NLRB Green-Lights Union Expansion With Broadened "Joint Employer" Rule

Construction companies may find themselves with "new" employees eligible for union organizing

By Stephen L. Wright, Esq.

The National Labor Relations Board took a major step toward making it easier for labor unions to organize with its recent decision in the *Browning-Ferris Industries of California* case issued on August 27, 2015.[1] The decision loosens the criteria for treating the employees of one organization as employees of another when the organizations are found to be "joint employers." The decision reverses decades-old practice and promises significant impacts on many parts of the U.S. economy including construction.

What does this mean for the construction industry? The decision is particularly important for construction companies that outsource their labor needs to subcontracting firms. Combined with the NLRB's indication of intent to loosen another impediment to organizing, labor unions soon find themselves able to broaden the scope of employers subject to organizing far beyond the current set of candidates. The decisions could also result in both organizations being held liable for unlawful labor practices even when only one of the organization is found to have engaged in the offending practice.

What was the NLRB decision? In *Browning-Ferris*, the NLRB agreed with the Union's arguments that if one company has the potential to control the employees of another based upon a set of criteria, the two can be found to be joint employers for purposes of the National Labor Relations Act even if that "control" is not actually exercised. Arguing that it was merely reverting to the common law definition of joint employer after the NLRB had taken a different path over the years, the NLRB pointed to a set of factors to evaluate whether one company has "control" over the other company's employees:

- Hiring, firing and discipline
- Supervision, direction of work
- Hours of work
- Setting of wages

In the case, Browning-Ferris operated a recycling processing facility in the State of Washington and used labor supplied by temporary employment firm Leadpoint to staff a portion of the plant. The Teamsters Union already represented Browning-Ferris' direct employees and sought to organize the workers supplied by Leadpoint. Both companies resisted the union efforts.

The NLRB Board evaluated the two companies' relationship in terms of each of the parameters above. In reviewing the facts, the NLRB focused on the ability of Browning-Ferris under its labor supply agreement with Leadpoint to control the latter's employees without regard to whether that control was actually exercised. Previous NLRB decisions made actual exercise a factor critical to the determination of joint employment.

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[1] Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FPR-II, LLC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, Petitioner. NLRB Case 32–RC–109684 (August 27, 2015). Find the complete text at www.nlrb.gov.

A majority of Board members then determined that although Browning-Ferris may not have actually made use of its control powers under the agreement, those powers were sufficient to make Browning-Ferris a "joint employer" thus entitling the Teamsters Union to seek an election among the Leadpoint workers. The Board justified its decision as simply a return to old common law requirements for finding joint employers while the NLRB decisions requiring actual exercise of control was a deviation meriting correction. The dissenting minority of Board members sharply disagreed with the majority's characterization of common law.

In a separate case, the NLRB Board has given indication it intends to lower the hurdles for unions to compel joint employers to conduct an election. Under a 2014 decision, the Board decided that both employers in a join employer situation must consent to an election. In taking a new case dealing with that question, the Board now indicates it will reverse itself and permit an election to be held even if one of the employers objects. Together with *Browning-Ferris*, these decisions incentivize unions to target temporary employment companies and professional employer organizations (PEO) for organizing.

What should construction employers do now?

Trade contractors who do work for unionized general contractors, even if the unionized operations are out of state, need to review their subcontracts in terms of how much control the general contractor is given to make employment decisions. Trade subcontracts often give the general contractor at least some aspects of "control" over a subcontractors' employees, at least on paper. If that control is broad enough, the new NLRB decision could provide an opening for the general contractor's labor union to organize even if the general never intends to actually make use of those control abilities. We might even see unions expand efforts in right-to-work states as the unions leverage off of existing labor agreements.

General contractors with an existing labor union arrangement in some states need to examine their agreements with temporary labor companies and PEO's. The reach for those organizing efforts could even be extended into right-to-work states. As with trade contractors, general contractors can take steps to minimize unionizing activity by making sure their temporary labor/PEO agreements grant them control over as few of the factors listed above as possible. Bear in mind that whether a control ability is actually exercised is no longer determinative. It's all about what written in the agreement as a potential control ability.

Another ominous aspect of this ruling is the exposure to liability for wrongful employment practices. Wrongful practices by one of the joint employers could create liability for the second joint employer even if the latter had nothing to do with the wrongful practices. For example, a PEO could be wrongfully withholding parts of paychecks or erring on how hours are counted, but the PEO's client company could be held liable even if it had no actual input on how the PEO operates.

Ironically, the *Browning-Ferris* decision may become a favorite NLRB decision among the PEO community. With the PEO and its client bound together under a collective bargaining agreement after a union succeeds in organizing, it may be very difficult for the client organization to extricate itself from the PEO relationship. This would cut down on competition among PEO firms and help clients become "captive" to the PEO. For the client employers, this would be a very bad result, of course, since a main benefit in engaging a PEO is supposed to be increased flexibility and ease of engaging a new PEO firm.

What finally happened with Leadpoint? The shop ballot on joining the union was impounded for over a year while the dispute was pending with the NLRB. After the Aug. 27th decision, the ballot was disclosed and it turns out the employees voted in favor of joining the labor union. Question is: are any of the employees who voted still working at the Browning-Ferris facility? But that opens another can of worms altogether.