March, 1996

Keeping the Government Out of the Way: Project Labor Agreements Under the Supreme Court's Boston Harbor Decision

Henry H Perritt, *Chicago-Kent College of Law*

Keeping the Government Out of the Way: Project Labor Agreements Under the Supreme Court's *Boston Harbor* Decision

Henry H. Perritt, Jr.*

In Memory of William J. Curtin

I. Introduction

Large public works projects, such as the construction of dams and other flood control projects, airports, hospitals and environmental clean-ups present major governance problems. They usually span several years, involve public expenditures of millions of dollars, and involve the efforts of dozens of private sector enterprises and thousands of individual employees. Traditionally, such projects in the United States have been undertaken by both public and private organizations and management.

Fragmentation in the institutional structure of employee relations in the construction industry frequently made it difficult to establish and maintain a coherent set of wage relationships and work rules, while protecting a project from disruptions like strikes and other industrial action. As a result, project labor agreements were developed as a governance mechanism for such projects.[1] Project labor agreements probably were first used in the 1930s on large government-funded projects such as flood control and hydroelectric dams. In the later 1940s the agreements

*Professor of Law, Villanova University School of Law; member of the bar, Virginia, Pennsylvania, District of Columbia, Maryland, United States Supreme Court. The article was written with support from a research grant from the Building and Construction Trades Council of the AFL-CIO and the National Constructors Association. The author appreciates research assistance from Brian P. Crowner Class of 1996, Villanova University School of Law.

1. Project labor agreements have been described by a leading commentator as follows: "Project agreements: For large projects involving a considerable volume of construction at a single site (or interrelated group of sites) over a period of years, a special agreement will sometimes be negotiated. It may involve the owner of the project as well as his contractors, or it may be sought by the contractor at the owner's insistence. These agreements normally attempt to guarantee the progress of the work without interruption by strikes and to establish special mechanisms for dispute settlement; sometimes they provide means for determining wages and conditions at the projects. While project agreements may be negotiated independently at the national level, at other times they are negotiated with the full cooperation of local parties." D. QUINN MILLS, INDUSTRIAL RELATIONS AND MANPOWER IN CONSTRUCTION 40 (1972). *See also* D. QUINN MILLS, CONSTRUCTION IN COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE 69 (1976) [hereinafter *Construction*] (describing project agreements).

were a regular feature of projects at atomic energy facilities.[2] There was a lull in the use of such agreements during the 1950s. However, interest in the use of project agreements renewed in the 1960s. For example, there was the Walt Disney World Construction Project Agreement, and large project managers, such as Bechtel, began to use project agreements. When construction industry wage inflation led a general price inflation that accelerated through the early 1970s,[3] a variety of efforts to reform the employee relations structure in the construction industry further increased interest in project labor agreements. Such agreements were used successfully to build the Alaska Pipeline and a number of other important public works projects.[4]

The success of project labor agreements in the private sector encouraged public sector project managers to use them. There was, however, doubt whether such public sector agency involvement was permitted by the National Labor Relations Act. This doubt was resolved when, in 1993, a unanimous Supreme Court held, in the *Boston Harbor* case,[5] that when a public agency undertakes a public works project, it has at least as much power to arrange its industrial relations policy as a private sector entity would have undertaking the same project.

The *Boston Harbor* case is important because it legitimizes project labor agreements for public works projects. The case also implicitly recognizes the role of private, voluntary methods of governance in public projects as privatization of certain public functions proceeds and the economy is deregulated.[6]

This article explains how project labor agreements work in the context of construction industry labor markets, reviews the history and significance of the *Boston Harbor* case, and considers other potential

---

2. *See generally* Phoenix Eng'g, Inc. v. M.K.—Ferguson of Oak Ridge Company, 966 F.2d 1513 (6th Cir. 1992) (affirming denial of injunction against project labor agreement at Oak Ridge nuclear facility; applying *Boston Harbor* case and finding no violation of federal procurement regulations).

3. *See generally* DANIEL QUINN MILLS, GOVERNMENT LABOR, AND INFLATION: WAGE STABILIZATION IN THE UNITED STATES 217 (1975) (explaining that strong growth in contract construction helped fuel the onset of inflation in the late 1960s and early 1970s).

4. *Construction* at 69-70.

5. Building and Constr. Trades Council v. Associated Builders and Contractors, 113 S. Ct. 1190 (1993) [hereinafter *Boston Harbor*].

6. After *Boston Harbor* was decided, the Associated General Contractors commissioned a report by the law firm of Murphy, Smith & Polk in Chicago attacking project labor agreements. CHARLES E. MURPHY & ROBERT P. CASEY, A DETAILED POLICY AND LEGAL ANALYSIS OF PUBLIC OWNER PROJECT LABOR AGREEMENTS iii (no date). [hereinafter *AGC Report*]. The *AGC Report* characterizes *Boston Harbor* as deciding a narrow legal question: that a public agency acting in its proprietary capacity is not subject to NLRA preemption. *AGC Report* at 2. It mobilized policy arguments against the use of PLAs on public projects. The section, "What's Wrong with Public Owner PLAs" focuses on the "political" character of arguments in favor of PLAs. The report devotes some six pages to strategies against proposed PLAs and some eight pages to purported legal issues surrounding public owner PLAs, "the key to understanding the legal challenges that still can be raised in challenging public PLAs." *AGC Report* at 10. The entire tenor of the report indicates that it is intended as a resource guide for persons already opposed to public PLAs.

legal impediments to project labor agreements on public projects. Finally, the article concludes by suggesting that the validation of project labor agreements is an important step in creating a legal environment within which private governance can arrange a variety of matters more efficiently than detailed government regulation.

II. Evolution of Construction Industry Labor Markets and Regulation

A. *The Construction Labor Market Is Sui Generis*

The construction industry labor market differs from labor markets in other industries[7] because construction firms are less integrated, employment fluctuates greatly, and employees of different employers work side by side on the same projects.[8] Unlike other industries the construction industry is not vertically integrated; compared with manufacturing industries, a greater proportion of the construction industry's overall transactions are conducted in external markets rather than through internal bureaucracies.[9]

Moreover, most construction enterprises do not maintain a significant workforce unless they are working on a particular job. Therefore, the level of employment at any particular construction enterprise fluctuates widely.[10] Employment levels also fluctuate because of cyclical forces in the economy. Thus, when investment expenditure increases, construction activity increases and employment levels rise. During recessionary periods, construction activity and employment decline sharply.[11] An industry in which such fluctuations in employment predominate must have institutional arrangements to deal with those fluctuations. Generally there is no fixed group of employees in

---

7. *See* Associated Builders and Contractors v. Massachusetts Water Resources Auth., 935 F.2d 345, 363-64 (1st Cir. 1991) (Breyer, J., dissenting) (explaining need for subcontracting restrictions); *id.* at 366-67 (appendix to dissent by then Chief Judge Breyer containing legislative history explaining special characteristics of construction industry and need for subcontracting restrictions and hiring halls).

8. *See generally Construction* at 49-50 (describing structure of construction industry).

9. *See* ALFRED D. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 6-8 (1977) (reasons for development of modern enterprise structure); *id.* at 14 (nature of traditional enterprise); JAMES WILLARD HURST, LAW AND MARKETS IN UNITED STATES HISTORY 106-07 (1982) (replacement of bargaining among atomized units by rules in larger enterprise organizations). *See generally* Williamson, *Transaction—Cost Economics: The Government of Contractual Relations,* 22 J.L. & ECON. 233 (1979) (explaining determinants of firm decision to bring transactions inside the firm or to accomplish them in markets external to the firm); Williamson, *The Organization of Work: A Comparative Institutional Assessment,* 1 J. ECON. BEHAV. & ORG. 5 (1980). The construction industry has worked out mechanisms for making market transactions efficient so that it functions well without a high degree of vertical integration.

