THE PRO ACT: WHAT UNION CONTRACTORS NEED TO KNOW

Ryan McCabe Poor, Ice Miller LLP[1]

The Protecting the Right to Organize (PRO) Act of 2021 (H.R. 842) was introduced in the U.S. House of Representatives on February 4, 2021, as a bill to amend the National Labor Relations Act, the Labor Management Relations Act, and the Labor-Management Reporting and Disclosure Act. AGC of America opposes the bill. In light of the bill's title, with its sole reference to union organizing, union construction contractors might assume that the legislation would not harm them, because they are already organized, and might even help them, because it would be in their best interests to see their open shop competition organized as well. However, the PRO Act does not just address union organizing. I

picketing in jurisdictional disputes and eliminate National Labor Relations Board (Board or NLRB) procedures for resolving them. It would allow unlimited picketing for recognition, even against neutral employers. And, i ª Z C c C e î ª ž î p e ª – î ª p – i ž î C Z C ª Ñ ª p 4 p – î c î 5 ž ² ª p î secondary activity. The PRO Act would also significantly add to union s i leverage in the bargaining process. It would allow intermittent and possibly partial strikes and slowdowns. It prohibits permanent replacement of strikers. It makes pre-strike lockouts by contractors unlawful. T ª Z C c C e î ª ž î p e ª – î ª p – i ž X p – î ž ž p C î ª C p e i ž Y – C 5 = ª ª p î – 5 î C e

practice. There are dozens of significant changes to the NLRA proposed in the PRO Act. These items may very well still affect union contractors.[2] However, the focus of this paper is on the areas of most immediate impact.

Although picketing in any form can be disruptive, the NLRA currently strikes a balance between “–pª ªCe5 Ëp–V –ži for legitimate ends while minimizing disruptions and limiting disputes to the parties involved. It allows picketing directed at an employer with whom the union has a lawful Cž“²ª Xî f“–Ccî–Ñ, but outlaws picketing C– ª îª e ²ª–îZ Xfž pe s for the Y c“ZpÑ purpose of forcing them to stop doing business with the primary or others.[3] Current law allows picketing in jurisdictional disputes, but only where the employer is ignoring an order or certification from the Board regarding the assignment of work. It allows picketing for recognition of the union (where the employer has not already recognized another union or had an election in the last 12 months), but then only for 30 days without filing a petition for an election. It allows picketing to truthfully advise the public that an employer does not have a contract with a union, but only if it does not have the effect of causing others to not perform services.

The PRO Act eliminates <u>all</u> union unfair labor practices related to picketing and would make such picketing lawful [secondary, jurisdictional, recognitional or otherwise.[4] It will no longer be an unfair labor practice to picket a secondary, neutral employer to force it to stop doing business with the ²eCpeiž real, primary target. For example, if a union wants to organize a non-union employer on a jobsite, it can picket at all gates and at all related to [pi

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they are limited to work to be done at the site of construction. Meaning, union-only subcontracting agreements that apply only at the site of construction but not to off-site operations such as pre-fabrication or other non-construction work are lawful. The PRO Act would delete Section 8(e), making union-only clauses lawful in all respects in all places. Because such clauses would be lawful, a union could strike or picket in order to force a contractor to agree to off-site union-only restrictions.

The goal in most bargaining situations is to reach agreement on a new contract before expiration of the current contract. However, if the parties are unable to reach agreement, each has economic weapons to leverage their positions. The union may strike

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operations in order to put pressure on the union to agree to its proposals. The Pro Act would make it ²eZîË4²Z ªp f“–pcCž F ª=– îª eF p– ªîV îeÑ î ªCpeg ªp fZp Vp²ªF ž²ž employment from employees in order to influence the position of such employees or the representative p4 ž² = c“ZpÑ ž Ce pZZ ªCÊ î–5îCeCe5 “–Cp– ªp î žª–CV Kg Tª Cž the context of a whipsaw strike [where only some contractors in a multiemplo yer group but not all have been struck. Regardless, the elimination of offensive lockouts gives unions all of the cards as to the timing and use of this economic weapon.

Third, the PRO Act would prohibit unilateral implementation of proposals by an empl oyer when the parties reach an impasse in bargaining. Under current law, once bargaining parties have reached a bona fide impasse after bargaining in good faith, the employer may implement its final offer. The PRO Act would instead require c“ZpÑ –ž ªp fcîCeªîCe ²–– eª Ëî5 žF =p²–žF îe Ëp–VCe5 agreement. g[10] The prospect of unilateral implementation is valuable leverage, because it keeps the union at the table, bargaining so as not to reach impasse. The removal of the threat of unilateral implementation removes the incentive for the union to bargain for anything other than the terms the union wants, because all current terms must be maintained and could not legally be replaced until a new agreement is reached. Although continued bargaining may delay more favorable terms for the union, they would never have to agree to less favorable terms. And, because employers could not offensively lock out employees in the absence of a strike, the status quo would continue indefi

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organization, gto meet and negotiate within 10 days of a demand, mediate on request if there is no contract after 90 days, and settle the contract by arbitration after an additional 30 -day period. A three-member arbitration panel would be empowered to decide the terms of the contract [illegible] and prospects;[13] [illegible] of living; [illegible] wages and benefits they earn from the employer; and (v) the wages and benefits other employers in the [illegible] on the parties by this panel would be effective for two years. It is unclear from the bill whether this would apply to existing relationships which are converted from Section 8(f) to Section 9(a) (by agreement/recognition or through an election), but it certainly could be argued that it does.[14] The impact is that unions will have little reason to agree to an [illegible] that take into account [illegible] factors [illegible] objectives or intent.

