



Labor Strikes— Contractor’s Potential Recovery of Delays and Damages

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1. INTRODUCTION

In the United States, the building and construction industry has traditionally been highly organized by some of the nation’s strongest trade unions. Strikes can cause delays and increased project costs for contractors and owners. This article briefly discusses the history and legal consequences of strikes in the construction industry.

2. HISTORY

Strikes can be traced back to the formation of labor unions in the late 1800s and early 1900s. Labor unions were born in response to inhumane working conditions imposed by management in the textile and manufacturing industries. A striking labor force would refuse to work to apply pressure on management in an attempt to gain better working conditions. During those early years, however, management was able to disband striking employees using federally-supported injunctions under the Sherman Act. In many cases, strikes led to bloody battles between labor, management, and the police. Eventually, during the next 50 years, the labor force was able to obtain federal protection for the right to strike.

The earliest statutory protections for striking labor forces were the Clayton Act and the Norris-La Guardia Act. The most significant authorization of the right to strike, however, is contained in the National Labor Relations Act (“NLRA”). According to the NLRA, two categories of strikes are protected: (i) unfair labor practice strikes; and (ii) economic strikes. The NLRA does not protect illegal strikes, such as wildcat strikes, sit-down strikes, partial/slowdown strikes, picket line violence, and secondary boycotts.

An unfair labor practice strike is a lawful protest against alleged unlawful acts of the employer. Examples of unfair labor practices are refusing to bargain with the union, discharging employees if they decide to strike, not reinstating union employees after a strike, or discharging employees for union activities. Unfair labor practices can be caused by the union as well as the employer.

An economic strike is a lawful protest for reasons other than unfair labor practices. Examples of economic strikes include protests for wage increases, diverse benefit programs, bonus increases, or different colored hard hats.

3. ENTITLEMENT

Because the vast majority of construction contracts contain provisions for timely project completion, strikes can cause owners, contractors, subcontractors, and suppliers to miss contractual milestones or finish dates. Not only do construction strikes cause inconveniences to all parties, but strikes can also lead to more serious problems such as the assessment of liquidated damages and contract disputes.



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Generally, strikes only entitle contractors to a time extension unless the strike is precipitated by the owner. If a strike was caused by the owner, then the contractor may have entitlement to a time extension as well as time-related damages. United States federal courts generally recognize three different scenarios for strikes. A strike can be considered an excusable delay, a compensable delay, or an inexcusable (non-compensable) delay to the contractor. An example of each scenario is provided in the Sections that follow.

3.1 EXCUSABLE DELAY

Excusable delays entitle the contractor to a time extension for contract performance, but additional costs for the extended performance are not recoverable.

In *Andrews Construction Company, Inc.*, GSBCA No. 4364 ¶ 11,598 (1976), the Board found that the contractor could not be assessed liquidated damages for delayed completion because informational picketing on the site was an excusable delay.

The contracting officer argued that the liquidated damages were properly assessed because the subcontractor’s pipefitters refused to cross an informational picket line established by a union not representing the pipefitters. The contracting officer stated that “the delay was not excusable and informational picketing constituted neither a strike nor a picket line.”

During the strike, the subcontractor’s project engineer attempted to mitigate the effects by directing the pipefitters to show up to work and calling the local union for replacements, but all efforts were unsuccessful.

The Board of Contract Appeals (“BCA”) decided the subcontractor made reasonable efforts to obtain labor replacements. Moreover, the determination of whether informational picketing constituted a strike was irrelevant because “the fact that the job action causing this delay may possibly not be technically described as a strike does not abrogate the defense of excusability.”¹ Hence, liquidated damages were not proper because the delay arose from an unforeseeable cause, beyond control and without fault or negligence of the contractor or its subcontractor.

The fact that a strike occurred does not in itself entitle a contractor to an excusable delay. The contractor must prove that the strike caused a delay. Under federal contracts, the governing test of a strike is to determine whether the strike was unforeseeable, beyond the control, and without the fault or negligence of the contractor, subcontractor, or supplier. For example, if an owner or contractor caused an unfair labor practice which resulted in a strike, then the strike cannot be considered an excusable delay since unfair labor practices are not beyond control of the parties.

