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GOVERNMENT-MANDATED PROJECT LABOR AGREEMENTS IN CONSTRUCTION: A FORCE TO OBTAIN UNION MONOPOLY ON GOVERNMENT-FINANCED PROJECTS

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I. INTRODUCTION

The thesis of my presentation is relatively simple. I believe that the actual purpose of government-mandated project labor agreements ("PLAs") is to provide a minority of the construction labor force that is represented by the unionized sector a virtual monopoly of government-financed construction. I believe also that many government administrators who agree to PLAs either do not understand this, or are politically allied with the unions. Further, I find that to this layman the court decisions are difficult to understand, have been won by the PLA proponents by what seems strange reasoning as to what constitutes the lowest competent bidder, and by the failure of the PLA opponents to present more basic data while proponents publish "studies" which ignore the existence of an overwhelming majority of the construction labor force. I shall, therefore, summarize my arguments on these points after first setting forth the underlying union membership data.[1]

II. UNION DECLINE -- GENERAL AND CONSTRUCTION

Figure I shows the official U.S. Government data for union membership in the post World War II era through 1998, for the country as a whole. The percentage decline of union membership in the labor force has accelerated since 1980 because in most years since that date actual union membership, as well as the percentage

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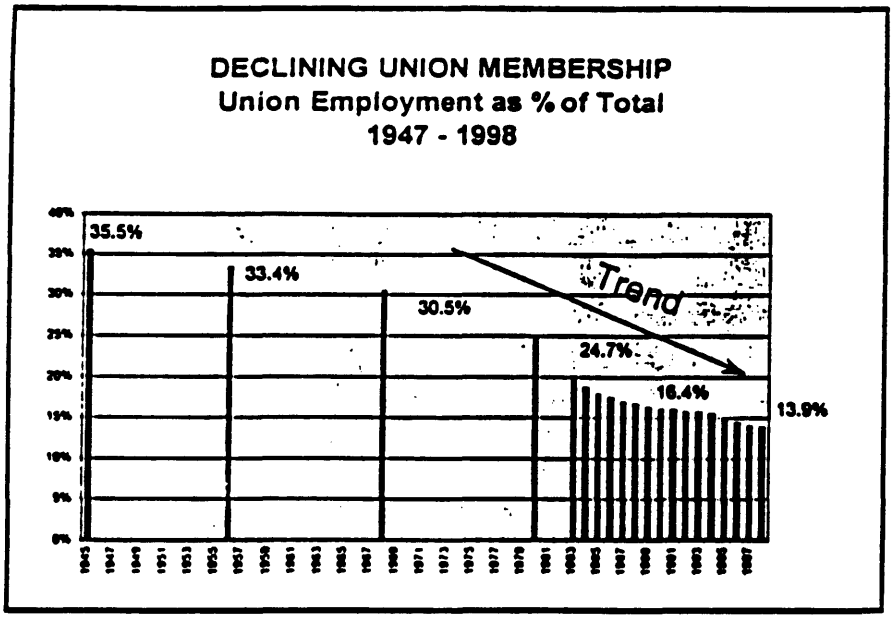
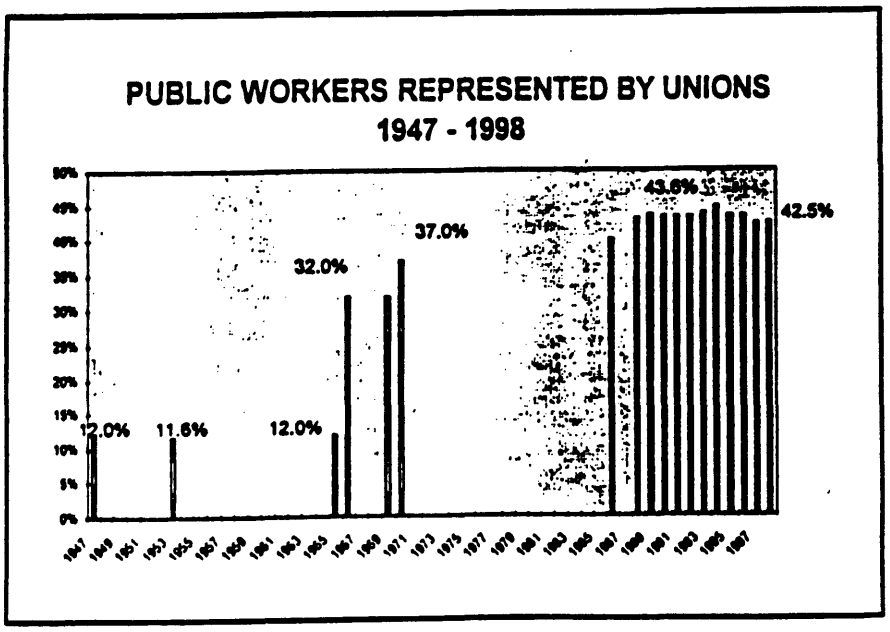
[1] A considerably more detailed presentation of these facts is found in my 1998 article with Linda E. Alario, *"Boston Harbor"-Type Project Labor Agreements in Construction: Nature, Rationales, and Legal Challenges*, 19 J. Lab. Research 1 (Winter 1998).

Figure I



SOURCE: 1947 - 1966, Lee Troy and Neil Sheflin, Union Sourcebook, (1986), p. 3-16
1969 - 1998, U.S. Bureau of Labor Statistics

