

Points of Law 5

The Tulare Job Problems with Labor Relations

5.1 Who's to Blame?

Here, the unanticipated labor relations problems of a subcontractor loused up the scheduling, efficiency, and productivity of a job causing losses to the prime contractor and also to subcontractors. Nobody seems to be morally to blame except, possibly, the trouble-making senior electrician who persuaded his colleagues to refuse to perform work that would normally be done by carpenters. The resulting job action has some characteristics of a jurisdictional strike or slow-down based on disputes between unions as to the classifications of work to be performed by their members. This is not a typical jurisdictional dispute, however, because it is not the carpenters (whose work is being performed by electricians) who are complaining – it is the electricians who spurn carpenter work!

5.2 Scheduling

The electricians really have a grievance with their employer. They object to the fact that the employer is requiring them to do work that would normally be performed by carpenters.

It is crucial to the efficient performance of a construction project that the work of subcontractors be scheduled and coordinated so they don't interfere with each other. The very epitome of poor coordination is illustrated by the drywall crews getting ahead of the electricians so that the electricians have to break through finished gypsum board in order to wire the job.

The upshot is cross-claims between prime contractor and subcontractor, each seeking from the other damages of more than \$200,000 for delay, inefficiency, lost productivity, and the cost of repairing damage done by electricians to the work of the drywall crews.

We will apply two legal doctrines in assessing the strength of these claims. The first is *impossibility* and the second is *implied covenants of cooperation*.

5.3 Impossibility

Legal impossibility excuses the performance of a contract. The prime contractor accuses the subcontractor of failing to install the electrical system on schedule. On schedule performance would be excused if it were impossible. An example of impossibility would be destruction of a building by fire. It would be literally impossible for an electrical subcontractor to install wiring in a building that did not exist because it burned down.

Power Electrical Corporations's difficulties do not rise to the level of legal impossibility. Prompt installation of the wiring system was not made *impossible* by the lack of cooperation of the journeyman electricians even though it was made more difficult and expensive.

5.4 Implied Conditions of Cooperation

Subcontractor signs a contract under which it promises to install an electrical system on schedule. Job action by electricians prevents the subcontractor from fulfilling that obligation. If the subcontractor expected to be excused from that obligation by such a contingency, it should have provided in the contract that timely performance would be excused by such job action. Absent such language, the law will hold the subcontractor to its obligation.

The prime contractor is backcharging the subcontractor for repairing gyp board that was damaged when the drywall crews got ahead of the electricians. The subcontractor could contend that the prime contractor should have ordered the drywall crews to wait on the electricians. But there is no specific provision in the subcontract that would require the prime contractor to reschedule the drywall crews for the benefit of the electrical subcontractor. This is where *implied covenants of cooperation* come in.

5.5 Express Covenants and Implied Covenants

Every construction contract contains both express covenants and implied covenants. The express covenants are to be found within the four corners of the instrument. In addition, the law recognizes implied covenants of cooperation, to the effect that neither party will do anything that would deprive the other party of the benefits of the contract. For example, even though there is no specific provision to that effect, the prime contractor has an obligation to make the jobsite available to the subcontractor when it is needed for the subcontractor's work.

5.6 The Schedule

Can such an implied covenant be stretched to cover an obligation of the prime contractor to order the drywall crews to wait on the electricians? Many subcontract documents authorize the prime contractor to establish a schedule and require subcontractors to follow it. Such a provision would give the prime contractor the legal power to require the electrical subcontractor to install its work ahead of the drywall crews.

5.7 Trade Practice

Absent such a directly controlling provision, the courts would resort to trade practice to determine the obligations of the parties. In this dispute, trade practice favors the prime contractor because it is customary for the prime contractor to schedule electrical work ahead of drywall work and for the electrical subcontractor to take care to stay ahead of the drywall crews. Therefore, although it's true that the prime contractor is bound by an implied covenant to cooperate with the electrical subcontractor in scheduling the work, that obligation does not go beyond trade practice, which would be for the electrical subcontractor to advance the job on schedule.