10. *Construction* at 53. *See* International Assoc. of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770, 772 (3d Cir. 1988).

11. *See generally* U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS, Table 68-71 at 290-296 (Bulletin 2340 1980) (showing greater fluctuations in construction industry employment than for most other nonagricultural sectors of the United States).

a defined area employed by a construction firm in a continuing work relationship. By contrast, in an industry such as the steel industry, there exists a continuous working relationship between employer and employee. Workers at a steel plant do not, on the whole, move on to other projects once a certain amount of steel has been produced. The steel industry, unlike the construction industry, is not occasional or seasonal in nature.

Finally, because construction work is conducted by specialized firms, each performing a particular type of task, employees from different firms regularly work side by side and must integrate their activities. For example, the employees of a plumbing subcontractor may be installing water pipe in the same space that the employees of an electrical subcontractor are installing electrical conduit. The industrial relations literature long has recognized that dramatically different employment terms of employees working side by side lead to dissatisfaction and disrupt work.[12]

Collective bargaining in the construction industry adapted to these unique market characteristics before detailed regulation of collective bargaining existed.[13] The construction labor market developed collective bargaining as a self-regulating mechanism to channel the competing interests of employees and entrepreneurs at different levels of the product chain.

B. *Collective Bargaining in the Construction Industry Is Sui Generis*

Collective bargaining in the construction industry differs from collective bargaining in other industries. It involves unions organized by craft, subcontracting restrictions, prehire agreements, and hiring halls. Usually, collective bargaining in the construction industry does not involve grievance arbitration. The legitimacy of subcontracting restrictions, grievance arbitration, and hiring hall arrangements expressed in prehire agreements was validated in *Boston Harbor*.

Subcontracting restrictions are one institutional feature of construction industry collective bargaining. Such restrictions typically involve contractor promises not to subcontract work on a construction site to

---

12. *See* JOHN T. DUNLOP, INDUSTRIAL RELATIONS SYSTEMS 222 (rev. ed. 1993) [hereinafter INDUSTRIAL RELATIONS SYSTEMS] (explaining how differences in compensation, as may be introduced by piecework system, and differences in work rules, create dissension among employees working closely together). *See also* JOHN T. DUNLOP, WAGE DETERMINATION UNDER TRADE UNIONS 70-73 (1966 reprint) [hereinafter WAGE DETERMINATION] (effect of wage differentials among enterprises and among local unions less when product markets and crafts are sharply differentiated and differentials traditionally have existed). *Id.* at 108-109 (nature of construction industry makes sensitivity to differences in wage and employment policy especially acute).

13. Judge Breyer noted that labor and management in the construction industry engaged in prehire bargaining long before Congress passed the NLRA. *Associated Builders and Contractors*, 935 F.2d at 362-64 (Breyer, C.J., dissenting) (reviewing history of mismatch between initial interpretations of NLRA and practices in construction industry, leading to the adoption of § 8(f) and § 8(e) proviso).

a nonunion contractor. These agreements reduce the risk of conflict between union and nonunion members who work side by side.

Prehire agreements[14] and hiring halls accommodate the fluctuating nature of work in the construction industry. There is little merit in the idea of holding elections for every project when the project is likely to be complete before the election ever takes place.

Another reason for using prehire agreements is that in the construction industry, work is obtained through competitive bidding on different projects. Therefore, it is essential for an employer to know exactly what labor costs will be so that an accurate bid can be made.[15] A guaranteed construction union contract is integral to defining labor costs upon which a bid can be based.[16] Moreover, an employer must have a supply of skilled craftsmen available for quick referral.[17] Prohibiting a union from negotiating a contract with an employer prior to complete hiring would result in economic inefficiencies of overbidding and underbidding, thereby creating a likelihood of business failure for employers that guess poorly on the price of labor. Additionally, the inefficiency of speculative bidding could create work interruptions on projects if financing runs out due to unreasonably low bids.

Subcontracting restrictions and prehire agreements are typically combined with hiring hall and grievance arbitration arrangements in a project labor agreement. A project labor agreement provides an overall framework—a kind of constitution—for labor relations on a construction project. It determines in advance, like other prehire agreements, the bargaining structure, bargaining relationships and recruitment sources for the entire project. It also determines at least the basic terms and conditions of employment, thus reducing the potential for disruption that arises from short term collective bargaining agreements with staggered expiration dates. But project labor agreements go beyond these traditional features of the construction industry industrial relations system; they also reduce disruptions by providing for grievance arbitration and prohibiting strikes for the life of the agreement.[18] Thus they substitute a comprehensive peaceful governance arrangement for periodic economic conflict.

By excluding from a construction project those unions and employers who do not agree to play by the basic ground rules set forth in the project

14. Prehire agreements are contracts negotiated by an employer and union while the employer has not yet hired all the employees that are to be bound by the terms of the contract, the union thereby assuming representative authority prior to an election proving majority status.

15. *See* S. REP. No. 187, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2345.

16. *See* International Assoc. of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770, 773 (3d Cir. 1988).

17. *See* S. REP. No. 187, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2345.

18. Neither type of provision is common in construction industry collective bargaining, except for project labor agreements.

labor agreement, an agreement performs the same function as other narrower or shorter-term subcontracting restrictions. In essence, it reduces the likelihood of disruption by not forcing employees to work side by side with those who are governed by different rules. However, according disruption is not the only reason for requiring that everyone on a project be covered by a project labor agreement. The primary purpose of a project labor agreement is to provide a comprehensive governance framework for a project's labor relations during the duration of the project. This central purpose would be vitiated if some enterprises on the project were not covered. Thus, project labor agreements negotiated in the legal elbow room afforded by the National Labor Relations Association (NLRA)[19] can culminate in private governance of large construction projects, and reduce the need for ad hoc or detailed government regulation.

C. *Application of the NLRA to the Construction Industry Is Sui Generis*

The NLRA, had it been applied when first enacted, would have disrupted the private governance mechanisms of construction labor markets.[20] The use of subcontracting restrictions and prehire agreements in construction industry collective bargaining long antedated any federal labor legislation. Accordingly, the National Labor Relations Board (NLRB) initially exempted the construction industry from application of the NLRA. Subsequent legislative initiatives attempted to remove the exemption,[21] but the realities of the construction labor market were recognized. Instead, Congress adopted specialized provisions accommodating private practices in the industry. These provisions included section 8(f), allowing prehire agreements, and a proviso to section 8(e),[22] allowing regulation of subcontractor labor practices by prime contractors.[23]

---

19. 29 U.S.C. §§ 151-168 (1988).

20. *See Associated Builders and Contractors*, 935 F.2d at 363 (Breyer, C.J. dissenting) (NLRB application of NLRA to construction industry was unsuccessful).

21. The union unfair labor practice provisions added to the Act in the 1947 Taft Hartley Amendments, now codified at 29 U.S.C. § 158(b) (1988), did not contain special exceptions for the construction industry.

22. Section 8(e), 29 U.S.C. § 158(e), makes it an unfair labor practice for a labor organization and employer to enter into a "hot cargo" agreement. A hot cargo agreement is one in which the employer agrees not to handle the products of another employer or agrees not to do business with any other person. The construction industry proviso reads, "provided, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting or work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ." 29 U.S.C. § 158(e). The proviso thus allows agreements that exclude certain subcontractors from a construction site, notwithstanding the general prohibition of § 8(e).

