FINISHING CONTRACTORS ASSOCIATION OF ILLINOIS

February 8, 2012

A Report for FCAI from Michael Boldt, Ice Miller LLP (edited)

RE: Finishing Contractors Association of Illinois – "Out of Area" Issues

From Mike Boldt:

You asked me to "clarify" the issues raised by several sources including members and the IUPAT. Doing so requires a complex analysis of both the Constitution of the International Union of Painters and Allied Trades (IUPAT) and the collective bargaining agreements between the Finishing Contactors Association of Chicago with Painters' District Council 14 (DC 14) and Finishing Contractors Association of Illinois with Painters' District Council 30 (DC 30).

Executive Summary

A detailed analysis of the issues follows, but the short summary is:

1. The membership-specific provisions of the DC 14 and DC 30 collective bargaining agreements (each says first man on the job must be from their DC) appear to be contrary to both the National Labor Relations Act (Act) and the IUPAT Constitution. Thus, they are unenforceable. In addition, James Williams, General President of the IUPAT has indicated in writing the first man on the job can be any person from your company (DC 30 or 14) regardless of domicile or where the job is located.

2. The jigsaw-like puzzle system of mobility of IUPAT represented employees to work in the jurisdictions of more than one district council (DC) is premised on a DC entering into collective bargaining agreements only with contractors whose principal place of business is within that DC's jurisdiction. Accordingly, the current situation we face in which some members of your association have signed collective bargaining agreements with both DC 14 and DC 30 are unworkable for those contractors given the clauses inserted into each agreement pursuant to other provisions of the IUPAT Constitution.

3. The inclusion in the DC 14 and DC 30 collective bargaining agreements of modified versions of certain clauses "mandated" by the IUPAT Constitution generates irreconcilable disputes over the treatment of benefit fund payments when a contractor works outside of its "home" area, defined as the jurisdiction of the DC within which it has its principal place of business.

The balance of this bulletin discusses these clauses and issues in more detail.

Mobility of IUPAT Members

As stated in paragraph 1, above, provisions of the DC 14 collective bargaining agreement (such as Article 3, Section 6(d)), or any collective bargaining agreement for that matter, that require persons to be actual members of a union, or of a particular subordinate body of a union such as a DC, as a condition of employment are unlawful under the Act. Thus, to require employers to employ only "DC 14 members," on any particular job regardless of where that job is located appears to call for unlawful employment practices.

Section 108 of the IUPAT Constitution essentially guarantees members of the Union in good standing the right to work in any city. Section 108 states, in pertinent part:

... a card fully paid up, regardless of where it is issued, shall entitle the holder to the right to work in any city, provided he or she conforms to the working rules and conditions of the locality and that no strike or lockout exists in that locality.

The IUPAT Constitution contains some other provisions regarding "clearance cards" and the like that members of the Union need to observe when working in other than their "home" DCs, but if they follow those rules, Section 108 says they can work anywhere.

"Out of Area Contractor" Issues

Michael Boldt indicates it is now clear where much of the confusion is coming from in regards to “out of area contractors.”

Most of the confusion is due to the fact that some contractors have signed ***both*** the DC 14 and DC 30 collective bargaining agreements. The reason this complicates matters is that the IUPAT Constitution, and the "Out of Area Contractor" clauses in each of the agreements, are all based on the premise that ***no contractor will sign an agreement with more than one DC.*** In other words, because some contractors have signed more than one collective bargaining agreement, each of which states that their principal place of business is in the jurisdiction of the DC whose agreements they have signed, the agreements cannot be applied in a logical way. Indeed, as some of Boldt's earlier letters have stated, the "Out of Area Contractor" clause cannot be applied to a contractor that has signed the agreement in which such a clause in included, because, by definition, that contractor is not "out of area" when it works in an area covered by that agreement. A review of some provisions of the IUPAT Constitution explains why the clauses exist, and why this is a problem.

IUPAT Constitution- Limitations on District Councils' Authority to Contract

Section 240 of the IUPAT Constitution restricts the power of DCs to enter into collective bargaining agreements. In doing so, it also, in effect, defines a "home" area for contractors under the Constitution. It states, in pertinent part:

a. Except as noted in sub-section (b), a District Council ... ***shall enter into Collective Bargaining Agreements only*** with contractors ..., whose principal place of business is located within the geographic jurisdiction of such District

Council ..., and ***shall not negotiate or enter into agreements with any ... out-of jurisdiction contractors ....***

b. A District Council ... may enter into an agreement with an out-of-jurisdiction contractor ... under the following conditions:

   1. The District Council ... must receive prior written approval from the Office of the General President.
   2. The agreement contains the International Union's mandatory out-of-jurisdiction clause as set forth in Sec. 246; and
   3. The District Council … immediately, in writing, sends to the District Council … in whose jurisdiction the employer's principal place of business is located, notification that the agreement has been signed and a complete, signed copy of that agreement.

(Emphasis Added)

As you can see, a DC is not permitted, by the IUPAT Constitution, to sign collective bargaining agreements with any contractors except those whose principal place of business is located within the territorial jurisdiction of that DC ***unless*** the three conditions of (b), above, are met. Yet, apparently without meeting those conditions, each of DC 14 and DC 30 have signed collective bargaining agreements with some members of your association ***and*** the FCA of Chicago.

Each of the DCs has at least paid "lip service" to the Section 240 requirement, but that "lip service" is what creates the problem. Article 3, §10(a) of the DC 14 agreement and Section 6.1(a) of the DC 30 agreement ***each*** state that the "principal place of business" of the signatory contractors is within the respective DC's jurisdiction. Therefore, those contractors who have signed both agreements have stated that they have two principal places of business, which destroys the premise on which the agreements are structured.