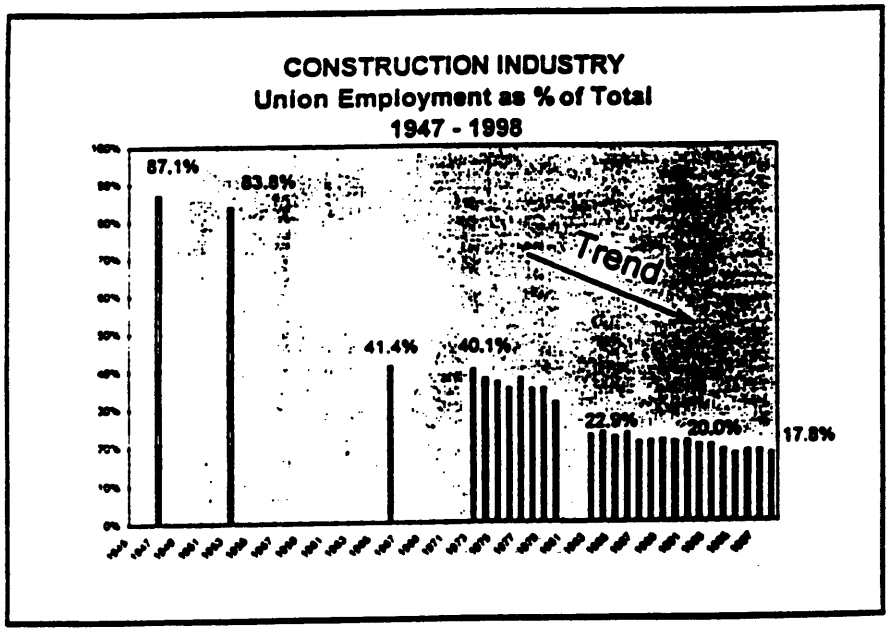
Figure II



SOURCE: 1947 - 1966, Lee Troy and Neil Sheflin, Union Sourcebook, (1986), p. 3-16
1969 - 1998, U.S. Bureau of Labor Statistics

of union members in the work force, has fallen. Moreover, this decline has occurred despite the substantial increase in unionization of the public labor force. As shown in Figure 2, the percentage of public sector workers represented by unions reached a peak of 44.7 in 1994, but has declined since that date so that in 1998, unions represented 42.5 percent of the public sector labor force and had an actual membership of 37.2 percent of the public sector's labor force. In contrast, only 9.6 percent of the private sector's labor force were union members in 1998.[2]

Figure III



SOURCE: 1947 - 1964, Leo Troy and Neil Sheflin, Union Sourcebook, (1985), p. 3-16
1969 - 1998, U.S. Bureau of Labor Statistics

[2]Union Membership data are published annually by the U.S. Bureau of Labor Statistics in the Bureau's monthly journal, Employment and Earnings, usually in the January issue. They are also usually reproduced in an early February issue of the Daily Labor Report, a publication of the Bureau of National Affairs, Inc., (BNA).

Construction Union Membership Decline

Figure III shows that construction unions have contributed substantially to this membership decline. In 1947, with 87.1 percent of the construction labor force as members, these unions had a virtual monopoly. By 1973, this percentage was down to 40 percent, and in 1998 it stood at only 17.8 percent. Meanwhile, the construction labor force has increased by almost two million since 1970.[3]

Analysis of Unionized Construction Decline Nationally

The decline of construction union membership has, of course, resulted from the loss of the unionized contractors' share of the market for construction. Uneconomic labor costs, including wage-benefit inflation and restraints on productivity, have been a major factor in this loss of market share. In the first nationwide study of the market penetration of open shop construction, it was estimated that in 1975, "it appears likely that the open shop builders are in the majority and probably control 50 to 60 percent of the total work."[4] The second nationwide study made nine years later concluded:

that the dollar volume of construction produced by

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[3]Data on the construction work force are reported monthly in the U.S. Bureau of Labor Statistics journal, Employment and Earnings. The data for the early post-World War II years are from Leo Troy and Neil Sheflin, UNION SOURCE BOOK (1985), at 3-15, Table 3-63.

[4]Herbert R. Northrup and Howard G. Foster, OPEN SHOP CONSTRUCTION. Major Industrial Research Unit Study No. 54. (1975) at 351.

> unionized craftsmen is not likely to exceed 30 percent of the total.... During the years since 1970, open shop construction has increased in the sectors and regions in which it has historically dominated. At the same time, sectors and regions which traditionally have been union strongholds have been significantly penetrated by the open shop.[5]

No study of this nature has been published since 1984, but based on my regular monitoring of the field, the national open shop share of the construction dollar has probably stabilized at 75-80 percent.[6]

III. THE RATIONALE FOR GOVERNMENT-MANDATED PROJECT LABOR AGREEMENTS

A variety of reasons have been offered to attempt to demonstrate that government-imposed project agreements are in the public interest. These relate to the qualifications of open shop contractors, labor peace, safety, labor costs, deployment and training, utilization of local personnel, and other factors. Yet the factual record does not support any of these generalizations. As I have examined these issues in detail in a previous study,[7]

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[5]OSCR Book, supra, n. 5 at 27.

[6]These are the my estimates and are based on regular monitoring of association, contractor, and union contacts and their publications. For case studies in four states including where union construction virtually collapsed, and where union control has largely been maintained, see Herbert R. Northrup, Arizona Construction Labor: A Case Study of Union Decline, 11 J. of Lab. Research 161 (1990); Northrup, The Status and Future of Unionized Construction in New Jersey, 4 N.J. Building Contractor 9 (1990); Northrup and Armand J. Thieblot, Cost Review for Contracting Alternatives For Transmission Facilities in Alaska (Unpublished Report 1996); and Northrup and Roger G. McElrath, The Division of Work Between Unionized and Open Shop Construction in Massachusetts (Unpublished Report 1999).

[7] *See*, Northrup and Alario, supra, n. 1 at 10. 1998).

the analysis will be summarized here.

The Capability of Open Shop Contractors

A major selling point that unions and unionized contractors often use in support of including a project agreement requirement in bid specifications is that open-shop contractors do not have the capability of managing very large construction jobs.

The second largest contractor for 1998, and the largest for the previous five years, in the Engineering-News Record ("ENR") 400 list of largest contractors was Fluor Daniel, with 1998 construction revenue of $9.6 billion.[8] Currently, it is estimated that Fluor Daniel earns at least 80 percent of its domestic revenue operating open shop.[9] Its capability to handle the largest projects is beyond question.

Fluor Daniel is not alone in this regard. Kellog Brown & Root, Inc., the third largest 1998 contractor on the 1998 ENR 400 list, and at least twelve others who operate open shop are on the list as larger than Kaiser, which ranked No. 74 and won the Boston Harbor contract. Moreover, many other sizable open shop contractors are found on the 400 list,[10] and many other contractors thereon operate doublebreasted, that is, they have both a unionized and an

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[8]See, *The Top 400 Contractors Sourcebook*, (ENR 1999) at 13.

[9]This figure is my estimate based upon conversations with company officials and knowledge of contracts won.

[10] These include McDermott International, Clark Construction, Austin Industries of Dallas, BE&K, H.B. Zachry, TIC - The Industrial Company, and Sundt Companies, all larger than Kaiser which won the contract, and is No. 74 on the 1998 list.

open shop subsidiary. The facts put the capability argument to rest.

