06/21/02

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A.D. 0587 RELEA

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Baltimore Building and Construction Trades Council
(Associated Builders and Contractors, Inc.)
Case No. 5-CE-57

This case was submitted for advice as to whether the Labor Stabilization Agreement entered into between the Maryland Mass Transit Administration (herein MTA) and the Baltimore BCTC violates Section 8(e).

FACTS

The MTA is a political subdivision of the state of Maryland. It currently owns and operates a bus system serving the Baltimore area. The MTA is also responsible for the planning, design, construction, and ultimate operation of the Baltimore Area Rapid Transit System, or subway, now under preliminary construction.

The MTA employs neither construction employees nor supervisory personnel on the construction site. According to competitive bidding procedures established under state law, the MTA must award contracts for the subway construction to the "lowest responsible bidder." In an effort to prevent work stoppages and other disruptions to the subway construction, the MTA on May 17, 1976, entered into the Labor Stabilization Agreement (herein LSA) with the Baltimore BCTC and its affiliates. 1/

1/ The MTA received a Federal capital grant for the subway construction. MTA entered into the LSA pursuant to a United States Department of Transportation policy, announced in the spring of 1976, encouraging applicants for Federal grants to obtain "no strike" pledges from construction unions in order to prevent additional construction costs from strikes and other work stoppages.

The LSA establishes a mechanism for resolving jurisdictional disputes and it contains a grievance procedure for resolving other disputes. It forbids strikes and lockouts. It also provides that the minimum wages to be paid to all employees working on the project shall be "the highest prevailing wage rate applicable to the project." The agreement further provides that the MTA will require all contractors receiving subway construction contracts to agree to be bound by the LSA and to agree that their subcontractors will be so bound. However, apart from the obligation to be bound to the LSA, the contractors and subcontractors are not required to have a collective bargaining agreement or relationship with any union. Finally, the LSA provides that if some of its provisions conflict with the provisions of any existing collective bargaining agreement, the LSA provisions shall control.

Pursuant to its competitive bidding procedures, the MTA has awarded construction contracts to both "non-union" contractors and also contractors who have agreements with the Baltimore BCTC or one of its local affiliates. As required by the LSA, all contractors accepting bids have agreed to be bound by the LSA.

The instant Section 8(e) charge was filed by the Associated Builders and Contractors, Inc., Baltimore Metropolitan Chapter.

ACTION

It was concluded that further proceedings are not warranted because MTA, a state governmental entity, is not subject to the proscriptions of Section 8(e).

The MTA, as a political subdivision of a state, is not an "employer" within the meaning of Section 2(2), although it is a "person" within the meaning of Section 2(1) of the Act. It was concluded that the proscriptions of Section 8(e) do not apply to such a governmental person. The cases which hold that political subdivisions are entitled to the protection of 8(b)(4)(B) are not dispositive of this issue since the proscription and order in such cases operate against the union and not the political subdivision. 2/ Further, the cases which hold that Section 8(e) applies to agreements between a union and a person such as an airline 3/ are not dispositive of the issue because such cases do not require a conclusion that a state entity has violated the Act and such cases do not require the issuance of an NLRB order against such an entity.

2/ See, e.g., City of Juneau, 176 NLRB 889; Local 3, IBEW (Mansfield Contracting Corp.), 205 NLRB 559, 563, and cases cited therein.

3/ See International Association of Machinists (Lufthansa German Airlines), 197 NLRB 232, enf'd. 491 F.2d 367 (C.A. 9, 1974).

Thus, the Board decisions in this area do not teach that Section 8(e) would apply to a state entity. Further, a recent Supreme Court decision suggests that Section 8(e) cannot constitutionally apply to such an entity. In National League of Cities v. Usery, 4/ the Court held that the Federal Government was forbidden to impose the minimum wage requirements of FLSA on the state entity involved therein. In the Court's view, a contrary holding would mean that the state could not structure its labor relations in a manner calculated to conserve financial resourses. In that same sense, it would seem that the Federal Government may not impose the provisions of Section 8(e) on a state entity so as to forbid that state entity from entering into an agreement like that in the instant case. It is clear that the MTA entered into that agreement for the purpose of minimizing labor strife on its construction project, thereby holding down construction costs. If the NLRB were to impose the requirements of Section 8(e) on that agreement, the Federal Government would be effectively precluding the state government from structuring its relations with unions in a manner calculated by the state to conserve its financial resourses. National League appears to teach that the Federal Government cannot constitutionally do this.

In summary, there is no authority for the proposition that Section 8(e) would reach agreements entered into by a state entity, and there are strong arguments that Section 8(e) cannot constitutionally have that reach. In these circumstances, further proceedings on the charge were considered unwarranted. 5/

H.J.D.

4/ 96 S. Ct. 2465 (1976).

5/ We do not conclusively hold here that Section 8(e) cannot constitutionally apply to state entities like MTA. The National League case may not apply to non-traditional governmental activities. However, there have been no administrative or judicial rulings denominating subway construction as a non-traditional governmental activity. (See 94 LRRM 262 for the Department of Labor procedures for denominating non-traditional governmental activities.) Further, National League may not apply to federal laws forbidding states from practicing age, sex, or other invidious discrimination. Fitzpatrick v. Bitzer, 96 S. Ct. 2666 (1976); Usery v. Board of Education of Salt Lake City, 421 F. Supp. 718; Christensen v. Iowa, 417 F. Supp. 423. However, such laws which are grounded in the Fourteenth Amendment and which do not preclude states from struoturing their labor relations in a manner reasonably calculated to conserve financial resources, are arguably different from Section 8(e) as applied in the instant case.

Further, in view of our conclusions herein that Section 8(e) does not apply to MTA, it is unnecessary to decide whether MTA is engaged in the construction industry and, if it is so engaged, whether the project agreement would be protected by the construction industry proviso to Section 8(e). See n. 20 of Guidelines for Handling Section 8(e) Construction Industry Proviso Cases Under the Supreme Court's Connell Decision, Memorandum 76-57, dated December 15, 1976.