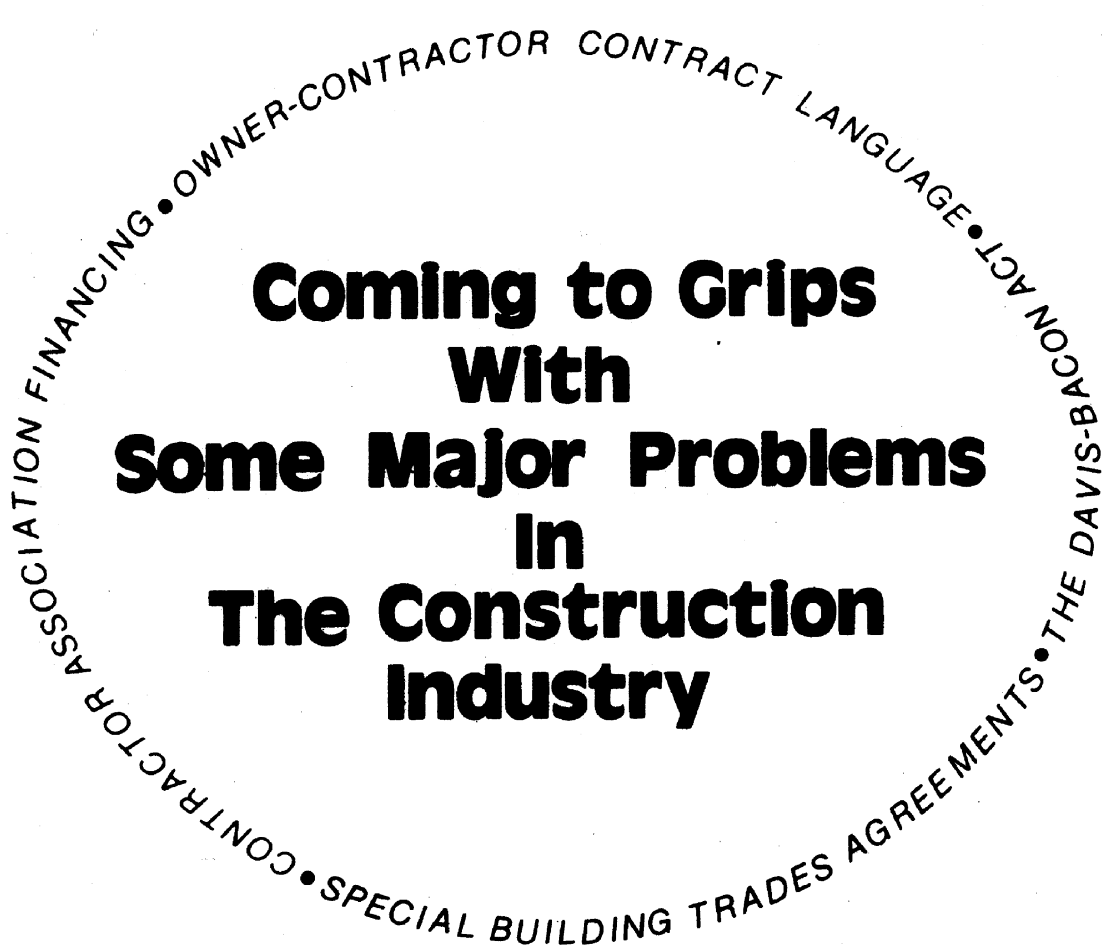
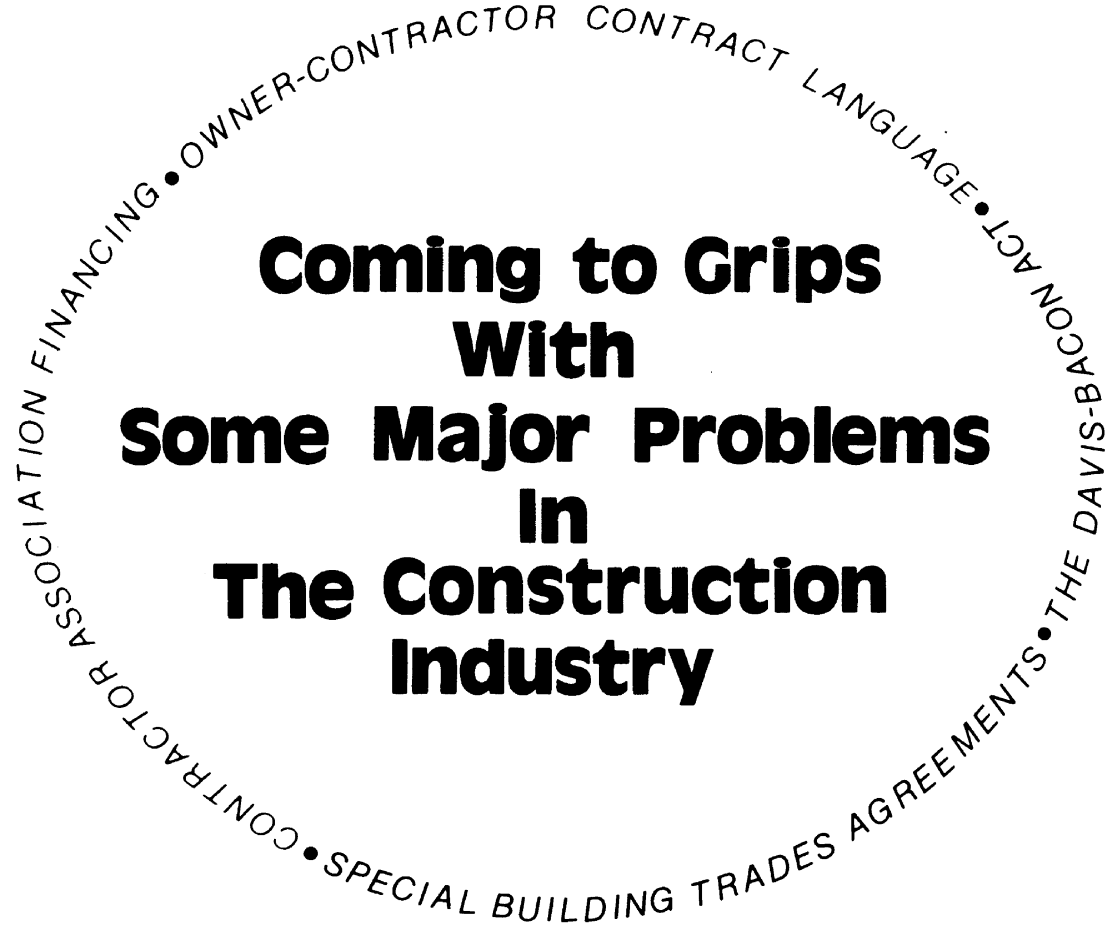


Coming to Grips With Some Major Problems In The Construction Industry

a Business Roundtable Report

Volume II

1978



Coming to Grips With Some Major Problems In The Construction Industry

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FOREWORD

One of the principal objectives of the Construction Committee of The Business Roundtable is the development of better understanding of contractor labor relations problems by construction users. Generally, users have sufficient in-house staff and expertise to handle labor-related matters of their own employees — but few have developed a thorough understanding of the significantly different set of conditions which prevail in labor-management relations in the construction industry.

Efforts to cope with this need brought forth in the early 1970s several task force reports which sought to discuss objectively many facets of construction labor relations. In 1974, four of these reports were published under the title, "Coming To Grips With Some Major Problems In The Construction Industry." The subjects discussed in that publication are:

- Scheduled Overtime
- Jurisdictional Problems
- The Hiring Hall
- Restoring the Management Role

A quotation from the Foreword of the 1974 volume appears appropriate at this point:

> "The construction industry has been called 'the least understood' of the great American industries, although it is the nation's largest. The value of new construction put in place annually is close to the combined sales of all forms of motor vehicles, steel, and aluminum. Construction, in fact, accounts for one out of every nine dollars of the Gross National Product.
>
> "Also little understood is the complexity of the construction sector of our economy. It is beset by severe problems of productivity and inflation, and differs in important respects from conventionally structured industry, where management manages and the composition of work forces is marked by comparative stability.
>
> "In 1969 these factors impinged so severely on construction that major customers of the industry organized to try to suggest some solution. This required an analysis of the problem areas."

We review that earlier publication here because we recommend study of it as a basis for better understanding of this second volume. Copies of the first volume are still available upon request to The Business Roundtable offices in New York.

In this — Volume II — we present reports by task forces of the Roundtable Construction Committee on:

- Contract Language Between Owner and Contractor
- The Davis-Bacon Act
- Special Building Trades Agreements
- Contractor Association Financing

The Roundtable believes that the task force reports in both this and the earlier volume constitute a valuable and lasting contribution to better understanding of problems that are of major consequence to construction users and, therefore, to the U.S. economy.

Roger M. Blough
Counsel, The Business Roundtable

J.E. Turner
Chairman, Construction Committee
The Business Roundtable

November, 1978

CONTRACT LANGUAGE BETWEEN OWNER AND CONTRACTOR

A principal "problem area" which has become apparent as better understanding of the construction industry has emerged has been the Construction User himself. The written contractual relationship between the User and his contractor is an important mechanism for improving understanding of labor relations matters, thus reducing the role of the User as a problem. If labor relations matters are talked out in advance—and mutual understanding of common objectives is reached in advance—progress can be made in solving some of the problems which have plagued the industry for many years.

The collective bargaining structures and procedures which have evolved through many decades in the unionized portion of the construction industry have tilted the balance of power in the industry strongly toward the union position. Abuse of this power during bargaining and administration of the resultant contracts has contributed to situations within the industry which are undesirable from the points of view of both contractor and User. These include:

1. Inflationary wage and benefit settlements.
2. Counterproductive work practices.
3. Inadequate supply of skilled workers.
4. Excessively long construction time schedules.
5. Arbitrary limitations on the use of innovative construction materials and techniques.

Construction Users have an interest in developments in the construction industry that extends beyond the cost and completion time of their projects. Some of these interests are:

1. Inflationary construction pay and benefit programs influence industrial programs.
2. Restrictive work practices in construction set targets for industrial workers and unions.
3. Industrial workers and unions can become involved in or be impacted by strikes and other counterproductive practices of construction unions.

Despite having a vital self-interest in developments in the construction industry, the User can and sometimes does make short-range decisions in his immediate interest that contribute significantly to the tilt of the balance of power in construction negotiations to the unions and away from management.

In initiating this task force effort, it was felt that a review of the means by which a variety of contractors and Users had worked out their own contractual relationships on labor-related problem areas would be helpful.

Since many of the aspects of the agreements entered into by the Construction User and the construction contractor are affected by local conditions existing in the area of the proposed construction project, no uniform solution to the problems connected with such arrangements can be offered. Rather, what this report offers are outlines of certain labor relations Items on which agreement and understanding between the User and contractor is desirable before initiating the project. Some of the Items may be inconsistent with others and, hence, the inclusion of one may preclude the incorporation of all or part of others.

Objectives

The objectives of the Items presented are to:

1. Assure a self-interest for the contractor in collective bargaining and contract administration in the geographical area of the project.
2. Provide a mechanism for User support of contractor and contractor organizations in the complicated contractor-union relationship in construction.
3. Provide an opportunity for the User to minimize his construction costs both in the short-term and long-range.
4. Provide an opportunity for the User to minimize the impact of construction wage rates and work rules on User's operations.
5. Provide the User with a preliminary analysis of some of the legal aspects of closer User association with contractor employment practices.

There is some risk to the User of being considered a co-employer if he becomes excessively involved in the contractor's labor relations decisions. The result could be that construction project labor disputes may impact the User's operatons. The Items presented herein have been designed to minimize that risk. However, the User is naturally expected to consult counsel as he finalizes his contract with the contractor.

Section I of this report reviews various items which might be covered by contractual provisions together with a discussion of the objectives which are hoped to be attained through the use of such a contract provision. Also included within the context of the various items are examples of language which a variety of construction Users–both large and small–have found to be useful.

It is *not the intent* of this report *to recommend any specific individual item or contract language*. This must necessarily be done by the *User* himself *to fit the particular needs of his project and his relationship with his particular contractor.*

It is the intent of this report, however, *to emphasize that the labor relations climate on a project is oftentimes established at the time the contract language is mutually agreed upon*–rather than at the time that the contractor enters the field with his workforce.

Section II of this report provides a legal review of some of the factors involved in construction labor relations matters with emphasis on the following:

1. Lockout provisions
2. The joint employer question
3. Freezing of the work force
4. Antitrust considerations

Section I

Labor Relations Items

Which Should Be

Considered for Inclusion In

User-Contractor Contracts

Item 1 – Labor Relations Information

Agreement should be reached in advance that it is an obligation of the contractor to keep the User informed on labor relations matters affecting the project, including:

1. Every demand for collective bargaining made upon the contractors' association, the contractor or any of his subcontractors by any labor organization as soon as such demand may come to the contractor's attention.
2. Any labor dispute which may reasonably be expected to affect performance of the work on the project by contractor or any of his subcontractors or the final cost of such work to the User.

Objective:

To provide the User advance notice of potential labor relations issues that may affect the implementation of his project, so that he will have adequate time to provide an input or take a position on the issues.

Examples of Contract Language covering this Subject:

"Contractor shall give to User's designated representative prompt notice in writing of (1) every demand for collective bargaining (under the provisions of the Labor-Management Relations Act (LMRA) as amended) made upon the contractor or any of his subcontractors by any labor organization as soon as such demand may come to the contractor's attention, and (2) any labor dispute which may reasonably be expected to affect performance of the work under this contract by contractor or any of his subcontractors or the final cost of such work to User."

"The contractor shall give to User's designated representative prompt notice in writing of any labor dispute or anticipated labor dispute which may reasonably be expected to affect the performance of the work under this contract by contractor or any of his subcontractors in regard to the final cost (or completion date) of such work to User."

"Whenever the contractor has knowledge that any labor dispute is delaying or threatens to delay the timely performance of the work, the contractor shall immediately give notice thereof to the Company. The contractor shall confirm the notice in writing within 24 hours of the giving thereof."

Item 2 – Contractor Participation In Local Bargaining

If contractor is a member of an association or multi-employer bargaining group to which he has

assigned his bargaining rights, he should participate in local negotiations to the fullest extent possible.

Objective:

To insure that the contractor's views and interests are felt at the bargaining table.

Example of Contract Language covering this Subject:

"In addition to contractor's legal obligations under the LMRA, in the event contractor is a subscriber to a multi-employer bargaining association or group, contractor shall, if User so directs, participate to the fullest extent in the collective bargaining of that group with any of those labor organizations claiming jurisdiction over any portion of the work under this contract or any subcontract."

Item 3 – Action In Event of Strike

Agreement should be reached in advance that in the event of a strike (or work stoppage or slowdown) in the area, contractor would have the obligation to consult with the User before:

1. Employing on the project any workmen not actually employed as of the date of the strike (or work stoppage or slowdown).
2. Applying retroactively increased wage rates negotiated as a result of the negotiations associated with the strike.
3. Continuing work on the project when other projects in the area are shut down.

Objective:

To prevent striking unions from strengthening their position with respect to the local negotiating contractor association by sending their members to non-struck projects to be assigned as additional workmen. Agreement to pay retroactively to project employees any bargained increases can strengthen the union leader's position during bargaining.

An antitrust concern would exist if a User group acting collectively created a horizontal freezing arrangement or the appearance of such an arrangement.

It is entirely appropriate for an individual User to take steps to assure that contractor actions in implementing his project do not undermine local collective bargaining. Care should be taken to assure that these steps do not result in illegal discriminations against union members.

Example of Contract Language covering this Subject:

"In the event of a labor dispute which threatens adversely to affect the progress or cost of the work hereunder, User reserves the right to restrict additional hiring of employees, to suspend or discontinue the work of the contractor and any subcontractors, or in User's sole discretion to terminate this contract. This paragraph shall be applicable whether or not the contractor or any subcontractor is directly involved in said labor dispute."

Item 4 – Allocation of Increased Wage and Fringe Cost

Agreement should be reached in advance as to how increased wage rates and fringes negotiated during the term of the project should be borne. This is particularly applicable on fixed price contracts.

The completion time of most construction projects is such that the pay rates and benefit plan costs of one or more craft unions are likely to increase during the life of the project. User and contractor should agree in advance whether these increased costs should be:

1. Anticipated by the contractor and included in his bid.
2. Assumed by the User and a specific method of calculating cost reimbursement included in the contract.
3. Shared between contractor and User to give each a vital interest in agreements reached during bargaining.

Objective:

To provide an incentive for the contractor to participate in contract negotiations and to resist, to the extent possible, high wage settlements. It is recognized that few contractors are large enough and well enough financed to assume a significant portion of wage cost increases resulting from collective bargaining during the life of a project. Further, a single contractor may have limited influence on the contract settlement. As a consequence, it may be more appropriate to agree in advance that only the contractor's profit margin will be reduced if negotiated settlements during the contract life result in "excessive" cost increases.

Example of Contract Language covering this Subject:

"Any proposal made under these General Conditions is to be based on field labor rates in effect as of the date of your proposal or, where applicable, on future rates set forth in existing labor contracts. You are not to include field labor escalation. If the total amount (material and labor) of your proposal exceeds $250,000 and you are the successful bidder, you will be asked to provide a tabulation of crafts showing (1) the total number of field labor man-hours in your estimate, (2) the wage rate used in preparing your field labor estimate, and (3) the portion of the field labor man-hours that will be subject to escalation, based upon the proposed schedule. You will then be reimbursed for the differential between existing and new rates on the actual number of field labor man-hours worked under the new rates, not to exceed, however, the man-hours previously given for work under the new rates. You will not be paid any overhead or profit on this wage differential, nor will there be any reimbursement for increased costs for any supplemental services such as equipment rental."

Item 5 – Conformance With Existing Contracts

Agreement should be reached in advance that contractor will abide by all labor agreements applying to the project.

Objective:

Oftentimes contractors agree to special conditions and work practices which may not affect his work on the project, but may have long-term implications on future performance and productivity in the area. The objective of this provision is to deter individual contractors from undermining the intended purpose of existing agreements.

Examples of Contract Language covering this Subject:

"Before hiring local labor for the work, the contractor shall abide by all labor agreements which may affect the performance of the work or its cost to the Owner in effect between the local contractors' association and local construction trade unions."

— — —

"The contractor shall not make any labor agreements with any local construction trade union affecting the performance of the work or its cost to the Owner, independent of those in effect between the local contractors' association and such union, without first obtaining written approval from the Owner.

"The term local 'Contractors' Association' as used herein means any association in the community where the work is to be performed which bargains on behalf of construction contractors in that community with construction trade unions concerning terms and conditions of employment of construction labor."

— — —

"The contractor shall exercise its management rights either specifically detailed in or not expressly limited by applicable collective bargaining agreement(s). Such management rights shall be deemed to include, but shall not be limited to, the right to hire, discharge, promote and transfer employees, to select and remove foremen or other levels of supervision, to establish and enforce reasonable standards of production, to introduce—to the extent feasible —labor-saving equipment and materials, to determine the number of craftsmen necessary to perform a task, job or project, and to establish, maintain and enforce rules and regulations conducive to efficient and productive operations."

— — —

"Contractor shall conduct his labor relations in accordance with his established labor agreements. Contractor agrees to advise Owner, prior to making any new commitments, in the negotiation of new agreements or understandings with local or national labor organizations as they affect the work."

Item 6 – Suspension of Work

Agreement should be reached in advance that the User may, at any time and without cause, suspend the work on the project or any portion thereof by notice in writing to the contractor.

Objective:

To provide the User the legal right to suspend work on the project for a multiplicity of reasons which might include:

1. A review of the project's economic viability in light of a changing economic climate.
2. A review of the project's economic viability in light of new technical developments.
3. A review of the project's economic viability in light of the project's labor climate.

The incorporation of this Item into the User-Contractor arrangement is to insure that the User can maintain some degree of control over the cost of his project, while at the same time preserving his independence from the overall construction employment phase of the project. The arrangement between the User and the contractor should, of course, provide for adjustments of scheduled completion dates and alterations in contract prices in the event of the implementation of these procedures.

Examples of Contract Language covering this Subject:

"At any time and from time to time, Owner, at his option, may require contractor to suspend work under this contract for such period as Owner may direct; provided, however, that if suspensions hereunder exceed 180 days during any period of twelve consecutive months, the contractor may, at his option, terminate the contract. In the event of a suspension hereunder, the parties shall confer and mutually agree as to appropriate adjustments, if any, to the Scheduled Completion Date and to the Contract Price."

"The Owner will reimburse contractor or any subcontractor, as the case may be, for its reasonable out-of-pocket costs and expenses arising out of the suspension or discontinuance of the work and caused by the exercise of the Owner's rights under Paragraph_____ of this Section_____ set forth herein. Reimbursable costs and expenses shall be exclusive of loss of anticipated profits."

"In the event of a labor dispute which threatens adversely to affect the progress or cost of the work hereunder, the owner reserves the right . . . , to suspend or discontinue the work of the contractor and any subcontractors, ... This paragraph shall be applicable whether or not the contractor or any subcontractor is directly involved in said labor dispute.

"The Owner shall reimburse contractor or any subcontractor, as the case may be, for its costs, and expenses arising out of the suspension, discontinuance, or termination of this contract or any subcontract caused by the exericse of the Owner's rights set forth herein. Costs and expenses shall be exclusive of anticipated profit."

Item 7 – National Agreements

Understanding should be reached in advance as to the status and provisions of any national agreements to which the contractor is signatory. Agreements should be reached with regard to appropriate action in the event of a work stoppage associated with a local contract expiration.

Objective:

Many contractors hold national agreements with some international unions which permit them to work through work stoppages associated with a local contract expiration. However, contrary to common belief, uniformity with regard to contractor options in such a situation does not exist. In addition, national agreements with some unions[1] have been allowed to expire; in some instances, work is performed in accordance with these expired agreements, although they are not contractually binding. Suffice it to say that it is important that the User have a complete understanding of his contractor's labor agreements which may affect his project.

Further, recent developments tend to favor language developed between the National Constructors Association and the pipefitters in the early 1970's and more recently adopted by both the boilermakers and the laborers. It is felt appropriate to include this language in this report as an example of the options available to many contractors.

"During the life of this agreement, each of the signatory parties agrees that there will be no strikes, work stoppages, or lockouts by members of the Union or by the Employer. In the event of an area strike over local contract negotiations, it will not be considered a violation of this agreement for the Employer to stop work covered by this agreement for the duration of the strike. The Employer is required to give notification to the Union five (5) working days prior to taking such action.