23. Hiring halls and grievance arbitration are generally allowed or encouraged by federal labor law and no particular construction industry provisos were needed as to these features of construction industry project labor agreements.

The proviso to section 8(e) of the NLRA[24] allows employers and unions in the construction industry to enter into "hot cargo" agreements otherwise generally prohibited by federal labor law.[25] Under section 8(e), a construction employer may voluntarily[26] enter into an agreement with a union that restricts the employer from dealing with a third party.[27] However, the section 8(e) exception is limited to "the contracting or subcontracting of work to be done at the site of the construction."[28]

When considering exemption of the construction industry from section 8(e) of the NLRA, Congress noted that the construction industry "is highly organized and has a long history of collective bargaining."[29] Thus, a proviso exempting the construction industry from section 8(e) was "necessary to avoid serious damage to the pattern of collective bargaining in [this] industry."[30] While Congress considered the strong tradition of collective bargaining in the construction industry when it refrained from subjecting the industry to section 8(e) there was another important reason that justified exemption: the construction industry is very different from most manufacturing and service industries.[31]

As already noted, the construction industry faces the special situation of multiple employers and employees working on a single job. Like workers in other industries, construction workers often picket employers with whom they have a dispute. However, when union and nonunion employers both work on the same project, pickets cannot single out the employer with whom there is a dispute without interfering with the entire project.[32] In order to eliminate the friction and delay caused by such activity,[33] Congress excluded the construction industry from sec-

---

24. 29 U.S.C. § 158(e) (1988).

25. *See* Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. v. Massachusetts Water Resources Auth., 935 F.2d 345, 355-56 (1st Cir. 1991), *rev'd on other grounds*, 113 S. Ct. 1190 (1993).

26. NLRA § 8(b)(4) forbids picketing to secure an otherwise lawful hot cargo agreement. This section accommodated the Supreme Court's decision in *Carpenters v. NLRB*, 357 U.S. 93 (1958) (*Sand Door*) (indicating that compliance with hot cargo agreements was legal as long as it was voluntary).

27. *See* Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 654 (1982).

28. 29 U.S.C. § 158(e) (1988).

29. S. REP. No. 1509, 82d Cong., 2d Sess. 2 (1952).

30. 105 CONG. REC. 17899 (1959) (remarks by Sen. Kennedy).

31. S. REP. No. 1509, 82d Cong., 2d Sess. 3 (1952).

32. *See* 105 CONG. REC. 17881 (1959) (remarks by Sen. Morse).

33. Under *NLRB v. Denver Bldg. and Constr. Trades Council*, 341 U.S. 675 (1951) (picketing a general contractor to force it to terminate relationship with nonunion subcontractor violated § 8(b)(4) of NLRA), construction industry unions may not picket an entire construction site when they have disputes with only some employers on the site and not with others. Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 630 n.8 (1975) (explaining interrelationship between *Denver Bldg. & Constr. Trades* and § 8(e)). A variety of techniques, such as reserved gates have been developed to allow effective use of economic pressure notwithstanding this prohibition. Nevertheless, when a construction site is mixed, with both union and nonunion employers on the site and with a plethora of different collective bargaining agreements expiring at different times, the possibility of disruption remains high.

tion 8(e) in relation to work done at a single job site.[34] The proviso recognizes that a union employee forced by subcontractor arrangements to work next to a nonunion employee might be concerned, because of the community of interests among employees in the industry, about the tendency of the nonunion employee and his nonunion subcontractor to undercut wage levels and working conditions. Thus, Congress concluded that it is legitimate to allow employers to agree voluntarily that they will use only union labor.

Congress also recognized that other practical realities of the construction industry led to prehire agreements, which are now allowed by section 8(f) of the NLRA.[35] Generally, the NLRA requires that a union obtain the support of a majority of the employees it represents before the union may act as that group of employees' collective bargaining representative.[36] However, section 8(f) allows unions and employers in the construction industry to negotiate contracts before the union has attained majority status, and even before the employer has hired all of the workers to be covered by the contract.[37] This provision, like the construction industry proviso to section 8(e), was meant to accommodate the unique characteristics of the construction industry. For instance, normal NLRB elections usually cannot be held before the completion of most construction jobs. Therefore, it is most impractical, and sometimes impossible, to show majority status through representative elections before the completion of a particular job.[38]

Once all employees for a job are hired, however, the employees may, through formal NLRB elections, decertify a union recognized under a section 8(f) prehire agreement.[39] It is important to note that construction unions normally represent a majority of employees who regularly perform construction work in a certain area, as a formal election would eventually prove.[40] Thus, "representation elections tend to be less necessary and serve less purpose than in other industries. . . ."[41]

---

34. *Connell,* 421 U.S. at 629.

35. 29 U.S.C. § 158(f) (1988).

36. *See* NLRA §§ 158(a)(1), (b)(1)(A) (1959) (codified at 29 U.S.C. §§ 158(a)(1), (b)(1)(A) (1988)).

37. *See* S. REP. No. 187, 86th Cong., 1st Sess. 27 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2442. In the construction industry, "the vast majority of building projects are of relatively short duration, [therefore] such labor agreements necessarily apply to jobs which have not been started or may not even be contemplated. . . ." *Id.* *See* NLRB v. Local Union 103, International Ass'n of Bridge, Structural Ornamental Iron Workers, Local 103, 434 U.S. 335, 349 (1978) (unions and employers can enter agreements before any work begins).

38. *See* 434 U.S. at 349.

39. Howard Douglas Fineman, *The Retroactive Application of Deklewa: Inequitable and Unjust Results for Construction Industry Employees,* 8 HOFSTRA LAB. L.J. 417, 425 (Spring 1991) (citing *Ornamental Iron Workers,* 843 F.2d at 773, 775).

40. S. REP. No. 1509, 82d Cong., 2d Sess. 2 (1952).

41. S. REP. No. 1509, 82d Cong., 2d Sess. 5 (1952).

III. The *Boston Harbor* Case

A. *How the Boston Harbor Case Arose*

In the late 1980s the United States District Court for the District of Massachusetts ordered the Massachusetts Water Resources Authority (MWRA) to clean up the Boston Harbor.[42] Compliance with the order would cost an estimated $6 million over a ten-year period. Nevertheless, the district court required that clean-up construction proceed without interruption, including interruptions from labor disputes.[43]

The MWRA was established by the Massachusetts General Court (the legislature) as an independent agency responsible for water supply, sewage collection and treatment, and sewage disposal for the eastern half of Massachusetts.[44] The MWRA had primary responsibility for complying with the district court's Boston Harbor mandate, providing the funds for construction, which included state and federal grants, establishing bid conditions, deciding all contract awards, paying contractors, and generally supervising the project. Ultimately, the MWRA would own the sewage treatment facilities.[45]

In 1988, the MWRA selected Kaiser Engineers, Inc. as the project manager responsible for managing and supervising construction activity. Kaiser suggested to the MWRA that a comprehensive uniform labor relations policy would maintain work site harmony and stability through the duration of the project by ensuring labor management peace. More particularly, Kaiser suggested that it be permitted to negotiate a Project Labor Agreement (PLA) with the Building and Construction Trades Council (BCTC) and affiliated organizations.[46] The MWRA approved Kaiser's PLA initiative, and Kaiser then negotiated an agreement with the BCTC. The agreement recognized BCTC as the exclusive bargaining agent for all craft employees.[47] In addition, it provided for the use of peaceful labor dispute resolution techniques, contained a ten-year no-strike commitment, endorsed primary use of BCTC hiring halls to supply the project's craft labor force, contained union security provisions, and required that all contractors and subcontractors agree to operate under the PLA.[48]

---

42. *Boston Harbor*, 113 S. Ct. 1190, 1192 (1993) ("citing *United States v. Metropolitan Dist. Comm'n*, 757 F. Supp. 121, 123 (D.Mass. 1991)"). The original order was issued in September 1985, based on discharge of sewage into Boston Harbor by the Metropolitan District Commission, the MWRA's predecessor. The series of remedial orders culminated in the 1991 decision.

