Recent Developments in Construction Industry Bargaining: Doublebreasting and Prehire Agreements

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COMMENTS

RECENT DEVELOPMENTS IN CONSTRUCTION INDUSTRY BARGAINING: DOUBLEBREASTING AND PREHIRE AGREEMENTS

I. INTRODUCTION AND OVERVIEW

Exceptions... all rules seem to have them. The National Labor Relations Act\(^1\) calls its exceptions "provisos." For the construction industry, the exceptions are the rules. Take, for example, sections 8(e)\(^2\) and 8(f)\(^3\) of the NLRA, which govern the construction industry. Added to the NLRA as a part of the Landrum-Griffin amendments of 1959,\(^4\) each is designed to address the unique attributes of labor relations in an industry about which only one thing is a constant — flux.\(^5\) The many faces of the construction industry make generalization difficult. Its sectors\(^6\) span from building single family dwellings to roads, bridges and airports.\(^7\) Within any given sector (for instance, residen-

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1. 29 U.S.C. §§ 151-169 (1982) [hereinafter the NLRA or the Act].
4. Pub. L. No. 86-257, §§ 704(b), 705(a), 73 Stat. 519, 543, 545 (1959) (codified at 29 U.S.C. §§ 158-531 (1982)). The Landrum-Griffin amendments of 1959 are officially titled the Labor-Management Reporting and Disclosure Act. Some sections of Landrum-Griffin amended the NLRA. Sections 8(e) and 8(f) are two such sections. Landrum-Griffin § 704(b) became NLRA § 8(e); Landrum-Griffin § 705(a) became NLRA § 8(f).
6. Within each of these sectors, contractors operate both publicly and privately. H. NORTHUP, supra note 5, at 2.
7. Id.

The building of single family homes, apartments, and other dwellings makes up the residential construction sector which may account for as much
tial construction) there is a great deal of job specialization. These sectors, however, are characterized by both seasonal and cyclical fluctuation. Because of the industry's unique character, sections 8(e) and 8(f) were adopted. These sections help accomplish for the construction industry the same goals the NLRA seeks to further in all instances of labor-management relations it governs — employee free choice and labor relations stability.

Section 8(e) of the Act prohibits "hot cargo" agreements. A union and employer may not enter into an agreement that prevents the employer from "dealing in any of the products of any other employer," or "doing business with any other person." The first proviso to section 8(e), with certain limitations, exempts the construction industry from this prohibition. This allows general construction contractors and unions to enter into collective bargaining agreements which require subcontractors of the general contractor to sign the agreement. This requirement gives rise to several questions: 1) in what con-

as 40 percent of all construction dollar volume in a single year. Commercial construction includes such projects as stores, office buildings, warehouses, small factories, hospitals, nursing homes, and service stations. Industrial construction refers primarily to large factories, power plants, refineries, and other large structures built for establishments engaged in secondary economic activity. Heavy and highway construction includes streets, roads, bridges, dams, pipelines, airports, and subways. Government data do differentiate between private and public construction, but public projects may be in any of the aforementioned classes: residential construction (low-income housing), commercial construction (schools, office buildings), industrial construction (power plants), and heavy and highway construction (roads and bridges).

Id. at 1-2 (emphasis in original).
8. Id. at 1.
10. Id.
12. 29 U.S.C. § 158(e) (1982) provides in pertinent part:
It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, that nothing in this subsection [e] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . .

Id.
13. Id.
14. Id.
15. Id.
17. For an overview of the history and treatment of these issues, see generally
text may subcontracting clauses be sought; 2) what is the jobsite; and 3) how
may a clause be obtained and/or enforced.

Of particular import in the section 8(e) area today is whether no-
doublebreasting clauses are protected by the section 8(e) proviso. Double-
breasting\textsuperscript{18} or a "dual shop" occurs when a union employer sets up a separate
company that operates nonunion.\textsuperscript{19} To be lawful, a doublebreasted operation
must be "legitimate;" it may not be a "sham" operation designed to remove
work from the unionized company.\textsuperscript{20} The principle control mechanism to pre-
vent employer abuse of doublebreasting is the single employer doctrine, which
disallows a dual shop operation where it is inappropriate.\textsuperscript{21}

\textbf{The Developing Labor Law} 1230-42 (C. Morris 2d ed. 1983); H. Northrup, \textit{supra}
ote 5, at 41-72.

18. A doublebreasted operation may also be called a "dual shop." H. Nor-
thrup, \textit{supra} note 5, at 4.

19. Doublebreasting is explained as follows:
A 'double-breasted' operation is one in which a contractor operates two com-
panies, one unionized and the other nonunionized. Depending on how the
companies are structured and operated, each may be a separate corporation
or else both may be so interrelated that they constitute a single employer or
one may be the alter ego of the other. A collective-bargaining contract signed
by one of the companies would not bind the other if each were a separate
corporation, but would bind the other if both constituted a single employer
and the employees of both companies constitute a single appropriate bargain-
ing unit or the nonsignatory company is an alter ego of the signatory
company.

H. Northrup, \textit{supra} note 5, at 68 (quoting Walter N. Yoder & Sons, Inc., 270
N.L.R.B. 652 (1984)).

20. The Board summarized that sham operations are:
[S]ituations in which employers, through deception and misrepresentation,
used related companies to evade their obligations under collective-bargaining
agreements, to deprive bargaining unit employees of the fruits of collective
bargaining, and to destroy bargaining units. In those cases, the employers sur-
reptitiously and unilaterally transferred and shifted work away from bargain-
ing unit employees to employees of related companies.

217, 218-19 (1980), \textit{remanded on other grounds}, Road Sprinkler Fitters Local Union
No. 669 v. N.L.R.B., 676 F.2d 826 (D.C. Cir. 1982)).