[1]Notably, brickmasons, painters, operating engineers, as of September 1976.

"In the event of an area strike over local contract negotiations, it will not be considered a violation of this agreement for the Union to refuse to furnish men to the Employer for the duration of the strike. The Union is required to give notification to the Employer five (5) working days prior to taking such action.

"This no strike, no lockout, commitment is based upon the agreement by both parties to be bound by the grievance and arbitration provisions of this agreement. The parties also agree that a breach of this no strike, no lockout, provision shall constitute a breach of the entire agreement."

The objective is to provide both User and contractor freedom to furnish support to local contractors during negotiations of local agreements if the situation warrants.

The changes which have been included in recent national agreements make previously-used contract language on this subject out of date. Recognizing this, Users may wish to consider the following contract language:

"Contractor shall supply Owner with copies of all national agreements to which he is a party. No later than five (5) days before the expiration of any local agreement which may effect the work, Contractor will meet with Owner for the purpose of discussing the appropriate course of action."

Item 8 – Jurisdictional Disputes

Agreement should be reached in advance that the contractor is to have the obligation of using all available steps to settle jurisdictional disputes.

Objective:

To reduce or eliminate work slowdowns or work stoppages resulting from illegal jurisdictional disputes.

A clear understanding of the contractor's responsibility to institute timely action will decrease his response time, and will serve to deter repeat jurisdictional violations by the unions. Recognition of contractor liability for losses incurred by the User due to work stoppages or slowdowns resulting from jurisdictional disputes, unless the contractor has taken all steps available for resolution, will be beneficial.

It might be well to implement this Item with a provision that the contractor shall compile a history of violations and report each violation to the union's international office.

Examples of Contract Language covering this Subject:

"Contractor shall take any and all steps that may be available in connection with the resolution of violations of collective bargaining agreements and jurisdictional disputes, including–without limitation–the filing of appropriate process with any court or administrative agency, having jurisdiction to settle, enjoin or to award damages resulting from violations of collective bargaining agreements or jurisdictional disputes."

"Contractor agrees that in the event any of its employees, or union representing such employees, breach the labor agreement between contractor and the union representing contractors' employees, contractor will exercise all legal remedies to which it is entitled under state and federal law, including, by way of example only, unfair labor practice charges with the National Labor Relations Board, requests for temporary restraining orders and injunctions under state and federal law, and suits for damages against the union representing the em-

ployees of the contractor. Further, in the event the employees of contractor, or the labor organization representing such employees, engage in jurisdictional disputes, contractor will institute appropriate legal actions as required by the labor agreement between contractor and the labor organization involved, and whatever legal remedies are available under federal and state law to the contractor."

Item 9 – Scheduled Overtime

Agreement should be reached in advance that the contractor will use scheduled overtime only with the written agreement of the User.

Objective:

To provide for retention of control by the User of this very important cost factor.

Studies have shown that use of scheduled overtime over extended periods of time is counter-productive and generally adds to the total cost of the project with little or no improvement in the completion date.

Examples of Contract Language covering this Subject:

"It is agreed that contractor shall work field labor (workmen at the work site) at straight-time wage rates only; however, contractor may use spot or casual overtime, such as that required to complete a concrete placement or to leave the work site in a safe condition. Contractor shall not work field labor at other than straight-time wage rates without Owner's prior written approval."

— — —

"The contractor shall accomplish all work during normal working hours. However, when necessary to accommodate the Company's operating requirements, the Company shall have the option to order any phase or phases of work performed at times other than normal working hours or on weekends or holidays, in which event extra cost, if any, for such work will be paid the contractor in accordance with the Contract Documents.

a. Except as noted in paragraph (b) below, the additional cost of authorized overtime labor, on contract work and/or additional work which may be ordered in accordance with this Article and/or Article_____(changes in work) and which is subject to reimbursement by the Owner, shall be only the actual premium time paid for such authorized overtime work, including such regular taxes and withholdings as are customary, plus agreed upon percentage for the contractor's and/or subcontractor's overhead and profit.

b. No profit shall be allowed for authorized overtime labor which is performed for the sole purpose of accelerating a job schedule to reduce the contract time."

"Premium time shall not be charged to Owner unless authorized in writing by Owner's Purchasing Agent.

— — —

"Premium time will be paid for at the premium rates established by the local applicable union agreement wage scale for each craft plus payroll taxes thereon and any workmen's compensation insurance premium that contractor is required to pay on account of such premium time. No payment will be made for public liability insurance, overhead, supervisory services, profit or other charges. Invoices for premium time must show a breakdown of payroll taxes by percentages and, if a percentage of workmen's compensation insurance premiums is applied, evidence that such premiums are applicable must be submitted.

"Premium time authorization, when authorized, constitutes formal authority to perform premium time work in accordance with Paragraph five of the Construction Contract.

"Invoice for premium time work shall be submitted separately, without retention, and such invoice shall be identified by the premium time authorization number."

Item 10 – Labor Supply

Agreement should be reached in advance that the contractor is to have the obligation to aggressively seek skilled craftsmen and other workmen, if the union is unable to supply an adequate number of workmen to man the project including:

1. Use of the "Job Bank" program, if available
2. Recruiting from other areas
3. Advertising
4. Training

Objective:

To provide assurance that adequate manpower will be available to complete the project in a timely manner.

The actual contract language may well have to be tailored to the situation in the particular trades involved and to the contractor's relationships to them. Thus, if the contractor had a contract with the union providing that he is free to hire men not referred by the union after a period of 48 hours, the contractual provision might make direct reference to his exercise of that right.

Example of Contract Language covering this Subject:

"Within_____ days after the execution of this contract, the contractor shall determine the actual number of craftsmen who are presently available for the work in the appropriate geographical area, and will project such availability throughout the term of the contract. Further, contractor shall determine the number of journeymen, apprentices, and trainees contractor will require on a month-by-month basis until project completion. Contractor shall also devise a course of action to enable contractor to perform the work, especially during periods of projected labor shortages. The program may include, but shall not be limited to, shift work, training programs, or hiring journeymen directly when the unions' referral arrangements fail to provide journeymen under the applicable labor agreement(s). Within _____ days prior to commencement of construction, contractor shall report to User the result of contractor's determinations hereunder."

Item 11 – Use of Apprentices

Agreement should be reached in advance that the contractor has an obligation to make maximum use of appprentices on the project. Apprentices will perform journeyman work as qualified. If the relevant building trades unions are unable or refuse to supply the apprentice manpower required, the contractor should employ personnel from whatever source is available to perform work normally handled by apprentices.

Objective:

To provide an incentive for the contractor to actively participate in the contractor union apprentice programs so as to augment the number of participants in these apprentice training programs.

The advantage to be obtained through the implementation of this Item can reduce the cost of the immediate project and contribute to moderating future construction costs by adding to the supply of skilled workers. Of course, the rough outline set forth above must be expanded into a more definitive program. The federal government is taking action to implement apprentice ratios in government-assisted construction. The proposed regulations would establish apprentice ratios based on (1) the ratios established in collective bargaining agreements in the area where the construction is undertaken; (2) in the absence of a ratio in a collective bargaining agreement for an occupation, the ratio recommended in the standards of the National Joint Apprentice Committee for the occupation (which are filed with the Labor Department); and (3) for any occupation for which no such recommendations are found, the ratio of one apprentice for every five journeymen has been judged reasonable.

Examples of Contract Language covering this Subject:

"It is expressly understood and agreed that unless specifically excused by User:

a. Contractor shall employ during the performance of this contract the number of apprentices or trainees, or both, in each occupation, called for by each applicable labor agreement;

b. Contractor shall take whatever steps may be necessary to assure that 25% of such apprentices or trainees in each occupation are in their first year of training;

c. During the performance of the contract, contractor shall employ the number of apprentices or trainees necessary to comply at all times with the requirements of subparagraphs (a) and (b) of this paragraph;

d. Contractor agrees to maintain and make available for inspection, upon User's request, contractor's records on employment of apprentices, trainees, and journeymen, in each occupation."

"Contractor shall exert his best effort to maintain the maximum complement of apprentices in the field work force as permitted by the local collective bargaining agreements."

Item 12 – Use of Prefabricated Materials

Agreement should be reached in advance that all prefabricated or factory assembled units purchased by the User and furnished to the contractor in connection with the project shall be properly installed without change or rework except as authorized by a written change order received by the contractor from the User.

Objective:

To retain for the User the right to aggressively seek ways to use the most efficient and economic means of implementing the project.

Examples of Contract Language covering this Subject:

"Contractor shall purchase materials, equipment, and prefabricated or factory assembled units to obtain the best cost/quality alternative, unless the material in question is covered by a work preservation clause of the applicable collective bargaining agreement."

"Contractor shall install prefabricated or preassembled equipment where specified or purchased by the Owner, or otherwise where it is deemed to be the most economic alternative, whether or not fabricated in a union shop and without unnecessary change or rework."

Item 13 – Subcontractors

Agreement should be reached in advance that the contractor shall cause similar labor relations provisions to be inserted in all subcontracts.

Objective:

To insure consistent labor relations policies on the total project. It may, of course, be difficult for the contractor to find subcontractors willing to adopt all of the Items. This will be a matter for negotiation and adjustment to local conditions.

Examples of Contract Language covering this Subject:

"Contractor shall incorporate the substance of the foregoing paragraphs appropriately into all subcontracts which contain field labor."

"Contractor shall cause the covenants and/or conditions of this Article to be inserted in all subcontracts so that User and contractor shall have the rights herein set forth with respect to each subcontractor."

"Contractor shall cause the foregoing provisions to be inserted in all subcontracts to the end and in the manner that the Owner and contractor shall have the same rights with respect to each subcontractor as the Owner has with respect to the contractor under this Section 9."

Item 14 – Industry Funds

Agreement should be reached in advance as to the extent to which the cost of "Industry Funds" or "Industry Advancement Funds" will be reimbursed by the User.

Objective:

During the last ten years, many labor agreements have been negotiated at the local level which contain provisions for the collection of funds (either on a cents per hour basis or as a percentage of gross labor payroll) to be used to finance an Industry Fund or Industry Advancement Fund. Some of these Funds have in fact been used to advance the specific industry with which the contractors are associated. However, oftentimes, they are used as a means of financing contractors associations, including the collective bargaining activity, as a substitute for contractor dues. Since their utilization and continuance are subject to renegotiation at each contract expiration, this gives the unions involved substantial power over the financial affairs of the contractor association and over its paid staff.

Some national agreements contain provisions which eliminate contributions to locally negotiated industry funds on jobs awarded to national contractors. Those recently negotiated by both the laborers and the pipefitters contain the following language:

"Industry promotion funds, for the purposes of this agreement, are not considered fringe benefits and need not be paid by the employer".

It is important for each User to be aware of the possible existence of such Funds in the area in which his project is located and to determine in advance his position with regard to contributions to such Funds.

Section II

Analysis of Legal Aspects

Legal Aspects of the Labor Relations Items Reviewed In Section I

Lockout Provisions

The key to the User-Contractor relationships reviewed in Section I is the ability of local contractors to augment their bargaining position with the local construction unions by preventing striking unions from sending their members to nonstruck projects to be assigned as additional workmen. This can be achieved by providing that contractors not employ on the project any workmen not actually employed as of the date of a strike. Real economic impact is imparted to this concept by providing that the contractors may suspend all work on the project performed by members of the striking union after genuine bargaining has broken down.

Any contract provision to the effect that the Contractor shall suspend work on the project in the event of a strike or other work stoppage by members of a building trades union in an area where other members of said union are being utilized by the Contractor in connection with a project, may result in charges by the union of a lockout violating Sections 8(a) (1), (3) and/or (5) of the National Labor Relations Act. Section 8 provides in pertinent part that

"(a) It shall be an unfair labor practice for an employer–

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment on any term or condition of employment to encourage or discourage membership in any labor organizations . . .

* * *

(5) to refuse to bargain collectively with the representatives of his employees . . ."

29 U.S.C.A. §158(a) (1), (3) and (5).

Prior to the Supreme Court's decisions in *American Ship Bldg. Co.* v. *NLRB,* 380 U.S. 300(1965) and *NLRB* v. *Brown,* 380 U.S. 278 (1965) lockouts fell into three categories only one of which was considered legal.

The first category was the case in which the employer meant to destroy the representative union or to undermine representative collective bargaining. The employer's motive rendered the lockout unlawful. See, e.g., *NLRB* v. *Wallick*, 198 F.2d 977 (3d Cir. 1952); *Industrial Fabricating Inc.*, 119 NLRB 162 (1957). This illegal motive, if proved, will always render a lockout illegal.

The legal category consisted of "defensive" lockouts justified by unusual economic circumstances; when a company's employees threatened to strike or when faced with whip-saw strikes. In *Betts Cadillac Olds, Inc.* 96 NLRB 268 (1951) the Board declared that:

"an employer is not prohibited from taking reasonable measures, including closing down his plant, where such measures are, under the circumstances, necessary for the avoidance of economic loss or business disruption attendant upon a strike . . . The nature of the measures taken, the objective, the timing, the reality of the strike threat, the nature and extent of the

anticipated disruption, and the degree of resultant restriction on the effectiveness of the concerted activity, are all matters to be weighed in determining the reasonableness under the circumstances, and the ultimate legality, of the employer's action." *Id.* at p. 286.

"Generally, two factors are present in all such cases: the reasonable threat of a strike and the potential harm over and above the usual effects attendant upon any strike." Ross, "Lockouts: A New Dimension in Collective Bargaining", 7 Boston College Industrial & Commercial Law Review 847, at p. 849 (1966). The following examples are illustrative: Members of auto dealers association legally closed down when the union refused to tell them when a threatened strike would occur and the dealers required advance notice so that repair work in progress could be completed and returned to customers, *Betts Cadillac Olds, Inc., supra;* a bottling company was permitted to close down in anticipation of a strike which would have resulted in a costly spoilage of syrup, *Duluth Bottling Ass'n.*, 48 NLRB 1335 (1943); construction contractors legally locked out their employees when a union refused to give an assurance that it would not call a "quickie" strike, because of "the necessity for continuous operation in the construction of bridges, overpasses and roads, once a phase of such an operation is underway," *Building Contractors Ass'n of Rockford,* 51 LRRM 1211 (1962); general contractors legitimately locked out their building trades employees after determining they couldn't continue operations without the striking members of the plumbing union, *Central Calif. Chapt., Assoc'd Gen. Contractors,* 32 LRRM 1374 (1953).

As noted, there is another type of "defensive" lockout. Where a multi-employer bargaining unit is faced with a whip-saw strike, the courts traditionally have permitted lockouts by nonstruck member employers. This tactic protects contractor associations which meet the requirements for multi-employer status: (1) the members of the group have indicated unequivocal intention to be bound in collective bargaining by groups as opposed to individual action; (2) the union has been notified of this intention by all group members; and (3) the union has entered into negotiations with the group's representative. See, e.g., *Western States Regional Council* v. *NLRB,* 68 LRRM 2506 (D.C. Cir. 1968). Of course, Board certification of a multi-employer unit will fulfil these requirements. These lockouts are justified on the theory of preserving the integrity of the bargaining unit.

The third type of lockout was the kind used to enhance the employer's bargaining position in collective bargaining negotiations where the employer's motive is "offensive" in nature, i.e. a closing down not because the employer intended to protect himself from the consequences of a strike, but to exert pressure upon the union to abandon its contract demands and accept the employer's proposals. Although the employer's motive itself did not bring it within Section 8(a)(3), the Board prior to 1965 consistently held that the action was unlawful, See, e.g., *Evening News Ass'n.*, 145 NLRB 996 (1964). Despite the absence of a specific illegal motive, in balancing the conflicting legitimate interests of the employer and his employees, the Board determined that the greater interest lay with the employees to be free from the reasonably foreseeable consequences of a lockout, i.e. infringement of their rights under Sections 7 and 8 (a) (3) to bargain collectively and to be free from employer discrimination based upon the exercise of such right.

In *American Ship Bldg., Co.* v. *NLRB,* 380 U.S. 300 (1965) the Supreme Court approved the use of the "offensive" lockout. The American Ship Building Company operated a highly seasonal business, the repairing of ships used in Great Lakes shipping with most work done during the winter months when navigation was impossible. The parties negotiated for two months before the contract with the union expired on August 1. They separated on August 9 with no plans for future negotiations (which, the Trial Examiner subsequently concluded, constituted a bargaining impasse). There had been a history of difficult labor relations, five strikes having occurred in the

preceding ten years. There were indications that the union would strike or delay negotiations until the peak season and also threats that a wild-cat walkout might occur. Under these circumstances the Company laid off part of its work force. Upon the filing of Section 8(a) (1) and (3) unfair labor charges, the Trial Examiner concluded that the lockout was in reasonable apprehension of a strike and therefore a ligitimate *defensive* tactic. The NLRB rejected the Examiner's finding with respect to the reasonable apprehension of a strike and declared that the sole object of the lockout was to exert economic pressure to break the impasse and to secure a favorable settlement of the dispute, thereby violating Section 8(a) (1) and (3). 142 NLRB 1362 (1963). After affirmance by the D.C. Circuit, the Supreme Court granted certiorari on the issue "whether an employer commits an unfair labor practice under . . . sections [8(a) (1) and (3)] of the Act . . . when he temporarily lays off or 'locks out' his employees during a labor dispute to bring economic pressure in support of his bargaining position." U.S. 380 at pp. 301-303. Reasoning that the lockout is illegal only where it contravenes a specific section of the Act, the Supreme Court concluded that when an impasse has been reached, a company may lay off or lockout workers "solely as a means to bring economic pressure to bear in support of the employer's bargaining position . . ." *Id.* at p. 308. In order to establish a violation of Section 8(a) (1), it must be proved that the employer's intention was to destroy or to frustrate the process of collective bargaining; in order to violate Section 8(a) (3), discrimination and resulting discouragement of union membership must be established—and because employer actions usually serve legitimate business interests at the same time that they tend to discourage union membership, the employer's specific intention to discriminate or at least his anti-union animus must be proved in order to establish a violation of the Act. Writing for the majority, Mr. Justice Stewart declared:

> "(W)e have consistently construed the Section [8(a) (3)] to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership. See, e.g., *Labor Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 347. Such construction is essential if due protection is to be accorded to the employer's right to manage his enterprise. See *Textile Workers* v. *Darlington Mfg. Co., ante,* p. 263.
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> "This is not to deny that there are some practices which are inherently so prejudicial to union interest and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other anti-union animus is required. In some cases, it may be the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose. *Radio Officers' Union* v. *Labor Board, supra,* at 44-45; *Labor Board* v. *Erie Registor Corp. supra* . . .
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> "But this lockout does not fall into that category of cases arising under §8(a) (3) in which the Board may terminate its inquiry into employer motivation. As this case well shows, use of the lockout does not carry with it any necessary implication that the employer acted to discourage union membership or otherwise discriminate against union members as such. The purpose and effect of the lockout were only to bring pressure on the union to modify its demands. Similarly, it does not appear that the natural tendency of the lockout is severely to discourage union membership while serving no significant employer interest . . ." *Id.* at pp. 311-312.

The ultimate effect of the *American Ship* decision was to obviate the distinction between the "defensive" and "offensive" lockout. See also *NLRB* v. *Brown,* 380 U.S. 278 (1965).

After the Supreme Court's decision in *NLRB* v. *Great Dane Trailers, Inc.,* 388 U.S. 26 (1967), there was some concern that the gains made in *American Ship* and *Brown* would be lost to the new burden of proof standards of *Great Dane.* Janofsky, "New Concepts in Interference and Discrimination Under the NLRA", 70 Col. L.R. 81 (1970).

In that case the Court held that employer actions which result in harm to employee rights must be justified by a showing of legitimate and substantial business reasons, even without evidences of anti-union animus. Actions inherently destructive of employee rights cannot be justified.

However, the apparent conflict between *Great Dane* and *American Ship* and *Brown* has not developed. The leading case on this point is *NLRB* v. *Wire Products Mfg. Corp.*, 484 F. 2d 760 (7th Cir. 1973). The Board had found that an offensive lockout suggested by the company's attorney had been improperly motivated and violated 8(a) (1) and (3). 198 NLRB No. 90. The court disagreed with the finding of improper motivation and denied enforcement. On the question of evidence necessary to support a finding of improper motivation the court distinguished *Great Dane* as follows:

> "*American Ship Building* and *Brown,* when read together, reflect that lockouts are not per se violations of the National Labor Relations Act. '(T)he Board must find from evidence independent of the mere conduct involved that the conduct was *primarily* motivated by an anti-union animus.' (Emphasis added.) *Brown,* 380 U.S. at 288, 85 S.Ct. at 986. Nothing in *NLRB* v. *Great Dane Trailer, Inc.* 388 U.S. 26, 27, 87 S.Ct. 1792, 18 L.Ed. 2d 1027 (1967), leads to a contrary conclusion because there the Court concluded that the employer's conduct was 'inherently destructive' of important employee rights, thus relieving the Board of proving anti-union motivation. Further, the Company there offered no evidence of legitimate motives. This decision does not effect the holdings in *American Ship Building* and *Brown* to the effect that a lockout by an employer without more does not reach that level of destructiveness." *Id.* at 764.

Of course, anti-union animus or other improper motivation will render a lockout illegal. See e.g., *McGivier Co.* 204 NLRB No. 87, 83 LRRM 1570 (1973) (lockout not intended to strengthn employer bargaining position).

Great Dane has not so much been ignored as lockouts have been recognized as a legitimate bargaining tactic which no longer have to be justified by unusual circumstances. Bringing economic pressure on unions has become a justification in itself and it is clear that lockouts are not "inherently destructive" of employee rights. Once an employer shows that the lockout is reasonably intended to strengthen its bargaining position, then there must be independent evidence of unlawful motive to support a violation of the Act. *American Ship, supra; Brown Food, supra; NLRB* v. *Wire Products, supra.*

In some respects, the legitimate bargaining lockout authorized by the *American Ship* decision has been expanded. Following the lead of two circuit courts in *Body & Tank Corp.* v. *NLRB,* 344 F.2d 330 (2d Cir. 1965) and *Detroit Newspaper Publishers Ass'n* v. *NLRB,* 346 F.2d 527 (6th Cir. 1965), the Board has concluded that a bargaining lockout may be legitimate before an impasse has been reached. *Darling & Co.,* 171 NLRB No. 95, 68 LRRM 1133 (1968).