Labor Peace

A key component of government-mandated PLAs is a no-strike, no-lockout agreement. These provisions have not always been adhered to in practice. For example, despite such a provision in the San Francisco airport construction job, it was struck by dissident union members who were protesting the ratification of a local labor agreement.[11]

In supporting its project agreement, the New York Thruway Authority made much of the fact that it had strife when it awarded a contract to an open shop builder in 1992 to clean and to make repairs on the Tappan Zee Bridge. A majority of the judges on New York's highest court accepted this argument in sustaining the agreement over a vigorous minority dissent.[12] The facts, however, are that after the 1992 contract was awarded, the unions in the area created a riot on the Bridge which stalled traffic, and that some violence on the unions' part occurred during the work.[13] To

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[11] *Strike by San Francisco Carpenters Affects PLA-Covered Airport Project*, Daily Lab. Rep. (BNA) No. 98 at A-11 (May 21, 1999); and *Arbitrator Orders California Carpenters to End Wildcat Strike, Return to Work*, Daily Lab. Rep. (BNA) No. 101 at A-9 (May 26, 1999).

[12] *See* New York State Chapter, Associated General Contractors of America, *et al.*, v. New York Thruway Authority, 88 N.Y.2d 56 (1996).

[13] See the picture of the unionists occupying the Bridge, N.Y. Times, Mar. 25, 1992, at B7; and Union Workers' Protest Blocks the Tappan Zee Bridge, Mar. 25, 1992, at B7. The Gannett News Service, Mar. 11, 1992, reported that then Governor Cuomo told the protesting unions that "neither he nor the Thruway Authority ...

make violence or threatened violence a reason for granting unions a monopoly of work by a government-directed project agreement rewards the perpetrators of such strife and penalizes the victims and the public. It is the simple fact that open shop employees do not strike, thus assuring labor peace as far as they are concerned.

Safety

Unions regularly attempt to characterize open shop contractors as negligent in safety matters, often keep records of any safety missteps by such contractors, and regularly and repeatedly file complaints and encourage inspections by the Occupational Safety and Health Administration ("OSHA") at sites where open shop contractors are working.[14] Yet the only nationwide statistical study of 5,564 construction fatalities investigated by OSHA, and reported in its Integrated Management Information System Data Base, 1985-93, found that fatality rates for nonunion contractors' employees were significantly lower than those of unionized contractors for each of the nine years studied. Figure IV summarizes these findings, which were made by a former director of OSHA's Office of Construction and

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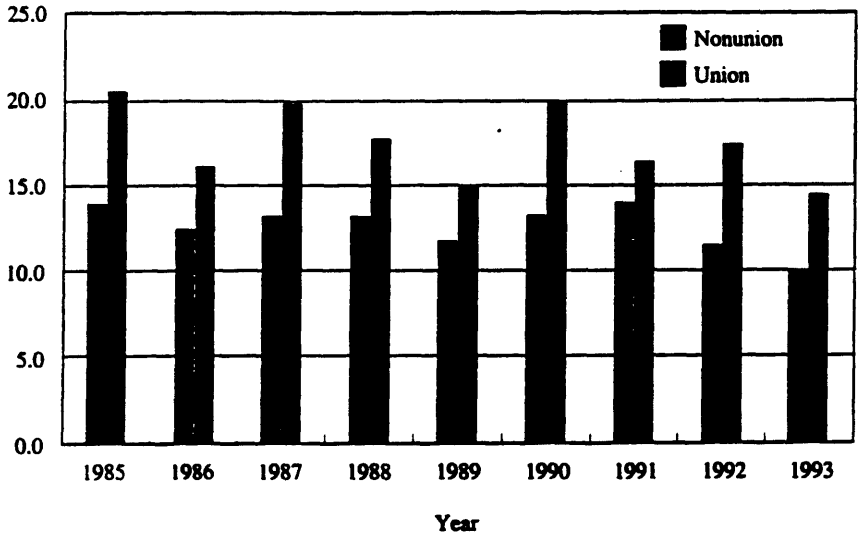
could have steered the contract locally -- because Cianbro [the open-shop contractor headquartered in Pittsfield, ME], had the lowest bid." From a very pro-union Governor, this was an interesting statement, particularly in view of the later decision of New York's highest court in the Thruway case.

[14]For examples of this, along with union use of environmntal matters, *see* Herbert R. Northrup and Augustus T. White, *Construction Union Use of Environmental Regulation to Win Jobs: Cases, Impact, and Legal Challenges*, 19 Harvard J. of L. & Pub. Pol'y 55 (1995).

Engineering.[15] The record for the Boston Harbor project in this regard has been poor with five persons killed.[16]

Figure IV

Construction Fatalities:
Comparison of Nonunion and Union Contractors, 1985–1993



Source: Charles Culver. *Construction Fatalities.* (1995)

Good safety records do not flow from whether a company is unionized or operates open shop. Rather, it depends above all upon the extent to which a company management stresses safety and insists that safe practices be maintained at all times.

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[15]Charles Culver, COMPARISON OF NONUNION AND UNION CONTRACTORS CONSTRUCTION FATALITIES (National Center for Construction Education and Research. 1995). The AFL-CIO Building and Construction Trades Department and the National Constructors Association (NCA), the association of large, unionized contractors who are parties to the national project agreement, have attacked the Culver study, but it is believed that Culver's statistical analysis is straightforward and not biased. For the union-NCA comments, see PROJECT LABOR AGREEMENTS: AN OBJECTIVE VIEW (1995).

[16] *Engineer Killed in Deer Island Tunnel Accident*, ENR, July 3, 1995, at 2; *Companies to Pay Nearly $2.7 Million to Settle Suit Over Wrongful Death*, 42 Construction Lab. Rep. (BNA) 98 (Mar. 27, 1996); and *Tunnel Diver Deaths Stop Work on Boston Harbor Cleanup*, ENR, August 2, 1999, at 12.