21. The basic principles of the single employer doctrine are:
The single employer doctrine is a creation of the Board which allows it to
treat two or more related enterprises as one employer within the meaning of
section 2(2) of the NLRA. . . . The factors which the Board uses to determine
. . . single employer status are (1) interrelation of operations, (2) common
management, (3) centralized control of labor relations, and (4) common own-
ership. . . . The Board has stressed the first three of these factors, as well as
the presence of control of labor relations . . . .

A finding of single employer status does not by itself mean that all the
subentities comprising the single employer will be held bound by a contract
signed only by one. Instead, having found that two employers constitute a
single employer for purposes of the NLRA, the Board then goes on to make a
further determination whether the employees of both constitute an appropri-
ate bargaining unit. . . . In determining whether a single employer exists we
Section 8(f) of the Act allows an employer "engaged primarily\(^2\) in the construction industry to enter into an agreement with a construction union whereby the employees of the employer will be represented by the union, even though they have not yet been hired and a representation election has not been held. The employer and union thus have entered into an agreement without determining whether the majority of the employees want to be represented by the union. This practice is only permitted in the construction industry.\(^4\) Morris states:

Such prehire contracts are deemed necessary because \"[t]he traditional system of recognition following the hiring of a work force and proof of the union's majority status would be unworkable in an industry in which employers simultaneously work a number of construction projects in various geographical areas, move from project to project in a relatively short time, and rely on unions in each area to refer employees to the job site.\"\(^5\)

Although sections 8(e) and 8(f) already aid construction industry...
unionization in ways not enjoyed by other industries, supporters of building trade unions recently have campaigned for major changes in the interpretation and application of the NLRA provisions. These changes would make the unions' treatment under the Act even more favorable. Additionally, proposed amendments to the NLRA would radically affect the current use of both doublebreasting and prehire agreements. This Comment will discuss both actual changes brought about by recent cases, and the impact of approval of the proposed legislative changes.

II. RECENT DEVELOPMENTS IN DOUBLEBREASTING

Because of the increasing use by construction industry employers of doublebreasting, construction unions are seeking to incorporate anti-dual shop clauses into their collective bargaining agreements. These clauses seek to prevent a unionized construction employer from running a nonunionized sister operation, either on the same site or on other projects.

In a unique recent case, Painters District Council No. 51 (Manganaro Corp.), a union's demand for an anti-dual shop clause was upheld against charges by the employer that the clause violated section 8(e) of the NLRA. The court found the clause to be a valid work preservation clause, and thus

26. H. NORTHRUP, supra note 5, at 35-40. It should be noted that § 8(e) also has a proviso governing the clothing industry which is not within the scope of this Comment.

27. H. NORTHRUP, supra note 5, attributes this phenomenon to the general erosion of union influence, the higher cost of wages and benefits for union employees which may no longer be justified by a correspondingly higher skill content, hours of work restraints and compensation sought by unions, constraint of management prerogatives in personnel by union use of exclusive hiring halls, and the constraint of the union craft organization structure. See generally id. at 14-31.


29. Id. at 17 (“This case squarely presents the question of whether an anti-double breasting clause is protected under the construction industry proviso to Section 8(e) of the Act. . . . I am not persuaded that any reported Board or Supreme Court decision is dispositive of this issue.”); Letter from G. Brockwel Heylin, National AGC Liaison to AGC Labor Lawyers Council (Jan. 15, 1987) (“This is believed to be the only one of these cases decided arising from the recent campaign of the building trades unions to eliminate dual shops.”).

30. N.L.R.B. JD-313-86 (December 18, 1986).

31. Id.

32. The clause provided:
Section 1. To protect and preserve, for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement, and to prevent any device of subterfuge to avoid the protection and preservation of such work, it is agreed as follows: If the Contractor performs on-site construction work of the type covered by this Agreement, under its own name or the name of another, as a corporation, company, partnership, or other business entity, including a joint venture, wherein the Contractor, through its officers, directors, partners, owners or stockholders exercises directly or indi-
in support of the clause was permissible. In Manganaro, Maryland was a drywall contractor subject to a Painters District Council No. 35 contract in Boston. Under that agreement, when Manganaro entered another jurisdiction to do drywall work, it was required to become a signatory to the local union-employer agreement. Manganaro entered the Washington, D.C. market and signed a “memorandum of understanding” with the local union, thereby becoming subject to the terms of that collective bargaining agreement. The agreement was negotiated between the local union and the Painting, Decorating and Drywall Finishing Contractors of Washington, D.C. and Vicinity, a multi-employer bargaining association. When negotiations for a new collective bargaining agreement began, Manganaro participated. The negotiations stalled over the employers’ demand
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for a market recovery program\(^{37}\) and the union's demand for the work preservation clause which became the issue in the case. The union ultimately offered the two as a package and most of the employers signed the contract just before the expiration of the collective bargaining agreement then in place. Manganaro refused and the union ceased referring employees to Manganaro jobsites.\(^{38}\) Manganaro filed charges against the union asserting that the strike action constituted an "unfair labor practice" in that it violated sections 8(b)(3),\(^{39}\) 8(b)(4)(i)(ii)(A)\(^{40}\) and 8(b)(4)(i)(ii)(B)\(^{41}\) of the NLRA.

\(^{37}\) This "program" was designed to make the union contractors more competitive by producing a twenty percent cut in labor costs. Manganaro, N.L.R.B. JD-313-86 at 4, n.6.

\(^{38}\) Manganaro, N.L.R.B. JD-313-86 at 9.

\(^{39}\) 29 U.S.C. § 158(b)(3) (1982) provides: "It shall be an unfair labor practice for a labor organization or its agents — (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title." The § 8(b)(3) charge did not succeed. The clause was found to be protected by § 8(e), therefore it was not an unfair labor practice for the Union to refuse to bargain over it and to engage in strike activity to gain it once impasse was reached. Manganaro, N.L.R.B. JD-313-86 at 27.