> "While we recognize that the Court's holding (in the *American Ship* decision) was limited to a situation involving a lockout after an impasse in bargaining, we do not find that the absence of an impasse renders the test per se inapplicable. The Court indicated that a careful evaluation of all the surrounding circumstances must be made to determine whether there was unlawful motivation in the lockout. The absence of an impasse is one of the surrounding circumstances, but it does not necessarily require a conclusion that the lockout was unlawful on that ground alone. While the finding of an impasse in negotiation may be a factor supporting a determination that a particular lockout is lawful, the absence of an impasse does not of itself make a lockout unlawful any more than the mere existence of an impasse automatically renders a lockout lawful." *Id.* at p. 1135.

Some of the factors which persuaded the Board of the absence of an illegal motive were those which traditionally had been cited in "defensive" lockout decisions: (a) the presence of a strike threat by specific acts of the union, against a history of work stoppages and of union strength and (b) the threat of unusual ecomomic effects due to the seasonal nature of the business and the fast approaching busy season. The other factors establishing a legitimate business interest in locking out were: (1) the employer had negotiated in good faith and continued to do so after the lockout (10 bargaining sessions before and 6 afterward) and (2) during the negotiations the employer had made a number of concessions.

Note that the contractual provisions discussed in Section I for a lockout of construction workers when other members of the local union are on strike in the area are designed to establish the contractor, not the User, as the party who does the locking out. That is because the minimal requirement for a legitimate lockout is a bargaining relationship with the union representing the locked out employees. This does not mean that each locking out employer must be a member of a formal multi-employer unit, although as noted, defensive lockouts in support of a multi-employer bargaining unit have long been recognized as legal and since *American Ship,* lockouts in support of a multi-employer bargaining position have also been accepted. The Board has accepted lockouts in support of a joint bargaining position as well. *Weyerhaueser Co.* 155 NLRB 921 (1955) (lockout by employers in joint bargaining does not violate Act). This is particularly important for the functioning of the Concepts because not all contractors will be part of an Association. See *Capital District Sheet Metal, Roofing and Air-Conditioning Contractors' Association, Inc.*, 185 NLRB 702 (1970). In that case the Board adopted the decision of its Trial Examiner that an area-wide lockout by various contractors and contractor associations did not violate the Act. Building contractors in the Albany, New York area were loosely associated under Eastern New York Construction Employers, Inc. and for the purpose of the 1965 negotiations coordinated their bargaining through it. The group was not a multi-employer bargaining unit. The main issue in the negotiations was the unions' demand for a shorter workday; the contractors uniformly resisting this demand. Several contracts expired on April 30; on May 3, the contractors, acting jointly locked out all employees and shutdown all projects.

The unions filed 8(a) (1), (3) and (5) charges against the contractors and associations. Preliminarily, the Trial Examiner found that the contractors negotiated in good faith and that there was no evidence of anti-uinon animus:

> "In other words, it cannot be said that any action or position of the Respondents was designed to discourage union activity, to evade bargaining, or to destroy the existence or representative status of any of the unions involved." 185 NLRB at 716.

He then examined the bargaining lockouts in light of *American Ship, Detroit News* and *Darling & Co.* His analysis of *Detroit News* and the interrelationships inherent in construction is especially helpful:

> "As the Board's opinion in that case clearly implies—and as member Brown's dissent explicitly states—the fact that the lockout by the News was to assist another employer in a dispute with its employees was relevant to a consideration of whether, assuming no express evidence of union animus or evasion of bargaining, the lockout was 'inherently so prejudicial to union interest and so devoid of significant economic justification' that no such evidence of unlawful intent was necessary. The interest of the News in supporting the Free Press position in bargaining with the Teamsters was assumed, without discussion, by the Board, although the interests of these two employers vis-a-vis the union cannot be described as anything more than parallel. In this case, however, the interests of the several groups of employers are more than

parallel, they are inextricably interwoven: not only is the record replete with evidence concerning the interrelated activities of the different crafts in the construction of a building, but the relationship (which could even be assumed on the basis of judicial notice) has been noted by the Board in the following terms:

> ". . . .cognizance must be taken of the peculiar conditions which prevail in the building and construction industry, as reflected in the record, and in particular the close interdependence and the necessary operational sequence of the different craft functions inherent in commercial construction.
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> * * *
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> Accordingly, I find that *the interest of the employers in the several crafts involved* in this case *are sufficiently interwoven to justify their taking common action in their common interest."* (Emphasis added) *Id.* at 717-718.

The Trial Examiner distinguished *Daniel Friedland Painting Co.,* 158 NLRB 571 (1966), enforced 377 F. 2d 983 (3d Cir. 1967). *Id.* at 717 n. 57. In that case, Friedland, a painting contractor, was employing painters from Local 144 because his Local, Local 1221, was unable to provide enough workers within the latter's jurisdiction. Friedland was not a member of the employees' Association in the Local 144 jurisdiction, but when Local 144 struck members of their employer association, Friedland locked out the Local 144 painters he had hired, while his other painters continued to work. Friedland had done over $100,000 of painting work in Local 144's jurisdiction during the preceding three years and was likely to continue to do a substantial amount of business therein. By the terms of his agreement with Local 1221, Friedland was bound to pay any higher wage scale called for in the Local 144 contract when work was done in their jurisdiction. Disagreeing with Friedland's contention that the lockout was justified because of his legitimate interest in the bargaining, the Board declared, at p. 578.

> "(T)here (referring to Detroit Newspaper Publishers Ass'n v. NLRB, 348 F.2d 527), unlike here, the employer using the lockout, while seeking to advance the bargaining position of another employer, was facing many identical issues in its bargaining negotiations with the same union and was therefore seeking, by using the lockout offensively, also to advance its own position. As already appears, Respondent was not in bargaining negotiations with the union representing its employees and, therefore, was not concerned about advancing its own bargaining position. Nor could it have done so by its lockout here, because it was in a bargaining relationship with another union, *albeit* a sister local. Stated differently, Respondent was seeking to intrude in a labor dispute not its own, involving a union other than the one with which it was then in untroubled relationship, for the reason that a settlement of the labor dispute favorable to that union could have an economic effect upon it. To allow this collateral for indirect interest in a labor dispute to be deemed a legitimate business interest sufficient to serve as justification for a lockout of Respondent's own employees is to arrive at a far-reaching result never intended by the Supreme Court in *American Ship Building.* It would lead to a proliferation of the use of a lockout so as to render it lawful in any situation where the employer making use of it against members of a certain union could arguably be affected economically by the outcome of particular negotiations between the union and another employer."

Capital District Contractors was different. Unlike the situation of construction contractors in the same "principal bargaining area," *Id.* at 719, i.e., within the territorial jurisdiction of the union or unions, "Friedland's interest in the bargaining position of the other employers, who were

negotiating with another union in another geographical area, was not sufficient to justify his lockout of employees in that other union." *Id.* at 717 n. 57[2].

The case is also important because the contractors did not violate the Act even when they locked out employees "whose collective-bargaining contracts were in midterm and concerning which contracts no negotiations were pending." *Id.* at 719. As stated, the shutdown was general and included all crafts and even a national contractor. *Id.* at 718. This was alleged to violate Section 8(a) (5) because of the requirements of 8(d) (4). However, the purpose of these lockouts was to put pressure on the unions in support of the contractors' bargaining position. This did not violate 8(a) (5) because the purpose was not to "terminate or modify" the agreement and thus 8(d) did not apply. In addition, the Trial Examiner found that these mid-term lockouts were not unjustified as pressure tactics or so remote, under *Daniel Friedland,* as to be violative of Section 8(a) (1) and (3). *Id.* at 720 n. 70.

> "The News was negotiating with the same local and over many of the same issues as was the Free Press. The Free Press had been struck and there was a very real possibility that the News would also be struck. The News lockout was designed to aid the News' own bargaining position, which could not be said, without great attenuation, for the lockout by the employer in *Friedland.*"

Capital District Contractors affirms all the essential provisions of the concepts concerning lockouts and shutdowns by contractors. It condones lockouts by construction contractors in a joint or coordinated employer bargaining situation and total shutdowns of projects (without need to show economic undesirability) by contractors. It also points out that these actions should be taken only in the context of good faith bargaining within a prescribed area.

See *Darling & Co., supra,* where the employer held 10 sessions with the union before the lockout and six afterwards, and he made a number of concessions. Not only does this rebut any animus to avoid §8(a) (1) and (3) charges due to the lockout, but it also avoids a §8(a) (5) charge of refusal to bargain.

The absence of a direct bargaining relationship between the User and the Union might result in an unfair labor practice despite the evidence of the economic interests of the User in such a situation. It would appear to be the more prudent course to establish a procedure whereby the Contractor is induced, by means of a sharing of the costs attributable to the labor dispute, to participate in negotiations with the Union and to lockout, at his discretion, in order to improve his own bargaining position.

Arguably, the User is not governed by the *Friedland* decision which involved a horizontal economic relationship, i.e., the Contractor's business interests in the labor dispute with a Union with which he had no direct relationship would not affect him until he moved into the adjacent jurisdiction to perform work therein. The User, on the other hand, maintains a vertical economic

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[2]In *Newspaper Drivers Detroit News* v. *NLRB*, 70 LRRM 2061 (6th Cir. 1968), the Court overruled the Board's finding of an unfair labor practice where a newspaper locked out employees after a union struck another newspaper in town. The Court distinguished the *Friedland* decision, at p. 2064.

relationship, through the Contractor, with the employees of the striking union so that costs attributable to the labor dispute are directly and immediately incurred by the User. An effective rebuttal to such an argument is found in the customary form of most User-Contractor relationships–these are often fixed price contracts which ostensibly afford the User little economic interest in preventing increased labor costs.

A contract which inflexibly calls for a lockout is incompatible with the kind of unusual economic circumstances and other evidence of good faith bargaining efforts needed to satisfy the requirements of the Act. Therefore, the contract ought to allow the Contractor discretion as to when a lockout should be imposed. *Capital District Contractors, supra.*

The Joint Employer Question

Under current Board case law, it seems clear that the various labor relations items discussed in Section I in themselves will not subject the User to joint employer status with his Contractor. However, should the User go further and infuse itself in the labor relations of its Contractor, it might step over the boundary and be treated as a joint employer or ally by the NLRB. Under the National Labor Relations Act, this would have two potentially adverse effects on the User; the User would be jointly liable for the unfair labor practices of the Contractor and the User could not claim secondary employer status entitling it to the protections of the secondary boycott provisions of the Act.

It is clear that in the absence of extensive control by the User over the labor relations of its Contractor, the User will not be considered a joint employer with the Contractor even if there is a cost-plus contract. The rules are generally stated in *Fidelity Maintenance Corp.*, 173 NLRB 1032, 1037 (1968), as follows:

> "On an issue of this kind as the Board has frequently held, no single factor is decisive; it is one that must be decided upon the totality of the facts of the particular case. Basically, the determinative factor in an owner-contractor situation, is whether the owner exercises or has the right to exercise sufficient direct control over the labor relations policies of the contractor, or over the wages, hours and working conditions of the contractor's employees, from which it may be reasonably inferred that the owner is in fact an employer of the employees involved. *Hychem Constructors, Inc.,* 159 NLRB 477; *Ref-Chem Company,* 169 NLRB No. 45; *Westinghouse Electric Corporation,* 163 NLRB 914; *Space Service International Corporation,* 156 NLRB 1227, 1230-33, and the cases cited at fn. 14; *S. G. Tilden, Inc.,* 172 NLRB No. 83."

Numerous cases have held that the usual relationship between a User and a Contractor is not that of joint employers, even when there is some "interference" with the labor relations of the Contractor. Thus, in Hychem Constructors, Inc., 159 NLRB 477 (1968), the plant owner had a cost-plus contract with his maintenance contractor which gave the owner the right to approve wage increases and overtime. The owner also had a policy of consulting with the contractor regarding proposed layoffs. The Board, even with these "intrusions" on the labor relations of the Contractor, refused to find a joint employer relationship. See also *Hotel and Restaurant Employees,* Local 343 *(Kutsher's Country Club),* 198 NLRB No. 178, 81 LRRM 1100 (1972); *W. L. Golightly, Inc.,* 172 NLRB No. 244, 69 LRRM 1146 (1968); *Oil Chemical and Atomic Workers (Firestone Synthetic Rubber and Latex Company),* 173 NLRB NO. 195, 69 LRRM 14569 (1968).

One factor which will weigh heavily in shifting the balance toward finding a joint employer relationship is the joint ownership or substantial financial interest of a User in its Contractor. For example, in *Ref-Chem Company,* 167 NLRB 376 (1968), the plant owner not only had a substantial financial interest in its insulating contractor, but it exercised almost total control over "not only Ref-Chem's employees but its labor relations policies as well." *Id.* at 379. The owner had the right to terminate the contract at will in its absolute discretion, the right to request removal of any employee and the right of approval over all work, wages and cost of equipment rental and materials. In this unusual situation, the Board was constrained to find a joint employer relationship. See also *Hamburg Industries, Inc.,* 193 NLRB 67 (1971), an RC case in which the Board held that a company which had no employees of its own but supervised employees of another contractor was a joint employer with that contractor.

A User which is a joint employer with its Contractor is not a neutral employer and may be picketed by a union striking the Contractor without violating the secondary boycott provisions of the NLRA. In that case the User is an "ally" of the Contractor. There is another branch to the "ally doctrine" involving an otherwise neutral employer who does struck work for the primary employer. That is, even though two companies may be separate entities, a union may picket both companies if the struck company requests another firm to do work that the struck company would have performed except for a strike against the first company. See generally Paul A. Brinker, "The Ally Doctrine" 23 Labor L.J. 543 (1972).

It is unlikely that a User will ever be found to be an ally of a Contractor under the struck work doctrine. Even if a User decided to complete a construction project abandoned or suspended by a strike against a Contractor, the User would probably not be found to be an ally of the Contractor. *Virginia-Carolina Chemical Co.,* 126 NLRB 905 (1960). In that case, a general contractor subcontracted the concrete work on a project to a nonunion firm. When the subcontractor was struck and picketed, the general completed the work himself. The general in turn was picketed as an ally of the subcontractor, but the Board ruled that the firms were not allies, and that the Contractor was simply taking over the work that the nonunion firm could not complete. The labor relations items discussed in Section I do not extend as far as the activity allowed without recourse in the *Virginia-Carolina Chemical* case, and should not subject a User to picketing as an ally of a struck contractor.

This may not insulate the User completely from possible picketing by a construction union.[3] Picketing by a union–even of a neutral employer–is illegal only "where an object thereof" is one

[3]The threat of legal picketing under *Los Angeles Building and Construction Trades Council* (Church's Fried Chicken Inc.), 183 NLRB No. 102 (1970), has been virtually eliminated by Connell, but it may return if a common situs picketing bill is enacted. In *Church's Fried Chicken,* a User acting as its own general contractor was legally picketed to force it to sign a hot-cargo agreement. Of course, the Supreme Court in *Connell Construction Co.* v. *Local 100, Plumbers,* U.S., 89 LRRM 2401 (1975) held that such hot-cargo agreements between a union not representing any employees of a general contractor and that general contractor violate the antitrust laws and Section 8(e). *Id.* at 2407. The Supreme Court specifically declined to rule on the question whether picketing to obtain such a clause can be enjoined under the Norris-LaGuardia Act. *Id.* at 2409, fn. 19, however, such picketing clearly violates Section 8(b) (4) (A) and is enjoinable under Section 10(1), H.R. 5900 seeks to change this result (Report of House Committee on Situs Picketing Bill, BNA Daily Labor Rpt. No. 140, pp. E-1 to E-12) (July 21, 1975): Users which act as their own general contractors should be aware of this change. Users which do not act as their own general contractor are not considered to be "an employer in the construction industry," see, e.g., *Falstaff Brewing Co.,* 144 NLRB 100 (1963); *The Kroger Co.,* 149 NLRB 1224 (1964), and will still be protected from direct picketing.

of those objects proscribed by Section 8(b) (4) or (7). One object which is not proscribed is protesting or demanding reemployment of employees. *International Longshoremen's and Warehousemen's Local B (Waterway Terminals Co.),* 185 NLRB No. 35, 75 LRRM 1042 (1970), set aside and remanded on other grounds sub nom *Waterway Terminals Co.* v. NLRB, 467 F.2d 1011, 81 LRRM 2449 (9th Cir. 1972) and cases cited therein; *United Automobile Workers Local 259 (Fanelli Ford Sales, Inc.),* 133 NLRB 1468, 49 LRRM 1021 (1961). In *Waterway Terminals,* Waterway took over loading work that it had previously subcontracted. The union representing the displaced former employees of the subcontractor picketed Waterway allegedly for the object of securing the reemployment of those employees. The Board held that such picketing was not in violation of Section 8(b) (4) (D), i.e., not a jurisdictional dispute.[4] In *Fanelli Ford, supra,* the Board held that picketing to protest a discharge (not necessarily an unfair labor practice) without more is not an 8(b) (7) violation; that it is not per se recognitional.

Therefore, it is possible that if a contractor suspends work on a construction project as outlined in Section I, the unions representing the contractor's employees may be protected in picketing the User to bring pressure on the Contractor to have the work restarted. This is more likely if the shutdown is pursuant to an agreement between User and Contractor but there is no reason why a union could not picket a User which only acquiesced in the shutdown solely to bring pressure on the Contractor to restart work. Such picketing is difficult for a union to maintain in its pure state (the line between bringing pressure to restart work and bringing pressure to change contractors is fine), but it is possible and Users should be aware of the possibility.

Freezing of the Work Force

Steps to limit the flow of labor from a struck project to a nonstruck project during a strike require a word of caution. The Contractor must be careful not to discriminate against any of the strikers. It cannot refuse to hire a worker because he is on strike at another firm. See, e.g., *Universal Mobile Homes,* 210 NLRB No. 115, 86 LRRM 1417 (1974); *Marydale Products Co., Inc.,* 133 NLRB 1223, 49 LRRM 1004 (1961). Accordingly, any contractor "freezing" employment during an area strike should do just that and not hire any new employees or it might be faced with an 8(a) (3) discrimination charge.

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[4]The 9th Circuit disagreed with the Board that the sole purpose of the picketing was to protest displacement and remanded for a 10 (k) hearing, but did not disagree with the Board's formulation of the legal principle. 81 LRRM at 2453. See 203 NLRB No. 126, 83 LRRM 1232 (1973) (decision on remand). In a companion case, the Board found that the picketing had a recognitional object and thus violated Section 8(b) (7). 193 NLRB No. 65, 78 LRRM 1573, enf'd___F.2d___, 82 LRRM 2686 (9th Cir. 1973). But see discussion of *Fanelli Ford,* infra.

Anti-Trust Considerations

As to potential antitrust liability, none of the labor relations items discussed in Section I contemplate any activity which would be a per se violation. In the event of antitrust attack, each activity would be measured against the rule of reason. In any event, to avoid even the appearance of conspiracy it is completely inappropriate for Users to agree among themselves to use any specific contract language. Each User should decide whether his business interests are best served by addressing any of the labor relations items in his contractual arrangmeent with his particular contractor on each of his planned projects.

There is a labor exemption contained in Section 20 of the Clayton Act which protects joint activities in preparation for or in contemplation of negotiations. See, *Connell Construction, supra,* 89 LRRM at 2403. This provides substantial protection for the labor relation activities discussed in Section I, but they should only be engaged in with the advice of knowledgeable counsel.

THE DAVIS-BACON ACT

Background

The Davis-Bacon Act was one of the first pieces of American federal labor legislation. It was enacted on March 3, 1931 and is a relatively obscure law, although its impact is felt throughout the construction industry and beyond. The stated purpose of the Act is to protect local workers on federally financed construction projects from the competition of lower-paid, nonlocal labor. The Act requires contractors to pay their laborers and mechanics "prevailing" wage rates and employee benefits for each job classification as specified by the Department of Labor. Prevailing wage rates are those determined by the Department of Labor to be prevalent for similar types of construction in the locality where the federal work is to be done. In effect, the Davis-Bacon Act establishes minimum wages for all classifications of construction workers in each locality where federally financed or funded construction is to take place.

The law was spawned at the beginning of the Great Depression. Work was scarce, and there was an oversupply of labor willing to work for low wages. Government projects such as post offices and veterans' hospitals were just about the only construction work available. There was great pressure on Congress to "do something." Senator James J. Davis (Pa.) and Congressman Robert L. Bacon (N.Y.) obliged with a "prevailing wage statute" drawn to protect local construction wage standards from "predatory, itinerant contractors" who were importing workers from the South at very low wages to work on government jobs in other areas of the country.

Amendments to the Act in 1935 introduced several new provisions in an attempt to overcome several shortcomings of the original law. These required "unconditional payment of wages at least once each week"; mandated "prevailing wage payments to take place regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics"; required "posting the scale of wages to be paid at an easily accessible place"; provided that "payments could be withheld from the contractor in sufficient amount to reimburse workers who had received less than the wage to which they were entitled under the contract." Also, the dollar amount of covered contracts was reduced from $5,000 to $2,000.

In 1964, the definition of "prevailing wages" was expanded to require the provision for payment of several fringe benefits, or the payment of a cash equivalent.

Over the years, 60 or more statutes have incorporated Davis-Bacon type provisions and a number of states have enacted so-called "little Davis-Bacon" acts as well.

The Act is short but not simple. Insufficient explanation is given for terms such as "prevailing rate of wages" or "work of a similar nature." Considerable discretion has been left with the Department of Labor. Its interpretations frequently result in establishing rates of pay which do not truly reflect "the prevailing rate of wages" in the area and result in inflated construction costs. The "prevailing wages" for each classification of laborers and mechanics are defined in three steps:

1. The rate of wages paid in the area in which the work is to be performed to the *majority* of those employed in that classification in construction in the area similar to the proposed undertaking;

2. In the event that there is not a majority paid at the same rate, then the rate paid to the greatest number, provided such greater number constitutes *30 percent* of those employed; or

3. In the event that less than 30 percent of those so employed receive the same rate then the *average rate* prevails. The 30 percent test seems the one most commonly used.