43. *Id.*

44. *Id.*

45. *Id.* at 1192-93.

46. *Id.* at 1193.

47. This provision was appropriate to avoid disputes over representation and to give a coherent framework for application and administration of the PLA.

48. *Boston Harbor,* 113 S. Ct. at 1193.

Both Kaiser and the MWRA recognized that the project labor agreement would be ineffective unless it universally applied to all of the work on the Boston Harbor project. Accordingly, the MWRA used its statutory authority to specify certain terms to be included in bids by would-be contractors,[49] including compliance with the PLA. It included "bid specification 13.1" in its solicitation of bids for work on the Boston Harbor project, which expressed the requirement for a project labor agreement term as follows:

> [E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement as executed and effective May 22, 1989, by and between Kaiser . . . on behalf of [the MWRA], and [BCTC] . . . and will be bound by the provisions of that agreement in the same manner as any other provision of the contract."[50]

In 1990, a non-union construction industry association, the Associated Builders and Contractors (ABC) sued the MWRA, Kaiser, and BCTC, seeking to enjoin enforcement of bid specification 13.1.[51] The ABC claimed that state support for the PLA was preempted by the National Labor Relations Act and the Employee Retirement Income Security Act.[52] Further, the ABC also claimed violations of the equal protection and due process clauses of the Fourteenth Amendment, federal antitrust law and state law.[53]

The United States District Court for the Eastern District of Massachusetts rejected all of the ABC claims, but this decision was reversed by the United States Court of Appeals for the First Circuit,[54] which held that the PLA was preempted by the NLRA. The majority rejected the ABC's argument that the MWRA decision should be evaluated as though it had been entered into directly between the state agency and the unions. Further, the majority expressed concern about an inability to distinguish decisions on single projects from state-wide decisions.[55] The court of appeals gave relatively short shrift to the argument that the MWRA procurement decision should be distinguished from state regulation.[56]

---

49. *Id.* at 1193 n. 1 (explaining authority under competitive bidding laws for MWRA to state preference for PLA).

50. *Id.* at 1193.

51. *Id.* at 1193-94. Earlier, another contractors' association had unsuccessfully sought NLRB intervention by filing an unfair labor practice charge. The NLRB determined that the PLA was a valid prehire agreement under § 8(f) of the NLRA, 29 U.S.C. § 158(f), and that limiting work on the project to contractors agreeing to operate under the PLA was lawful under the construction industry proviso to § 8(e), 29 U.S.C. § 158(e). *Id.* at 1193.

52. 29 U.S.C. § 1144(c).

53. *Boston Harbor,* 113 S. Ct. at 1194.

54. *Id.* (citing 935 F.2d at 359-60).

55. *Id.* at 355.

56. "The fact that the state here has acted through its bidding regulations rather than its general law is irrelevant to our analysis. . . ." *Id.* at 353 n.15, 358.

The dissent noticed that the majority had not found that the NLRA *explicitly* forbids a state, acting like a general construction contractor, from entering into a prehire agreement, but rather had found such conduct *implicitly* forbidden.[57] The dissent did not see "how permitting a state agency, when acting like a general contractor, to make labor agreements just like those that private general contractors make, could 'conflict with' the NLRA, 'frustrate' the NLRA 'scheme,' or otherwise interfere with the regulatory system that the NLRA creates."[58] According to the dissent, any upset in the balance between labor and management resulting from the MWRA requirement for PLA compliance went no further than Congress intended to allow with respect to private general contractors.[59] The special circumstances of the construction industry justify prehire agreements, regardless of whether the project manager is public or private.[60] The proponents of the MWRA project labor agreement sought review by the Supreme Court, which accepted much of the dissent's reasoning.

B. *The Parties' Contentions*

1. Nonunion Employer Arguments

The ABC argued that, although the MWRA is only a quasi-public rather than a traditional government agency, it was prohibited from requiring a project labor agreement. Although the ABC sought to prevent the MWRA from interfering in the bargaining process,[61] the heart of the ABC argument would undercut the private governance mechanism represented by the PLA. The ABC in effect sought federal limitations on MWRA's interpretation of the state statutory "mandate that the MWRA award all construction work to the lowest responsible bidder through full and open competition."[62] Despite the authority in the Massachusetts statute for the MWRA to state contract-term preferences,[63] the ABC argued that federal law displaced this authority.[64] In other words, under the ABC argument, if the MWRA finds that the public contracting law accommodates its prime contractor's judgment about the best way to regulate the labor market on an MWRA sponsored project, the National Labor Relations Act nevertheless preempts this accommodation. Consistently, the ABC argued in its brief that the MWRA could act only if it had permission or authorization under federal

57. *Id.* (Breyer, C.J., dissenting)
58. *Id.*
59. *Id.*
60. *Id.*
61. *See generally* Respondent's Brief, 1992 WL 511838 at i *Boston Harbor* (alternative question presented).
62. *Id.* at 4 (citing MASS. GEN. LAWS ch. 30 §§ 39M.).
63. *Boston Harbor,* 113 S. Ct. at 1193 n.1.
64. Every substantive heading in the table of contents of the ABC's brief reflects an argument that federal law overrides the state allowance of the PLA. *See* Respondent's Brief, 1992 WL 511838 at ii *Boston Harbor* (table of contents).

law, and that it had less authorization than private entities acting on their own.[65]

Congress, in sections 8(e) and 8(f) recognized that the NLRA should not disrupt long established private regulatory mechanisms in construction labor markets. The ABC argued, however, that the text of the NLRA can be construed to withhold from the MWRA the privileges otherwise allowed construction industry labor market participants because the MWRA was not a statutory "employer." The construction industry proviso of section 8(e) grants a privilege to "an employer in the construction industry."[66] Section 8(f) allows prehire agreements to "an employer engaged primarily in the building and construction industry."[67] The ABC argued that political subdivisions, such as the MWRA, are expressly excluded from the definition of employer in section 2(2) of the NLRA, and thus do not qualify for the privileges granted construction industry "employers" in sections 8(e) and 8(f).[68]

Because, under the ABC's interpretation, governmental entities are not expressly privileged by the section 8(e) proviso and by section 8(f), the general rule "that the [NLRA] as a whole prohibits governmental entities from mandating or otherwise interfering with the process of collective bargaining" required that the MWRA endorsement of the PLA be set aside.[69]

The ABC argued that its interpretation should be adopted because of purely theoretical economic predictions that prices and costs will be lower if traditional construction industry structures are replaced by greater competition. Finally, it argued that "public policy" compels adherence to the ABC's view of extensive federal preemption. It noted seventy-five percent of all construction work is normally performed on a nonunion basis[70] and that collective bargaining tends to increase costs because "unionized construction is more expensive generally."[71] Additionally, it noted that collective bargaining imposes burdens on employees who may not wish to pay union dues or have union benefit plans.[72]