¹ The BCA referenced *Fred A. Arnold, Inc.*, ASBCA No. 16506, 72-2 BCA ¶ 9,608 (1972).



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In order to establish a strike as entitlement to excusable delay, the contractor must demonstrate cause and effect and present documented evidence. Additionally, the contractor must prove it acted reasonably by not unlawfully provoking or prolonging the strike, and it must take steps to mitigate the effects.

3.2 COMPENSABLE DELAY

A compensable delay entitles the contractor to an extension in performance time and recovery of additional costs for the extended period.

In *T. C. Bateson Construction Co. v. U.S.*, 162 Ct.Cl. 145 ¶ 172,173 (1960), a contractor claimed a compensable delay under a suspension of work clause because of a strike at an Air Force base.

The strike resulted after a United States Air Force (“USAF”) decision to take over boilers 1 and 2 of the base’s new heating plant. The USAF utilized civil service personnel for the operation of the heating plant. These personnel were to be trained to operate the heating plant by the subcontractor according to the contract operating agreement. Both parties agreed that the subcontractor would temporarily operate the boilers on a price-per-week basis until all boilers were ready for the USAF. According to the USAF, it was cheaper for the USAF to temporarily operate a boiler with civil service personnel rather than use the subcontractor’s union personnel. In addition, the USAF’s position was that boilers 1 and 2 were substantially complete, the property of the USAF, and that the contractor and its employees had no further connection to the boilers.

Union plumbers, steamfitters, and electricians, however, would not work with nonunionized civil service personnel under the same roof. The union claimed that only union operators should operate the boilers until all boilers were complete according to their collective bargaining agreement. New York labor relations advisers stated that the unions would not “stand for” the USAF’s takeover of boilers 1 and 2 with civil service operators before boilers 3 and 4 in the same building were completed.

The USAF, however, took over the operation of the boilers 1 and 2 with civil service personnel before completion of the entire heating plant. A strike was called by the union and picket lines were established. The general contractor was powerless to act bringing a 100 percent construction shutdown at the base. Both before and after the commencement of the strike, the general contractor and subcontractor made repeated attempts to discuss a settlement with labor. The union refused, however, stating that its dispute was with the USAF.

The Court decided that “responsible government officials were aware that a strike was the highly probable consequence of the government’s planned action. The government officials fully expected the strike. We find the work stoppage was the foreseeable and probable result of the government.” Hence, the strike constituted a compensable delay and the contractor was equitably granted a time extension along with compensation.



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3.3 INEXCUSABLE DELAY (NON-COMPENSABLE)

An inexcusable delay entitles the contractor to neither a time extension nor the recovery of additional costs.

In *Diversacon Industries Inc.*, ENGBCA Nos. 3284, 3286 ¶ 11,875 (1976), the Board ruled that a contractor was not entitled to a time extension for a delay caused by a strike. Local 25 Marine Division, International Operating Engineers AFL-CIO petitioned under the guidelines of the NLRA for an election to determine if the contractor’s dredging employees were interested in representation in collective bargaining. The contractor and Local 25 agreed to the election. When the election was held, Local 25 received a majority vote.

The contractor, however, filed objections to the elections claiming that the election did not represent the free choice of the employees because of misrepresentations, threats, and promised benefits by Local 25 prior to the election.

The National Labor Relations Board (“NLRB”) overruled the contractor’s objections, but the contractor still refused to recognize Local 25. Consequently, Local 25 filed a charge with the NLRB against the contractor alleging that the contractor’s refusal to bargain collectively constituted an unfair labor practice. The dredging employees voted to strike and picket. An NLRB trial examiner found the contractor was engaging in an unfair labor practice. The examiner ordered the contractor to cease its refusal to bargain collectively.