Davis-Bacon applies only to contractors involved with federally-sponsored projects. Generally, the Department of Labor has determined the prevailing wages to be at the union scale or at an average rate that is higher than the norm for the open-shop scale. This forces nonunion employers (if they want to participate in government projects) to pay higher wage rates than otherwise would be required to attract competent crews, and in turn, this effectively denies the government the savings associated with open-shop construction. (Ref. No. 4, page 46)

Procedural questions raised by Davis-Bacon have adversely affected open-shop contractors, particularly in heavily unionized areas. For example, some job classifications, notably helpers, have not been considered prevailing. This means no helper wage rate is established and no one classified as a helper can be used on the job. (Ref. No. 3, page 47)

The "rate of wages paid" includes employee benefits if they are a prevailing practice. The "area where the work is performed" refers to the "city, town, village, or other civil subdivision of the state in which work is to be performed." The Department of Labor generally uses the county as the "area." These, and other definition problems, have led to inconsistency and occasional abuse with little or no ready recourse for the contractor. (Ref. No. 3, pages 48 & 84)

The administration of Davis-Bacon involves the Department of Labor, contractors, federal agencies, employers' associations, and labor organizations. The Department of Labor establishes regulations and procedures which are administered by the Department's personnel. Federal agencies must have a schedule of prevailing rates before contracts can be let. Contractors must pay wage rates established and file detailed reports on wages paid. They also can initiate appeals on rates or classifications. Both employers' associations and labor organizations can be involved in reviews and appeals and can contribute data in the form of rate schedules and survey information.

The task of establishing prevailing rates for a hundred or more job classifications on many thousands of jobs is a formidable one, yet it is still done "by hand," without the aid of computers or other sophisticated equipment. Unfortunately, many wage determinations have been inaccurate and have led to adverse impact on wage levels in that area. (Ref. No. 3, pages 121-125). Too much reliance is placed on rates provided under area labor contracts.

Another problem is the importation of wage scales from metropolitan areas to rural counties, occasionally to the extent of crossing state boundaries. These interpretations have led to increased construction costs and inflated local wage rates, contrary to the original intent of the Act.

Another sticky question concerns the determination of "similar construction." The Department of Labor has been very liberal in its interpretations in the three general categories of building construction, heavy construction, and highway construction. One of the biggest problems has been the assignment of commercial rates to residential construction. This problem has declined somewhat with the introduction of wage survery data gathered by the Department of Housing and Urban Development.

The use of the "30 percent rule" outlined earlier gives rise to a great deal of concern to contractors. Even if the rules are properly applied, they intrinsically set rates higher than would occur under an averaging method in the typical situation where the union rate is higher than the nonunion rate.

The foregoing briefly identified existing Davis-Bacon problems. While the listing is not all inclusive, attention should now be turned to possible remedies to cure the identified ills.

Changes Proposed

Certainly, the ultimate remedy would be the outright repeal of the Davis-Bacon Act itself. The Act has on balance weaknesses that in the opinion of most impartial observers only repeal can cure. Repeal should continue to be a primary objective. At the same time, this objective should not be

misconstrued as an attempt to push back wages to inequitably low levels. Other protections would still assure workers of being fairly compensated for labor and skill expended.

Still, acknowledging the political reality that repeal, at best, will take considerable time to achieve, interim remedies should be pursued. These can be divided into two categories:

1. Changes in the administration of the present Act; and
2. Supplemental legislation either to restrict the Act's application or to limit outside influence of its administration or regulation.

Both categories should be pursued simultaneously, even though a particular component's chance of success may appear remote. Efforts in one program should reinforce action in the other.

The following are proposed adminstrative changes in the Davis-Bacon Act. None of these should require any legislative action. Rather, each proposed change is within the existing authority of the Department of Labor to effect:

1. Employ a weighted average calculation for definition of prevailing wage.
2. Incorporate semiskilled classifications at lower rates.
3. Exempt bona fide training or apprenticeship programs from Davis-Bacon coverage.
4. Clarify the definition of the area covered by a particular set of wage rates.
5. Clarify the definition of "similar construction." Consider reclassification of construction into more categories than the three general categories of building construction, heavy construction and highway construction.
6. Consider broadening classifications and rates to include all similar operations when determining prevailing wage rates. (For example, rates for truck driving should be equally includable in the computation regardless of whether the work is being performed for highway construction, sewer excavation, a dam, or a building foundation.) (This broadening is especially important if we are to use weighted averages (see #1 above).)
7. Eliminate the weekly submission of certified payrolls, In its place, the Department of Labor should require weekly "Affidavits of Compliance." This in no way restricts an audit of payrolls if complaints arise.
8. Require wage determinations to be completed 60 days in advance of bid opening.
9. Accept as valid pay rate schedule information only that certified as "correct" by contractor or employer organizations (these will reflect actual payroll figures).
10. Accept requests for wage determinations by interested parties as well as Federal agencies.
11. Extend the 120-day period on labor contract changes to 180 days.
12. Pay for fringe benefits only if majority of those employed in any classification of laborer or mechanic in area receive same fringe benefit.
13. Use modern computerized techniques, as applicable, in determination of prevailing rates.

While the above-mentioned changes should require only that authority presently held by the Department of Labor, the following are proposed changes in the Davis-Bacon Act that can be implemented only through new legislation. Certainly, the success of this new legislation would

require the prior dissemination of Davis-Bacon information to the general public so as to solicit their support for these legislation changes.

1. Create a statutory Wage Appeals Board with full authority to review administration and determinations under the Act. Its members should be appointed by the President, with permanent staff assigned and annual budget allotted.
2. Raise the threshold of covered projects from $2,000 to the level covered by Small Business Set-Aside programs.
3. Require the rules, regulations, definitions, and procedures of Davis-Bacon be subject to independent review, preferably by the statutory Wage Appeals Board described in Item 1 above.

   In the event that the statutory Wage Appeals Board described in Item 1 above is not established, transfer the administration of Davis-Bacon to some impartial agency other than the Department of Labor.
4. Restrict the application of Davis-Bacon only to those projects involving the direct use of Federal funds.

The discussion presented herein applies only to the Federal Davis-Bacon Act. It should be remembered that many other statutes have incorporated Davis-Bacon type provisions. Similar "little Davis-Bacon" legislation exists in many states, which extends these previously identified problems to State and locally funded projects. Review of this legislation is also needed, so as to effect remedies comparable to those listed above at these lower levels of government.

References

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SPECIAL BUILDING TRADES AGREEMENTS

Contents

Introduction

Fragmentation in the construction industry has been cited repeatedly as a source of many of its problems. This fragmentation is particularly evident in the collective bargaining structure of its unionized sector - with local contractor associations bargaining individually with locals of 18 international unions, generating some 10,000 local agreements. In addition, the industry has seen a proliferation of "special agreements" superimposed on the local agreements for individual jobs or particular types of work. The purpose of this report is to objectively analyze these various special agreements and reach conclusions concerning their effect on the construction industry.

For purposes of this report, the term "special agreements" is defined as any agreement between construction unions and management negotiated outside the normal sphere of "local negotiations". By "local negotiations" is meant the bargaining process between an individual local union or group of local unions and representatives of the local contractor association having "bargaining rights".

Over a period of several decades a wide variety of special agreements have been negotiated to cope with situations where it was perceived that the local agreements were not adequate for the work in question. This report does not attempt to analyze all of these various types of special agreements but has focused on a representative cross-section in an attempt to demonstrate the various features found in these contracts. An attempt has been made to analyze a wide range of special agreements that are local, regional and national in scope, agreements with a single craft, with multiple crafts, etc. The forces behind the development of the agreements have come from owners, contractors, and in some instances from the building trades unions. The fact that they have been mutually agreed upon bears evidence of a recognition of inadequacies in existing local agreements. Although the inadequacies vary as widely as the agreements, the most commonly-cited reasons for special agreements are attempts to avoid work stoppages, to get greater assurance of adequate labor supplies and to avoid inefficient or inflationary provisions found in local agreements.

The report attempts to impart an understanding of the different types of special agreements, their historical development, the motivating factors behind the parties in developing them, their notable features and their all-important impact on local bargaining and construction costs. Each type of agreement is individually discussed, and an appendix contains specific treatment of the more notable provisions found in the various agreements. A summary of conclusions and recommendations is also included.

Summary And Conclusions

Special agreements have evolved from attempts to correct one or more deficiencies in construction industry labor relations. For various reasons – including poor labor supply in remote regions, lack of responsible local construction management, a multitude of short-term agreements expiring at different times, inclusion in local agreements of work practices and referral procedures not suited to large projects or specialty owrk – special agreements have become commonplace.

The owner has often faced the choice of accepting what was in existence (and often less than adequate), or encouraging his contractor to negotiate a special agreement more responsive to the specific project in question. This situation has persisted because many local contractor associations lacked both the time and experience to effectively arrive at satisfactory agreements at the bargaining table, or lacked the economic strength to withstand a prolonged strike, or simply signed agreements detrimental to large projects because the work in question did not affect them.

Unions, recognizing a competitive threat from open shop construction or in-house forces, have frequently been receptive to special agreements to help union contractors improve their competitive position and thereby provide more jobs for union workers.

Some controversy has arisen among contractor associations and owners over these special agreements, the primary contention being that they undermine local bargaining. Two circumstances which have contributed to animosities among contractor groups have been noted:

- Local contractor negotiations are often conducted exclusively by local contractors. These contractors understandably are primarily concerned with the type of work which they perform, and the resulting contracts are often ill-suited to efficient performance on large projects. Frequently, local contractor-negotiators have been unreceptive to suggestions from owners or other affected contractors regarding contract provisions.

- National contractors are primarily interested in timely completion of a particular project. Despite the impact of local negotiations on their future work, they sometimes offer little input into local bargaining and in the past have often seemed oblivious to the impact of their activities on local management's bargaining position.

There is little question that firm no-strike/no-lock-out clauses in special agreements weaken the local contractor groups at the bargaining table, particularly if a strike occurs and the project in question becomes a haven for strikers. This is detrimental not only to the local contractors but also to the owners who must absorb the costs of excessive wage increases and inefficient work practices which result from the disadvantaged position of the local management negotiating group.

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Project agreements have been the most controversial of the special agreements. Some view them as an anachronism, a temporary expedient which exists only because of the inadequacies of local construction bargaining – and one which will disappear if and when construction collective bargaining responds in some other way to industry needs. Others view them as a beneficial means of gaining contract improvements for a specific project, in situations where local unions recognize the threat of other labor sources and are willing to include in a project agreement features which for political reasons they are unwilling to incorporate across-the-board in local agreements.

The project agreement can be a constructive influence on local bargaining if

- Local contractor input is obtained in negotiating the agreement.

- A clause is included permitting the contractor to support local contractors during an economic strike.

- Local bargainers seek to incorporate at a later date in their local agreements any more favorable work practices included in the project agreement.

National construction agreements negotiated by national contractor associations and the Building and Construction Trades Department on a national level are considered by most owners to have been beneficial on larger projects. As in the case of project agreements the primary objection to the national agreement has been the undermining of local bargaining by continuation of work through economic strikes. This issue has been diminished by the inclusion in some national agreements of a "five-day clause" which permits support of local contractors, and by improvement in the understanding of the impact of lack of support of local bargaining groups among owners.

More recently, dissatisfaction with locally-negotiated wages, fringes, and work practices has spurred interest in industry-sector multi-craft national agreements, to include wage/fringe rates. It remains to be seen whether this approach, being pioneered in the Nuclear Power Construction Stabilization Agreement, offers a more desirable solution.

National specialty agreements have caused little controversy. They have been generally effective in providing skilled manpower on specialized work and have in many cases been extremely advantageous by allowing an influx of skilled craftsmen from outside the local area when manpower shortages exist, and for providing temporary inter-craft flexibility.

In-house and open-shop maintenance pose an ever-increasing competitive threat to the construction trades. To combat this threat, *maintenance agreements* have evolved permitting greater flexibility among the crafts, eliminating many of the costly work practices such as double time for overtime, shift differentials, coffee breaks, etc. These agreements have become a significant benefit to both the large industrial user and the local unions. However, in practice, they have not generally yielded the efficiencies potentially available because of reluctance on the part of both union members and contractor supervision to depart from construction work practices. Greater acceptance of maintenance agreements hinges upon development of an effective mechanism for departing from construction work rules and wage rates.

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Overall, no single clear path has evolved to solve the problems of construction collective bargaining. Each of the types of special agreements examined appears to have filled a constructive role in some circumstances. Each can be beneficial to the owners by reducing labor costs and construction delays, and in many instances can contribute to longer-term improvements. The key importance of negotiating and implementing these agreements in such a way that they are not detrimental to local bargaining, and where possible are supportive and contributive to it, must not be overlooked. The greatest need is for improved openness and meaningful communication among contractor bargaining groups whose actions impact on one another. Secrecy and isolation in construction collective bargaining has been a divisive element and the root of many animosities.

In this connection, many owners and contractors endorse the following general recommendations:

- Owners should urge national contractors on major work to maintain communication links with local contract bargainers, to seriously consider their views and to seek ways of most effectively supporting local bargaining.
- Owners should urge local contract bargainers to communicate their bargaining goals to both the local owners and national contractors in the area, and to invite input and dialogue.
- Contractors should seek provisions in national and project agreements to allow suspension of work in support of local bargaining in the event of a local economic strike.
- Owners should recognize the independent employer status of their contractors and should not attempt to usurp the contractor's prerogatives in his labor relations with his employees. Each owner should strive to understand construction labor problems which can impact his business, and should effectively make his views known to his contractors (especially regarding the provisions of any project agreement which might be negotiated for his facility), but should avoid direct participation in negotiations or becoming signatory to an agreement.

- Efficiencies gained at the negotiating table can be quickly lost by poor adminstration in the field. Owners should develop an understanding of the provisions of agreements applicable to their work, and should strongly encourage their contractors to fully implement the agreements so as to realize all efficiencies potentially available.
- Contractors foreign to the area should consult with local contracting groups or associations regarding local work practices and jurisdictional precedents. They should avoid arbitrary departures from local practices in ways which decrease efficiency or set undesirable precedents for the local contractors.
- In the event of a local economic strike, each owner and his special agreement contractors should each consider how they can appropriately support local bargainers. Among the options are: suspension of work, suspension of hiring, reduction in the work force of the striking craft.
- Agreements in advance to pay retroactively any negotiated wage increases to employees who work through a local strike tend to further undermine local bargaining and should be avoided. Owners should urge their contractors to make wage increases effective on the date of the new agreement or the date of return to work after a strike, whichever is later.

No-Strike, No-Lockout Provisions and Their Impact on Local Bargaining

Owners and investors involved in construction projects have a natural concern about the effect of work stoppages on their project costs and schedules. There have been numerous examples of costly delays on large projects because of strikes and slowdowns resulting from jurisdictional disputes or bargaining at the expiration of local contracts. Many owners and contractors have attempted to avoid these delays by the simplistic approach of a no-strike, no-lockout clause in project and national agreements.

Of course, the theory behind the no-strike, no-lockout clause is to spare the owner and the contractors, by virtue of their special agreements, the threat of a strike every time one of the more than 18 individual unions reaches an impasse with the local bargaining groups. Building trades unions have usually been eager to offer a no-strike pledge in return for a no-lockout agreement by the contractors, especially if it is accompanied by a guarantee of retroactive payment of any locally-negotiated wage settlements.

These no-strike clauses have been the most controversial feature in special agreements, because of their effect on the local labor relations situation, when an agreement provides the opportunity for a contractor to continue to work through a local economic strike. When local contractor bargainers find major portions of the union membership able to continue working through a local strike because of such a clause, the strike becomes a single-edged weapon, pressing only on the contractor-bargainers. Thus, the owner and the special-agreement contractor, by virtue of the fact that they employed a significant number of a striking craft(s), are able to weaken the bargaining strength of the local contractors, thereby increasing the possibilities of a poor settlement. Since most special agreements automatically incorporate locally-negotiated wages and working conditions, these inflationary settlements are quickly felt by the owner.

More specifically, the concerns about no-strike clauses have arisen from the following sequential effects:

- When work continues through a local strike on a project with labor requirements which constitute a substantial portion of the local union membership, the union can provide work

for most of its active voting members on the project. Working members contribute to strike funds which help support the minority who are on strike and unable to find other employment. This makes the strike a single-edged economic weapon, putting pressure only on the contractor management side of the bargaining table. Settlements arrived at under these circumstances have included highly inflationary wage and fringe increases and efficiency-stifling work practices.

- Union leaders, recognizing their position of strength in such circumstances, press for exorbitant demands, and call strikes in situations where peaceful settlements could otherwise be reached.

- Smaller construction jobs on offices, schools, hospitals, sewer plants, etc., not covered by special agreements suffer costly work stoppages.

- Animosities develop among contractors and owners because of these effects. These have sometimes resulted in the introduction into local agreements of costly provisions which impinge only on large industrial projects.

- The cost of all future construction soars because of inflated settlements, and thus the entire community must pay the bill,

These undesirable and divisive effects can be avoided without sacrificing most of the benefits of special agreements. Many project and national agreements today include a "five-day contract termination notice" clause. This clause allows the contractor the option of shutting down work requiring the use of employees represented by a union on strike against the local employer bargaining group. This clause sacrifices none of the protection against strikes over jurisdictional or other disputes while the local contracts are in effect. There is a widespread view that *the five-day option clause is an essential element of national or project agreements*. It preserves all the options for a review in the light of the conditions at the time the decision must be made, instead of "giving away the store" well in advance.

It is true, of course, that at least a portion of the economic costs[1] of exercising the five-day clause must be borne by the owner (as is also true of the longer-term costs of not exercising it, if an inflationary settlement results). In each instance, the owner must assess the likely long-term costs of undermining the local bargaining versus the short-term economic impact of shutting down the work. An owner should consider the following, in deciding whether to encourage his contractor to give five-day notice of intent to shut down the work:

- the economic impact on his business of delay in the project (this is often overestimated).
- The compensating higher costs of remaining work on the current project, and of all future construction work, which could result from a higher-than-otherwise settlement if the work is not shut down. Additive to this is the ultimate impact of a higher construction settlement on wage levels and work practices of industrial plant employees.

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[1]The owner always bears the cost of delayed completion which results from the increase in the time his sunk investment is non-productive. In many cases, he also reimburses his contractor for his continuing overhead and other expenses during the shutdown, but this is dependent on either prior agreement or subsequent negotiation.

- Experience has shown that construction work on a no-strike job is often less efficient during an area strike. Union efforts to distribute the unemployment result in high turnover, and sometimes in overmanning. Productivity and work quality decline.
- After settlement of an area economic strike, some of the card-carrying union members who shifted to the no-strike project during the strike will migrate back to their preferred position with a local contractor. This turnover produces a detrimental effect on productivity which may continue for several weeks after strike settlement.
- A strike does not always occur when notice of intent to shut down is filed. Giving the five-day notice is often sufficient stimulus to serious bargaining that a strike is averted. Strikes which do occur tend to be shorter when there is unified contractor support.

Contractors must recognize, however, that there will be instances when the owner determines that the short-term economic impact on his buisness of shutting down a project is too high for him to afford. In these instances, contractors and owners have found the following considerations helpful in reducing the impact on local bargaining of continuing the work, and in reducing the total cost to the owner:

- When anticipated well in advance, it is sometimes possible to reprogram so as to shift some of the work of the affected craft ahead of the contract expiration date, or defer it until later.
- On some occasions, the union may shift men in advance of contract expiration, so as to replace travelers or permit men on the no-strike job with local card carriers. If this is happening, hiring can sometimes be suspended a few weeks in advance of contract expiration.
- During a strike, contractors can reduce crews to the extent possible, and can sometimes suspend hiring of the striking craft.
- It is generally recognized that an agreement to pay retroactively a yet-to-be negotiated increase is detrimental to local bargaining.

In summary, the inclusion of a firm no-strike, no-lockout clause in special agreements can have a serious unfavorable impact on construction costs and inefficiences. The short-term benefits of such a clause are highly questionable, particularly when compared to potential long-term costs.

Project Agreements

Project agreements are ad hoc in nature, apply only to a specific project,[2] and exist only for the duration of that project. They are multi-craft agreements, generally signed by the local building trades council and/or all local unions involved, and by the prime contractors on the project. Their provisions supersede those in applicable local agreements, but they generally rely on the local agreements for wage and fringe benefit rates, and for any other provisions which they do not specifically address.

[2]Some (e.g., Missile Sites agreement) apply to related projects at multiple sites.

When project agreements were first developed, they were sought by contractors. Today, owners often provide the driving force to negotiate a project agreement; sometimes the owner is signatory and "imposes" the agreement on contractors who desire to work on the project.

Management's objectives for project agreements include: to secure more advantageous terms and conditions from management's view than are contained in the local agreements; to stabilize the cost of the project as much as possible; to involve international union officials in the manning of large projects, at times in remote areas; to ease contractor management of a large project by bringing all unions under a single stable agreement; to decrease the exposure to work stoppages.

Today, union leaders see project agreements as a means of assuring use of union employees in the face of open shop competition, and as a stabilizing influence where the high employment levels of a large project might otherwise encourage activist members to press for unreasonable work practices. These considerations sometimes make possible the exclusion of productivity-stifling provisions of local agreements, at a time when removal of these provisions from local agreements would be politically unacceptable to the union leadership.

Historical Development of Project Agreements

Project agreements have existed as far back as the 1930's where they were used on large jobs to pin down labor costs in the face of obvious unionization. For instance, in 1937-38 a portion of the Grand Coulee Dam was built under a project agreement between the Washington State Building Trades Department and a joint venture headed by Guy F. Atkinson Company. In 1940, the Shasta Dam in California was built under a project agreement between the building trades and a ten-company contractor group.

The practice of such agreements continued in World War II for atomic energy installations and other government war production enterprises. After the war, the use of project agreements continued for construction of certain major projects. For instance, most major dams built with union forces on rivers west of the Mississippi after 1945 were built under project agreements. Contractors for these jobs wanted to eliminate uncertainties about labor costs for firm unit price bidding, and they obtained assurances of no strikes in their project agreements. In some instances, they referred to local agreements for their wages and in others wages for a period of several years were included. If wages were included, the local contractor bargaining representatives were sometimes consulted with before the project agreement was reached, or were invited to be present at the bargaining.

In the 1950's, project agreements continued to be used for other large projects such as the atomic energy plants at Paducah and Portsmouth and the expansions at Hanford and Oak Ridge. Multiple sites for a single large project were also covered, as in the St. Lawrence Seaway Agreement, which was really a loose series of addendums to local agreements for the geographically spread out project. The Missile Sites Agreement, in the early 1960's, was another example of a multiple site agreement.

Public-type projects like the New York World's Fair and major amusement centers were also covered under project agreements in the 1960's. An example from that era, the Disneyworld Agreement (1968), included a no-strike clause and a jurisdictional dispute settlement procedure. It also provided for shift work, a flexible day shift schedule, the elimination of travel and subsistence pay, a grievance procedure, and a contractor management rights clause. In addition, local contractor groups and unions renegotiated their contracts to carry the same expiration date as the project agreement, June 30, 1972.