Terms and Conditions Costs

As a result of the competition of open shop contractors and the loss of work to them, construction unions during the last twenty years have agreed to numerous provisions that eliminate or modify costly provisions that reduce productivity. On the other hand, other premiums have tended to rise as the costs, based on percentage, increase as wages rise. Thus, a recent Construction Labor Research Council ("CLRC") study found that:

> There has been an increase in the number of agreements that designate seven unpaid holidays up from six. Contracts providing for larger shift premiums have increased while prevalence of time paid, but not worked, such as coffee breaks, has declined....[17]

Other concessions by unions designed to improve the competitive position of union contractors include the substitution of time and one-half for double time for overtime work, but holiday and Saturday and Sunday work are usually paid at double time regardless of the number of hours worked during the week. An increasing number of union contracts now permit four-day, ten hours per day schedules without daily overtime provisions so that if weather or other factors causes a day's work to be cancelled, it can be made up without weekend work. Open shop contractors generally pay overtime only for work over forty hours, and have long worked under four-day, ten-hour shift schedules.[18]

The tight labor market in construction has caused some open

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[17] *Terms and Conditions Reference Guide*, Construction Labor Research Council (November 1999), at 1.

[18] See Northrup and Alario, supra n. 1 at 14, for a broad analysis of this subject.

shop contractors to loosen their practices and to provide such items as travel pay, guaranteed overtime, and other policies which are compensated without work. Despite such aberrations, pay practices in the open shop sector remain considerably less non-productive than those in unionized concerns. With often lower wages and less costly fringe benefits, such as profit sharing instead of pensions, these factors provide sharply less costs for the open shop.

Labor Deployment

One of the greatest cost advantages for open shop construction is found in the deployment of labor. Despite many improvements, the unionized sector continues to utilize skilled labor for unskilled work, such as unloading parts and equipment, nailing conduit and pulling wire through it, etc. Tied closely to this policy is craft demarcation which prevents workers in one jurisdiction from doing incidental work in another, and requires extra men to perform this work and often be paid for a full day when the work took much less time. Open shop contractors use laborers and helpers for work that they can perform. and have craftsmen do incidental work that may be beyond the traditional work of their crafts.

Training and Use of Local Labor

Prior to the 1970s, the Bureau of Apprenticeship and Training ("BAT"), U.S. Department of Labor, established regulations which effectively prevented open shop builders from gaining approval for apprentice programs, but this is no longer true, although some state agencies have approved such programs only after considerable

litigation.[19] Today, open shop companies have many approved such training systems.

Besides apprenticeship, open shop contractors do a considerable amount of on-the-job training, and in addition, task or block training which involves the breakdown of skilled jobs into their component parts, and has been described in this manner:

> An important difference between labor-management apprenticeship programs and the training done by open-shop contractors and their associations is the greater use of task training.... Training of workers merely to accomplish specialized tasks has ... proven to be more efficient and economical for specific projects than the broader training offered by traditional apprenticeship programs. Trainees can reach necessary levels of skills much faster when they concentrate on specialized tasks. The broad knowledge and abilities learned more slowly through traditional apprenticeship are not required by every member of the workforce.[20]

Task training, moreover, does not confine the learner to a narrow craft education. The "building block" method permits the trainee to acquire all-around knowledge by combining school work and on-the-job instruction. The trainee can progress as far as is desired, and at a pace based on his ability and motivation to master a subject and task. Thus, whereas traditional apprenticeship

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[19]See e.g., Operating Engineers and Participating Employers Pre-Apprentice, Apprentice, and Journeyman Affirmative Action Fund v. Weiss Bros. Construction Co., 221 Cal. App. 3rd 867, 270 Cal. Rptr. 786 (1990); cert. den., 111 S.Ct.1337 (1991); Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee, 891 F.2d 719 (9th Cir. 1989); cert. den., 498 U.S. 822 (1990); and Electrical Joint Apprenticeship Committee v. McDonald, 949 F.2d 270 (9th Cir. 1991); cert. den., 112 S.Ct. 2991 (1992).

[20]GOVERNMENT LIMITATIONS ON TRAINING INNOVATIONS 6 (Construction Industry Cost Effectiveness Project, Report D-2, The Business Roundtable, 1982).

is time-constrained, usually set at four years regardless of the trainee's learning ability or desires, the same skills and competence under task training may be acquired in two years, or six years, or at intervals over long periods.

Two other advantages of task training are that it can be implemented on a job-by-job basis, and that multicraft skills can be acquired. Open shop contractors survey an area's labor force, and then devise a training program to meet the job needs in that area. This permits them to utilize local talent to a maximum extent. When the job is completed, the community has a reservoir of workers with new skills. Additionally, where multicraft training is provided, the trainee not only has a wider skill to sell, but also the contractor can make more efficient use of the labor force.

The fact that the task training method permits open shop contractors to utilize a high proportion of local labor runs directly counter to the almost standard union claims that only by signing a union contract can a community guarantee that outside labor will not receive most of the employment generated by a construction project. It is often difficult for unionized contractors to employ local labor because first, they must utilize a higher percentage of skilled employees since they employ few, if any, subjourneymen (helpers) to handle the semiskilled work despite the fact that unions have officially begun to support the employment of some subjourneymen for semiskilled work. Second, because their training is largely restricted to the traditional apprentice programs, unions typically import "travelers" from local

unions in other areas in order to supply journeymen rather than to offer opportunities to local semiskilled labor.[21]

The Impact of Prevailing Wage Legislation

Some of the wage and deployment advantages enjoyed by the open shop are likely to be narrowed on government-funded work by the arcane rules and regulations required by the U.S. Department of Labor under the Davis-Bacon Act, or by state regulators pursuant to "Little Davis-Bacon" laws. Many incorrectly believe that where the federal or state government establishes the key wages that must be paid, the cost advantages of open shop contractors are nullified.

Because of the severe shortage of craftsmen in the construction labor markets during the late 1990s,, open shop contractors today often pay the union rate, or even higher wages, to attract top-flight craftsmen. Nevertheless, there remains considerable opportunities for open shop contractors to utilize their deployment and other advantages to maintain a labor cost

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[21] Union journals and other sources contain numerous references to the use of "travelers." See, e.g., IBEW J., Aug. 1995 at 33; Sept. 1995 at 34; Oct. 1995 at 33, 34, 38, 41, and 44; Nov. 1995 at 30, 34; Dec. 1995 at 36, 39; Jan./Feb. 1996 at 51; Mar. 1996 at 40; May 1996 at 29; June 1996 at 34; July 1996 at 37; Aug. 1996 at 27, 30, and 33; Sept. 1996 at 37; Dec. 1996 at 21, 24, and 28; Jan./Feb. 1997 at 23; Mar. 1997 at 31-32; Apr. 1997 at 33 and 41; June 1997 at 44; July 1997 at 31, 37, and 47; Sept. 1997 at 42; Oct. 1997 at 34, 40, and 43; Dec. 1997 at 34; June 1998 at 21; July/Aug. 1998 at 32 and 35; Nov. 1998 at 20 and 23; Dec. 1998 at 18; Jan./Feb. 1999 at 34; Apr. 1999 at 19 and 20; June 1999 at 25; July/Aug. 1999 at 34; Sept. 1999 at 19 and 21: Oct. 1999 at 18, 22, and 23; Nov. 1999 at 17 and 21; and Dec. 1999 at 21 and 22. See also, *California Unionized Construction Workers Get Big Boost from Environmental Regulations*, Daily Lab. Rep. (BNA) No. 223, at A-11 (Nov. 18, 1992), discussing use of travelers in the San Francisco Bay area "from Arizona and Nevada and far beyond." Many other references are available.

differential. This increases the open shop contractors' opportunities of winning contracts in open competitive bidding.