Although the ABC endorses the proposition that there is a "presumption that governmental actions are prohibited if they interfere with the process of private sector collective bargaining,"[73] thus seeming to endorse collective bargaining, the ABC's brief turned this proposition

65. "So, too, whereas 8(e) and 8(f) clearly authorize certain private employer behavior in the construction industry, these provisions say nothing about increasing the power of state agencies . . ." *Id.* at 25.
66. 29 U.S.C. § 158(e).
67. 29 U.S.C. § 158(f).
68. Respondent's Brief at 21.
69. *Id.* at 21-22.
70. *Id.* at 34.
71. *Id.*
72. *Id.*
73. *Id.* at 22.

on its head. The conceptual flaw in the ABC position was the failure to recognize that collective bargaining and completely uninhibited competition cannot coexist. Rather, collective bargaining is an institutional mechanism for channeling and limiting labor market competition. PLAs are a private means of changing the structure of collective bargaining on a particular project. In order for them to have their intended affects, they must alter the boundaries between collective arrangements and market forces. The ABC argument in favor of uninhibited competition did not acknowledge this need.

2. Project Manager and Union Arguments

Kaiser (the Boston Harbor project manager) and the unions argued[74] that the MWRA endorsed a labor relations arrangement that Congress expressly made lawful in the 1959 amendments to the NLRA.[75] They argued that the MWRA's decision, identical to decisions that public and private owners of construction projects had been making for decades, was an example of the economic choices Congress intended to leave unrestricted.[76] The court of appeals also failed to heed the rule that preemption is not to be lightly inferred, they said.[77]

The unions and Kaiser argued that when the states engaged in proprietary conduct for proprietary reasons, they should have, if anything, more freedom under the NLRA than private parties in matters affecting labor relations. They pointed out that prior Supreme Court decisions relied upon by the court of appeals arose in regulatory rather than truly proprietary contexts.[78]

C. *The Supreme Court Decision*

Building and Construction Trades Council v. Associated Builders and Contractors[79] was a unanimous decision by the United States Supreme Court, reversing the en banc court of appeals decision and adopting many of the Kaiser and union arguments.[80]

The Supreme Court began its preemption discussion with the proposition that preemption should not be inferred because of the basic assumption that Congress usually does not intend to displace state law.[81] Then, it summarized the two distinct preemption principles that exist

74. *See* Building and Construction Trades Council v. Associated Builders and Contractors, Nos. 91-261, 91-274, Brief for Petitioners, 1992 WL 511837 (filed July 22, 1992) [hereinafter Petitioners' Brief].

75. Petitioners' Brief at 20.

76. *Id.* at 25-26, 33 (Congress focused not only on special characteristics of construction industry, but also on propitious use of PLAs on public projects).

77. *Id.* at 21.

78. *Id.* at 33.

79. *Boston Harbor,* 113 S. Ct. 1190 (1993).

80. *Id.* at 1194 (procedural history).

81. *Id.*

under the NLRA. "*Garmon* preemption"[82] forbids state and local regulation of activities that are protected by section 7 of the NLRA or constitute an unfair labor practice under section 8.[83] *Garmon* preemption is intended to prevent regulation that might conflict with Congress' integrated institutional scheme for regulating labor relations.[84]

The second preemption principle, "*Machinists* preemption,"[85] prohibits state regulation of activities that have been left to be controlled by the free interplay of economic forces. "*Machinists* preemption preserves Congress' 'intentional balance between the uncontrolled power of management and labor to further their respective interests.' "[86]

Both types of preemption prevent a state from regulating within a protected zone, either the zone protected and reserved for market freedom under *Machinists* preemption or for NLRB jurisdiction under *Garmon* preemption.[87] However, the key to the court's analysis is the fact that preemption applies only to state *regulation.* There is a distinction between government as regulator and government as proprietor.[88]

In *Golden State I*,[89] the Supreme Court held that Los Angeles could not condition renewal of a taxicab franchise upon settlement of a labor dispute because such action constituted municipal regulation within *Machinists* preemption.[90] Granting exclusive franchises is a regulatory activity, but contracting or otherwise participating in the market is not. As the Supreme Court said, "a very different case would have been presented had the city of Los Angeles purchased taxi services from Golden State in order to transport city employees. In that situation, if the strike had produced serious interruptions in the services the city had purchased, the city would not necessarily have been preempted from advising Golden State that it would hire another company if the labor dispute were not resolved and services not resumed by a specific deadline."[91] The Court disagreed with the non-union employers' exten-

82. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).
83. *Boston Harbor,* 113 S. Ct. at 1194.
84. *Id.* at 1195.
85. Machinists Local 76 v. Wisconsin Employ. Comm'n, 427 U.S. 132, 140 (1976).
86. *Boston Harbor,* 113 S. Ct. at 1195.
87. *Id.* at 1196.
88. *Id.*
89. Golden Gate Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614 (1986) [hereinafter *Golden Gate I*]. In a later appeal, *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) [hereinafter *Golden Gate II*], the Supreme Court held that the taxicab company was entitled to seek damages under 42 U.S. § 1983 against the municipality for its intervention in the strike.
90. *Boston Harbor,* 113 S. Ct. at 1196. Much of the Supreme Court's analysis in *Golden Gate I* emphasized that the parties to the taxicab strike were engaging in economic activities permitted by federal labor law. 475 U.S. at 615-16. Municipal intervention thwarted these activities. *Id.* at 616. The situation in the *Boston Harbor* case is the reverse. Not only was the action by MWRA proprietary instead of regulatory; it reinforced rather than thwarting Congressionally permitted activities—negotiation and enforcement of a project labor agreement.
91. *Id.* (internal citations omitted).

sion of the proposition in *Golden State* that the government's unique position of power justifies special restraints.[92]

The *Boston Harbor* Court went beyond preemption analysis, observing that "[p]ermitting the States to participate freely in the marketplace . . . also . . . promotes the legislative goals that animated the passage of sections 8(e) and 8(f) exceptions for the construction industry."[93] The Court acknowledged that the construction industry exceptions in sections 8(e) and 8(f), like the prohibitions from which they provide relief, are not specifically applicable to states because states are excluded from the definition of "employer" under the NLRA, and "because the State, in any event, is acting not as an employer but as a purchaser in this case."[94] Thus, while the proviso in section 8(e) does not literally apply to states, neither does the more general prohibition in section 8(e).

The purpose of sections 8(e) and 8(f), the Court noted, is to accommodate conditions specific to the construction industry.[95] The defining features of the construction industry do not depend upon the public or private nature of the entity purchasing contracting services, and thus the Court saw no principled reason to alter the boundary between private decisions and government regulation depending on the purchaser.[96] Indeed, the Court noted, "there is some force to petitioner's argument that denying an option to public owner-developers that is available to private owner-developers itself places a restriction on Congress' intended free play of economic forces identified in *Machinists*."[97]

The Supreme Court held that the MWRA bid specification 13.1 was not government regulation and therefore was not subject to preemption. It stated that "specification 13.1 constitutes proprietary conduct on the part of the Commonwealth of Massachusetts, which legally has enforced a valid project labor agreement."[98]

IV. Questions Not Answered by *Boston Harbor*

Federal preemption is not the only potential obstacle to project labor agreements on public works projects. Several state courts have considered whether state competitive bidding laws allow project labor agreements. If competitive bidding laws are interpreted to ban project labor agreements on public works projects, such an interpretation might itself be preempted by federal labor law. In addition, project labor agreements might be questioned under federal antitrust laws because they substitute collective bargaining mechanisms for completely uninhibited market competition.