In the middle 60's, construction unions began to capitalize on their greater power at the bargaining table over the local contractors. The result was an accelerated rate of construction wage inflation, an increase in restrictive and costly work practices, and an erosion of contractor manage-

ment rights. Many of the national contractors, who did not participate in local bargaining, and their industrial owner clients believed this imbalance of power was not their problem. By ignoring it, by emphasizing project completion, and by working during pivotal local strikes, they enhanced the power of the unions. Gradually, the owner realized construction bargaining was sharply increasing his field costs, impacting his own in-plant wage costs, and in many other ways was increasing his cost of doing business. Lower cost open shop construction, where feasible, became one of the owner's options.

Project agreements proliferated in the late 1960's and the 1970's, stimulated by this rapid increase in competitive open shop construction, the dismay of owners over their inflated union construction labor costs, and the recognition by unions, in varying degrees and in varying areas, of the undesirability of pricing themselves out of work by high wage costs and restrictive work practices. This accelerating proliferation of project agreements has been a source of concern, especially to building trades leadership and to some elements of contractor management. Some fear that the system is out of control, and may be proceeding in directions contrary to the long-term best interest of the industry.

The provisions of these agreements have ranged from little more than a no-strike clause and hiring procedures in some early agreements, to very detailed conditions under which the work force is to be managed.

Today, project agreements generally are becoming more specific in delineating contractor management rights and eliminating costly work practices. In many agreements, the no-strike provision has been modified so that either contractor or union may with 5-day notice support local bargaining (stop work or withdraw workers). Since they have been developed in most instances for very large projects, the contractor signator is usually a large national contractor. In a few instances, the owner has become signatory to the agreement along with the contractor and the unions.

The use of project agreements has been a source of irritation between national contractors and local contractors responsible for local bargaining. The nationals have blamed the local contractors for provisions of local labor agreements which cause inefficiencies or are slanted against visiting contractors on large projects; while the local contractors have accused the nationals of agreeing to undesirable provisions which had been kept out of local agreements by local contractors, and of undermining local bargaining by working during strikes. These attitudes are less prevalent today. There is a greater recognition by each group of the different conditions and pressures to which they are exposed, and increasing acceptance of the need for national and local contractors to coordinate their bargaining activities in order to improve their mutual positions without detriment to each other.

Owners' Views

Not all owners press for project agreements. Many feel that an experienced and well-managed contractor working under local or national agreements can be at least as efficient overall as one under a project agreement. In a recent survey of user groups, those owners who have employed project agreements expressed general satisfaction with the performance of their contractors but would like to see stronger implementation of the terms of the agreement. Where difficulties were encountered, they seemed to stem from contractor supervisors who found it difficult to change their own habitual way of running the job, particularly in the face of resistance to any innovative project agreement terms at the worker/steward level.

Owners also believe there has been a limited incorporation of some of the gains made in project agreements into local agreements in later negotiations, but not as yet to a very significant

extent. Certain provisions may not be relevant to the work of local contractors. In the main, project agreements appear to provide temporary concessions for a temporary purpose made with a different set of bargainers at the table. Project agreements are only one of many influences – including coordination of contractor bargaining, upgrading of contractor bargaining skills, open shop competition, owner support of local bargaining, attitudinal change by the building trades unions, etc. – which can produce lasting improvements in local agreements. Project agreements can contribute only in combination with some of these other forces, and when improvements are made in local agreements, assessment of the relative influence of each is virtually impossible. Nevertheless, it is felt that project agreements properly developed and administered can be a constructive influence on local bargaining.

Owners as Signatories to Project Agreements

Recently in a few instances, owners have become party to the project agreement in addition to the contractor and the building trades unions. Owners have cited a number of reasons for this participation: concern over construction labor costs; need for assurance before contractor selection that efficient work rules will apply on the project; anxiety to know the negotiations more intimately and exercise greater control by being closer to the action; and a desire to give weight and support behind the contractor position.

In addition, there is an increasing union awareness of the freedom of choice for owners, who are paying the bill, and a desire by the unions to discuss construction problems directly with owners to convince them they should remain with union construction. The complexity and critical nature of a project might also prompt an owner to become directly involved. The Alyeska Pipe Line provides an example of this – a consortium of oil companies negotiated with the Building Trades Department the agreement under which their contractors subsequently worked.

Before undertaking a signatory role, owners are urged to give serious consideration to the following possible effects:

- The contractor's responsibility as the employer for the management of the work may be undermined by owner participation in project agreement negotiations.
- It is possible that an owner might be viewed as a co-employer under labor law, if he either participates directly in project agreement bargaining or becomes a signatory to the agreement.
- From an overall point of view, there is a danger of further fragmenting the construction industry by adding one more participant, the owner, in the collective bargaining process and doing serious harm to the position of the contractor.

In general, contractors strongly object to the direct involvement of the owner in negotiating project agreements. Contractors feel they are better equipped to evaluate the tradeoffs which arise in negotiations, and believe the owner can make his influence felt more effectively through the contractor.

The Future

Project agreements have existed in one shape or another for a long period of time in construction. In the unique environment of this industry, it is safe to assume that in the foreseeable future project agreements will continue because there will be instances where they will be in the self-interest of all of the three interested parties – contractor, owner, union. Perhaps the growth will

not be as extensive as in the early 1970's, because the building trades unions are concerned over the competition among contractors to win additional concessions with each new agreement. On the other hand, there will always be a unique project in terms of complexity, duration, technical difficulties, area covered, size, critical nature, etc., so that the conventional labor agreement will not cover it adequately. The optimum approach appears to be not to deny the parties access to a project agreement, but to encourage the parties to fashion an agreement that meshes with the surrounding collective bargaining environment.

There are several ways to facilitate this:

- The contractor seeking a project agreement may find it useful to consult local contractor bargaining groups as a resource in his negotiations; e.g., for local bargaining history, local agreement provisions, local union leadership, etc. A local contractor representative sitting as an observer/advisor in the negotiations might also be helpful.

  It is poor strategy and a divisive practice for contractor groups not to review with each other their negotiations with the same union leadership for working conditions for the same union work force. Project agreements may provide the owner an opportunity to encourage multiple contractor groups to work together harmoniously.

- The owner can encourage his contractor to include a 5-day notice termination clause to allow his contractor to support local bargaining when local agreements are being renegotiated. The owner can also impress on the contractor the importance of contractor unity in local bargaining. (This subject is discussed in more detail in the preceding section on no-strike clauses and their impact on local bargaining.)

- The local contractor bargaining groups can in turn invite the project agreement contractor into their local pre-negotiations discussions, and possibly to actual union negotiations meetings as an observer/advisor. The rationale is the same as for coordination in negotiating the project agreement.

- The project agreement terms should be lived up to by both sides. It makes no sense to win concessions at the bargaining table and give them away in the field. Owners should understand the special provisions of any project agreements applicable to their work, and should monitor performance of their contractors in implementing them.

Local contractors will always be a major factor in unionized construction because of the local nature of the construction industry. Even where project and other special agreements are employed on major projects, local contractors will continue to do other portions of the industrial owner's work, and often act as subcontractors on the larger projects.

If the local contractor believes that the local agreements should serve all the owner's requirements, he faces a two-fold challenge: (1) to reorganize his bargaining to eliminate the local fragmentation that is so weakening and draining of his strengths; and (2) to incorporate into the agreements the modifications and flexibilities needed to serve the needs of the owner. The local contractor may have the opportunity in some instances to accelerate the improvement of local agreements by pressing for incorporation of those elements of a project agreement which have proven beneficial.

The national contractor, on the other hand, can contribute to this process by inviting local contractor input into his project agreement negotiations, and by contributing to local negotiations in areas where he is working. With cooperation and working together of local and project agreement contractors, project agreements can be supportive and not disruptive of local bargaining.

National Construction Agreements

The majority of labor contracts governing construction wages and working conditions are negotiated by local unions and contractor associations, usually on a single craft basis, in thousands of locations across the country. A substantial volume of work in the industry, however, is performed by large contractors, operating around the country, who do not participate in such local bargaining. The existence of these so-called national contractors has led to the development of national construction agreements.

National construction agreements had their origins in the early 1900's. The bricklayers had a national agreement in use in 1910, and the operating engineers signed their first in 1914. Agreements such as these were aimed at organizing contractors who, as the industry grew, were beginning to undertake larger projects in parts of the country distant from their home base. In return for their agreement to use union labor and pay union wages, contractors building projects in unfamiliar locations were provided a source of skilled manpower and the assistance of the national union in settling disputes that might arise on the project.

By strict definition, these early agreements cannot be said to have been collectively bargained. Although both union and contractor sought and obtained mutual benefits, the agreements were offered unilaterally by the national union. It was in the periods of heavy industrial expansion prior to, during, and after World War II that groups of national contractors in various branches of the industry began to involve themselves more deeply in negotiations with national unions and more explicit national agreements emerged.

All of the national construction agreements in use today provide for the exclusive use of union labor. Most of the agreements briefly describe the conditions that apply to the use of that labor, requiring the contractor to meet the wages, fringes and working conditions contained in locally-negotiated agreements and to use the local union as the sole source of manpower. The national agreements serving special branches of the industry such as pipeline, tank building and elevator construction, go further in that they spell out the wages and fringes to be paid, and allow the use of other than solely local union labor.

It should be noted here that most national construction agreements contain no-strike/no-lockout provisions. Application of these provisions commonly involves working through local economic strikes; when an impasse in local collective bargaining results in a strike against local contractors, national contractors have been able to keep their projects open and the local union has an obligation to supply them with workers. This aspect of both project agreements and national agreements and its effect on the balance of local bargaining are a subject of serious discussion within the industry, and are treated in more detail later in this report. Some agreements (the pipefitters, laborers, and teamsters, for example) now provide national contractors with an option to continue working during a local strike or to shut down their projects in support of local bargaining.

Opinions as to the effectiveness of national agreements vary widely. Their usefulness can sometimes depend on which union, which contractor, which owner, or even which part of the country is involved in their implementation. Several representative national agreements are discussed individually below.

NCA National Construction Agreements

National agreements are particularly prevalent in the industrial construction sector, where much of the work is done by contractor members of the National Constructors Association (NCA). As a

result, the NCA has been involved, directly or indirectly, in the bulk of the national agreements. Organized in 1947, the NCA now comprises over 40 major engineering and construction companies, plus a number of national electrical and mechanical contractors, who build facilities primarily in the oil, chemical, metals, and utilities industries. Over the years since 1947, it has negotiated agreements with many of the building trades national unions. In recent years, several of these have been agency agreements, binding all NCA members. Today the NCA has agreements with the boilermakers, carpenters, ironworkers, laborers, pipefitters, cement masons, sheetmetal workers, and teamsters. Many, but not all, NCA contractors have national agreements with the electricians.

Given the competitive nature of the industry, particularly the pressures of open shop construction, it is not surprising that almost all the NCA agreements are being looked at today with a view to improving them. Reflecting the growing volume of industrial work performed by open shop competitors, the NCA is attempting to include conditions in national agreements that hopefully would increase production and efficiency. These attempts involve such things as more efficient work rules, standard shift and overtime provisions, manning provisions to supplement the local union referral systems, expediting grievance and arbitration procedures, and greater involvement of the national union in the application of the agreement.

There are other recent developments regarding NCA national construction agreements that are indicative of this trend. One is the announcement by the NCA that it will no longer negotiate on an agency basis that binds all its members to a single agreement. The NCA laborers and pipefitter national agreements have been renegotiated recently without an agency clause. This move away from agency agreements would appear, at least technically, to allow individual NCA member companies the option to utilize the national agreements with building trades unions or to seek an alternative to the use of building trades labor.

Another development within the NCA has been a movement toward agreements which specify wages rather than requiring the payment of wage rates provided for in local agreements. For example, the NCA tri-state agreement with the laborers (which will be discussed in the later section on Regional Agreements in this report) set wage and benefit rates within geographic zones in the states of Texas, New Mexico, and Oklahoma. Another NCA agreement, although it appears to be an expedient resulting from unusual local bargaining difficulties, sets wage and benefit rates for its members working in the State of Washington. Given these precedents it would not be surprising to see the development of NCA agreements that include wage scales in other parts of the country.

A third development in NCA national construction agreements is a potential national heavy industrial agreement. Committees representing the NCA and the AFL-CIO Building Trades Department have been discussing a single national agreement to cover all the building trades unions involved in industrial construction. In response once again to the growth of open shop construction, the NCA is seeking an agreement that would depend less on the terms of local agreements, and would provide instead uniform national terms and conditions that would apply to all the construction unions its members' employ. There has been some suggestion that the agreement might also attempt to include specific industrial construction wage rates, but this is not at all clear at the time of this report.

Concurrently, negotiations have proceeded between the Building Trades Department and representatives of four major contractors who are heavily involved in nuclear power plant construction, aimed at a single national agreement applicable to all such work. At this writing, it appears that the Nuclear Power Construction Stabilization Agreement will be the first such multicraft industry-sector agreement to be consummated. It also appears that further progress in negotiating the national heavy industrial agreement will await the implementation of the nuclear agreement.

National Specialty Agreements

The preceding description of national construction agreements points out that most of those agreements refer to a local contract for their explicit wages and working conditions and depend on a local union for their manpower. In addition, there are national construction agreements in special branches of the industry that differ in that they include specific wage rates or allow the use of other than local union labor. In general, these specialty agreements seem to be well-suited to the unique kinds of construction they encompass. They have enabled unionized contractors to be reasonably competitive and have received little criticism from local contractors. Brief descriptions of several national specialty agreements follow.

National Pipeline Agreements

Prior to World War II, the majority of pipeline work was built on an open-shop basis. As the industry expanded, however, the growing lengths and numbers of pipeline projects put increasing economic pressure on the open shop contractors and brought them more and more into unionized areas. An extensive organizing campaign by building trades unions brought about the signing of the first national pipeline agreement in 1949. It is estimated that by 1952 over 90% of the industry was unionized. In recent years, with the growth of open shop work, this percentage has declined somewhat, but unionized pipeline contractors continue to be competitive in many areas.

Negotiated today by the Pipeline Contractors Association, the agreement consists of four separate collective bargaining agreements: one each with the laborers, operating engineers, pipefitters, and teamsters national unions. Each of these agreements provides working conditions uniformly applicable anywhere in the country, no-strike/no-lockout clauses, and grievance and arbitration procedures. Jurisdictional disputes are handled by a special committee and appear to be a minimal problem in the industry.

One of the more notable features of the agreement is its manning provision which provides that pipeline contractors may hire up to 50% of their labor directly and the remaining 50% from the local union. The exact formula for the alternate hiring of contractor and local union employees varies with the particular craft. The pipefitters, for instance, have a central union that has jurisdiction in 30 states. While in practice the final composition of the work force sometimes depends on either the ability or willingness of a local union to comply with the national agreement terms, pipeline contractors are able to develop and maintain productive work crews which they may use across the length of a project and from project to project. The use of such directly-hired key employees is a genuine advantage for pipeline contractors.

As to wages, specific hourly rates and fringes covering various worker classifications are negotiated by the Pipeline Contractors Association on a location, zone or statewide basis. In the case of the laborers, operating engineers, and teamsters, much of the rate structure is based on area heavy and highway rates. It is interesting to note that these three crafts in early 1977 agreed to a wage reduction for work performed on pipelines 16 inches and less in diameter. The contractors have been unable to negotiate similar concessions with the pipefitters' union. The contractors had proposed the wage reduction for all crafts in an attempt to protect their smaller diameter pipeline work from increasing open shop competition.

National Tank Construction Agreement (NTM Agreement)

The contemporary version of the National Transient Members (NTM) Agreement was first signed in 1947. Negotiated between the boilermakers national union and contractors who build boilers, tower tanks, storage tanks, nuclear vessels and other pressure vessels, the agreement covers their

work in 41 states. (Similar work in eight Western states and Hawaii is performed under a separate agreement.)

The agreement depends on local agreements for much of its terms and working conditions. In particular, it calls for the payment of wages and fringes as established in the local or area agreement where the work is performed. There are, however, a number of provisions in the agreement that apply in whatever part of the country work is performed. It contains, for instance, grievance and arbitration procedures, a no-strike/no-lockout clause, reporting and travel pay provisions, a wage incentive provision, and a procedure for the referral of workers.

These last two items, the wage incentive provision and the referral procedures, are some of the more notable features of the NTM agreement. Like many other branches of the construction industry, tank building originally was done on an open shop basis. During that time, there evolved a pool of transient workers who followed the contractor from project to project. Even though the industry is extensively unionized today, the wage incentives and referral practices pertaining to these transient workers have been carried over to the national agreement.

The essence of these provisions is that they enable the tank building contractor to maintain a cadre of key employees and pay them production incentives. The ratio of contractor employees to those hired from the local union varies according to the kind of work being performed. For example, on water tower tanks, the contractor may use his own employees exclusively; on storage tanks, 50% of his own and 50% of local union employees; on nuclear containment vessels and other pressure vessels, the ratio is two of his own employees for every local union employee. The method of computing wage incentives is arrived at by mutual agreement with each individual contractor. The net result of these procedures is to provide tank building contractors with genuine productivity advantages.

National Elevator Construction Agreement

A national agreement covering elevator construction was first developed in the 1920's. That agreement has evolved into a detailed labor contract that today is negotiated between a national multi-employer association and the elevator constructors national union. Except for New York City, which has a separate agreement, there is little local bargaining in this branch of the construction industry. Instead, the national agreement governs almost all the terms and conditions of employment. It includes, for instance, a no-strike/no-lockout clause, grievance and arbitration provisions, specific work rules, vacation plan, wage formula, and pension, health and educational funds. A few provisions, such as travel and subsistence allowances are negotiated locally, and a local option clause allows local parties to alter the hours of work and shift schedules of the national agreement.

As to manpower, the national agreement depends in the main on the local union to supply the workforce needed by contractors working in the area. There is a restricted allowance for contractors to bring certain of their own key employees into the local unions' jurisdiction; this provision is narrowly interpreted, however, and allows only the temporary transfer of such key employees.

The most notable feature of the national elevator construction agreement is that it does not leave the determination of wage rates to local bargaining. Rather, the agreement provides for an involved formula that, in effect, relates the wages of elevator constructors to the average of the four highest wage rates among seven building trades unions.

A new five-year agreement, liberalizing use of prefabricated units, mobile lift equipment, and shift schedules, was agreed to in August, 1977. It covers some 20,000 members in 100 locals.

Houston Industrial Agreement

The Houston Industrial Agreement was negotiated between the National Constructors Association and the Houston Building and Construction Trades Council in November, 1973. The steady growth of open shop contractors in the Houston Gulf Coast Area was the primary stimulus for this multi-craft, multi-employer negotiation. Union contractors and union members had noted their resulting loss of work. Both parties involved recognized that work was going to the open shop contractor because "working conditions spelled out in local union agreements were resulting in costs well in excess of those incurred by open shop competitors; and jurisdictional and other labor disputes, with strikes and other disruptions, were the source of additional costs for union contractors".

The resulting agreement addressed itself to industrial construction with a project cost of two million dollars or more, within the 20-county jurisdiction of the Houston-Gulf Coast Building Trades Council. This was a unique agreement in that it was multi-craft, multi-employer in nature, covered a specific type of work in a relatively small area; and covered work above a dollar minimum. Thus, the stage was set wherein two or more union, industrial contractors would be working on the same project under different labor agreements.

The Houston Industrial Agreement included provisions similar to those in some of the NCA national agreements (industry fund exemption, grievance procedure, 5-day clause, etc.) In addition, it provided for a series of work rules aimed at promoting increased efficiency; the right to use apprentices or trainees in ratios of 20 to 30% of the workforce of each craft; and a strengthened management rights clause.

On re-examination of the situation some three years after the Houston Industrial Agreement was negotiated, the majority of the industrial owners felt that few of its provisions which differed from local practice had been put into effect. Both management and labor contributed to the failure to implement the agreement. On the one hand, stewards insisted upon conditions and practices prevalent in local agreements which contravened the HIA, and on the other hand, job site foremen and superintendents who were accustomed to working under other conditions and who did not fully understand the provisions of the HIA were not insisting on compliance. Business agents and contractors compounded the problem by not printing and distributing copies of the agreement or properly educating stewards and foremen, and by not using all practical means at their disposal to obtain cooperation and compliance.

Overall, except for the shift clause which has been very helpful on some jobs, it appears that the terms of the HIA have been largely cosmetic in application, and have done little to improve productivity and decrease inefficient work practices, high turnover, absenteeism, and other artificial cost factors.

The original Houston Industrial Agreement expired in February 1977 (but continued to apply to covered projects underway at that time). A two-year extension of the agreement, incorporating some further improvements, was verbally agreed to by the parties on January 18, 1977, but the operating engineers, electricians, teamsters and boilermakers declined to sign the new agreement. An effort to enforce the agreement reached by the negotiating teams failed when the Federal District Court ruled the agreement invalid insofar as the non-signatory unions were concerned. It now appears that no further attempts will be made to negotiate a new Houston Industrial Agreement.

Owners generally view the Houston Industrial Agreement as a commendable effort on the part of union contractors and most of the local unions to improve the competitiveness of union construction in the Houston area. If extended as proposed, and if the provisions to improve

productivity were more effectively implemented, it could have significantly aided unionized contractors in recovering a share of industrial construction in the Houston area.

General Presidents' Offshore Agreements

The *West Coast Offshore Construction Agreement* is a contract between offshore construction firms, seven building trades unions,[3] and the Seafarers Union. The nature of the work covered by this agreement is limited to offshore construction and related work for oil, gas and/or other natural resources/exploration and drilling facilities. The geographical boundaries of the agreement include all United States West Coast territorial waters from the Mexican boundary North, including Alaska. Pipeline and onshore work are excluded.

The West Coast Agreement evolved from a 1965 understanding between the United Brotherhood of Carpenters and the International Association of Bridge, Structural and Ornamental Iron Workers, to eliminate jurisdictional disputes between the two crafts on construction work on offshore drilling platforms. Essentially, these two groups agreed that all construction of platforms in the area would be done on a fifty-fifty composite crew arrangement.

Due to the unique needs of offshore work, the need for uniformity of contract provisions across numerous local jurisdictions and the desire for immunity from local strikes, the understanding had developed by 1969 into a full fledged area-wide contract agreement between the seven building trades unions, the Seafarers and the "offshore" contractors (initially only Kaiser Steel and J. R. McDermott). In 1971, the Agreement was renegotiated effective in 1972 and negotiations for a new 3-year agreement were concluded in December 1976 for a new contract effective January 1, 1977.