(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section.

Id.


(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization
The ultimate issue of the case hinged on whether the anti-dual shop clause was a valid work preservation clause. If so, the construction industry proviso section 8(e) of the Act protected it from being an unfair labor practice violating section 8(b)(4)(i)(ii)(A).\(^4\) The Administrative Law Judge used four lines of reasoning to reach the conclusion that the clause, though an anti-dual shop clause, was a valid work preservation clause and thus protected by section 8(e).\(^4\)

First, he considered the clause in light of four cases cited by the parties that "developed certain principles which provide a framework within which the question may be resolved."\(^1\) In the first of these cases, *NLRB v. Local 217, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (The Carvel Co.)*,\(^4\) the NLRB examined a clause similar to the one in *Manganaro*. The union was charged with a violation of section 8(e) for entering into a collective bargaining agreement which contained the following clause:

> The employer agrees that no journeyman or apprentice who is a member of Local 217 . . . will be assigned to work or expected to work or required to work, on any job or project on which a worker or person, is performing any work within the jurisdiction of Local No. 217, if said worker or person is performing such work for wages, or hours or under any conditions of employment, which are different from those established by this Agreement.

Although holding that the clause was secondary in nature, and thus within the general proscription of section 8(e), the NLRB found that the clause was *generally* protected by the construction industry proviso.\(^4\) How-

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1. Id.
3. The A.L.J. first considered two threshold issues: 1) whether the clause purported to deal with the relationship between the signatory employer and any other "employer" or "person" under the NLRA and 2) whether the clause was an agreement to cease doing business with others under section 8(e). He answered both questions affirmatively and thus found a prima facie case against the union existed. He then turned to the inquiry of whether the clause, although within the proscription of § 8(e), could be excepted from it. *Manganaro*, N.L.R.B. JD-313-86 at 15-17.
4. Id. at 17.
7. General Counsel's argument in *Carvel* that the clause did not merit protection because it did not follow the statutory language and refer specifically to the "con-
ever, the Board also held that the clause was unprotected by the construction industry proviso in that it “incorporated into the contract self-enforcement terms which permitted employees to engage in work stoppages in reliance upon the clause.” 48 The A.L.J. in Manganaro concluded that the only “pertinent” difference between the Carvel clause and the clause in the present case was that “the Carvel clause was limited in its applicability to jobsites where the signatory employer's employees were or might be engaged at work, whereas the present clause is not so limited.” 49 He concluded the comparison by stating:

In Carvel, the Board carefully explained that the construction industry proviso is not limited to situations involving the contracting of work to or from the signatory employer. Rather, as demonstrated by Carvel, the protection afforded by the proviso extends to the contracting or subcontracting of jobsite work among firms which may not even be related to the signatory employer. The instant clause is directly addressed to the contracting or subcontracting of jobsite work, in that it is designed to restrict ‘doublebreasting’ i.e. the contracting or subcontracting of ‘on-site construction work’ on a nonunion basis by related firms which also contract or subcontract on a union basis. 50

In the second case, International Union of Operating Engineers Local 542 (York County Bridge), 51 the NLRB held the following “dual company” clause to be secondary in nature and hence beyond the protection of the construction industry proviso:

Section 11-Non-Union Equipment:

(a) No operator shall be required to operate equipment belonging to a contractor or supplier with whom this Local Union is not in signed relations provided Union equipment is available in the locality. No party to this agreement shall rent or supply equipment unmanned to anyone doing construction work covered by this agreement who is not in signed relations with this Union.

(b) No employee represented by this Union on construction work shall be required to operate equipment of or for any Employer who has any interest in a firm or company doing construction work within the jurisdiction of this

contracting out” or “subcontracting” of work was rejected by the NLRB as sacrificing “substance to form.” In addition, the failure of the clause to be limited in applicability to work for which the employer holds a contract or subcontract was not fatal to it. “The Board concluded that ‘consequently... the failure of [the clause] to refer specifically to ‘contracting out’ or ‘subcontracting’ and the fact that it may affect persons and employers with whom [the signatory subcontractor] has no contractual relationship does not bar application of the proviso here.'” 48 Id. at 17-18 (quoting Carvel, 152 N.L.R.B. at 1677).

48. Id. at 18 (the Court of Appeals in Carvel did not agree with the analysis that the clause incorporated self-help provisions and enforced the Board's order as to the prohibited strike conduct only).

49. Manganaro, N.L.R.B. JD-313-86 at 19.

50. Id.

Union and which is not in signed relations with this Union.\textsuperscript{52} 

Thus, the threat by the Union to engage in a work stoppage if the employer did not sign a multi-employer contract that contained the clause was an unfair labor practice under section 8(b)(4)(ii)(A). Addressing \textit{York County Bridge}, the A.L.J. in \textit{Manganaro} stated:

In sum, the Board held that the clauses were not protected by the proviso because they restricted the signatory employer from performing work at job-sites where nonunion labor was not present. The Board also found that Local 542 violated Section 8(b)(3) of the Act. However, the Board did not find that the clauses were unlawful or unprotected by the proviso for this reason. Rather the Board’s finding was based on two other grounds. First, the finding was based on Local 542’s insistence that it would not permit York to sign the contract unless York agreed to take steps to bring Wagman, its parent company, under the contract. Indeed York itself asked to sign the contract. The Board concluded that Local 542 thereby conditioned negotiations on enlargement of the bargaining unit, a nonmandatory subject of bargaining. Second, the Board held that Local 542 further violated Section 8(b)(3) by holding the negotiations hostage to another nonmandatory subject of bargaining, namely, its demand for contract provisions banned by Section 8(e). On review, the Court of Appeals affirmed the Board’s decision.\textsuperscript{53}

