 14, 2012

TO: Olivia Garcia, Regional Director  
Region 21

Mori Rubin, Regional Director  
Region 31

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

SUBJECT: Southern California Edison, et al 584-5000  
Cases 21-CA-72766, 21-CB-72804, 21-CE-72570, 584-5028  
31-CA-73272, and 31-CE-73273 584-5042  
584-5070

Regions 21 and 31 submitted these cases for advice as to whether the Project Labor Agreement between Southern California Edison and IBEW Local 47 is protected by the construction industry proviso to Section 8(e) of the Act. We conclude that the project labor agreement is covered by the construction industry proviso because Southern California Edison is an employer in the construction industry and the agreement at issue arose out of its longstanding collective-bargaining relationship with Local 47. The Regions should therefore dismiss all charges, absent withdrawal.

## FACTS

Southern California Edison (“SCE”) provides electrical utility services to customers throughout southern California. IBEW Local 47 (“Local 47”) represents a unit of SCE employees engaged in the construction and operation of electrical and distribution facilities. SCE and Local 47 have had a collective-bargaining relationship since 1947.

SCE’s Local 47-represented employees regularly perform construction work on its transmission and distribution infrastructure. SCE maintains a Field Construction operating group, whose primary functions are to perform construction work at switching centers, build substation components, lay underground electrical conductors, and build out underground vaults. Over SCE’s history, Local 47-represented employees have built thousands of miles of electrical transmission lines, hundreds of manned and unmanned substations, major electrical grid switching centers, and numerous power generation facilities. Over the last 20 years, however, SCE has shifted to subcontractors for its large-scale new construction projects rather

than using its own employees. Regardless, SCE continues to employ employees covered by its collective-bargaining agreement with Local 47, and these employees continue to perform construction work on SCE's existing facilities.

SCE and Local 47 entered into the Project Labor Agreement for Transmission & Substation Projects (PLA) in September 2006. This agreement includes a subcontracting clause that requires all contractors and subcontractors to become signatory to the PLA and to Local 47's Master Labor Agreement prior to performing any work on a PLA-covered project and to perform such work under the terms of that Master Labor Agreement. At the same time, SCE explicitly reserves the right to perform any PLA-covered work with its own employees under the terms of its collective-bargaining agreement with Local 47. The PLA also requires all contractors and subcontractors to recognize Local 47 as the exclusive bargaining representative of their employees and requires all employees performing work under the PLA to join Local 47. The PLA covers all on-site new construction, alteration, and other related activities within Local 47's craft jurisdiction on specific large-scale projects. The PLA expired by its terms in 2011, but SCE and Local 47 continue to apply the terms of the agreement to new large-scale construction projects.

Although SCE and Local 47 entered into the PLA more than six months prior to the filing of these charges, SCE communicated the subcontracting requirements in writing to potential contractors within that timeframe. At least one subcontractor was unable to bid for a job covered by the PLA based on these communications because a different union had been certified as its employees' Section 9(a) representative.

#### ACTION

We agree with the Regions that the subcontracting clause in the Project Labor Agreement is lawful under the construction industry proviso to Section 8(e). We further agree that the clause does not violate Section 8(a)(2) or 8(b)(4)(ii)(C). The Regions should therefore dismiss the charges, absent withdrawal.<sup>1</sup>

Section 8(e) makes it an unfair labor practice for a union and an employer to enter into any contract or agreement where the employer agrees to cease doing business with any other employer or person. But a contract clause that

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<sup>1</sup> We also agree that SCE reaffirmed the challenged subcontracting provision within the 10(b) period by communicating the subcontracting requirements in writing to potential contractors. *See SEIU Local 1 (The Wackenhut Corp.)*, 13-CE-127, Advice Memorandum dated January 24, 2007 at 3–5 (agreement reaffirmed where signatory to agreement explained and reproduced the subcontracting requirements to potential subcontractors and included the subcontracting provisions in circulation of requests for proposals).

technically falls within this prohibition will be found lawful if: (1) the clause has a primary objective, i.e., if it is intended to preserve the work of unit employees; or (2) even if secondary in nature, the clause is protected under Section 8(e)'s construction industry proviso.<sup>2</sup> The construction industry proviso exempts agreements between unions and employers “in the construction industry relating to 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,”<sup>3</sup> provided that they arise within the framework of a collective-bargaining relationship.<sup>4</sup> And because the construction industry proviso protects union subcontractor clauses with secondary objects that would be otherwise unlawful under Section 8(e),<sup>5</sup> the fact that such a clause could allow a union to capture work historically performed by members of other unions is immaterial.<sup>6</sup>

As long as an employer “actually performs construction work,” it may claim protection of the construction industry proviso even if construction is not its principal business.<sup>7</sup> SCE engages in the construction of transmission and distribution systems as an integral part of its business of providing electrical service to its customers. It maintains an operating group dedicated to the performance of this on-site construction work at its various facilities and employs Local 47-represented employees who routinely perform construction work similar to the craft work covered under the PLA. SCE reserves the right to utilize its own employees on PLA-covered projects and has in fact done so. We therefore conclude that SCE is an employer in the construction industry for Section 8(e) purposes.