The agreement includes a number of clauses commonly found in national and project agreements, in addition to the following more unique provisions:

- A uniform journeyman wage for all crafts is specified, along with a formula for annual updating, based on average of prevailing construction rates in specified nearby metropolitan areas. (Seafarers' rates are excluded from this determination, and presumably conform with local agreements.)
- A travel – subsistence – standby clause provides payments in recognition of the unique requirements of offshore work. In addition to a conventional shift clause, there is a provision for 12-hour shifts.
- Provision is made for composite crews, and for relaxation of craft jurisdictions in emergencies and when appropriate crafts are not available on the job.
- A firm no-strike, no-lockout clause is included, except for the proviso that employees may honor "any properly authorized picket line."

Contractors who have erected offshore structures under this agreement have been generally satisfied with its provisions and implementation.

An *Offshore Construction Agreement for the East Coast* was proposed in June 1976, by the same unions signatory to the West Coast agreement, in anticipation of offshore work on the East

[3]Electrical Workers, Carpenters, Operating Engineers, Painters, United Association, Ironworkers, and Boilermakers.

Coast. To date, no work has been performed under this agreement, and no employers have signed it. The agreement essentially duplicates the 1971 version of the West Coast agreement, with the following exceptions:

- The geographical boundaries include all United States East Coast territorial waters from the Canadian boundary south to the southern tip of Florida.
- Certain flexibilities available to the contractors were deleted from the referral clause.
- Double-edged "most favored nations" clauses were added.
- The reference to composite crews is not included.

Taconite Agreement

During the initial development of facilities on the Taconite and Iron Range in Minnesota, it was believed by the owners that a standard contractual arrangement was needed and would benefit the owners, contractors, and union employees. Several owner/operators established the Taconite Contracting Corporation, which negotiated the Taconite Agreement. The initial agreement was negotiated with international representatives of the craft unions and the Teamsters, and was signed by the local unions in November 1953. There have been several negotiated extensions, the latest being effective on April 12, 1974 for a period of five years.

The contract covers all work relative to ". . .the construction of facilities for the converting of Taconite into iron ore pellets in the State of Minnesota, the construction of facilities for the transportation of such pellets to a shipping point on Lake Superior, the construction of dock and loading facilities and power plant at that point, and necessary housing facilities. . ." The intent of this Agreement was to provide a vehicle which would standardize contract terms, contain a common expiration date and otherwise minimize the likelihood of work stoppages through the incorporation of a no-strike provision.

While the Taconite Agreement does give owners and their contractors the right to work through a strike, the "pro quo" is that the majority of work rules and all of the wages and fringes are taken from the local agreements. In effect, since the Taconite contractors employ a significant portion of the area's labor market, the unions are able to play off Taconite Range owners and contractors against contractors negotiating in the local area by finding employment on the Taconite project for members on strike against local contractors. This, of course, weakens the bargaining position of the local contractors as the unions can then hold out longer for higher wages, benefits, more restrictive contract language, etc., knowing full well that they will be under minimum pressure from the membership to settle and that all improvements will be recognized retroactively under the terms of the Taconite Agreement.

On analysis, there appears to be no significant advantage to contractors using the Taconite Agreement versus the use of local agreements. Several of the NCA national construction agreements and some recently-negotiated project agreements contain more favorable terms and conditions. Additionally, the Taconite Agreement has made more difficult the hiring of construction labor for other work in the area, and has undermined the efforts of the Regional Congress of Construction Employers (RCCE) to coordinate construction bargaining and remove restrictive and non-productive work rules from local contracts.

NCA Tri-State Agreement

The Tri-State Agreement was negotiated in early 1977 (effective date is April 1, 1977) between the National Constructors Association (NCA) and the Laborers International Union of North America and its affiliated district councils within the three-state area of Texas, New Mexico and Oklahoma. Since it is not an agency agreement, it becomes effective for each NCA contractor only if and when he signs it.

This single-craft regional agreement is a departure from prior NCA reliance on national agreements, and seems in conflict with current efforts to negotiate industry-wide, multi-craft agreements. Local contractor associations have also been invited to become signatory to this agreement. Once signed, it supersedes for work by signatory contractors within the tri-state area, both the NCA national Laborers agreement and the local Laborers agreements.

Proponents have cited as beneficial the provision for transfer of employees from one job to another (by a single contractor) without union approval, the exclusion of employees above the foreman level from the agreement, all Monday – Saturday overtime at time-and-one-half, decreased exposure to leap-frogging in future wage negotiations, and ease of administration as a result of the uniformity of terms throughout the three-state region.

Critics have expressed the following concerns:

- Dues and initiation fee checkoffs, and use of the hiring hall are prescribed – procedures not previously in effect in many of the areas involved.

- The reason for the departure from the usual "five-day clause" in other NCA agreements, by requiring written direction from the owner, is not apparent. Some view this as an abrogation by the signatory contractors of any responsibility for local bargaining. Some owners may be concerned that the written notice would directly involve them in a contractor's labor dispute, causing them to incur co-employer risks. In any event, it seems inappropriate to address the relationship between the contractor and his client in an agreement between the contractor and his employees.

- There appears to be no logic for the geographic scope of the agreement other than its correspondence to the area serviced by a Laborers International Representative. Some portions of the area have a high volume of open shop activity while others have virtually none. Much of Central and West Texas and New Mexico is remote, with a low construction volume, primarily commercial. The Texas Gulf Coast is primarily industrial, with a high construction volume, and in construction labor relations has more in common with the Louisiana-Mississippi Gulf Coast than with the remaining area of the Tri-State Agreement.

  Because of this situation, the coordination between the Regional and/or National Wage Negotiating Committees and the various local contractor bargaining groups will be a difficult task, with leap-frogging pressures in many areas. Future settlements appropriate for both booming industrial areas and remote low-activity areas will be difficult to achieve.

- The likely acceptance of this agreement by only a portion of the employers working in a given area will further divide and weaken, rather than strengthen and unify, the area. The possibility exists in the Houston area that a single jobsite could include different contractors working under the Tri-State agreement, the NCA national Laborers agreement, and the local Laborers agreement – with variations in work rules between each.

It is too early to accurately assess the impact of the Tri-State agreement; however, there are potential serious long-range problems that this agreement poses and careful analysis of the potential long-range impact should be carefully made by contractors and owners alike.

Boilermakers Agreements

Various local and regional construction agreements have been established between different employer groups and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers. The agreements cover all field construction work within the geographic scope of the contract and also contain supplemental provisions applicable to maintenance work. Management's bargaining committee is usually composed of representatives of local contractor groups, national contractors, and tank manufacturers. The actual make-up of the committee depends on the geographic coverage of the agreement and the presence of one or more strong local industrial contractor groups.

Controversy surrounds several of the key aspects of these agreements. Proponents of this type of agreement point to the following provisions:

- Uniformity of terms and a common expiration date over a geographically broad area (generally statewide or multi-state).
- A uniform wage and benefit package for all locals within the jurisdiction of the agreement.
- A functional hiring hall arrangement that can supply adequate manpower when necessary, recognizing the need for a mix of local craftsmen and experienced longer-term employees from outside the local area.
- Provision for either management or labor to shut down a project in support of local bargaining that has reached a strike, provided a five-day notice has been delivered.

However, critics argue:

- The geographical area covered by the agreements includes areas with varying economic interests, and therefore does not correspond to local bargaining or regional bargaining processes.
- Uniform terms are established, but again, often are in conflict with those contained in other craft local agreements, thus leading to craft-by-craft whipsawing.
- The common expiration generally does not correspond to the common expiration dates of the local bargaining groups, thus frustrating local efforts to achieve uniform multi-craft expiration dates.

The structure involved in the Boilermakers Agreement has established one important feature worthy of comment. At least in some instances, local industrial contractors have set and bargained in unison with national contractors and tank manufacturers and have consummated agreements that have been considered acceptable to both local and national groups. A fair exchange of ideas and bargaining strategy has taken place in various Boilermaker negotiations. It appears there has been greater cooperation among affected contractor groups in these negotiations than in other regional construction negotiations.

MAINTENANCE AGREEMENTS

General Presidents' Project Maintenance Agreements

Blue Book Agreement

In 1956, the General Presidents of the Unions comprising the Building and Construction Trades Department of the AFL-CIO developed with the Catalytic Construction Company an agreement for performing maintenance work by contract for Tidewater Oil Company's new refinery in Delaware. This result was called the General Presidents' Project Maintenance Agreement by Contract, and because it was initially printed on blue paper has come to be more commonly known as the "Blue Book". This agreement is generally available to responsible contractors on a nationwide basis. There have been four revisions to the Blue Book – September, 1960; June, 1970; November, 1972; and in 1975. Today there are over 150 such agreements in effect in 30 states.

Each of these agreements is limited to work at a particular plant. These are multi-craft agreements, signed by International Unions representing all crafts intended to be used. Although the owner is not signatory, the General Presidents before authorizing the agreement seek some indication that the owner intends to continuously engage a contract maintenance crew from the signatory contractor. Crew sizes may be increased to accommodate major overhauls and emergencies, but the agreements are not intended solely for intermittent or infrequent use of contract employees.

In summary, the agreement reached in 1956 eliminated many of the restrictive provisions contained in local construction trade agreements and gave the employer latitude to assign work in a more economical manner. A grievance procedure terminating in binding arbitration and a no-strike provision were included. The agreement also excluded subsistence, travel allowance, mileage, or travel time pay. Shift work was permitted at a shift premium rather than overtime rates, and the overtime rates were reduced to time and one-half for all hours worked during the week and Saturday. Basic wage and fringe rates were not covered – those in the local building trades agreements for each craft apply.

Agreements entered into more recently include a strengthened Management Rights clause, and, in some cases, wage rates less than prevailing area construction rates (commonly 80 to 90% of the construction rate). The reduced rate recognizes that many employees are more attracted to maintenance work because of increased job security, continuing work at the same location, and greater availability of overtime work.

Orange Book Agreement

In March 1972, a "special revision to the General Presidents' Project Agreement" was developed for the Baton Rouge, Louisiana area. This was the result of an effort by the building trades unions to compete with an independent union organized in that area to provide employees with maintenance work. The revised agreement is referred to as the "Orange Book", again deriving its name from the color of the paper initially used.

Some of the more notable improvements in the Orange Book over the Blue Book are included in provisions related to:

> Wages – this agreement set common area rates for certain specialized crafts and lower common rates for other crafts. In addition, it was established that all future wages and benefit increases would escalate at the same percentage as the national average for manufacturing industries.

Management Rights – explicit major improvements in field practices involving hiring, firing, work assignment and other facets of field flexibility (these management rights improvements were later incorporated into the Blue Book so that now the two agreements are essentially the same in this regard).

Jurisdiction – a significant reduction of craft lines and one jobsite union representative, who must be a qualified working craftsman, to replace the individual craft shop stewards. It has been noted that the uniform wage rate for related crafts provided in the Orange Book contributes to the avoidance of jurisdictional problems.

Although the General Presidents have recently agreed to extend the use of the Orange Book throughout the State of Louisiana, the wage rates established for the Baton Rouge area do not apply to other locations where the Orange Book is utilized for maintenance work. Use of the Orange Book must be negotiated on a plant-by-plant basis, but "wage rates may be established by the General Presidents' Maintenance Committee" in Washington, D.C. This, of course, means maintenance wage rates will vary for each area, and although the agreement indicates wage rates are to be established by the General Presidents' Committee, in actual practice the rate for each craft and area, as well as for the "Mechanic" classification, must be agreed upon by the building trades *locals.*

Although both the Blue Book and the Orange Book were developed by the General Presidents' Committee of the Building and Construction Trades Department and signed by the General Presidents, it should be recognized that implementation of the agreements is strongly influenced by the local business agents and the existing labor climate; i.e.,

- A particular craft local or business agent can decide not to furnish men for maintenance at rates below the existing construction rates. The contractor, after a 48-hour waiting period, contractually has the option to fill manpower requirements from any other source. However, although a violation of the Agreement, picketing and a work stoppage may result from such action by the contractor, and this option has seldom (if ever) been exercised.

- The contractor may have difficulty in retaining or, more likely, increasing the craft skills to a level necessary for maintenance work at the lower wage rates when higher paying construction jobs become plentiful.

- The Mechanic A, B, C and D classifications for the Orange Book may be unobtainable in those areas where wide wage differences exist between crafts in each Mechanic group. The higher paid crafts may be unwilling to take a larger cut in pay than the other crafts working in the same Mechanic classification, to achieve the uniform rate groupings.

- While the contract language provides certain work assignment flexibilities aimed at more efficient performance of maintenance work, these flexibilities have not usually been vigorously exercised. This is because a) contractor supervision tends to follow the rigid craft distinctions to which it is accustomed on construction work, b) Business Agents and stewards are generally resistant to departure from construction work rules, and c) contractor management, recognizing its dependence on the Union for manpower supply, is reluctant to ruffle any feathers.

The contractors signatory to General Presidents' Maintenance agreements have formed the Maintenance Contractors' Association which provides a forum for discussion of experience with the agreements. This association does not bargain formally with the General Presidents, but it has contributed to improvements in the agreements.

The General Presidents of twelve Building Trades International Unions and of the Teamsters are signatory to the agreements, and each has a representative on the General Presidents' Committee on Contract Maintenance. This committee meets monthly to resolve grievances and to authorize new agreements. The Committee employs a full-time Administrator, to assist in prompt resolution of any problems.

In 1975, it was reported that about 6,000 craftsmen were working on General Presidents' Maintenance agreements nationwide (mainly in oil refineries and chemical plants), with about half of these in the Baton Rouge area. A Building Trades spokesman stated that 15 million manhours were worked under these agreements in 1976, and the 1977 total is expected to approach 20 million.

National Erectors Association National Maintenance Agreement

In June 1970, the National Erectors Association appointed a National Maintenance Agreement Committee to explore, with several international building trades unions, the feasibility of negotiating National Maintenance Agreements. This was prompted by a situation where building trades contractors were continually losing repair and rehabilitation work because of the contractors' inability to control the work force and, in general, contract terms which made them less competitive in the industrial maintenance field.

By April of 1972, a total of four National Maintenance Agreements had been established and the first work under the terms of the agreements began in that year. As of last count, there were ten international unions signatory to individual National Erectors Associations' Maintenance Agreements.

The National Maintenance Agreements are administered by a National Maintenance Agreements Policy Committee. This committee meets quarterly and consists of ten contractors and ten international union representatives who are jointly empowered to interpret the agreements.

NEA agreements are applicable nationally, but they are individual agreements with selected crafts, rather than single-location, multi-craft agreements. In practice, while this type of agreement eliminates the requirement for a separate contract on each site, it also tends to reduce craft flexibility by reinforcing individual craft lines. In contrast to the General Presidents' Maintenance agreements, NEA agreements have found application mainly on intermittent requirements for major repair or rehabilitation work, rather than as a continuous maintenance crew. Much of their use has been in metals processing industries.

General Comment – Maintenance Agreements

In some areas, total employment under maintenance agreements (General Presidents', National Erectors, and local maintenance agreements) has reached a significant percentage of the local building trades workforce. These agreements generally include a no-strike, no-lockout clause, without provision for shutdown of the work in support of local bargaining. Owners tend to regard contract maintenance activity as unrelated to construction activity or to building trades bargaining.

These agreements do pose a risk, however, where the total employment under them is large, of undermining contractor management strength in local bargaining by providing a haven for striking workers. Because much of the work performed under these agreements, once started, is very costly to interrupt, and some is of an emergency nature, the introduction of a five-day clause into the contracts would not, in most cases, be helpful in avoiding the problem. Many owners are sensitive, however, to these relationships, and believe that the following steps can be used to minimize the impact on local bargaining:

• Maintenance managers in their advance planning should be aware of the expiration or wage reopener dates in local contracts with the crafts employed. Scheduled turnarounds or renovation work can often be programmed to complete before, or start after, these dates.

• With preplanning, it is often possible to avoid build-ups in the employment of a craft just prior to and during its contract negotiations, and especially during a period when the craft is on strike against the local contractors. This may require deferral of desirable but non-emergency work.

APPENDIX

Notable Features

As might be expected, the language of individual special agreements varies widely, but recurrent examples can be found of clauses aimed at certain basic deficiencies in local agreements. The more prevalent of these will be discussed individually. In most cases, illustrative clauses from actual contracts are quoted.

1. Management Rights

Special agreements commonly include language aimed at reserving to management an unencumbered right to take certain actions which may otherwise be limited by local agreements or area practice. The following are sometimes addressed:

- right to reject persons referred by the Unions
- right to select and hire supervisors, and to determine the number required
- right to assign work and to determine crew sizes and schedules
- right to employ efficient work methods, tools, or prefabricated items
- right to determine when overtime shall be worked and by whom
- right to subcontract
- right to establish safety rules and other work rules.

Older special agreements generally addressed only a few of these items – often scattered piecemeal among Articles devoted to other subjects. Later agreements tend to group them in a separate article entitled "Management Rights".

The following sample is from a July 1976 project agreement:

Management Rights

"1. The Contractors retain full and exclusive authority for the management of their operations.

2. The Contractors shall have the unqualified right to select and hire directly all supervisors they consider necessary, without such persons being referred by the Union.

3. The Contractor shall have the responsibility and shall be the sole judge of the selection and number of all Foremen and General Foremen for all classifications and for employees required for the project.

4. No rules, customs or practices shall be permitted or observed which in any way restrict production, or limit, or restrict the working efforts of employees as determined by the Contractor. The Contractor shall have the right to utilize any efficient work methods, procedures or techniques of construction, and select and use any type of materials, apparatus or equipment. There shall be no refusal of any kind concerning the use of machinery, equipment, or materials, tools or other labor saving devices, nor shall there be any limitation whatsoever upon choice of materials or design. The Contractors at their sole discretion shall assign and schedule work and shall determine when overtime will be worked and by whom. The Contractor shall have the right to subcontract all or any part of such work or services, including the maintenance of machinery or equipment. This shall apply to warranty service, crane and vehicle repair, etc.
5. The on-site installation, fabrication, assembly or application of materials generally shall be performed by the craft traditionally and customarily having jurisdiction over such work; provided, however, it is recognized that in some cases personnel having special training, skills, experience or qualifications not employed under this Agreement, or other collective bargaining agreements, may install, apply, set up, test items or perform other work as determined and directed by the Contractor. There shall not be any restriction on the size or type of pre-fabrication or pre-assembly of process equipment shipped to the site for erection and installation by the craft having jurisdiction.
6. The furnishing of materials, supplies, or equipment and the delivery thereof shall in no case be considered as subcontracting. Equipment purchased by or at the discretion of the Owner shall not be subject to any restrictive provisions.
7. It will be the Contractor's right to establish project rules, including safety, for all work on this project that are within the purpose and the scope of this Agreement. These rules will be presented at the pre-job meeting.
8. The parties agree that the foregoing enumeration of the Contractor's rights shall not exclude other functions not specifically set forth. Therefore, they shall retain all rights not otherwise specifically covered by this Agreement."[1]

While managements' rights clauses are sometimes helpful in correcting abuses, they are no panacea. The actual exercising of agreed management rights has been spotty, at best. Contractors have generally been reluctant to take actions which are at variance with well-established area practices.

2. **No Strike – No Lockout**

The obvious aim of these clauses is to eliminate or minimize work stoppages. Older agreements usually contain an unqualified prohibition of "strikes, work stoppages, picketing, or slowdowns by the Unions or employees. . .or lockout. . ."[2] (See Page 31 for a more complete discussion.)

More recent agreements attempt to provide for possible shutdown of the job in support of local bargaining, while retaining prohibition of strikes or lockouts for any other purpose. Example:

No Strike – No Lockout

"The Council agrees that there will be no strike or other collective action which will interfere with, or stop, the efficient operation of construction work of the Employer. Participation by an employee, or group of employees, in an act violating the above provision may be cause for discharge by the Employer. If there is a strike, work stoppage or picket line in violation of the

Agreement by any craft, it is agreed that the other crafts will be bound to ignore such action and continue to man the project without interruption. The Council will support the Employer in maintaining operations in every way during such a work stoppage.

"The Employer may suspend a portion of the work or shut down a project in the event of a slowdown by one or more Unions or a partial or complete work stoppage by one or more Unions.

"In the event of an area strike over local contract negotiations, it will not be considered a violation of this agreement for the Employer to stop work covered by this agreement for the duration of the strike. The Employer is required to give notification to the Council five (5) working days prior to taking such action.

"In the event of an area strike over local negotiations, it will not be considered a violation of this agreement for the Council to refuse to furnish men to the Employer for the duration of the strike. The Council is required to give notification to the Employer five (5) working days prior to taking such action.

"Nothing in this Agreement shall be construed to limit or restrict the right of the union or the Employer to pursue fully any and all remedies available under the law in the event of a violation of this Article."[3]

3. Overtime

Local agreements generally require double time payment for all overtime. Clauses limiting double time payments to Sundays and holidays are found in most special agreements. Example:

"All hours worked in excess of the regular working hours Monday through Friday, excepting shift work, and all hours worked on Saturday shall be at time and one-half. On Sunday and Holidays employees shall be paid for hours worked in accordance with the provisions established in locally negotiated agreements. There will be no duplication of or pyramiding of overtime pay."[1]

Some more recent project agreements additionally provide for working on Saturday at straight time, when the work is make-up for cancellation because of weather conditions earlier in the week.

4. Shift Work

Many local agreements have no provision for shift work, requiring overtime payment for all work outside the normal Monday-Friday day shift. Others pyramid a shift differential on top of the common provision of 8 hours pay for 7 or 7-1/2 hours work. Special agreements provide for shift work with clauses like the following:

Shifts

"Shift work may be performed at the option of the Contractors; however, when shift work is performed, it must continue for a period of not less than three (3) consecutive days. The Contractors shall have the sole right to designate the craft or crafts on the project, or any portion thereof, who shall work on a multiple shift basis. When two or three shifts are worked, the first, or day shift, shall work a regular eight (8) hour shift with no shift differential. The second shift shall be established on a seven and one-half (7-1/2) hour basis, for which each employee shall receive eight (8) hours pay at the regular straight time rate. The

third shift shall work seven (7) hours and be paid eight (8) hours at the regular straight time rate. No shift premium shall be paid where overtime premium rates are paid for the same hours."[1]

5. Referral Procedures

Local agreements commonly designate the union as the sole and exclusive source of referrals for employment. Some bind the union to referral only of union members.

