

Employer May Terminate Pre-Hire Agreement with Union, Sixth Circuit Rules

April 25, 2016

On April 21, 2016, resolving a situation not previously decided by the Sixth Circuit Court of Appeals, the court held that a construction company that was a party to a pre-hire collective bargaining agreement lawfully repudiated the agreement after several years passed without it having any employees subject to the agreement. Consistent with rulings in the Seventh and Ninth circuits, the Sixth Circuit held in *Baker Concrete Const., Inc., v. Reinforced Concrete Contractors Ass'n*, that the "single-employee rule," which states that where an employer employs one or fewer employees on a permanent basis the employer may withdraw from the contract, applied to the situation and that the employer lawfully repudiated its statutory and contractual obligations to the union.

In 2000, the employer, Baker Concrete Construction, became party to a pre-hire multi-employer collective bargaining agreement (CBA) between the Reinforced Concrete Contractors Association and the Reinforced Concrete Iron Workers' Local Union 372. The CBA covered current employees and future employees. This type of agreement is valid under § 8 (f) of the National Labor Relations Act (NLRA) in the construction industry, where employers generally do not hire and keep employees on a permanent basis. Because of the nature of the business, the NLRA allows for these agreements since otherwise, it would be difficult for construction employees to gain representation due to the irregular nature of their employment.

The agreement was renewed several times, with the most recent CBA being effective January 1, 2012, through May 31, 2015. On January 25, 2013, Baker sent the union a letter stating that it repudiated any "ongoing contractual obligations" under the agreement since it had not had any employees covered by the agreement for at least seven years. The union responded by stating that Baker could only terminate the agreement consistent with its terms, which required a termination notice to be sent 60 days prior to the expiration of the agreement. Baker rejected the union's position, and the union filed a grievance. An arbitrator found for the union, and Baker filed suit for declaratory judgment, asserting that it properly repudiated the agreement.

The Sixth Circuit agreed. The court held that the concept of collective bargaining requires more than one eligible person be involved. Finding that Baker had not had any employees who were covered by the agreement in over seven years, the court held that "a collective bargaining agreement should be voidable where there is no one with whom and nothing about which to bargain." The court also held that the pre-hire agreements by their nature were "tentative and anticipatory," since they are based on future employment of potential bargaining unit members, and where there have been no employees to represent for years and no reason to believe there would be in the foreseeable future, "it is difficult to conceive of a reason to deny a contractor the right to terminate the agreement that was intended to be tentative, anticipatory, and conditional in the first place."

For construction companies that have gone extended periods of time without employees covered by a multi-employer CBA like the one here, Miller Canfield attorneys are available to help make sure that your situation fits within the parameters established by the Sixth Circuit.

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