The contractor notified the Corps of Engineers seeking a time extension for the strike under Clause 5 of the contract. The contracting officer denied the contractor’s request due to the fact that the NLRB found the contractor was engaging in an unfair labor practice against its employees for refusal to bargain collectively. The BCA agreed with the findings of the NLRB and found the strike to be foreseeable, within control, and due to the fault and negligence of the contractor. The strike constituted an inexcusable delay and no time extension or compensation was granted.

4. CONTRACTOR’S DEFENSE

The best defense against a construction strike is to resolve the labor dispute before it deteriorates into a strike. Contractors should strive for a straightforward, efficient, and cooperative labor/management relationship. Contractors also should conduct thorough investigations of the labor/management relationships of its subcontractors and suppliers.

In the event of a potential delay due to a strike, it is important that the contractor inform all relevant parties in a timely manner following contractual notice requirements. Events should be thoroughly documented to support delay claims and to permit the proper assessment of damages.



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Excellent support documents include any collective bargaining agreements, job site logs, emails, internal/external conversation memoranda, progress meeting minutes, CPM schedules, job cost reports, accounting records and delay notice correspondence. If a strike occurs, however, attorneys that have written on this subject matter recommend that a contractor should consider the following:²

1. Verify if the cause of the strike was by an unfair labor practice or an economic issue. This will determine how to deal with the crisis.
2. Never discharge employees if they are engaging in a lawful, protected strike, whether for economic protests or alleged unfair labor practices.
3. If strikes are unprotected or unlawful, participating employees may be discharged.
4. A contractor may permanently replace striking employees connected with an economic strike. However, if strikers have not been replaced at the end of an economic strike, the contractor must reinstate them.
5. Economic strikes can easily be converted into an unfair labor practice strike. A contractor must be careful not to commit such an act.
6. Picketing takes many forms and has many objectives. Always read picket signs to accurately advise counsel of your situation when calling legal advice. Picketing or other activity arising out of a labor dispute has limitations.
7. Recognitional or organizational picketing must cease after 30 days unless a petition for an election is filed with the NLRB.
8. It is illegal for a union to picket or coerce a neutral or secondary employer to cease doing business with the primary employer with whom the union has a dispute. This is called a secondary boycott according to the Taft-Hartley Act. Picketing at a construction site must be limited to the time and place where the primary employer involved in the dispute is likely to be found.
9. In confronting secondary boycotts, the contractor may use a “reserved” gate for his forces at a construction site. If proper notice and posting of all gates is done correctly, the union may only picket at that gate.
10. A contractor can sue a union for damages in federal court if the union breaches a collective bargaining agreement or commits an unfair labor practice.
11. Labor dispute violence is unlawful and injunctions can be obtained to stop violence.

² J. Richard Margulies and Andrew W. Stephenson, Braude, Margulies, Sacks & Rephan, “Construction Strikes & Picketing,” *Construction Briefings*, No. 86-8, July 1986.



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5. CONCLUSION

If a strike occurs, the contractor may be entitled to an excusable delay (time, no money), a compensable delay (time and money), or an inexcusable delay (no time or money). Under U.S. federal contracts, the contractor’s entitlement is dependent upon whether the strike was unforeseeable, beyond the control, and without the fault or negligence of the contractor. The contractor also has the responsibility to prove the strike caused a delay with the necessary evidence and analyses. In addition, a contractor must mitigate the effects of a strike by being aware of its rights as well as the union’s rights.

About the Author



Ronald J. Rider, M.B.A., is a Senior Principal with Long International and has over 30 years of experience in construction project management and contract dispute resolution. Mr. Rider has performed CPM schedule development, project cost control, cost and labor hour variance modeling, impact identification and causation, change order pricing and resolution, retrospective schedule delay, time extension and acceleration analyses, concurrent delay assessments and damages quantification. Mr. Rider’s experience includes petrochemical, oil refinery, power, commercial, industrial, road/highway, transit, hospital/medical, airport and casino projects. He holds a B.S. degree in construction management from Colorado State University and an M.B.A. degree from the University of Colorado. Mr. Rider is based in the Denver, Colorado area and can be contacted at rrider@long-intl.com and (303) 346-5836.