Special agreements generally refer to or duplicate established local referral procedures, with the following exceptions:

- A requirement that the unions "accept for registration and referral all applicants for employment without discrimination against any applicant by reason of membership or non-membership in the Union. . ."
- The employer is free to employ applicants directly at the jobsite if the union is unable to fill requests within 48 hours.
- Most special agreements emphasize the employer's right to select foremen and general foremen, and some provide the right to hire directly for those positions.

The Distribution Pipeline agreement provides additional flexibility:

"C. The Employer shall have the right to bring directly into the job journeymen who are considered by the Employer to have special knowledge and experience in gas distribution pipeline work and shall have the right to keep such journeymen on all work throughout the territory covered by the pre-job conference.

"D. It is agreed that the Employer may bring directly into the job 50% of the number of employees required for such job. For purposes of this provision, it is understood that the Union shall refer the first employee required; the Employer shall bring the second one; the Union shall refer the third one; the Employer shall bring the fourth one; the Union shall refer the fifth one; and so on, in accordance with this procedure."[9]

Specialty contractors generally seem to exercise the flexibilities provided in their agreements to depart from local referral procedures, in order to retain an experienced and loyal cadre of employees, who move with the contractor from job to job. This is especially true of the highly mobile contractors, such as the pipeliners, tank builders, and chimney constructors.

On project agreement work, on the other hand, there has been little discernible departure from normal referral procedures of the local unions.

6. Travel and Subsistence Pay

Travel and subsistence pay for work outside urban areas are common among local contracts, some even requiring expense payments to employees who use contractor vehicles.

Most project and special agreements prohibit travel and subsistence pay.

It should be noted that the absence of travel and/or subsistence pay provisions is not necessarily advantageous. In cases where employees are drawn from a union whose jurisdiction includes both an urban area and distant rural areas, it may be very difficult to attract sufficient numbers of skilled craftsmen in the more distant areas without travel/subsistence pay. Such pay provisions also provide an additional inducement to attract "travelers" from other areas.

7. Show-up Time

Employees reporting for work under local contracts may get from two to four hours pay where no work is available or where inclement weather prevents work. These provisions often vary from craft to craft within the same area.

Some special agreements merely adopt the show-up time provisions of applicable local agreements. Others attempt to achieve consistency craft to craft and to avoid abuses by inclusion of more restrictive clauses. Example:

> *"Reporting Time:* Any employee who reports for work and for whom no work is provided shall receive two hours pay provided he remains available for work. Any employee who reports for work and for whom work is provided shall be paid for actual time worked, but not less than two hours provided he remains available for work. However, no such payment shall be paid when an employee leaves work of his own accord."[5]

8. No Formal Coffee Breaks

Most local contracts do not address the issue of employee coffee breaks; however, they are accepted local practice in many areas.

Most special agreements specifically prohibit coffee breaks and other scheduled non-working periods. Some recognize use of personal thermos jugs on the job in lieu of organized breaks.

Following is an example of such a clause:

> "There shall be no organized coffee, coffee pot, or rest breaks on the project. The employer has no objection to employees taking their thermos to a point adjacent to their place of work."[4]

9. Grievance Procedure

Local agreements generally provide a grievance procedure including specified steps and time limits, with final resort to binding arbitration. Some local IBEW contracts call for submission of unresolved disputes to the Council of Industrial Relations (a permanent board of NECA and IBEW representatives in Washington) for final resolution.

Grievance procedures in special agreements follow a similar pattern. A uniform procedure is provided for all crafts. Additional intermediate reconciliation steps are sometimes specified. Time limits for each step tend to be shorter. The final step in most agreements is binding arbitration. There is a consensus that the threat of binding arbitration contributes to early resolution of disputes.

Special agreements normally include a proviso that the work be continued without interruption or interference during the operation of the grievance machinery.

10. Activities of Stewards

Most local agreements provide for a working steward for each craft on each shift. They indicate that he is to perform journeyman work, but is to be excused when necessary to perform necessary union work, such as investigation of grievances.

Abuse of these provisions has been a pervasive problem. Stewards have been given preferential treatment, have been allowed to collect dues, to participate in referral, indoctrination of new employees, etc. These sorts of practices are sometimes contended to be "area practice," despite limiting local contract language.

In an effort to avoid these abuses, special agreements sometimes discuss duties of stewards at some length, addressing as well what they are prohibited from doing. The following clause is extracted from a recent project agreement:

"The Union shall have the right to designate one (1) working steward on each shift who will be recognized as the Unions' representative on the project.

"The steward designated by the Union shall be a qualified workman assigned to a crew, and shall perform the assigned work of his craft.

"There will be no non-working stewards on the project. The steward shall be paid at the applicable wage rate for the job classification in which he is employed.

"In the case of overtime, in order for the steward to work such overtime, he must be qualified to perform the work being undertaken during the overtime period.

"The steward shall, in addition to his work as a journeyman, be permitted to perform, during working hours, such of his normal union duties as cannot be performed at other times. The Union agrees that such duties shall be performed as expeditiously as possible, and the Contractors agree to allow the steward a reasonable amount of time for the performance of such duties. The Contractors shall not discriminate against the steward in the proper performance of his Union duties, provided such duties do not interfere with his regular work or with the work of employees, and he shall not leave his work area without first notifying his appropriate supervisor as to his intent, the reason thereof, where he can be reached and the estimated time he will be gone.

"The steward's duties shall not include any matters related to referral, hiring, assignment, overtime, termination or discipline of employees. Nor shall the steward be authorized to halt any work or otherwise interfere with work progress.

"The steward shall only represent those employees of his craft employed by his employer/ contractor, and not employees of other Contractors working at the project site.

"The steward shall not be entitled to any preferential treatment by the Contractors, and will be subject to disciplinary action (up to, and including discharge) to the same extent that other employees are. The Contractors shall notify the Union prior to the discharge of any steward."[3]

11. Exclusion of Industry Fund Payments

Most current project agreements and other special agreements provide for payment of all local wages and benefits, but exclude Industry Fund payments.

A recent project agreement contains language restricting payment of Industry Funds:

"The Contractors shall pay only fringe benefits for employees that have been legally negotiated and established by a bonafide collective bargaining agreement. Industry promotion funds and similar funds which are not of direct benefit to the employee shall not be paid by the Contractors."[3]

12. Resolution of Jurisdictional Disputes

While jurisdictional disputes have declined steadily over the last several years (with recorded work stoppages over jurisdictional matters declining from 845 in 1968 to 222 in 1976), they nonetheless deserve continued attention in an effort to reduce them further.

Many local and national agreements prohibit strikes over jurisdictional disputes, and prescribe settlement in accordance with the "Plan for the Settlement of Jurisdictional Disputes in the Construction Industry," or "in accordance with the procedure established by the National Joint Board for the Settlement of Jurisdictional Disputes or any successor agency. ." Problems most often stem from situations where one of the crafts involved (most notably the Teamsters), or a contractor association (e.g., SMACNA), does not participate in the Impartial Jurisdictional Disputes Board.

Project agreements commonly address this problem with language like the following:

"There will be no strikes, no work stoppages or slow downs or other interference with the work because of jurisdictional disputes.

"Work shall be assigned by the Employer in accordance with the procedural rules of the Impartial Jurisdictional Disputes Board and jurisdictional disputes will be settled in accordance with the procedural rules and decisions of such Board or successor agency. If the work in dispute can be delayed pending settlement, the Employer shall so delay it. If the Employer undertakes to execute the work all unions shall respect the assignment unless and until changed by the IJDB.

"Where a jurisdictional dispute involves any Union or Employer not a party to the procedures established by the Impartial Jurisdictional Disputes Board and is not resolved between the Unions, it shall be referred for resolution to the International Unions, with which the disputing Unions are affiliated. The resolution of the dispute shall be reduced to writing signed by representatives of the International Unions and the Employer.

"If the Unions cannot reach agreement, the Employer will make his assignment which will be respected by all Unions."[3]

13. Use of Apprentices and Trainees

Local contracts commonly provide for use of apprentices and specify a ratio of apprentices to journeymen (usually in the range of 1:4 to1:7). However, the availability of apprentices has often limited usage to lesser numbers of apprentices. Where apprentices are available, they usually are not allowed to work alone. This results in inefficient use of apprentices, and in considerable unskilled and semi-skilled work being performed by journeymen.

Efforts to rectify this have resulted in provisions in special agreements which decrease the limitations imposed on use of apprentices, and which in some instances add a new classification of Trainee in the skilled crafts. The following extract from the Houston Industrial Construction Agreement is similar to clauses in a few recent project agreements:

"(4) Trainee classifications should be included in all skilled crafts. Such classifications shall be considered a training classification and the rate of pay will be at the equivalent apprentice rate of pay. The trainee may be overaged for apprentice training, but will have the necessary qualifications to become a skilled craftsman. Training period will be at least the same length as the apprentice. The trainee will be assigned by the Employer to perform any work which is normally performed by his craft and which is within the capability of the trainee. The trainee will remain in training until qualified to become a journeyman. Trainees and/or apprentices shall comprise from 20 to 30 percent of each craft's work force at any time and the composition of this ratio shall be at the craft's discretion.

"(5) Journeymen will have the necessary skills required to perform all work within their jurisdiction. Wage premiums such as those based on height of work, type of work or material,

special skill, etc., shall not be paid.

"(6) Recognizing the need to maintain continuing support of apprenticeship and similar training programs in the construction industry, the Employer will, to the extent permitted by job conditions, employ apprentices to perform work which is performed by his craft and which is within his capability."[5]

Trainees, however, have generally been unavailable from union halls, and contractors do not seem to have exercised their right to hire them directly. Union Business Agents find it politically unacceptable to accept trainees as long as there are only journeymen seeking employment, and contractors are reluctant to "rock the boat." This continues to represent a major competitive disadvantage to union contractors vis-a-vis open shop.

14. **Craft Flexibility Clauses**

There have been some attempts, especially in maintenance contract agreements, to decrease rigid jurisdictional lines where these result in inefficiencies or delays. The following extract from the Baton Rouge "orange book" agreement is an example:

"SECTION II: The Contractor may, if he desires, *maintain a variety of skills within his group of employees* to be prepared to have skills and/or leadership for any type of work that may arise.

"SECTION III: It is understood that all employees will work together harmoniously as a group and as directed by the Contractor. Employees will also cooperate with and follow directions of Owner Representatives as required.

"SECTION IV: The Unions understand the extreme importance of keeping operating equipment and units running at all times. The Unions also understand that the loss of production and the cost of repairs together create a great loss to the Owner. Therefore, the Unions will encourage and advise the employees to exhaust every effort, ways and means to perform work of good quality and quantity. The Contractor and the Unions recognize the necessity for eliminating restrictions and promoting efficiency and agree that no rules, customs or practices shall be permitted that limit production or increase the time required to do the work, and no limitation shall be placed upon the amount of work which an employee shall perform, nor shall there be any restrictions against the use of any kinds of machinery, tools or labor-saving devices.

"SECTION V: It is understood by the Contractor and agreed to by the Unions that *any employee will accept any work order, pertaining to any type of work and perform the work to the best of his ability.*

"SECTION VI: It is understood by the Contractor and agreed to by the Unions, that the employees of this Contractor will perform the work requested by the Employer *without having any concern or interference with any other work performed by any employees who are not covered by this agreement."*

"Article VIII: Work Assignments

"1. The signatories to this Agreement agree to the concept that work assignments cannot and shall not interfere with the efficient and continuous operations required in the successful application of the intent of this Agreement."[7]

It appears that, except in emergencies, these provisions have not resulted in appreciable economies as a result of avoiding redundant manning because of jurisdictional lines.

In the General Presidents' Offshore Construction Agreement (West Coast), the following clauses are aimed at this same objective:

"Article IX: Jurisdictional Disputes

"Section 4: In the event that an emergency arises which would not warrant the "call in" of other men or others could not be reached, the Employer shall have the right to assign those on the shift to such emergency work as is necessary. The Employer agrees that in such cases, it will have due regard where practicable to craft jurisdiction.

"Section 5: In the event qualified craftsmen are not immediately available and referral requests have been on file for at least forty-eight (48) hours, excluding Saturday, Sunday and Holidays, with the appropriate Union, the Employer is free to assign such employees as are available on the job to perform work of any nature until qualified craftsmen can be referred by the appropriate Union.

"Section 6: In the interest of promoting harmony and efficient operations throughout the Industry, the parties agree to the concept that composite crews can often satisfy that interest.

"Section 7: When agreement can be reached on the manning requirements of a project, or series of projects between the Employer and two or more of the Unions directly involved, then the Employer can make work assignments to the employee affiliated with the agreeing Unions on any work falling within the joint jurisdiction of the agreeing Unions."[8]

The Distribution Pipeline agreement includes a similar clause:

"E. Employer may establish for a project or job a crew or crews, known as a 'Composite Crew', which shall consist of the required crafts in such proportions as are respective to the type of work to be performed, subject to provisions of Article IV, Section L.

"F. In performing its work, the 'Composite Crew' shall be allowed relaxation from strict craft jurisdiction, provided the employees from each craft are assigned to their craft's jurisdiction as far as practicable and possible but not inconsistent with the provisions of this Agreement."[9]

15. Subcontracting

The Building Trades unions have traditionally sought restrictive language in subcontracting clauses so as to give themselves exclusive rights to construction work, by excluding open shop and independent union employees. An example follows:

"The Unions and Employers agree to be bound by the terms of this Agreement, however, nothing in this Agreement shall be construed to limit the Employer from selecting the most competitive bidder for the award of any work, provided such bidder has contractual relationships with the appropriate Unions or International Unions affiliated with the Northern Michigan Building and Construction Trades Council and signatory to this Agreement."[3]

The Supreme Court in *Connell* ruled that for such agreements to escape antitrust vulnerability and be lawful under Section 8(e) of Taft-Hartley, three ingredients must be present:

1. A collective bargaining relationship between the union and the employer.
2. Limitation to a particular job site.

3. Congruency with the basic purpose of the 8(e) proviso, which is to protect union employees from working alongside non-union employees. (Thus, a requirement that subcontractors have contractual relationships with a particular union or group of unions does not qualify.)

The requirement that subcontractors have "contractual relationships with . . . the Northern Michigan Building & Construction Trades Council. . ." does not meet this test.

The following clause appears to satisfy the requirements of the Connell decision:

"The Employer agrees not to sublet, assign or contract out any work on the said construction project to any contractor or subcontractor who fails to comply with the wages, hours, fringe benefits and working conditions of this Agreement. The union agrees to abide by the terms and conditions contained in the Agreement with respect to all such contractors and subcontractors."[10]

16. **"Most favored nations" Clauses**

The term "most favored nations" has been applied to clauses whose objective is to protect the employer from a competitive disadvantage which might result from later negotiation by the Union of more favorable terms with another employer. Examples of these clauses are found infrequently in construction collective bargaining agreements – both in ordinary local agreements and in some of the special agreements being considered here.

The U.S. Supreme Court in *Pennington* [United Mine Workers v Pennington, 381 U.S. 657,69 (1965)] found that any such clauses which prohibit the union from negotiating more favorable terms with other employers do not have the shelter of the labor exemption to the antitrust laws. Parties to such agreements could be found in violation of antitrust laws if the intent or effect of the agreement is an unreasonable restraint of trade.

The type of "favored nations clause" which makes automatically available to the employer any more favorable terms subsequently agreed to by the union with other employers, on the other hand, does not fall within the *Pennington* rationale of antitrust vulnerability.

An example clause from a 1973 project agreement:

"*More Favorable Terms.* If, during the life of this agreement, the Union grants any more favorable terms or conditions than are contained in this Agreement, the more favorable terms automatically become a part of this Agreement and the Union shall promptly notify the contractor in writing of any such concession."[11]

Apart from the matter of antitrust vulnerability, in considering use of "favored nations" clauses, the long-term effect of their widespread use must be considered. Special agreements have provided, in many situations, an opportunity to negotiate more favorable conditions than the Unions could at that point in time accept for all work in the area. If, however, "favored nations" clauses become commonplace, then the knowledge that any more favorable terms obtained in a special agreement would apply to all area work, would deter the unions from making concessions in special agreements. *One might thereby conclude that "favored nations" clauses would tend to "lock in" inefficient practices to a greater degree, and consequently that they are not in the industry's best interest.*

References

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2. Disney World Project Agreement, between Allen Contracting Company and Orlando B. & C. T. Council, Building and Construction Trades Department, AFL-CIO, and International Brotherhood of Teamsters, March 1969.

3. Project Agreement between Limbach Company and the No. Michigan B. & C. T. Council and the local unions, for Stabilization project at Shell Oil Company plant at Kalkaska, Michigan, June 1976.

4. Project Agreement between Daniel Construction Company and local B. & C. T. and IBT unions for Union Electric Company, Callaway County, Missouri, Nuclear Units 1 and 2, 1975.

5. Houston Industrial Construction Agreement, between the National Constructors Association and Houston B. & C. T. Council and International Brotherhood of Teamsters, November, 1973.

6. January 1977 Amendment to 5. above.

7. General Presidents' Project Maintenance Agreement by Contract as revised for the Baton Rouge, Louisiana area, March 1972.

8. General Presidents' Offshore Construction Agreement (West Coast) between seven unions and various contractors, January 1977.

9. National Distrubition Pipeline Agreement, between the Distribution Contractors Association and the United Association (AFL-CIO), October 1968.

10. Stabilization Agreement between contractors and subcontractors . . . of Stauffer Chemical Company, Mt. Pleasant, Tenn., and the B. & C. T. Dept. (AFL-CIO), . . . the International Brotherhood of Teamsters and appropriate local unions, November 1975.

11. Labor Agreement for use by Contractors, Subcontractors, and their Employees for the Construction of the West Jefferson Steam Plant of the Alabama Power Company, May 1973.

CONTRACTOR ASSOCIATION FINANCING

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Introduction

The management side of the construction industry consists of a multitude of contractors – approximately 900,000 – of which the preponderance are local and small, the remaining handful being regional and large national construction companies. To cope with their situation as contractors and as an industry, many local contractors have joined together to form industry associations. However, one of the most persistent problems challenging the association is funding. To the contractor short of money, his dues contribution to the industry association is one of the easiest costs to eliminate.

An alternate to association dues for local union contractors became available in the 1950s when contractor associations began to secure agreement from their counterpart unions to use the labor contract as a collection device for dues to finance contractor associations. The cents-per-hour-worked feature of their financing is similar to that for employee fringe benefit funds; however, they are not a Taft-Hartley fund permissible under Section 302 (c). They simply have been created and have not been found illegal. The IRS has established conditions for them to be tax-exempt.

At present, such provisions are written into countless local labor agreements, and Industry Advancement Funds (IAFs), also known as Industry Funds, Industry Promotion Funds, Construction Advancement Programs and by other names, have become an important aspect of local contractor association management in the union construction industry.

Large union national construction companies have formed a contractor association of their own, The National Constructors Association (NCA). They finance NCA on a dues basis and do not present the same problem of financing as the local union contractor.

The open shop contractor, of course, does not have the union agreement mechanism available to him. Many of these contractors have become members of the Associated Builders and Contractors (ABC), the single association for open shop contractors. ABC is supported on a voluntary dues basis and does not appear to have a financing problem.

This report, therefore, addresses itself only to contractor association financing for union construction wherein the funding arrangement is contained in a union collective bargaining agreement.

Contractor Associations

Local contractors, who make up the bulk of the construction industry, are a diverse group with different backgrounds, different interests and different skills. Most have not more than a few full-time employees. Many of the small local contractors operate on a marginal basis, and can find themselves in severe financial trouble due to relatively minor business fluctuation, a delay in receiving payment from a client, or a labor disturbance. Individudally, the local union contractor is in no position to oppose the demands of a construction trades union which is sometimes large, is frequently well-financed, and most importantly has the power to control the craft manpower system, foremen as well as tradesmen, on which the union contractor depends in order to survive. Also faced with government regulation, the local union contractor frequently lacks the knowledge to understand and comply with all the demands of the law, much less to negotiate on an equal footing with a government agency. Since they are individual businessmen, their first and most urgent concern is simply survival.

In response to this pressure from labor, government, customers, competitors, and the economic environment in general, local union contractors frequently combine into associations to gain the strength to promote the best interest of the members and to resist influences detrimental to them.

One of the most critical functions of a union contractor association is labor relations. Standing alone, a contractor would usually find it very difficult to negotiate his own labor settelement with a construction trade union. Even a strong contractor association may find the task of negotiations difficult, and the history of bargaining in the construction industry shows that in general their success has been marginal. Effective action by an association requires broad membership, plus adequate funding. However, some contractors do not belong to any association because they are not convinced that membership is sufficiently in their own interest to justify the necessary commitment of manpower and money to the association. The non-members take the position that the association will do the job anyway, and they can enjoy the benefits without paying their share of the cost.

Many local union contractor associations, rather than selling themselves and the real advantages of association membership, have turned to the labor agreement as the easy means of securing non-voluntary financial support. Once written into the agreement, an IAF provision is usually observed by all contractors dealing with that union, whether they belong to the association or not.

Because the IAF contribution is contained in the collective bargaining agreement, the contractor who is operating under a time and material agreement with the user will directly pass on this cost to the user of his services in the same manner as he passes on all the other direct labor related costs in the collective bargaining agreement. In a few rare instances users have insisted and contractors have agreed that the contractor will not be reimbursed for his IAF contribution.

A contractor working under a lump sum agreement with the user does not, of course, delineate any of his costs except where he is reimbursed for extras paid on a time and material basis. While the IAF contribution by the contractor cannot be found in the lump sum price as a discrete cost element, neither can the hourly rate, the fringe benefit costs or other wage payment commitments found in the union agreement. Nevertheless, as long as the contractor pays them, as he must by union agreement, it can reasonably be assumed the contractor has built his price on these costs and the user is reimbursing him for them, though not on a direct pass-through basis.

There is one major exception to the usual union contractor practice of paying the IAF contributions found in union agreements. The large national contractor will usually decline to pay into IAFs by virtue of national or project agreements or addenda to local agreements that specifically exclude such payment. This refusal is a part of the general unhappiness local contractors frequently express in describing the role of national contractors working in their areas. Some local contractor associations have filed court cases to compel the nationals to pay these contributions but have not met with success.