In the bidding for the initial contract at the Southern Nevada Water Authority job, for example, a clearly qualified open shop local contractor, who had successfully worked on previous jobs of a like nature, bid $243,636 less than the next lowest bid which was by an out-of-state unionized contractor. Other unionized contractors bid up to more than $1 million dollars higher than the lowest bid. The contract was awarded to the second highest bidder because the open shop contractor's bid included a refusal to sign the project agreement, but it was designed to meet the requirements of Nevada's "Little Davis-Bacon" law. Similarly, in the bidding for the pump station in the Metropolitan Water District of Southern California case, Helix Electric, Inc., bid more than $100,000 below the next lowest bidder for the electrical sub-contract, but again conforming to California's "Little Davis-Bacon Act." Helix refused to sign the project agreement, and was replaced by a subcontractor that had not bid in the original bid competition. Nevertheless, the highest courts of Nevada and California upheld these PLAs as conforming to bid requirements.[22]

Most of the cases won in court by the protagonists of PLAs stress that the open shop contractors are not forbidden to bid for jobs governed by a PLA and open shop workers can also work on such

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[22] *See*, Associated Builders & Contractors v. Southern Nevada Water Authority, 979 P.2d 224 (Nev. 1999); and Associated Builders & Contractors v. Metropolitan Water District of Southern California, No. SO67485, (Oct. 20, 1999); 45 Const. Lab. Rep. (BNA) 963 (Nov. 3, 1999).

jobs. This is only partially correct. If open shop contractors win a bid, they must operate within the terms of the projct agreement and draw most of their employees through the union hiring hall. In short they must work as if they were unionized contractors, thus forfeiting the terms, conditions, labor deployment, and methods which they have developed to increase efficiency and productivity. As a result, fewer companies bid and costs are higher. The huge Massachusetts CA/T project, for example, has been affected by the disinterest in bidding and by inflated bid costs, both of which are obviously related to the compulsory adherence to the government-mandated PLA.[23]

Massachusetts also provides another of the clearest models for how the existence of a government-mandated PLA affects the number of bidders and the project costs. The Mayor of Boston had issued an Executive Order requiring PLAs on the city's major construction

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[23]More Bidders Wanted for Central Artery Project Work, ENR, Feb. 3, 1997, at 18. The inflating costs of this mammoth project are noted in a number of places, particularly the litigation papers for Utility Contractors Association of New England, Inc., v. Commissioners of the Massachusetts Department of Public Works, Mass. Superior Court, Suffolk, ss, (Civ. Act. No. 90-3035, Mar. 5, 1996); and Jeremy Wallace and Thomas C. Palmer, Jr., Big Dig to Cost at Least $10.4b. Boston Globe, Mar. 8, 1996, at 23. The latter citation reports on a congressional hearing in which federal auditors expect the costs to inflate even more. This apparently did occur. See, Low Bid, $22 Million Over Estimate, Is Approved, ENR, Jan.13, 1997, at 5; and Boston Projects Tracking Higher, ENR, Jan. 20, 1997 at 27. See also, U.S. General Accounting Office, Resources, Community, and Economic Development Division, LETTER TO THE HONORABLE FRANK R. WOLF, Subcommittee on Transportation, Committee on Appropriations, House of Representatives, June 2, 1995. A bid in March 1997 came in below estimate, but again it is not known whether the estimate, which, of course, considered only union rates in the calculations, was itself inflated. See, Low Bid Beats Estimate Putting CA/T Back on Track, ENR, March 3, 1997, at 7.

bids, but also setting forth certain procedures that must be followed before a PLA was required. Thus, the Executive Order provided that decisions requiring a PLA would be made on a project-by-project basis "where the city has determined based on a thorough investigation and analysis that the use of a ... [PLA] benefit and enhance the interests of the city."[24] The Executive Order further required consideration of cost, efficiency, quality, safety, the principles of competitive building, and expanded opportunities for minorities, females, and city residents. Additionally, the Order provided for the creation of a committee responsible for investigating and making recommendations regarding the propriety of a PLA on city projects.[25]

In March 1998, the Superior Court, Suffolk County, issued a preliminary injunction requested by four company members of the Associated Builders & Contractors enjoining the city from requiring bidders to agree to a PLA as a condition of performing work on a project for renovations and additions to the city Hyde Park High School.[26] The expected cost of the project was $24,632,000, making it the largest school construction project in the city's history.[27] The plaintiffs claimed that the PLA would effectively bar them from bidding the work because of their nonunion status, and that the

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[24]Methuen Construction Co., et al., v. Boston, 157 L.R.R.M. (BNA) 3010, (Sup. Ct. Suffolk Cty, 1998).

[25] Id. at 3013.

[26] Id.

[27] Id. at 3012.

city had failed to follow the procedures established in the Executive Order.[28] Noting that the plaintiffs were quite correct in regard to the effect of the PLA on their nonunion status, and that the city committee had done no investigation or analysis before perfunctorily and arbitrarily ratifying the PLA requirement, the

Table I
Hyde Park School Construction Project
(Effect of PLA on the Number of Bids)

Contractor Trade	PLA Bids	Non-PLA Bids	Non-PLA Bids Greater Than PLA Bids
Aluminum Windows	1	2	1
Acoustic Tile	3	4	1
Ceramic Tile	3	4	1
Electrical	2	7	5
Elvator	2	2	0
Fire Protection	1	1	0
Glass & Glazing	1	3	2
HVAC	3	4	1
Joint Sealers	3	5	2
Masonry	3	5	2
Metal Fabrication	1	4	3
Painting	3	4	1
Plaster	3	3	0
Plumbing	3	5	2
Resilient Flooring	3	3	0
Roofing & Flashing	3	6	3
Terrazzo	1	1	0
Total	39	63	24

Source: Methuen Construction Co., et al., v. City of Boston, No. 98-1267, 157 L.R.R.M. (BNA) 3010, (Mass. Sup. Ct., Suffolk Cty. 1998).