If the A.L.J. ended his case analysis with \textit{York County Bridge}, he would not have approved the clause in \textit{Manganaro}.\textsuperscript{54} He continued, however, with two cases.\textsuperscript{55} In \textit{Connell Construction Co. v. Plumbers & Steamfitters Local 100},\textsuperscript{56} the Supreme Court ruled that the section 8(e) proviso “‘extends only to agreements in the context of collective-bargaining relationships,’ and ‘possibly to common-situs relationships on particular jobsites as well.’”\textsuperscript{57} However, the Court questioned, albeit by implication, the latter limitation,\textsuperscript{58} and later the \textit{Connell} decision was narrowed in scope “to the issue there presented, i.e. the validity of hot cargo agreements obtained outside of the context of a collective-

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{52} \textit{Manganaro}, N.L.R.B. JD-313-86 at 20.
  \item \textsuperscript{53} \textit{Id.} at 20-21.
  \item \textsuperscript{54} \textit{Id.} at 21.
  \item \textsuperscript{55} “\textit{York County Bridge} is no longer viable law . . . .” \textit{Id.} at 22.
  \item \textsuperscript{56} 421 U.S. 616 (1975).
  \item \textsuperscript{57} \textit{Manganaro}, N.L.R.B. JD-313-86 at 21 (quoting \textit{Connell}, 421 U.S. at 627, 630).
  \item \textsuperscript{58} The A.L.J. stated: 
  \begin{itemize}
    \item Specifically, the Court cited its earlier decision in \textit{National Woodwork}, for the proposition that the proviso was ‘a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there,’ but observed that ‘other courts have suggested that it serves an even narrower function . . . to alleviate the frictions that may arise when union men work alongside nonunion men on the same construction site.’
  \end{itemize}
\end{itemize}
\end{footnotesize}
The last case which the A.L.J. considered was Carpenters Local 944, United Brotherhood of Carpenters & Joiners (Woelke & Romero Framing, Inc.) v. NLRB. The A.L.J. characterized the clause in Woelke & Romero as "far broader in its organizational implications than the present clause" in that the clause in Woelke & Romero "covered all jobsite work, [and] was designed to benefit not only the signatory union, but all building trades unions." In contrast, the clause in Manganaro was "expressly limited to bargaining unit type work, when performed by firms affiliated with the signatory employer through common management, control or majority ownership." For these reasons, the A.L.J. concluded that "on its face, the present clause reflects at least an arguable unit work preservation purpose which was plainly inconsistent with the broadly worded clauses involved in Carvel and Woelke & Romero [and therefore the clause is permissible]."

Next, the A.L.J. examined the legislative history of section 8(e) and the construction industry proviso to see how the clause in Manganaro fared against that background. Concluding that the issue here was "whether the proviso should be interpreted in a flexible or a rigid manner" and that "[t]he key legislative history indicates a flexible approach," he quoted Senator John F. Kennedy:

Senator John F. Kennedy, speaking on behalf of the Senate conferees, stated that the proviso applied not only to 'promises not to subcontract work on a construction site to a nonunion subcontractor,' i.e., conventional no-subcontracting clauses, which 'appear to be legal today,' but also to 'all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relationship between them.' 105 Cong. Rec. 17900 (1959), II Legis. Hist. 1433. Senator Kennedy could not have anticipated that more than two decades later, construction unions would regard double-breasting as a major problem in connec-

61. Manganaro, N.L.R.B. JD-313-86 at 23.
62. Id.
63. Id.
64. Id.
65. Id. (rejecting General Counsel's argument on behalf of the employers that the issue involved "whether the construction industry proviso should be interpreted in an 'expansive or dynamic' manner").
66. Id.
67. It was noted that "[s]ince the proviso was added to Section 8(e) at the Senate conferees' insistence, and since Senator Kennedy was chairman of the Senate conferees, his explanation of the clause is entitled to substantial weight." Id. (quoting Woelke & Romero 456 U.S. at 656 n.9).
tion with jobsite work. Nevertheless, his statement makes clear that the 8(e) proviso was not simply intended to apply to clauses in common use in 1959, whose legality had been determined, but to future attempts by unions to deal with industry problems, without limitation as to nature of the relationship between the contractors and subcontractors involved.68

Thus, the legislative history strengthened the argument in favor of the clause.

The third issue addressed is really the key inquiry regarding the status of the anti-dual shop clause: whether the clause is indeed a valid work preservation clause under the Act and whether it should apply to separate employers who are affiliated with the signatory employers. The A.L.J. answered yes to both questions, relying on Woelke & Romero,69 and Berman Enterprises, Inc. v. Local 333, United Marine Division, International Longshoremen's Association.70 In Berman, a clause described as "a maritime equivalent of a no-double breasting clause"71 was upheld as primary — a work preservation clause — without the benefit of the section 8(e) proviso.72 The court found that the objective of the clause was preservation of work which the employees traditionally performed and that the award of the questioned work was in the control of the contracting employer. Following this rationale, the A.L.J. in Mangonaro concluded:

[T]he Court [in Berman] held that 'the Union's conduct also is not vulnerable to Berman's 'right to control' argument because the Union did not coerce Association members to obtain work for the Union that the members had no right or power to assign.' It is evident that the Court interpreted the phrases 'affiliated company' and 'subsidiary company' as encompassing entities which had the right or power to assign unit work. Indeed the courts have long held, in sum, that separate employer status does not guarantee absolute protection under Section 8(b)(4)(A) and (B) of the Act, that union pressure directed against one employer, in furtherance of a dispute over the conditions of a separate employer of self-employed persons, may be lawful where the union can demonstrate a work preservation objection, coupled with actual or potential control of such conditions by the struck or signatory employer.73