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<sup>2</sup> See, e.g., *Iron Workers (Southwestern Materials)*, 328 NLRB 934, 936–37 (1999).

<sup>3</sup> Section 8(e).

<sup>4</sup> *Connell Construction v. Plumbers*, 421 U.S. 616, 631–33 (1975).

<sup>5</sup> See, e.g., *Iron Workers (Southwestern Materials)*, 328 NLRB at 936–37, 938 (finding lawful a clause providing: “The Employer agrees not to sublet any work under the jurisdiction of the Association or its local unions—to any person, firm or corporation not in contractual relationship with this Association or its affiliated Local Unions”). See also *National Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. at 638–39 (construction industry proviso “was intended . . . to allow agreements pertaining to certain secondary activities on the construction site”).

<sup>6</sup> See *Metropolitan Regional Council of Carpenters*, 4-CE-136, Advice Memorandum dated February 25, 2008 (concluding that a union may use a secondary union signatory agreement that is covered by the construction industry proviso to capture work traditionally performed by other unions).

<sup>7</sup> *Carpenters Local 623 (Atlantic Exposition Services)*, 335 NLRB 586, 591 (2001) (contrasting the requirements of the 8(e) construction industry proviso with the 8(f) requirement that an employer be engaged primarily in the construction industry).

In *Connell Construction*, the Supreme Court held that a union signatory subcontracting clause with “stranger” contractors, outside a collective-bargaining relationship and not limited to any particular jobsite, is not protected by the construction industry proviso.<sup>8</sup> In that case, the union had specifically disclaimed any interest in representing the general contractor’s employees and insisted upon the subcontracting clause as a tool to organize subcontractors in the local area.<sup>9</sup> The Court reasoned that the proviso was not intended to give unions an “almost unlimited organizational weapon” and that Congress enacted the 1959 amendments to limit such “top-down” organizing campaigns.<sup>10</sup> Citing *Connell Construction*, the Board in *Glens Falls* held that a union’s agreements containing union signatory clauses with an owner-operator of a power facility and its general contractor violated Section 8(e) because the agreements were not negotiated in the context of either a Section 8(f) or a Section 9(a) collective-bargaining relationship.<sup>11</sup> The owner-operator had no employees in the building and construction trades and neither it nor the general contractor intended to employ any trade employees on the relevant jobsite.<sup>12</sup>

In the instant cases, SCE was not a “stranger” contractor to Local 47 when the parties entered into the PLA.<sup>13</sup> SCE and Local 47 have a collective-bargaining relationship that dates back more than 60 years. SCE employs construction workers, and their collective-bargaining agreement covers construction work. Moreover, SCE reserves the right to use its own employees to perform PLA-covered construction work. And Local 47 is willing to refer additional employees to perform the PLA work. Therefore, *Connell Construction*, where the union had disclaimed representation of the general contractor’s employees, and *Glen Falls*, where the owner-operator and the general contractor neither employed nor intended to employ construction workers, are inapposite. SCE and Local 47 entered into the PLA in the context of their collective-bargaining relationship, satisfying the *Connell Construction* non-statutory requirement. Accordingly, the subcontracting provision of the PLA is covered by the construction industry proviso and does not violate Section 8(e) or 8(b)(4)(ii)(A).

Further, contrary to the Charging Parties’ assertion in the Region 21 cases, the PLA does not violate Section 8(b)(4)(ii)(C) by requiring recognition of Local 47 by

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<sup>8</sup> *Connell Construction v. Plumbers*, 421 U.S. at 631–33 (1975).

<sup>9</sup> *Id.* at 619, 631.

<sup>10</sup> *Id.* at 631–32.

<sup>11</sup> *Glens Falls Building and Construction Trades Council*, 350 NLRB 417, 421–22 (2007).

<sup>12</sup> *Id.* at 421.

<sup>13</sup> *Cf. Connell Construction v. Plumbers*, 421 U.S. at 631–33.

potential subcontractors that already have a Section 9(a) relationship with a different union. In *Woelke & Romero*, the Supreme Court examined the legislative history of the construction industry proviso at length and found that the House Labor Committee heard testimony that then-existing subcontracting clauses denied “employers whose employees had selected another union” opportunities to compete for jobs.<sup>14</sup> Congress nevertheless proceeded to enact the proviso to protect such “broad” subcontracting clauses which were “part of the pattern of collective bargaining prior to 1959[.]”<sup>15</sup> Accordingly, the Congress that enacted Section 8(e) in 1959—including the construction industry proviso—clearly contemplated that a union could apply such an agreement to prevent the subcontracting of work to subcontractors whose employees were represented by a different union. For similar reasons, we agree with the Regions that SCE did not violate Section 8(a)(2) by entering into the PLA. It cannot be the case that Congress, after having carved out the construction industry proviso to Section 8(e), intended that employers or unions would violate other sections of the Act by entering into agreements covered by the proviso.

In sum, the Regions should dismiss all charges in full, absent withdrawal.

/s/  
B.J.K.

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<sup>14</sup> *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 648, 658 (1982) (holding that the proviso is not limited to jobsites where both union and non-union employees are employed and noting that the proviso’s protection is not limited to jobsites at which the signatory union workers are employed).

<sup>15</sup> *Id.* at 660.