[28] Id.

court issued the injunction in the case for which there were no projections of cost savings or evidence of concern about labor unrest.[29]

As a result of the court's decision, bids submitted pursuant to the original bid requests which included the PLA requirement were cancelled, and new bids were requested and submitted without any such requirement. The results are set forth in Tables I and II. Table I shows that only thirty-nine bids were submitted when the PLA was included, but that bids rose to sixty-three when the PLA was eliminated. Not surprisingly, the increase in the number of bidders was accompanied by a decrease of nearly 7 percent in the lowest bids, and a decline in the highest bids when the PLA waseliminated, as shown in Table II. Moreover, since the high school job was covered by prevailing wage legislation, the differential between the PLA-included bid and the non-PLA one would probably have been greater if a truly free market governed the conditions.

IV. THE "STUDIES" SUPPORTING GOVERNMENT-MANDATED PLAS

Beginning with the New York Thruway case, supporters of government-mandated PLAs have included so-called studies to support the adoption of such requirements. It is fitting to close my remarks by examining one such study, that of the proposal for the construction of the Berks County Convention Center and Arena in Reading, Pennsylvania, especially since the writer of the study, James M. O'Neill, is here with us today.

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[29] Id. at 3016.

Table II
Hyde Park School Construction Project
(Effect of PLA on Contractor Bid Prices)

Contractor Trade	Lowest PLA Bid	Lowest Non-PLA Bid	PLA Bid Greater Than Non-PLA Bid	PLA:Non-PLA % Difference	Highest PLA Bid	Highest Non-PLA Bid	PLA Bid Greater Than Non-PLA Bid	PLA:Non-PLA % Difference	% Variation PLA High:Low	% Variation Non-PLA High:Low
Aluminum Windows	607,808	587,000	20,808	3.4	607,808	596,308	11,500	1.9	0	1.6
Acoustic Tile	210,000	207,980	2,020	1.0	298,500	239,697	58,803	19.7	42.1	15.3
Ceramic Tile	102,200	141,900	-39,700	-38.8	169,092	177,400	-8,308	-4.9	65.5	25.0
Electrical	2,408,600	1,875,000	533,600	22.2	2,444,000	2,349,000	95,000	3.9	1.5	25.3
Elvator	86,480	85,788	692	0.8	91,030	85,860	5,170	5.7	5.3	0.1
Fire Protection	420,000	410,000	10,000	2.4	420,000	410,000	10,000	2.4	0.0	0.0
Glass & Glazing	69,340	58,768	10,572	15.2	69,340	131,500	-62,160	-89.6	0.0	123.8
HVAC	2,157,000	2,089,900	67,100	3.1	2,233,000	2,190,000	43,000	1.9	3.5	4.8
Joint Sealers	49,400	68,780	-19,380	-39.2	87,381	136,950	-49,569	-56.7	76.9	99.1
Masonry	1,647,050	1,734,000	-86,950	-5.3	1,930,000	1,895,000	35,000	1.8	17.2	9.3
Metal Fabrication	778,000	481,000	297,000	38.2	778,000	787,000	-9,000	-1.2	0.0	63.6
Painting	281,600	356,200	-74,600	-26.5	516,460	494,000	22,460	4.3	83.4	38.7
Plaster	279,000	305,000	-26,000	-9.3	515,200	498,500	16,700	3.2	84.7	63.4
Plumbing	1,095,000	1,038,000	57,000	5.2	1,178,000	1,080,000	98,000	8.3	7.6	4.0
Resilient Flooring	108,400	107,800	600	0.6	155,555	112,000	43,555	28.0	43.5	3.9
Roofing & Flashing	528,271	509,000	19,271	3.6	625,000	685,200	-60,200	-9.6	18.3	34.6
Terrazzo	298,892	297,792	1,100	0.4	298,000	297,292	708	0.2	-0.3	-0.2
Total	11,127,041	10,353,908	773,133		12,416,366	12,165,707	250,659			
Avg. Unweighted Variation									26	30

Source: Methuen Construction Co., et al., v. City of Boston, No. 98-1267, 157 L.R.R.M. (BNA) 3010, (Mass. Sup. Ct., Suffolk Cty. 1998).

Union Decline in Pennsylvania

Pennsylvania was formerly one of the most unionized states, but the decline of once basic industries such as coal, steel, railroads, other heavy metals, and the fall of construction and trucking have hit Pennsylvania's union membership. Table III shows that public employee unionism is a much higher percentage of the total sector, as is true for the national figures (Figures I and II), than is private sector unionism. The Current Population Survey

Table III

Unionization Data Compiled from the Current Population Survey by Barry T. Hirsch and David A. Macpherson Pennsylvania, 1973-1998

Year	Total Sample	Percent Union	Private Sector	Percent Union	Public Sector	Percent Union
1973	2,900	32.9	2,459	31.8	441	38.7
1974	2,856	34.2	2,401	33.2	455	39.4
1975	2,714	33.1	2,275	31.7	439	40.8
1976	2,622	32.1	2,203	30.4	419	40.7
1977	2,732	31.8	2,281	29.7	451	42.3
1978	2,653	32.0	2,241	29.6	412	44.9
1979	2,555	32.9	2,134	30.0	421	48.1
1980	2,614	32.0	2,162	29.1	452	45.8
1983*	6,737	27.5	5,696	23.2	1,041	51.4
1984	6,948	24.9	6 021	21.1	927	49.3
1985	7,458	22.8	6,441	19.1	1,017	46.4
1986	7,597	22.0	6,579	17.6	1,018	50.1
1987	7,498	22.0	6,498	17.8	1,000	49.2
1988	7,669	21.1	6,633	16.8	1,036	48.5
1989	7,964	20.9	6,907	16.4	1,057	50.3
1990	7,978	20.4	6,887	15.6	1,091	50.9
1991	7,834	20.3	6,744	15.5	1,090	50.2
1992	8,105	19.6	6,965	14.4	1,140	51.1
1993	7,882	19.0	6,810	19.0	1,072	52.0
1994	7,532	19.6	6,535	14.3	997	55.4
1995	7,569	18.9	6,605	14.1	964	52.5
1996	6,605	17.7	5,745	12.8	860	50.0
1997	6,535	17.1	5,667	11.8	868	51.4
1998	6,576	16.3	5,760	11.5	816	50.8

Source: Unpublished data provided by Professor Barry T. Hirsch, Department of Economics, Florida State University. All data are collected for union membership each May. For description of data and methodology, see Barry T. Hirsch and David A. Macpherson, Union Membership and Earnings Data Book, (1988 ed.).