This refusal of national contractors to pay into local industry advancement funds has been thrust into current sharp focus by the development of a new industry fund in the electrical contracting business. The National Electrical Contractors Association (NECA) has for many years been financed both at the local chapter and national office level by a dues system. In June, 1976, the national leadership of the contractors and electrical union (IBEW) announced an agreement covering the following five parts: increasing the electrical workers national pension fund from 1% to 3%, establishing a shift clause, providing no restrictions on certain management rights except the restrictions in a local agreement, establishing ratios of apprentices to journeymen, and establishing an industry fund in an amount not to exceed 1% nor less than 0.2 of the 1% as determined by each local NECA chapter. Experience thus far is that the fee is generally set at 1%. The agreement was eventually ratified by conventions of both groups and was made a part of all local agreements effective July 1, 1977. The 1% contribution is based on gross labor payroll (excluding fringes) and will escalate in actual cents per hour as wage scales increase. In their September, 1977, convention NECA voted to allow the industry fund assessment to be based on a gradually reduced percent of labor payroll when the contractor's annual labor payroll exceeded $1 million for

electrical work performed in any one chapter area. Few local contractors are likely to qualify under this standard.

It was reported at the time of the 1976 announcement that, while there were promotion funds in some local agreements, NECA wanted a national industry fund. It was also reported that the IBEW was looking for better pension coverage for its members and standardization of shift premiums and journeyman-apprenticeship ratios. The IBEW was said to have found the local industry funds increasingly objectionable.

This agreement has not been accepted by all the parties affected by it. Some contractors believe more money will be collected than under the former dues system and more than will be needed. Some contractors have withdrawn from NECA in protest of the agreement. Some users of construction have informed their electrical contractors that the 1% industry fund is not a reimbursable item. Finally, the National Constructors Association along with 17 other plaintiffs filed a class action antitrust suit against NECA, the IBEW and the industry fund trustees, claiming they are attempting to impose payments into the industry promotion funds as a condition of employing electrical workers. The IBEW and NECA in turn have filed a counter suit against NCA charging it with interfering with their collective bargaining relationship and the contractual rights that exist between them.

Industry Advancement Funds

Industry Advancement Fund contributions are generally paid by the contractor along with other union agreement fringe benefit contributions (pension funds, health and welfare, etc.) This lump sum contribution is either sent to the union, a fund administrator, or a bank for allocation and deposit to appropriate accounts.

IAF amounts vary widely in a range of 2¢ to 20¢ an hour, but they can go higher, e.g. 25-30¢ in isolated instances. The great majority have been under 10¢ an hour. The advent of the NECA 1% gross charge might increase that upper limit of the majority range. The amounts tend to be higher in some of the mechanical trades, such as electricians, sheetmetal, plumbers and pipefitters. Comprehensive national data on the funds do not exist at present. The total number of local agreements including industry funds and the total amount of money involved are both unknown. The fund negotiated by NECA and the IBEW is estimated to cost $38 million per year.

NLRB decisions have made it clear that employer contributions to IAFs are not a mandatory subject of collective bargaining, that is, either party to a negotiation is free to rule out either the creation or the continuance of an IAF by simply refusing to talk about it. Thus, a union is within its rights to refuse adamantly to discuss IAFs, unless other tactics or circumstances combine to indicate bad faith bargaining. It is not unlawful to use the IAF as a bargaining tool in the context of "hard bargaining" so long as good faith is maintained.

The funds are usually administered according to the terms of a trust agreement established by the contractor association unit, and expenditures are authorized and controlled by a contractor Board of Trustees appointed by the Association. There have been a few instances where the funds were simply collected by the contractor association without a written trust agreement. The program established by a trust agreement can vary by association and by geographical area. The Associated General Contractors Association (AGC) in its Industry Advancement Program suggested Guidelines states:

> ". . . . .examples of needed programs may include but not be limited to accident prevention; apprenticeship training; education; research into new methods and materials; public relations; relations with architects, awarding authorities, subcontractors, and material and equipment suppliers, labor relations, market development and disaster relief."

In support of its programs, the IAF may pay the expenses of the contractor association including wages and salaries of staff personnel, general operating expenses, travel expenses of association members, etc. The allocation of funds to these programs is discretionary with the Board of Trustees and continued budgeting is not mandatory.

In some trades, the local union agreement provides for industry fund support of the contractor association's national office as well as the local chapter. Two trust agreements are then set up to collect and disburse the funds.

Many of the associations supported by industry funds in the union agreement are also supported by dues paid by contractor members. The percentage of support from each source varies widely. Among Associated General Contractors chapters which have industry funds, the dependence on IAFs for chapter income ranges mainly from 10% to 60%, with several in the 65-95% range. In NECA there will be almost complete dependence on the new 1% IAF, despite the existence of a modest dues system. The hourly contributions tend to be higher in the specialty trades such as electricians, pipefitters, sheetmetal and insulators; hence, the dependence on industry funds is greater in those trades.

The decision between using industry fund money or dues money to support an association activity depends upon the intended beneficiary. For instance, the Mechanical Contractors Association of American Industry Fund Committee advises the association chapters that "expenditures by the industry fund must be applied only to those functions and activities that produce a benefit or benefits to the industry as a whole, i.e. labor, management, owners and/or the general public." Thus an association activity that benefits the mechanical contracting industry, for instance, all industry fund contributors, or perhaps the construction industry at large would be supported by the industry fund under this guideline. The AGC has a similar guideline.

Since the broad industry purposes for which industry fund money can be used and the narrower association purposes for which dues money should be used depend on the work of the association staff person, he is paid from industry fund money and/or dues money depending on his job. In a small staff, he is supported by both. A large staff conceivably could have some employees with split support and others 100% supported by either source or funds.

The same principle is applied to other expenses of the contractors themselves when working for their industry or for the association as members of the association. However, these decisions of charging certain expenses and staff salaries to different accounts are judgment calls and in many instances can go either way. Association purposes can be made identical with industry purposes with little difficulty in a large number of instances. The practicalities of the situation are such that frequently these decisions are made dependent on how much income there is and how the association wants to support itself, by dues or industry funds.

The payment of national association dues is an example. These dues are for the support of the national office of the various contractor associations. The local chapters forward the money. In most instances, they collect this money from the contractors; yet in some cases, the local chapter industry fund pays for the dues.

The choice for the contractors of which source of money to use for association support adds its own dimension to the decision where the choice is between using the dues payments of the association members only or the money paid by all contractors into the IAF under the terms of the collective bargaining agreement, for which as we have seen, the user generally reimburses the contractor. The electrical contractors have made this choice and are now supporting by an industry fund much the same activities they formerly supported on a dues basis.

Among general contractor associations like the Associated General Contractors, industry fund income can come from one or more trades with the agreement of the union(s) involved. There appears to be no problem in having only certain of the trades with which the association bargains accept an industry fund provision in their union agreement and not all of the trades.

One of the purposes of some industry funds, mainly in the general contracting industry, is to provide money for apprenticeship training. The industry fund trustees assign certain monies to joint union-contractor trustees of an apprenticeship training fund for training apprentices in that trade to become journeymen. However, in most construction union agreements, there is a provision for a separate trusteed apprentice training fund. Those apprentice programs sponsored by industry funds could easily become separate like the others if the parties so wished.

In some situations, the same industry fund is supported by contributions collected through several contractor associations. This sometimes creates problems of control for the associations involved over the people and the activities supported by the fund.

Advantages and Disadvantages of Industry Advancement Funds

Industry fund programs differ from association to association, but most of them seem to be beneficial from an unbiased point of view. The purpose of these programs includes:

- Strengthening of contractor associations at the bargaining table through more thorough staff research, better preparation for negotiations, and analysis of labor relations.
- Improving job productivity through training programs to improve management skills and proficiency.
- Research into new methods and materials.
- Settling of grievances and jurisdictional disputes.
- Aids to tuition, including scholarships.
- Improving the image of the construction industry through advertising and other promotional activities.
- Contributing to the community through disaster control programs, which include mechanisms to mobilize men and equipment.
- Providing for future manpower requirements, through recruitment programs and high school contests which generate interest in the construction industry.
- Increasing job safety through education, newsletters, and coordination with OSHA.
- Apprenticeship training.

The use of a union contract as a mechanism for collecting these funds also has certain apparent advantages:

Financing is virtually assured, since nearly all contractors, both association members and non-members, who work under the union agreement pay the stipulated amount for the fund.

Financing is even handed since all contractors pay the same cents per hour for each hour worked. The exception is the national contractor mentioned earlier who does not contribute.

However, since the base of industry funds is in the labor agreement, they are subject to certain weaknesses. For one, the contractors are provided with an assured and easy mechanism of collecting money that invites looseness in both the type of program supported as well as in the actual expenditures themselves. Most troublesome of all, in the periodic confrontation between contractor associations and unions – already an unequal match favoring the union in most cases – existence of industry funds tends to give the union an extra lever in bargaining.

With regard to programs and expenditures, critics have expressed the following concerns:

- There appears to be certain contractor functions which are properly his to support rather than from industry funds, which though paid by the contractor, are in the final analysis as we have seen reimbursed to the contractor by the user. For instance, an expense which seems inappropriate for the user of construction to support in the way just described is a tuition scholarship program confined only to children of contractors and their counterpart union members.
- Contractor attendance at association meetings or conventions, travel expenses and business meals on association matters or on joint contractor/union concerns are also proper expenses for the contractor to bear out of his association dues or his own cost of doing business rather than have them reimbursed to the contractor by the user of construction through the industry fund. The blurring of the contractor association with his industry does not change these expenses into a user cost. The guaranteed source of the money, the collective bargaining agreement, and the exemption of industry funds from the control of competitive profit-making can add a liberal touch to some of these expenses.
- While most of the funds receive an audit which is reported to the local contractor leadership, there is no disclosure to the user community, which pays the bill, or to the national headquarters of the contractor association.
- In some instances, contractor association expenses have immediately increased with the introduction of IAFs in the union agreement and the assurance of more income. Activity expanded to the limit of the budget.
- There are overlapping programs, conflicting objectives, and other administration conflicts in the several thousand IAF supported programs across the country. This is in part due to fragmentation in construction that causes many other problems too. However, the relatively easy method of supporting the programs through the collective bargaining agreement spawns programs that can be expensive and wasteful.

Probably the most serious disadvantage is the impact on collective bargaining. Where a contractor association becomes dependent on an industry fund, the choice of the union to include an IAF in the contract or to exclude it becomes a powerful lever in negotiations. Since bargaining on the subject is non-mandatory, the union can simply refuse to renew the IAF agreement for any reason or none at all. The threat can then be used from time to time as a type of trade-off to secure concessions from the contractor association or other issues.

The impact on collective bargaining can be illustrated in several ways:

- A dispute began in 1969 between a contractor association and a mechanical trade local in California over the question of whether the union had or had not agreed to continue the Industry Promotion Fund of the previous contract. In his award, the arbitrator stated:

  > "The evidence shows convincingly that the package settlement which was made on May 14, and by which the union achieved substantial wage and fringe benefits, was thought by the Employers to include Industry Promotion, and that the settlement would have been different had Industry Promotion not been included . . . ."

  Obviously in order to keep the Industry Promotion, the contractor association felt itself forced to make concessions on other points.

- Contractors claim the building trades unions have not openly used this leverage on a frequent basis. However, there are enough instances to establish the concern. Furthermore, the threat of the leverage is present in many situations as a subtle continuing pressure. No one needs to have it spelled out, particularly where there is a heavy dependency on the funds by the contractors.
- The trade-off can be any one of several issues, such as association operational expenses as in the arbitration case, the contractors' position on a controversial issue, and so on.
- Contractor associations depend a great deal on their paid staff to handle on-going problems and contractor positions vis-a-vis their union. When the paid staff person is supported in whole or in part by industry funds, he may find it difficult to be a strong contractor management representative, realizing his position depends on the union's continued willingness to keep the industry fund in the agreement.
- From time to time over the last fifteen years, it has been part of the legislative program of the Building Trades Department to have legislation introduced legalizing joint trusteeship of construction industry advancement funds. The continued presence of IAFs in union agreements is an incentive to the Building Trades to keep seeking this legislation. Contractors should recognize that the Building Trades Unions just might persuade Congress to change the law to allow joint trusteeship of these funds.
- On a practical basis, a union will seek at least joint control of any fund that is included in a collective bargaining agreement. The union regards the contribution to the industry fund as its "own money." It's in the agreement the contractor and, therefore, the user of construction, they say, is committed to payments and it is only by agreement of the union the money is going to the industry fund and not to some portion of the wage package. As a matter of fact, many unions have secured contractual agreement provisions allowing the union to audit and monitor industry fund activities.
- Some local contractor associations are encouraged to exist independently through IAF support where mergers, combinations and sharing of resources by contractor associations would be more desirable. At times, these associations can actually be a hinderance to developing sound local coordinated contractor bargaining. A marginally existing national contractor association supported by industry funds can also be a hinderance to contractor unity at the national level as well.

Some contractor associations do product development for their section of the construction industry, and where their association is supported with an IAF the product development work is thus supported as well. This work can involve engineering, product technical research, liaison with architects and engineers, product promotion and so on. Other associations have set up a separate product promotion fund, financed through the union agreement on a cents-per-hour basis where this same product development is carried on apart from the contractor association and its staff. These funds are trusteed only by contractors, but can have union advisers sitting in on the trustee discussions. The activity under either arrangement can be important to the economic growth of the contractor members of the association and the support for it through the union agreement places the contractor association in the same jeopardy of union leverage in collective bargaining. The location of separate product promotion financing in the union agreement can be just as hazardous to the contractor association as IAF support for the association through the agreement, even when in a given instance the association finances itself wholly through dues.

Alternatives

A mechanism in the union contract is not the only way to fund the contractor association activities. Several alternative methods are now in use.

Contractor Association Dues

Responsible contractors have consistently believed that all contractors have the obligation to support their association by participating in its activities and by their financial support. There is no reason why contractors could not include this cost along with other costs in their negotiations with users. Many users do not object to such an inclusion, and in fact encourage their contractors to become members of associations and to support them through the payment of dues. Construction users can only benefit when their contractors are assisted by effective contractor associations.

Many contractor associations' chapters are now supporting themselves on a dues basis, proving it can be done this way. Moving away from present dependence on industry funds to a dues arrangement should probably be done gradually, and in some instances might require for a period of time a "safe" combination of dues and industry funds. Safety in this matter, however, is really elusive and changing. The only real safety for contractor association financing is the elimination of industry advancement funds from the collective bargaining agreement. Some considerations for implementing this change include:

- Each association should develop a strategy that would allow it to shift from an industry fund to a dues arrangement as rapidly as possible.
- The length of time needed to make the transfer would depend on many factors, including the size of the association, its current dependence on industry funds, and the number of on-going programs.

  Some associations would be able to convert within one or two years. For others, the conversion would be more gradual.
- The goal of the change period would be to have the vital functions of the association financed through voluntary association dues. Such vital functions would include staff salaries, rent, utilities, office expenses, and so on. Industry funds would support those programs which could be eliminated without severely handicapping the association, i.e. apprenticeship, recruiting, and educational programs, etc.

If dues are used to finance an association, there are several ways to lower association costs. In fact, they should be pursued no matter what the financing arrangement is.

- Combine contractor associations in the same office arrangement and with the same paid staff. This could work particularly well with several association chapters for the same contractor type of business in a geographical area.
- Similar local contractor associations could actually combine into one association. This would help them speak with a unified voice and would reduce fragmentation in bargaining.
- Pool common contractor services for different associations in the same area.
- Provide some association services on a fee basis, such as management training seminars, counseling on EEO matters, safety training, etc. Many organizations have found that making a program pay for itself sharpens both the program and the attention of the participants.

One point needs to be addressed when discussing the subject of dues for support of local contractor associations. The local contractor association performs a service for the out-of-town contractor by providing him with at least a wage and fringe benefit schedule and sometimes the entire agreement under which he performs his work. The out-of-town contractor, including nationals, may recognize a cost responsibility when he receives the benefit of such negotiations. However, out-of-town contractors would find it difficult to accept a cost responsibility for those local negotiations that have resulted in wage costs that are higher for them than for the local contractors.

The relationship of the local contractors and the out-of-town contractor has often been a problem because the local contractors frequently press for financial support from the out-of-town contractor through the IAF basis that gives them a windfall income from a large project. In addition, the local association also has frequently required full membership in the association and assignment of bargaining rights which the traveling contractor believed would cause him legal problems with his national bargaining agreements. These are not insurmountable obstacles if each side recognizes the equity and the realities in the other's position. Instead of quarreling with each other, negotiations cost and membership status should be used as an opportunity to bring the local and national contractors into closer cooperation with each other on matters of mutual advantage.

The following observations would sum up the advantage of the dues alternative:

- Funds – the life blood of the association – are not subject to arbitrary termination by the union, and cannot become a liability during negotiations.
- Direct payment of dues by a contractor gives him a stake in the association. He is more strongly motivated to monitor expenditures and to participate in the business of the association.

Specialized Contractor Bargaining Groups

The dues alternative appears to have the most promise for contractors to finance their associations. However, there are a few other arrangements which have grown out of specialized local conditions allowing the contractors to finance their labor relations responsibilities on a voluntary basis in a special way, at the same time as they have strengthened their bargaining position with the unions. This involves organizing a separate area contractor association or industrial council whose members are individual contractors or associations. This separate group has a paid staff whose activities may include:

- Labor relations guidance to the contractors in their negotiations for collective bargaining agreements.
- Coordination of area contractor bargaining.
- Guidance to contractors in handling contract administration problems during the contract term, jurisdictional assignments, manpower problems, grievances, etc.
- Providing local users and out-of-town contractors working on a local project with local construction information – wage data, contract expiration dates, collective bargaining agreements for the construction trades, construction manpower data, etc.

This type of area contractor association is financed by dues from local contractors and out-of-town contractors working in the area, or by local contractor associations if they are the constituent members. In one instance, a voluntary charge of two cents per manhour worked has been substituted for dues payments from contractors. In some instances, owners have contributed financial support by their payments as subscribers for the local construction information provided.

Along with this type of local contractor organization, there seems to be less of a reliance on industry advancement funds for the support of the local contractor associations and an increased willingness to use dues payments for such support.

Several aspects of this method of contractor organization are worthy of note:

- The labor relations ability of the contractor bargaining teams is enhanced by the experience of the area association staff who participate or advise in the negotiations for the contractors for practically all of the trades in the area.
- Contractor coordination of bargaining in the area is improved.
- There is improved communications between the visiting out-of-town contractor and the local contractors concerning the out-of-town contractor's project on the one hand and the local construction conditions on the other.
- The local construction user becomes better informed on local construction developments as they affect his projects.
- The local contractor associations continue to provide all of the other services of an association for their contractor members.

Summary

Contractors have found it necessary to form associations for their own general betterment. In the main they are local associations. In the union sector, these local associations have an added importance since they are the bargaining agents for their members negotiating new agreements with their counterparts among the building trade unions.

For many years, these associations were financed on a voluntary dues basis. In the 1950's, the associations developed another way of financing themselves through the union agreement. The union and the association would agree to include in their collective bargaining agreement a charge of so many cents per hour, or percent of the hourly rate, that the contractor would pay into a fund trusteed only by contractors, which is used to pay the cost of operating the contractor association. All contractors working under that agreement, whether members of the association or not, pay the same amount. The contractors in turn charge the user of their construction services for this fee in the same way as they charge the user for the hourly wages and fringes in the same union agreement. National contractors generally refuse to pay these industry funds. These funds have become a common method of association financing although many successful local associations still continue to support themselves on a voluntary dues basis. Frequently the fund plus contractor dues will provide the financing for the contractor association. However, the new electrical industry fund might be signaling a change to an almost exclusive dependence on industry funds.

There are certain claimed advantages of course to the industry fund system. Financing of the association is relatively assured and even-handed, since all contractors working under the union agreement, whether members of the association or not, pay the same cents per hour worked.

The programs of the industry funds are generally identical with the programs of the association. They would be desirable for the contractor association no matter how the association was financed, through dues, industry funds, or some other mechanism. They include such subjects as product promotion, education and training, accident prevention, manpower recruitment, technical research, labor relations, apprentice training.

The industry advancement fund provisions in the union agreements have been declared to be non-mandatory items of bargaining by the Labor Board and the courts. Even though incorporated into the agreement, and dependence has begun on this system for association support, the union is free not to accept it in subsequent new agreements and does not have to bargain over it. The

bargaining leverage thus given the union can be quite harmful to the contractor association negotiating a new agreement. This is what has happened at times.

Unions have been granted concessions by the contractors in order for them to maintain the association financing clause in the union agreement. In addition, where paid contractor association staff positions become dependent on industry fund payments, the staff personnel become vulnerable to union pressure.

There is also a certain ease by which the money is spent from the funds into which the contractors pay but for which they are reimbursed by the user through the union agreement. It is a common belief among those who have studied industry funds that there would be a tightening up of both programs and expenditures if associations were to change from an industry fund to a dues arrangement or some other means of support outside of the union agreement. Programs also could be analyzed for both need and coordination for better effectiveness. Fragmentation is reflected here as well as elsewhere in construction.

The alternatives available to the contractors are those that do not depend on the union agreement for collecting the money.

- One such alternative is a 100% dues system, which is in force among a large number of local contractor associations. In view of the emphasis by some on the importance of industry funds to support contractor associations, it is surprising to note that a number of local associations still rely on dues. It appears to be the best alternative for most situations.
- Those associations that now rely on industry funds could wean themselves away from dependence on the funds over a period of time. During this change period, the objective would be to finance vital association functions through dues and allow industry funds to support other functions which could be eliminated without severely handicapping the association.
- Another approach has been to combine contractor association labor relations functions into a single area association supported by voluntary contractor dues and contributions from users as subscribers for construction data information. Along with this type of area association, there is an increased willingness to use dues payments for the individual local contractor association support.
- A voluntary charge on a cents-per-hour basis might be substituted for dues payments from contractors.

If the contractors could see the need to change, their ingenuity could develop a system of contractor association support outside of the union agreement. Unfortunately, the IAF systems generate a certain comfort to those using them and there is a trauma associated with a change. In that context, the contractors minimize the hazards and emphasize the income produced.

While questions can be raised about the financing of contractor associations through industry funds, there can be no questions about the importance of strong contractor associations for the health of the construction industry and the advantage of all interested parties – the general public, the building trades unions, the contractors themselves, and the users of construction. Everyone suffers, even the construction unions, as the Building Trades are now witnessing with the growth of open shop construction, when employers are not strong enough and are fragmented and their counterpart unions are strong.

Anything that tends to weaken the contractor employers in this situation is not in the best interests of either the contractors or the users of construction, and it is in that context that this report is written.