---

92. *Id.* (characterizing respondent's argument).
93. *Id.*
94. *Id.* at 1198.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 1199 (expressing agreement with then Chief Circuit Judge Bryer's dissenting opinion in the court of appeals).

A. *Interpretation of State Procurement Laws*

A number of state courts have considered whether state procurement law permits project labor agreements. In *George Harms Construction Co. v. New Jersey Turnpike Authority*,[99] the New Jersey Supreme Court recognized that *Boston Harbor* does not itself authorize PLAs.[100] The power of a state procurement agency must come from state law, and *Boston Harbor* only addresses the relationship between federal and state law. In other words, *Boston Harbor* recognizes a privilege under federal law for a state procurement agency to require a project labor agreement, but the federal law does not create such a power in the state agency. The New Jersey Supreme Court framed the state law question as follows: "Does the [New Jersey Turnpike Authority] have the statutory power to require project-labor agreements that designate exclusive labor representatives for workers on public projects?"[101] The New Jersey Turnpike Authority's Resolution 19-93 provided in material part that, "as a condition of all contracts heretofore and hereafter advertised by the New Jersey Turnpike Authority in connection with the Widening Project, the Chief Engineer shall require contractors and subcontractors of all levels to enter into project labor agreements with the appropriate affiliated locals of the Building and Construction Trades Council of the AFL-CIO of the State of New Jersey. . . ."[102]

The court concluded that Resolution 19-93 was not consistent with the policies of the state bidding laws because it required negotiation of a project agreement with one union. "That is like saying that a bid specification requires that a contractor use "Smith Family Steel. . . ."[103] The court found no power to require negotiation with a particular union, while recognizing the appropriateness of project labor agreements that offer more flexibility.[104]

In *Utility and Transportation Contractors' Association v. County of Middlesex*,[105] the intermediate appellate court in New Jersey similarly invalidated a county bid specification under the New Jersey local public contracts law[106] because it effectively required a project labor agreement

99. 644 A.2d 76 (N.J. 1994) [hereinafter *Harms* or *Harms Construction*] (reversing intermediate court and holding that particular project labor agreement was not consistent with state's bidding laws).

100. *Id.* at 86 (*Boston Harbor* does not itself supplant state contracting law provisions).

101. *Id.* at 89.

102. *Id.* at 79.

103. *Id.* at 94.

104. 644 A.2d at 85 (recognizing utility of project labor agreements to accommodate special circumstances of construction industry); *id.* at 94 (discussing in favorable terms Governor Whitman's Executive Order that allows project labor agreements that do not designate a particular labor organization).

105. A-3002-94T1 (N.J. Super. App. Div. Feb. 24, 1995) (unpublished per curium opinion).

106. 40A:11-1 et seq.

with a specific labor organization.[107] The court was at pains to explain that its opinion and the earlier *Harms* opinion "[do] not definitively preclude any and all public bidding specifications that require a bidder to agree to enter into and abide by a project labor agreement."[108] Rather, the court concluded that the public bidding laws "do not permit a project labor agreement specification that would require a contractor or a subcontractor to enter into such an agreement only with a single labor organization designated by the public entity to the exclusion of all others."[109]

On remand, the court required modification of the bid specification so that a bidder could determine through some objective standard what would be an "appropriate labor organization, and what would be acceptable as a 'project agreement.' " In addition, the court suggested development of a record showing that there would be more than one labor organization with the capacity to provide a project agreement within the project area other than the Middlesex County Building and Trades Council.[110]

In *Tormee Construction, Inc. v. Mercer County Improvement Authority*,[111] a New Jersey trial court found that a project labor agreement requirement for library construction projects met the requirements of *Harms*, and avoided the gaps in the *Utility & Transportation Contractors* case that necessitated remand. Like the bid specification in *Utility & Transportation Contractors,* the Mercer County Improvement Authority bid specification required only that project labor agreements be entered into with "an appropriate labor organization in the building and construction industry."[112] However, unlike the *Utility & Transportation Contractors* bid specification, the Mercer County specification defined an "appropriate labor organization" as "an organization representing journeymen in one or more crafts or trades listed in N.J.A.C. 12:60-3.2, for purposes of collective bargaining and which (1) has entered into a labor agreement with an employer in the building and construction industry, (2) has represented journeymen, mechanics and apprentices employer on projects similar to the contracted work, and (3) has the present ability to refer, provide or represent sufficient numbers of qualified journeymen in the crafts or trades required by the contract to perform the contracted work."[113] The specification also provided the characteristics of an acceptable project labor agreement: "The agreement will

107. Slip Op. at 4.
108. Slip Op. at 3.
109. Slip Op. at 3.
110. Slip Op. at 4.
111. Mercer County Docket No. L-95-1680 (N.J. Super. Ct. Law Div. transcript of oral decision May 1, 1995), *cert. granted*, M-1103/1104 (N.J. May 23, 1995) [hereinafter *Mercer County Transcript*].
112. *Mercer County Transcript* at 5.
113. *Mercer County Transcript* at 6.

establish the hours or work, wage rates, fringe benefits, dispute and grievance procedure, and any other terms that may be necessary to ensure a harmonious relationship between the parties."[114]

The *Tormee* court found that the definitional language distinguished the specification from those found in both *Harms* and *Utility & Transportation Contractors*, and that the breadth of the appropriate labor organization definition obviated the need for specific fact finding to determine if more than one labor organization could quality.[115] Thus, an interlocutory injunction against implementation of the bid specification was inappropriate,[116] and the court dismissed the complaint to permit an appeal.[117]

Both the *Utility & Transportation Contractors'* and the *Tormee Construction* courts concluded that the vice *Harms* seeks to prevent is "requiring bidders to deal with a single labor organization."[118] Single-union requirements limit employee choice of bargaining representatives. Some such limitations are necessary to maintain bargaining relationships and prevent strikes during the term of a project labor agreement. However, state procurement requirements that limit the range of bidders to those having preexisting relationships with a particular union are far more constraining than necessary to achieve the benefits of project labor agreements. Jurisdictional disputes between unions were not involved in New York litigation over PLAs under state procurement law. *New York State Chapter, Associated General Contractors v. New York State Thruway Authority*,[119] in which the intermediate New York court reversed a trial court determination that invalidated a bid specification requiring compliance with a project labor agreement.[120] The appellate division rejected the argument that the project labor agreement effectively created a union-only qualification. The PLA applied to both union and nonunion contractors. It required that eighty-eight percent of a contractor's employees be hired through referrals from the union hall, that employees pay the equivalent of union dues, that nonunion employees not be discriminated against in the referral process and that employees who were hired not be required to join the union. "[T]he

114. *Id.* The language from the bid specification defining appropriate labor organization was that contained in an executive order issued by the Mercer County executive.

115. *Mercer County Transcript* at 9-12.

116. *Mercer County Transcript* at 14.

117. *Mercer County Transcript* at 15.

118. Slip Op. at 5.

119. 620 N.Y.S.2d 855 (App. Div. 1994).

120. In another unappealed case, the trial court invalidated a project labor agreement bid specification. Empire State Chapter of Associated Builders and Contractors, Inc. v. County of Niagra, 615 N.Y.S.2d 841 (Sup. Ct. 1994) (granting administrative agency review petition under article 78 because "mandatory compliance with the [subject project labor] agreement erects a barrier that might eliminate or dissuade from the bidding process a prospective nonunion contractor" and thus violated § 103 of the general municipal law requiring awards to lowest responsible bidder).