Current remedies for unfair labor practices are generally limited to cease-and-desist orders (stop doing something unlawful), notice postings, orders to take some affirmative action (such as reinstatement of a terminated employee), and back pay remedies where an employment loss is indicated. Other available remedies depend on the nature of the violation but may include more extraordinary things like making an employer read a notice posting to employees or ordering bargaining in certain egregious violations in election cases. The PRO Act would dramatically increase the remedies and penalties available under the NLRA.

The PRO Act would require statutory remedies [illegible][15] of back pay (without reduction for interim earnings or failure to earn interim earnings), front pay, consequential damages (indirect or special damages), and an additional amount of liquidated damages equal to two times the amount of damages awarded.

In addition, the PRO Act would authorize civil penalties, in addition to any other remedy, of up to $50,000 per violation and up to $100,000 in certain cases (discrimination, retaliation, or cases of discharge or [illegible] a prior violation has been found in the preceding five years. The PRO Act also [illegible] them for civil penalties if they directed or committed the violation, established a policy that led to the violation, or had actual or constructive knowledge of and authority to prevent the violation and failed to

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[13] [illegible] otherwise be required in bargaining unless the employer claimed economic distress or an inability to pay in response to union demands.

[14] For example, the bargaining mandate begins [illegible] recognized or certified as a representative [illegible] Arguably, this could include a newly recognized or certified 8(f) to 9(a) employer.

[15] [illegible]

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situations where one employer has even indirect control over the terms and conditions of employment of another or has reserved authority to control such terms and conditions. For example, if a contractor requires that its subcontractor comply with wage and hour obligations and health and safety requirements, and reserves the right to audit compliance, is the contractor now a joint employer liable for the labor practices and bargaining obligations? To this end, the PRO Act specifically states that, a finding that indirect or reserved control standing alone can be sufficient given specific facts and that might require them to assume additional legal obligations and penalties on behalf of others.

Many parts of the PRO Act are recycled bits of previously failed legislation or administrative rulemaking. One such provision relates to certain reporting requirements under the Labor Management Reporting and Disclosure Act (LMRDA) that were the subject to the so- Persuader Department of Labor (DOL) in 2016 and rescinded in 2018, which would Under the LMRDA, reports must be filed with the DOL (to include financial terms) by the employer and any person who activities where an object thereof is, directly or indirectly to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing. However, the LMRDA has bright line between persons who engage in direct contact with employees (reportable) and everything else (not reportable). However, t

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[illegible] giving employers less time to react to election petitions, it would allow organizing of only micro-units (small portions) [illegible] workforce at a time, it would make [illegible] with [illegible] employees to discuss the [illegible] it would require employers [illegible] to allow [illegible] email and other electronic communication systems and devices for protected activities including union organizing, and it would allow the union to determine the method and place of voting in elections, including by mail ballots or electronic voting.[18] All of these changes are intended to make organizing easier and lead to the organization of more workplaces. Union contractors may feel that organizing their open-shop competitors would be a positive thing. However, there are potential drawbacks to having employers organized by individual elections under the PRO Act in the construction industry.[19]

Consider, for example, the effect that an influx of individually organized contractors could have on local area agreements. One of the benefits of construction industry agreements is that they are usually done on a multiemployer basis [through membership [illegible] agreements where contractors agree to be bound by the multiemployer agreement. Most union contractors are subject to the same terms for the same type of work through the same agreements. However, when a contractor is organized by election and the union is certified as the Section 9(a) representative, a duty to bargain in good faith for a contract attaches to both the employer and to the union [illegible] contractors signing on to area agreements in Section 8(f) relationships. Instead, the employer may insist on bargaining an individual agreement, with separate and distinct terms from the multiemployer agreement. And, wi[illegible] (discussed above), the parties themselves may not have control over the terms of the final agreement.

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procedures it may not want to agree to and it may well not be forced into hiring hall provisions. In addition, there could be differences in wage rates, other benefits like health care, overtime for h ours worked over eight in a day, rates for weekend make-up work, and any other term and condition of employment. As pointed out in H i ž2009 paper, the uniformity of area agreements could be undermined and the possibility exists that previously open shop contractors will be more competitive than historically union contractors while bidding in the union contractor space . The unions should also be concerned about different contract terms

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