*Quarter sample only made in 1981 and no union membership questions asked in 1982 surveys.

("CPS") data also demonstrate that Pennsylvania's private section union decline is very similar to the national trend with a union membership percentage of 31.8 percent in 1973, and one of only 11.5 percent in 1998.

Pennsylvania Construction Union Membership Trends

The CPS data also provide information as to the relative strength of Pennsylvania's unionized and open shop construction over the 1973-1998 period.[30] What is significant in the data for use here is the trend of union membership in private construction.[31] Table IV shows a reduction of union membership from 45.2 percent of the construction labor force in 1973 to 18.9 percent in 1998. Again this closely mirrors the national data found in Figure III.

Actually, union membership in Pennsylvania is heavily concentrated in the Philadelphia and Pittsburgh areas. In the vast area in between the State's two largest cities the open shop is largely dominate. As set forth below, this definitely includes Berks County, as O'Neill's report admits.

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[30] The data in Table III, and especially in Table IV are a relatively small sample. Professor Barry T. Hirsch, who with his colleague, Professor David A Macpherson, constructed the data, "too small to draw reliable inferences for specific years." He advises using these data "with some caution." (From a note by Professor Hirsch sent with the transmission of the data to this author, July 7, 1998.) Granted that the sample is small, the fact that the trend is steadily downward, and that national data are very similar, would seem to provide support for the accuracy of these CPS data.

[31] "Private construction" as used herein includes employees working for private contractors who, in turn, are performing government contract jobs, as well as private contract jobs.

Table IV

Pennsylvania Private Construction, 1973-1998
Unionization Data Compiled from the Current Population Survey
by Barry T. Hirsch and David A. Macpherson

Year	Total Sample	Percent Union
1973	156	45.2
1974	130	46.9
1975	94	33.0
1976	114	42.0
1977	122	40.1
1978	135	37.7
1979	113	42.3
1980	94	37.8
1983*	266	36.0
1984	291	30.1
1985	324	29.2
1986	377	26.6
1987	397	28.8
1988	358	23.8
1989	423	24.1
1990	430	25.6
1991	346	30.0
1992	328	27.5
1993	341	23.0
1994	311	22.1
1995	334	24.8
1996	255	27.3
1997	250	23.9
1998	273	26.7

Source: Unpublished data provided by Professor Barry T. Hirsch, Department of Economics, Florida State University. "Private construction" as used herein includes employees working for private contractors who, in turn, are performing government contract jobs. All data are collected for union membership each May. For description of data and methodology, see Barry T. Hirsch and David A. Macpherson, Union Membership and Earnings Data Book, (1988 ed.).
*Quarter sample only made in 1981 and no union status questions asked in 1982 surveys.

Labor Market Conditions in Berks County

Before examining the degree of construction unionization and open shop ranges in Berks County, it is pertinent to examine the labor market there because the PLA proponent proposal would turn over the construction work to contractors and employees from outside the County on what appears to be the spurious grounds that

Table V
Labor Force Statistics:
Berks County and the State of Pennslyvania

	1994	1995	1996	1997	1998	% Change 1994-98
Berks County, Pennsylvania						
Labor Force	175.6	177.3	180.1	184.6	182.8	4.1
Employment	167.1	168.9	172.4	176.7	174.9	4.7
Unemployment	8,500	8,400	7,700	7,900	7,900	-7.1
Unempl. Rate	4.9	4.8	4.3	4.3	4.3	-12.2
State of Pennsylvania						
Labor Force	5,829	5,837	5,900	5,979	5,938	1.9
Employment	5,469	5,495	5,587	5,688	5,861	7.2
Unemployment	361	343	313	311	275	-23.8
Unempl. Rate	6.2	5.9	5.3	5.2	4.6	-25.8

Source: Bureau of Research and Statistics. Pennsylvania Department of Labor and Industry.

Table VI
Unemployment in the Largest Counties in Pennsylvania

	1994	1995	1996	1997	1998	1999 (May)
Philadelphia	8.0	7.7	7.1	7.0	6.2	5.4
Allegheny	5.7	5.3	4.5	4.4	4.1	3.4
Montgomery	4.9	4.5	3.8	3.7	3.2	2.7
Bucks	5.2	5.1	4.4	4.2	3.6	3.2
Deleware	5.4	5.5	4.8	4.6	3.9	3.5
Lancaster	3.7	3.5	3.3	3.0	2.9	2.4
Chester	4.0	3.9	3.3	3.2	2.7	2.2
York	4.4	4.2	4.3	4.1	3.7	3.2
Berks	4.9	4.8	4.3	4.3	4.3	4.0

Source: Bureau of Research and Statistics. Pennsylvania Department of Labor and Industry.

the shortage of personnel is so serious in Berks County that the construction of the proposed Convention Center and Arena could not otherwise be built on schedule. The data from the Pennsylvania Department of Labor and Industry do not support this claim or the extraordinary proposed "solution."

With respect to the size of the civilian labor force, Berks is the ninth largest county in Pennsylvania. Since the 1991-92 recession, the labor market there has shown consistent, if not spectacular, improvement. The civilian labor force grew by 4.1 percent from 1994 to 1998 and employment expanded by 4.7 percent over the same period (see Table V). Not surprisingly, the unemployment rate declined from 4.9 percent to 4.3 percent as the overall number of unemployed fell from 8,500 to 7,900 (See Table VI). Therefore, the labor market has clearly tightened in Berks County. When compared to other large counties in Pennsylvania and to the state as a whole, however, the labor market in Berks County is characterized by a relatively high level of slack.