PLA also recognized the right of the contractors to determine the competency of the employees referred by the union hall, to select the employees to be laid off, and to use any other source of employees if a union hall referral is not made within 48 hours."[121] The court found that the Thruway Authority had a rational basis for requiring the project labor agreement, citing and adopting much of the reasoning of the *Boston Harbor* case.[122] It distinguished the New Jersey *Harms* case, on the basis that the project labor agreement in *Harms* had significantly different terms from the project labor agreement and the New York agency had engaged in a more thorough investigation than the New Jersey agency.[123]

The New York and New Jersey cases reveal important differences among PLAs. The *Boston Harbor* PLA was negotiated by a private project manager, allowed anyone to bid, and required successful bidders to enter into a PLA after being selected as the successful bidder. This is significantly less restrictive than a requirement directly imposed by a public agency, or one that disqualifies all bidders who do not already have a relationship with a particular union.

PLAs covering public works projects do not typically restrict bidding to union contractors or limit work to union members. Indeed, hiring hall provisions in PLAs typically involve hiring hall arrangements that must be nondiscriminatory as between union members and nonmembers, and PLAs require that bidders are or become bound by the PLA, but they do not typically discriminate based on the status of a contractor as union, nonunion, or "open shop."[124] Conflict between unions competing for the same work can be avoided by a single-union PLA requirement, like that rejected in *Harms*, or by requirements in the PLA for peaceful dispute resolution, like that contained in *Tormee Construction.*

Even PLA requirements that disqualify bidders are justifiable, however. PLA requirements may be attacked because they possibly result in award to a bidder who quotes a price higher than a bidder who has been disqualified by the PLA requirement. But the same thing can be said for any bid specification that tends to exclude some potential bidders. The question should be whether the bid specification is a legitimate requirement for the project. State procurement laws almost always require award to the lowest "responsible" bidder or lowest "best" bidder, signifying that no state legislature believes that price is the only consideration. Rather, requests for proposals and other bid specifications may specify various requirements for public works projects even though the requirements have the effect of excluding some bidders and increasing

121. *Associated Gen. Contractors,* 620 N.Y.S.2d at 857.
122. *Id.* at 858.
123. *Id.*
124. *See* Phoenix Eng'g v. MK-Ferguson, 966 F.2d 1513, 1525 (6th Cir. 1992) (finding that PLA did not discriminate based on union membership).

the price. Because project labor agreements are legitimate in the narrow sense that they preserve labor peace on a project, and also in the broader sense that they facilitate private, decentralized governance of project activities, they are entirely consistent with the basic concept of public bidding. In other words, the prohibition of *Harms* should not be extended beyond the particular facts of the case, involving an unusually restrictive PLA requirement and incomplete justification for the requirement by the public agency.

B. *Preemption of State Procurement Laws that Do Not Allow Project Labor Agreements*

The key to the *Boston Harbor* decision is the distinction between proprietary decisions made by state entities as project managers and regulatory decisions made by state entities as governments. Under *Boston Harbor,* a state project manager is free under federal law either to require or prohibit the use of a project labor agreement. The status of state decisionmaking under federal preemption law is altogether different if the state, by law or regulation, forecloses project labor agreements in general. This is the crucial distinction between *Boston Harbor* and *Golden State,*[125] and between *Boston Harbor* and *Gould.* As in *Gould,* state procurement law that does not allow project labor agreements on public works projects at all is a flat prohibition and thus takes state agencies out of any function as private purchasers of services and is "tantamount to regulation."[126] Accordingly, an interpretation of state procurement statutes that does not allow project managers to consider project labor agreements on specific projects on their merits is preempted.

C. *Antitrust Concerns*

The conflict between the *Boston Harbor* PLA and unrestricted competition in construction industry markets might seem to implicate antitrust issues as well as labor preemption issues. This section concludes that the labor exemptions from federal antitrust law shelter a PLA collective bargaining relationship and PLA requirements from antitrust liability. The labor exemptions to the antitrust laws[127] immunize

125. "[A] very different case would have been presented had the city of Los Angeles purchased taxi services from Golden State in order to transport city employees. . . . [In that case], the city would not necessarily have been pre-empted from advising Golden State that it would hire another company if the labor dispute were not resolved and services resumed by a specific deadline." 113 S. Ct. at 1196 (distinguishing facts in *Golden State* from hypothetical facts closer to those in *Boston Harbor*).

126. *Gould,* 475 U.S. at 289.

127. The statutory exemption, derived from the Norris-LaGuardia and Clayton Acts, immunizes agreements among workers within the labor union context. The non-statutory exemption, derived more broadly from the several federal labor laws collectively, shields agreements between unions and employees within the context of collective bargaining. *See* HENRY H. PERRITT, JR., LABOR INJUNCTIONS 3 (1987) (explaining history and application of antitrust labor exemptions); USS-Posco Indus. v. Contra Costa County Bldg. & Constr.

collective bargaining agreements subject to certain limitations. Practical arrangements relating to bargaining structure always have been recognized as legitimately within the labor exemptions.[128]

The starting point for almost any system of self-government, including collective bargaining, is to exclude those who will not play by the rules. That is what a PLA does. Such exclusions, however, potentially run afoul of section 1 of the Sherman Antitrust Act[129] because they represent concerted refusals to deal, which may be per se violations[130] of sections 1 and of 3 of the Clayton Act.[131] "Exclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods, or by allowing one buyer of goods unreasonably to deprive other buyers of a needed source of supply."[132] Thus a contractor disadvantaged by a PLA might argue that the exclusive dealing effectuated by the PLA deprives him of the market represented by the covered project.

It is logical, however, to suppose that conduct privileged by the National Labor Relations Act would be well within the labor exemptions to the antitrust laws. Thus a PLA authorized by section 8(e) of the NLRA could not give rise to antitrust liability. That essentially was the reasoning of the lower courts in *Connell Construction Co., Inc. v. Plumbers and Steamfitters Local No. 100.*[133] However, the Supreme Court reversed the Fifth Circuit decision because it read the privileges of the National Labor Relations Act more narrowly.[134]

In *Connell*, the Court did not have to decide whether conduct allowed by section 8(e) automatically is within the labor exemptions to the antitrust laws because it found the conduct in *Connell* potentially violative both of section 8(e) and the antitrust laws.[135] The Court rejected the union's argument that the NLRA provided the only remedies, exclusive

---

Trades Council, 31 F.3d 800, 805 (9th Cir. 1994) ("nonstatutory exemption for agreements between unions and employers that are intimately related to the unions' vital concern with wages, hours and working conditions") (citing *Connell Constr. Co. v. Plumbers and Steamfitters Local No.* 100, 421 U.S. 616, 622 (1975)). In *USS-Posco*, the nonstatutory exemption was inapplicable because there was no collective bargaining relationship. *Id.* at 805 n.2.

128. *See generally* National Basketball Ass'n v. Williams, 45 F.3d 684, 690 (2d Cir. 1995) (Congress never intended that antitrust laws prohibit multi employer bargaining because it is efficient and necessary counterweight to union; any doubt eliminated by federal labor law).

129. 15 U.S.C. § 1.

130. Balaklaw v. Lovell, 14 F.3d 793, 800 (2d Cir. 1994) (per se approach generally limited to situations in which firms with market power boycott suppliers or customers to discourage them from doing business with competitors).