IUPAT Constitution- Mandatory Collective Bargaining Agreement Clauses

Several provisions of the IUPAT Constitution set out clauses that each DC is required to negotiate into its collective bargaining agreements. At least two of these - Sections 245 and 246 - are relevant to our current situation. Modified versions of those clauses are included in the DC 14 and DC 30 agreements. The differences, particularly of the Section 246 clause, create additional problems regarding allocation of benefit fund payments.

Terms of Out of Area Agreements

Section 246 of the IUPAT constitution deals with observance of the out of area agreement when a contractor works outside the territorial jurisdiction of the DC in which its principal place of business is located. It states as follows:

District Councils and Local Unions shall include in each of their collective bargaining agreements the following clause:

> The Employer party hereto shall, when engaged in work outside the geographic jurisdiction of the Union party to the agreement, comply with all of the lawful clauses of the collective bargaining agreement in effect in said other geographic jurisdiction and executed by the employers of the industry and the affiliated Local Unions in that jurisdiction, including but not limited to, the wages, hours, working conditions, fringe benefits, and procedure for settlement of grievances set forth therein; provided however, that where no affiliated Union has a current effective agreement covering such out-of-area work, the employer shall perform such work in accordance with this agreement; and provided further that as to employees employed by such employer from within the geographic jurisdiction of the Union party to this agreement and who are brought into an outside jurisdiction, such employee shall be entitled to receive the wages and conditions effective in either the home or outside jurisdiction whichever are more favorable to such employees. *In situations covered by the last proviso fringe benefit contributions on behalf of such employees shall be made solely to their home funds in accordance with their governing documents, and the difference between the wages and benefit contributions required by the away funds and the home funds, if any, shall be paid to the employees as additional wages*.
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> This provision is enforceable by the District Council or Local Union in whose jurisdiction the work is being performed, both through the procedure for settlement of grievances set forth in its applicable collective bargaining agreement and through the courts, and is also enforceable by the Union party to this agreement, both through the procedure for settlement of grievances set forth in this agreement and through the courts.

(Italics and underscore Added)

DC 14

Article 3, § 10(c) in the DC 14 agreement corresponds to the clause required by Section 246 of the IUPAT Constitution. Its first sentence, including all the separate clauses, and its last sentence, are essentially the same as the Section 246 clause. However, it does not contain the second, italicized, sentence dealing with the payment of fringe benefits to the home local; instead, it states:

> If no benefit contribution(s) or a lesser benefit contribution(s) amount is required in the home local than the amount required in Painters District Council No. 14 where the work is being performed, the contributions or difference in contribution amount shall be paid to the Painters District Council No. 14 fringe benefit Fund(s).

This is obviously very different from what the Section 246 "mandatory" clause calls for, and is certainly a source of problems of reciprocal application of the two DC agreements.

DC30

Section 6.1(a)(3) and 6.1(b) in the DC 30 agreement correspond to the clause required by Section 246 of the IUP AT Constitution. The DC 30 agreement also includes the essence of the first and last sentences of the Section 246 clause, and also has something very different than the italicized sentence. In place of that sentence, the DC 30 agreement states:

> ... and fringe benefit contributions on behalf of such Employees shall be made pursuant to this Agreement solely to the Funds in accordance with the Funds' governing documents.

Overall Problem in the DC 14 / DC 30 Areas

While the IUPAT Constitution sought to avoid cross-application of "out of area contractor" clauses by defining that any contractor can have only one "principal place of business" and then prohibiting the DCs from signing a collective bargaining agreement with any contractor whose principal place of business is not within that DC's territory, it apparently did not stop the DCs from signing collective bargaining agreements with contractors whose "principal place of business" is outside of their territory. That circumstance seems to be the crux of the problem - such contractors will ***never*** be "out of area" when working in either DC 14 or DC 30 because, as noted above, each is signatory, and "home," in each DC.[6]

The IUPAT Constitution is not binding on the contractors, and the IUPAT Constitution has no bearing on the legality or enforceability of the collective bargaining agreements-the collective bargaining agreements are between contractor associations and the DCs, and as far as we can tell as of now, there is no legal defect that would somehow void any provisions of them as a matter of law (other than the ones requiring actual membership to be employed). In other words, as far as we can tell, the fact that DC 14 or DC 30 each signed collective bargaining agreements with some of the same contractors despite the IUPAT Constitution stating that they were not permitted to do so does not make the conflicting agreements unenforceable with respect to those contractors who have signed both agreements. Accordingly, the situation for those contractors is unworkable in any practical sense.

Potential Resolution

If the affected contractors are willing, I believe the matter should be handled by reformation and rescission of the two collective bargaining agreements. Each could be reformed to include clauses that more faithfully incorporate the Section 246 mandatory clause, thus eliminating any conflict about application of benefit contribution provisions. Also, the agreements that are with DCs other than where the contractors have their principal place of business could be rescinded, leaving every contractor signatory to only one collective bargaining agreement.

Of course, to accomplish that, each affected DC would need to agree to such reformation and/or rescission.

Analysis of the potential for withdrawal liability must also be assessed. For example, if a contractor now signatory to both DC 14 and DC 30 agreements ceases to be signatory to one of them, will that contractor be deemed to have withdrawn from a multi-employer pension plan in effect in that DC? We need to make sure that the cure is not even worse than the disease.

Finishing Contractors Association of Illinois
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