The last column in Table V shows the rate of change in key labor market variables since 1994.[32] In Berks county, the rate of unemployment fell by 7.1 percent and the number of unemployed declined by 12.2 percent; but in Pennsylvania, the rate of unemployment and the number of unemployed dropped by 23.8 percent and 25.8 percent, respectively, over the same period. Thus, the key determinant of labor market slack was declining far more rapidly in the State as a whole than in Berks county. Table VI also suggests that the degree of labor market slack in Berks county was higher than in other areas of Pennsylvania. Table VI lists (in order of the size of

[32] Owing to a revision in the data collection methodology of the U.S. Department of Labor, labor market data from 1994 are not comparable to earlier data and thus are not included in the tables.

the civilian labor force) the unemployment rates in the largest counties in Pennsylvania. In 1994, Berks county was in the middle of the pack, with roughly one-half the counties having lower unemployment rates and one-half having higher ones. By 1998, however, Berks county had the highest unemployment rate of all the counties except for Philadelphia, in some cases trailing by over 2 percentage points.

Similar to all counties in Pennsylvania, the labor market in Berks county has benefited from the long economic expansion of the 1990s. Given its unemployment rate of 4.3 percent in 1998, one cannot classify Berks county as a depressed economic area. Although labor markets are inherently local in nature, the fact that there are many counties in Pennsylvania with lower unemployment rates than Berks county *suggests* that there remains a not insignificant degree of labor market slack. Certainly turning over the jobs to be created by the construction of the Convention Center and Arena, which is difficult to defend in any circumstance, seems impossible to support given current economic conditions in Berks County.

Construction Division of Work, Unionized and Open Shop in Berks County

Although the kind of data that we were able to present for the country as a whole and for the Commonwealth of Pennsylvania is not available on a county basis, it is quite clear that Berks County is not a union stronghold. In fact, it is equally clear that open shop construction has won a decided majority of the work. Both unionized and open shop contractor associations when questioned readily conceded this fact. For example, an article noting that agreements had been signed by the Mechanical Contractors Association of America ("MCAA") and two local unions of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry ("UA") covering both Philadelphia and "outlying counties" including Berks, concluded with this statement:

> Both crafts [plumbers and fitters] have lower wage and benefit packages in the Lehigh Valley and Reading areas outside Philadelphia... where open shop competition

is more common.[33]

Telephone interviews with associations both of unionized and open shop contractors put the strength of the open shop in Berks County as controlling 55-65 percent of the construction dollar spent. None believed that unionized construction was in the majority,[34] and no facts were found which would seriously challenge this view. Yet the proposed government-mandated PLA would eliminate the open shop contractors and employees, the clear majority of the construction management and labor force, from consideration to work on the Convention Center and Arena unless the contractors signed the PLA, hired employees from the union hiring halls, and managed the operation as a unionized function.

In place of the local, tax-paying citizens, it is proposed to import personnel from outside of the County. But where are they to come from.? It has been demonstrated that the labor market in Berks County is looser than that in any other large Pennsylvania County except Philadelphia, but the wage rates are higher in the Philadelphia Metropolitan area than in Berks County. Would Berks wages attract workers who are accustomed to receiving higher wages? One must doubt that. Should wages, and therefore costs, be raised in order to import workers to displace local employees? Few would likely encourage that! What is being proposed is a PLA that increases unemployment of Berks citizens, raises their costs and probably taxes, and still is not likely to provide an adequate labor supply. The mere statement of the proposition is enough to condemn it.

Inaccuracies and Contradictions in the Pro-PLA Report

In coming to the conclusion that a government-mandated PLA will serve the public interest and

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[33] Philadelphia Craft Unions Sign Agreements Covering 4,800 Workers, Daily Lab. Rep. (BNA), No. 101 at A-3 (May 26, 1999). The agreed increases had Philadelphia metropolitan area plumbers and fitters receiving $39.43 per hour, but plumbers in the Lehigh Valley and Reading areas receiving $32.93 and Fitters $34.89.The executive director of the MCAA stated that they were "a little nervous about this increase ... and not sure it reflects a prudent interpretation of our market condition."

[34] These interviews were conducted on a confidential basis in June 1999.

is the only way in which the Convention Center and Arena can be built on schedule, the pro-PLA advocate makes a number of statements of questionable accuracy. For example, it is stated that only union contractors have the capability of attracting the requisite number of craftsmen required to complete the project on time. Yet he readily admits that open shop builders are in a majority in the area, that it is common for both unionized and open shop contractors to work on the same construction project harmoniously, and he points out no major project where labor shortages have prevented completion on schedule. Moreover, he notes that heavy production scheduled in the Philadelphia area are causing contractors there to recruit and offer "top wages and other attractive economic incentives."

The pro-PLA report does not explain how union contractors are to be able to recruit craftsmen from outside Berks County at lower wages than they can receive in other areas where they are also being recruited. Nor does it deal with the fact that open shop contractors who are dominant in Berks County have been able to man their needs and continue to do so. The pro-PLA report ignores the fact that open shop contractors do not utilize skilled craftsmen for such unskilled work as unloading truck of materials, pulling wire through conduit, and a host of other less-then-skilled jobs, thereby keeping costs down and saving the need for extra craftsmen while being able to use more local personnel.[35]
Moreover, additional savings in craftsmen time is generated by open shop builders because the fact that craft unions are not involved in their operations permit personnel to work across craft boundaries without calling in specialized personnel to perform small but necessary work.

The pro-PLA report makes much of the fact that time schedules and work rules in general for thirteen unions are synchronized. It ignores the fact that this is no problem for open shop contractors who will see to it that any such rules are obeyed by his employees. Moreover, provisions for peaceful

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[35]The differences in how unionized and open shop contractors deploy and train labor, and the consequences thereof, is discussed in detail in the article cited supra, n. 1 at 17. *See also*, OSCR Book at Chapters IX and X.

settlement of any controversies are also fine, but again unnecessary for open shop contractors and employees who do not strike.

V. CONCLUSION

This analysis shows that the justifications for imposing government-directed projects agreements are flimsy at best. They are neither based upon fact nor do they conform to the realities of the construction industry. The "studies" which purport to justify the imposition of PLAs also cannot stand careful analysis. The actual reason for their existence has been well stated by the since retired Assistant General President of the UA in his report to the 1996 convention of this union:

> To fight the growing non-union element throughout the country, numerous project agreements have been consummated by local unions and the United Association. The majority of these agreements are between the local building trades councils and contractors. In a few cases, the United Association has signed various project agreements to secure the work for our membership.[36]

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[36] UA, GENERAL OFFICERS' REPORT TO THE 35th GENERAL CONVENTION, Las Vegas, Nevada, (1996), at 12.