131. 15 U.S.C. § 14 (1988).

132. *Balaklaw,* 14 F.3d at 800.

133. 421 U.S. 616, 621 (1975) (characterizing district court opinion reported at 78 L.R.R.M. (BNA) 3012 (N.D. Tex. 1971)).

134. 421 U.S. 616 (1975).

135. 421 U.S. at 625-26 (concluding that restraint at issue was not entitled to antitrust exemption, and also concluding that § 8(e) does not allow this type of agreement).

of antitrust remedies, for a violation of section 8(e).[136] However, this part of its analysis only holds that the same conduct may not only be a violation of section 8(e), but also be outside the antitrust exemption. The Court does not hold or even suggest that conduct may be allowed by section 8(e) and nevertheless be outside the antitrust exemption. To the contrary, the more logical relationship between the two statutes is that conduct allowed by the NLRA also is within the labor exemptions to the antitrust laws. In other words, if a project labor agreement is permitted by section 8(e), it may not be the basis of antitrust liability.[137]

Even if legality under section 8(e) does not dispose of an antitrust challenge, straightforward antitrust analysis should. The basic holding of *Connell* is that the labor exemption to the antitrust laws is limited to contracts that do not have "a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions."[138] Under this standard the Supreme Court only accepted the possibility of antitrust liability in *Connell*, while remanding for consideration the issue of whether the subcontracting agreement in dispute actually would restrain trade within the meaning of the Sherman Act.[139]

Any Sherman Act analysis of a PLA should employ the rule of reason because no price fixing or output restriction among competitors is involved. Under that analytical framework, significant procompetitive and policy interests should shield a project labor agreement from antitrust scrutiny. Preventing disruption on public works projects surely is a legitimate policy objective, and self governance within an integrated community of employers and employees is the core object of the federal labor laws and the rationale for the labor exemptions in the first place. These interests should be entitled to great weight in the balance. They outweigh any restrictions on competition and thus should alleviate concerns of antitrust liability.

Another level of antitrust analysis assumes, first, that section 8(e) legality does not per se entitle actors to an antitrust exemption, and second, that notwithstanding *Boston Harbor* there is a class of conduct by public project managers that might be prima facie illegal under a Sherman Act rule of reason analysis. Even then, a public project manager's decision to require project labor agreement compliance on a particular project might be shielded by the privilege for state action under the antitrust laws.[140] State agency conduct authorized by law is immunized

136. *Connell*, 421 U.S. at 634.

137. The *Boston Harbor* district court adopted this reasoning. 935 F.2d at 349 (characterizing unreported district court opinion).

138. 421 U.S. at 635.

139. *Id.* at 637. No district court decision on remand is reported.

140. *See* Lucas v. Bechtel Corp., 800 F.2d 839, 846 (9th Cir. 1986) (rejecting, for lack of antitrust standing, claims by union electricians against project labor agreement).

from antitrust liability by the state action doctrine. Antitrust claims have been raised in project labor agreement cases involving public project managers but not resolved with respect to the public status of the project manager,[141] thus leaving open the question of state-action immunity for project labor agreement requirements. However, the state action privilege is reserved for regulatory acts by states and there is some suggestion in the literature that the boundaries of the privilege might be the same as the boundaries between governmental and proprietary conduct.[142]

The distinction between governmental and proprietary conduct animated the *Boston Harbor* labor preemption decision, and the MWRA decision in favor of project labor agreements fell on the proprietary side of the line. Thus, there would be room to argue that a proprietary decision like that validated for preemption purposes in *Boston Harbor* might be ineligible for state action privilege under the antitrust laws. However, for this argument to succeed, one would have to overcome the obstacles presented by the two assumptions previously stated, as well as the reluctance of courts to find antitrust injury.[143]

V. Conclusion

From a policy perspective, project labor agreements on public works projects, and the type of decentralized private governance they represent, must be allowed under federal labor preemption principles and state procurement practices to allow collective bargaining to be an effective form of private governance.

Before enactment of the National Labor Relations Act, collective bargaining operated in the printing, clothing, and construction trades.[144] In this pre-NLRA form, collective bargaining allocated responsibility between entrepreneur and craft union, provided mechanisms for resolving individual disputes, and served a variety of other desirable

141. *See generally* Associated Builders and Contractors, Inc. v. City of Seward, 966 F.2d 492, 498 (9th Cir. 1992) (finding that governmental work preservation clause was not preempted by NLRA and also rejecting antitrust claims, but not reaching the state action doctrine argument).

142. Phillip Areeda, *Antitrust Immunity for State Action after Lafayette*, 95 HARV. L. REV. 435, 443 (1981) (suggesting that waste disposal, water service, municipal transport, and public parts probably should not be included in the proprietary category and that mere regulation of zoning, cable television, and other public franchises would not be proprietary). One respected commentator, Phillip Areeda, suggested that proprietary activities by municipal governments, by which he meant "public activities that compete directly with private firms in the open market and that differ from them only in stockholder identity," might be subject to greater antitrust scrutiny under the state-action doctrine, although he expressed concern that drawing the distinction between proprietary and nonproprietary activities always has proven troublesome.

143. *See Lucas*, 800 F.2d at 846 (rejecting, for lack of antitrust standing, claims by union electricians against project labor agreement).

144. Collective bargaining also was well developed in the railroad industry before enactment of the Railway Labor Act.

rulemaking and adjudicatory purposes. While the National Labor Relations Act was controversial because its opponents saw it as a form of legal intervention that forced unionization on undesiring employers and some employees, the central theme of the NLRA always has been private decisionmaking through collective bargaining.[145]

Congress and the Supreme Court long have recognized the appropriateness of deferring to private rulemaking and adjustment machinery for the governance of labor and management relations.[146] The preferred instrument for achieving "industrial stabilization" through "self-government" was a collective bargaining agreement.[147]

The *Boston Harbor* decision is seminal because it appropriately blocks efforts to politicize and thus to subvert privatization. The problem in *Boston Harbor* and in many other privatized projects is that potential community members are tempted to avoid the private self governance process by insisting that a public agency set rules different from those set by the private institutions.

The Supreme Court's *Boston Harbor* decision legitimizes requirements that entities that want to be members of a private community play by the rules established for that community. Properly understood, this is all that the Massachusetts Water Resources Authority did. It required anyone who wanted to be a part of the Boston Harbor construction community to play by the rules represented by the project labor agreement. The content of the project labor agreement was not a creature of public authority but of the private members of the Boston Harbor construction community. The flexibility afforded to state government project managers by Boston Harbor should not be thwarted by inappropriate interpretations of state competitive bidding laws or by the federal antitrust laws.

The *Boston Harbor* case, although explicitly involving only a question of labor law preemption, more broadly reflects sound policy. It insulates private governance arrangements from governmental intervention once they are set up and it blocks resort to federal law to stymie local decisions. Most importantly, it recognizes the role of contract in defining private governance mechanisms.

---

145. *See* NLRB v. Insurance Agents' Int'l Union, AFL-CIO, 361 U.S. 477, 488 (1960).

146. *See* United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960) [hereinafter *Warrior & Gulf*]; United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); NLRB v. Insurance Agents' Int'l Union, AFL-CIO, 363 U.S. 477 (1960).

147. *Warrior & Gulf*, 363 U.S. at 578, 580. *See also* NLRB v. Insurance Agents' Int'l Union, 361 U.S. at 488 (Congress did not intend to give NLRB power to review substantive outcomes or negotiating positions, instead it provides parties with framework to reach a mutually acceptable position).