Finally, the A.L.J. noted that separate employer status did not automatically protect the separate employer from union action. If the union's objective was work preservation, the clause in Mangonaro should be protected by the

68. Id. (emphasis added).
71. Mangonaro, N.L.R.B. JD-313-86 at 24. The clause provided: "Section 1. Application Agreement[.] This agreement applies only to all licensed and unlicensed Employees, employed on tugboats and self-propelled lighters owned or operated by the Employers, a subsidiary company, an affiliated company or a company division in the Port of New York and vicinity." Id. (emphasis original).
72. Because the case was decided as an antitrust action, the labor law questions were decided as incidental to the federal suit. See Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 626 (1975).
73. Mangonaro, N.L.R.B. JD-313-86 at 24-25 (citations omitted) (emphasis in original).
section 8(e) proviso because it dealt with related firms. Because the anti-doublebreasting clause was protected by the section 8(e) proviso, the union did not engage in an unfair labor practice under section 8(b)(4)(i)(ii)(A) by striking to obtain a contract containing the clause.

The recent case of Carpenters Local 944, United Brotherhood of Carpenters and Joiners v. NLRB (Woelke & Romero Framing, Inc.) also interpreted section 8(e). In Woelke, the Supreme Court consolidated two cases to address two issues. One issue was whether union signatory subcontracting clauses are protected by the construction industry proviso to section 8(e) when they are sought or negotiated in a collective bargaining relationship. The other issue was whether it is a violation of section 8(b)(4)(A) of the NLRA for a union to picket so as to obtain a lawful subcontracting clause.

In the first case, Woelke & Romero Framing, a framing contractor, and the United Brotherhood of Carpenters and Joiners of America (Carpenters) entered negotiations for a successor agreement to their collective bargaining agreement which was about to expire. The parties reached an impasse over the inclusion of a signatory subcontracting clause (similar to one in the expiring contract) which provided:

The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

Some work stoppages occurred when two Carpenters locals picketed in support of the clause's inclusion at Woelke's construction sites. Woelke filed charges.

74. The A.L.J. reasoned:
Plainly, if a union may under Section 8(b)(4)(B), in furtherance of a work preservation objective, engage in economic pressure against related or integrated firms which do not meet the single employer test, then it is difficult to see why the Section 8(e) proviso, which expressly permits secondary agreements in the construction industry, should not be construed as permitting agreements which apply to related firms.

Id. at 25. The A.L.J. rejected the argument that since legislation regarding the status of clauses similar to the one at issue was pending in Congress, the clause here was illegal. Id. at 25 n.20. See infra notes 172-82 and accompanying text for a discussion of the legislation proposed.

75. The Manganaro decision has subsequently been appealed to the NLRB. As of the time of publication, decision by the Board was pending. Questions regarding its outcome may be directed to National Labor Relations Board, Executive Secretary, 1717 Pennsylvania Avenue N.W., Washington, D.C. 20570. The case number needed for inquiry is 5-CC-1036.

76. 456 U.S. 645 (1982).
77. Id. at 647-48.
78. Id. at 649 n.1 (emphasis added).
with the Board, arguing that the clause violated section 8(e) and thus the Carpenters picketing in support of the clause violated section 8(b)(4)(i)(ii)(A). Although the Board agreed the clause was secondary in nature, it held the clause protected by the section 8(e) proviso. Quoting Connell Construction Co. v. Plumbers & Steamfitters Local 100, the Board concluded it was lawful to seek a signatory subcontracting clause "in the context of a collective bargaining relationship," and thus it was not unlawful to picket to obtain a subcontracting clause.

In the second case, the legality of a similar clause was challenged before the Board by an employer-member of a multi-employer bargaining association. The employer asserted that the inclusion of the clause in a collective bargaining agreement between the construction employers association and the Union violated section 8(e) of the NLRA. The Board, following the reasoning examined above, held the signatory subcontracting clause was protected by the construction industry proviso. However, the clause included a provision for self-help enforcement. The Board held that this provision was not protected by the proviso.

The Ninth Circuit Court of Appeals reversed the Board, reasoning:

[T]he proviso was designed solely to minimize friction between union and nonunion workers employed at the same jobsite. Thus, the proviso shelters subcontracting clauses 'only where a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subcontractor.'

However, on rehearing the case, en banc, the court of appeals enforced the Board's orders.

79. Section 8(b)(4)(i)(ii)(A) is set out supra note 40.
81. Woelke, 456 U.S. at 650.
82. Id.
83. The clause provided: "Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work." Id. at 650 n.3.
84. Oregon-Columbia Chapter of the Associated General Contractors of America, Inc.
85. Local 701 of the International Union of Operating Engineers, AFL-CIO.
86. "[T]he agreement authorized Engineers to take 'such action as they deem necessary,' including strikes and other economic self-help, to enforce awards obtained through the grievance and arbitration process on matters covered by the agreement." Woelke, 456 U.S. at 650.
87. Id. at 651.
88. Id. (quoting 609 F.2d 1341, 1347 (1979) (three-judge panel)). The panel did not reach the picketing issue since it found the subcontracting clauses illegal.
89. It held that "union signatory subcontracting clauses are protected so long as they are sought or negotiated in the context of a collective-bargaining relationship," and that "economic pressure may be used to obtain a subcontracting agreement, but . . .
The Supreme Court held the clauses at issue fell within the prohibition of section 8(e), leaving the issue whether they were protected by the construction industry proviso. In answer to the question, the Court first relied on *Connell Construction Co. v. Plumbers & Steamfitters Local 100* for the proposition that the proviso "must be interpreted in light of the statutory setting and the circumstances surrounding its enactment." It thus rejected the employers' argument that the section 8(e) proviso should only be applicable to protect clauses which cover construction sites where both union and nonunion workers are present. Instead, the Court adopted a broader interpretation based on the legislative history of section 8(e) and of the construction industry proviso. Noting that "petitioners [employers] are unable to point to any pre-1959 cases in which a subcontracting agreement was found to be unlawful because it was not limited to particular jobsites at which the signatory union workers were
employed," the Court concluded:

In short, Congress believed that broad subcontracting clauses similar to those at issue here were part of the pattern of collective bargaining prior to 1959, and that the Board and the courts had found them to be lawful. This perception was apparently accurate. Thus, endorsing the clauses at issue here is fully consistent with the legislative history of § 8(e) and the construction industry proviso.

The employers argued that allowing unions this strong a tool with which to work for their goals was "top-down" organizing and therefore impermissible. Asserting that top-down organizing has its limits, the Court stated:

It is also true that secondary subcontracting agreements like those at issue here create top-down organizing pressure. . . . The bare assertion that a particular subcontracting agreement encourages top-down organizing pressure does not resolve the issue we confront in these cases: how much top-down pressure did Congress intend to tolerate when it decided to exempt construction projects from § 8(e)? As we have already explained, we believe that Congress endorsed subcontracting agreements obtained in the context of a collective-bargaining relationship—and decided to accept whatever top-down pressure such clauses might entail. Congress concluded that the community of interests on the construction jobsite justified the top-down organizational consequences that might attend the protection of legitimate collective-bargaining objectives.

Whether unions may picket to obtain a signatory subcontracting clause such as those in issue remained an open question in Woelke. The Court concluded that the Ninth Circuit did not have jurisdiction to rule on the issue because none of the parties before the Board had raised the issue. Section 10(e) of the NLRA thus barred court review of the issue.

95. Woelke, 456 U.S. at 659.
96. Id. at 660.
97. See id. at 664-65. The limits listed included: (1) "A subcontractor cannot be subjected to unlimited picketing to force it into a union agreement without regard to the wishes of its employees"; (2) If a subcontractor's general contractor is subject to a subcontracting clause, the subcontractor may use the § 8(f) prehire agreement mechanism to remain eligible for work. If the subcontractor's employees choose to do so, they may file an election petition to challenge the union's majority status. Under certain circumstances, the subcontractor may repudiate the prehire agreement; (3) Under 29 U.S.C. § 158(a)(3), (b)(2), a union may not discriminate in employee referral from hiring halls on the basis of union membership; (4) The only absolute membership requirement in the presence of a union security clause is dues, i.e. a § 8(a)(3) member; (5) "[E]mployees working for firms with whom a construction union has a primary dispute are protected against secondary picketing designed to force them off their current job."
98. Woelke, 456 U.S. at 663.
99. Id. at 666 ("[W]e do not reach the question whether the picketing was lawful.").
100. Id.
101. 29 U.S.C. § 160(e) (1982) provides in pertinent part: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered
III. RECENT DEVELOPMENTS IN PREHIRE AGREEMENTS

The key issue regarding prehire agreements is just how much deference they will be given. Will a prehire agreement be treated like a collective bargaining agreement entered following a full-blown election with a showing of majority employee support, or as something less? The NLRB’s position on the issue is often dispositive. Traditionally, prehire agreements have been treated as something less. But the Board’s (and the courts’) position on the issue is changing as they consider it, and an appropriate theme for this movement could be: “An administrative agency is not disqualified from changing its mind.”

In NLRB v. Local Union No. 103, Bridge Workers (Higdon), the Supreme Court upheld the NLRB determination (reversing the court of appeals) that “it is an unfair labor practice within the meaning of § 158(b)(7)(C) for

by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”

102. The Supreme Court described the Board’s power:

The Board’s resolution of the conflicting claims in this case represents a defensible construction of the statute and is entitled to considerable deference. Courts may prefer a different application of the relevant sections, but “[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.” Of course, “recognition of the appropriate sphere of the administrative power . . . obviously cannot exclude all judicial review of the Board’s actions.” But we cannot say that the Board has here “[moved] into a new area of regulation which Congress [has] not committed to it.”

NLRB v. Local Union No. 103, Bridge Workers (Higdon), 434 U.S. 335, 350 (1978) (citations omitted).


104. Higdon, 434 U.S. at 351.


(b) It shall be an unfair labor practice for a labor organization or its agents—

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a
an uncertified union not representing a majority of the employees to engage in extended picketing in an effort to enforce a prehire agreement with the employer.\textsuperscript{107} The employer, Higdon Construction Co., was party to a prehire agreement with Local 103 of the Bridge Workers.\textsuperscript{108} During that time, Higdon Contracting Co. was formed to engage in nonunion construction work. Local 103 picketed two Higdon Contracting sites, one for more than 30 days, without filing for a representation election. In response to Higdon Contracting filing section 8(b)(7)(C) charges against Local 103, an A.L.J. found no violation by the union.\textsuperscript{109} While the Board disagreed, the court of appeals set aside the Board's determination. The Supreme Court outlined the Board's position as follows:

Under the Board's view of § 8(f), a prehire agreement does not entitle a minority union to be treated as the majority representative of the employees until and unless it attains majority support in the relevant unit. Until that time the prehire agreement is voidable and does not have the same stature as a collective-bargaining contract entered into with a union actually representing a majority of the employees and recognized as such by the employer. Accordingly, the Board holds, as it did here, that picketing by a minority union to enforce a prehire agreement that the employer refuses to honor, effectively has the object of attaining recognition as the bargaining representative with majority support among the employees, and is consequently violative of § 8(b)(7)(C).\textsuperscript{110}

\textsuperscript{107} Higdon, 434 U.S. at 338 (footnote omitted).
\textsuperscript{108} Higdon Construction agreed to "abide by the terms of the multi-employer understanding between Local 103 and the Tri-State Iron Workers Employers Association, Inc." Id. at 339. The agreement did not contain a union security clause.
\textsuperscript{109} Id. The A.L.J. found that the two employers "were legally indistinct for purposes of the proceedings" and that the prehire agreement was legally entered. Thus, "[t]he picketing was for purposes of obtaining compliance with an existing contract, rather than to obtain recognition or bargaining as an initial matter. Only the latter was a purpose forbidden by § 8(b)(7)."
\textsuperscript{110} Higdon, 434 U.S. at 341. In support of its position, the Board cited its opinion in R.J. Smith Constr. Co., 191 N.L.R.B. 693 (1971), \textit{enf. denied sub nom.}, Operating Engineers Local 150 v. NLRB, 480 F.2d 1186 (D.C. Cir. 1973), overruled by NLRB v. Local Union No. 103, Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335 (1978). The D.C. Circuit set aside the Board's determination in the current case, as it did R.J. Smith:
The Court concluded that "the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections." To do so, it looked to the general rule of section 8(b)(7)(C), the policy behind that rule, the construction industry proviso under section 8(f), and the limitations on the exception for the construction industry. Under section 8(b)(7)(C), it is an unfair labor practice for a union to picket to force an employer "to recognize or bargain with" the union. The policy behind this prohibition is "the generally prevailing statutory policy that a union should not purport to act as the collective bargaining agent for all unit employees, and may not be recognized as such, unless it is the voice of the majority of the employees in the unit." Section 8(f) provides an exception to this general rule for the construction industry, permitting contractors and unions to enter into prehire agreements. However, there are several limitations on this exception, including: 1) the union does not enjoy a presumption of majority status during the term of a prehire agreement, as it does during the existence of a collective bargaining agreement; 2) the employers, employees, or union may petition for a representation election during the term of a prehire agreement; 3) the employer may repudiate the prehire agreement and refuse to bargain with the union, absent a showing of majority support by the union.

The Court of Appeals ruled that the validity of a § 8(f) prehire contract carried with it the right to enforce that contract by picketing, and the right as well, when breach of the agreement occurs, to file and prevail on an unfair labor practice charge against the employer for failure to bargain. This elevation of a nonmajority union to the rights of majority status was acceptable, in the court's view, because of the second proviso to § 8(f), which denies the usual contract bar protection to prehire agreements and permits a representation election to be held at the instance of either party at any time during the life of the agreement.

Higdon, 434 U.S. at 340.

111. Higdon, 434 U.S. at 341.
112. Id. at 343 (citing Building & Constr. Trades Council (Sullivan Electric Co.), 146 N.L.R.B. 1086 (1964)).
113. Id. at 344 (citing NLRA § 7, 29 U.S.C. § 157 (1982) (employees have "the right to bargain collectively with representatives of their own choosing"); § 9(a) of the Act, 29 U.S.C. § 159(a) (bargaining representative must have been selected by a majority of the employees); § 8(a)(1)-(2) of the Act, 29 U.S.C. § 158(a)(1)-(2) (it is an unfair labor practice for an employer to interfere with employee selection of their representative); § 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A) (it is an unfair labor practice for a union to interfere with employee selection of their representative); Garment Workers v. NLRB, 366 U.S. 731, 737 (1961) ("There could be no clearer abridgement of § 7 of the Act. . . than to grant 'exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority.' This is true even though the employer and the union believe in good faith, but mistakenly, that the union has obtained majority support.").
114. See supra notes 22-25 and accompanying text for a brief discussion of prehire agreements.
Applying the above principles, the Court accepted the Board's view that:

[W]hen the union picketed to enforce its prehire agreement, Higdon could challenge the union's majority standing by filing a § 8(b)(7) charge and could prevail, as Higdon did here, because the union admittedly lacked majority credentials at the picketed projects. Absent these qualifications, the collective-bargaining relationship and the union's entitlement to act as the exclusive bargaining agent had never matured. Picketing to enforce the § 8(f) contract was the legal equivalent of picketing to require recognition as the exclusive agent, and § 8(b)(7)(C) was infringed when the union failed to request an election within 30 days.118

A second recent case of import to the interpretation of section 8(f) is Jim McNeff, Inc. v. Todd.117 In that case, the Supreme Court held that "monetary obligations that have accrued under a prehire contract . . . can be enforced, prior to the repudiation of such a contract, in a suit brought by a union against an employer under § 301118 . . . absent proof that the union represented a majority of the employees."119

The general contractor in this case was subject to a Master Labor Agreement120 which contained a signatory subcontracting clause121 and a union se-

action for the development of a full bargaining relationship." Id. at 702).

116. Higdon, 434 U.S. at 346. The Court cited the legislative history of § 8(b)(7) and § 8(f) as supportive of this view. Noting that both were added to further the goal of allowing employees a free choice of their bargaining representative, the Court quoted its decision in Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, (1975) that "[o]ne of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees." Id. at 632.

117. 461 U.S. 260 (1983), aff'g 677 F.2d 800 (9th Cir. 1982).
118. Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185 (1982). Section 301 of the LMRA provides in pertinent part:
(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

120. The agreement was between the International Union of Operating Engineers, Local No. 12, and the Southern California General Contractors Associations. Id. at 262.
121. Article IV, § D of the contract provided:
The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use), except to a person, firm or corporation, party to an appropriate, current labor agreement with the ap-
curity clause requiring even employees of subcontractors to be union members. Jim McNeff, Inc., a subcontractor on the site, became a signatory to the Master Labor Agreement and under the terms of the agreement was required to make contributions to employee benefit trust funds. McNeff did not make the contributions and, in fact, falsified the monthly reports to the funds regarding the contributions. When the trustees of the funds requested an audit, McNeff agreed but delayed the audit. The trustees brought suit under section 301 to “compel an accounting and payment of any contributions found to be due the trust funds.”

Noting the legislative history of section 8(f) the Supreme Court distinguished the present case from Higdon and concluded that the subcontractor had enjoyed the benefits of section 8(f), had made an unrepudiated promise to his employees, and thus “[h]aving had the music, he must pay the piper.”

In distinguishing this case from Higdon, the Court noted that:

There is a critical distinction between an employer's obligation under the Act to bargain with the representative of the majority of its employees and its duty to satisfy lawful contractual obligations that accrued after it enters a prehire contract. Only the former obligation was treated in Higdon.

... There is no sense in which respondents' contract action has a recognitional

propriate Union, or subordinate body signatory to this Agreement.

Id. n.1.

122. Article II, §§ D and E of the contract provided:

D. Employees employed by one or more of the Contractors for a period of eight (8) days continuously or accumulatively under the work jurisdiction of a particular Union as that term is defined herein shall be or become on the eighth (8th) day or eight (8) days after the effective date of this Agreement, whichever is later, members of such Union and shall remain members of such Union as a condition of continued employment. Membership in such Union shall be available upon terms and qualifications not more burdensome than those applicable at such times to other applicants for membership to such Union.

E. The Contractor shall discharge any employee pursuant to the foregoing section upon written notice from the Union of such employee's non-payment of initiation fees or dues.

123. McNeff, 461 U.S. at 263 n.2.

124. McNeff, 461 U.S. at 264 (“Each form was submitted by petitioner [McNeff] with the false notation that 'no members of this craft were employed during this month.' ”).


126. See infra notes 146-58 and accompanying text.

127. NLRB v. Local Union No. 103, Bridge Workers (Higdon), 434 U.S. 335 (1978). See supra notes 102-13 and accompanying text.

128. McNeff, 461 U.S. at 271 (“However limited the binding effect of a prehire agreement may be, it strains both logic and equity to argue that a party to such an agreement can reap its benefits and then avoid paying the bargained-for consideration.”).
purpose like that forbidden in *Higdon*.

Neither does respondents' § 301 action trench on the voluntary and voidable characteristics of a § 8(f) prehire agreement.\textsuperscript{129}

In the most startling\textsuperscript{130} recent case, *John Deklewa & Sons*,\textsuperscript{131} the NLRB made a 180 degree turn in its treatment of prehire agreements. The ultimate impact of the decision is the prevention of unilateral repudiation of prehire agreements by either party before their expiration.\textsuperscript{132}

John Deklewa & Sons, a builder of commercial and industrial buildings, executed a prehire agreement with the union\textsuperscript{133} in 1960.\textsuperscript{134} In the agreement, Deklewa agreed as a separate entity to adhere to the collective bargaining agreement between the union and a multi-employer bargaining association.\textsuperscript{135} Deklewa remained a separate entity and entered successive agreements with the union until it joined the multi-employer association in 1980. It subsequently executed the 1982-85 agreement that became the focus of the case. Deklewa's commitment was short-lived. In 1983, it resigned from the multi-employer association and "notified the Union that it was repudiating the contract and withdrawing recognition."\textsuperscript{136} The union objected to the repudiation and filed a grievance which Deklewa maintained was not arbitrable because of its repudiation of the agreement and withdrawal of recognition.\textsuperscript{137} The union filed charges with the Board, alleging violations of sections 8(a)(5)\textsuperscript{138} and 8(a)(1)\textsuperscript{139} of the Act.\textsuperscript{140}

The Board considered the opinions of the parties and several interested persons to determine "whether the Board should continue to adhere, in whole or in part, to the current body of law interpreting and applying Section 8(f)."\textsuperscript{141} The Board noted several reasons for answering the question in the

\textsuperscript{129} *Id.* at 267, 269-70.

\textsuperscript{130} C. Murphy & P. Miscimarra, Pre-hire Agreements and the NLRB's *Deklewa* Decision: A Supplemental Evaluation of Collective Bargaining Alternatives to H.R. 281 1-2 (Mar. 5, 1987) (unpublished memorandum prepared for The Associated General Contractors of America). "Deklewa can be fairly characterized as the single most important development in construction industry labor law since the 1959 amendments to the National Labor Relations Act . . . ." *Id.*


\textsuperscript{132} *Id.* 124 L.R.R.M. (BNA) at 1194-95.

\textsuperscript{133} The International Association of Bridge, Structural & Ornamental Iron Workers, Local 3.

\textsuperscript{134} Deklewa, 282 N.L.R.B. No. 184, 124 L.R.R.M. (BNA) at 1186.

\textsuperscript{135} The Iron Workers Employer Association, of Western Pennsylvania, Inc. *Id.*

\textsuperscript{136} *Id.*

\textsuperscript{137} *Id.*

\textsuperscript{138} 29 U.S.C. § 158(a)(5) (1982). This section provides: "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." *Id.*


\textsuperscript{140} *Deklewa*, 282 N.L.R.B. No. 184, 124 L.R.R.M. (BNA) at 1187.

\textsuperscript{141} *Id.* Besides the General Counsel, those filing briefs included the Associated
negative. Generally, the conversion doctrine, as promulgated in *R.J. Smith Construction Co.* and *Ruttmann Construction Co.*, was believed to contain several shortcomings that "permeate[d] the entire existing 8(f) analytic scheme." 448

The first problem with the section 8(f) law was that it did "not fully square with either Section 8(f)'s legislative history or that section's actual wording." The Board examined the legislative history and found that the 1959 amendments to the NLRA (which contained section 8(f)) were passed because of congressional response to "serious problems" created by the NLRB when it abandoned "its pre-1948 practice under the Wagner Act by asserting jurisdiction over construction industry employers." The assertion of NLRB jurisdiction interfered with established construction industry practices, including the use of the prehire agreement, and sought to impose standards developed in an entirely different industrial context on this unique industry. 448 The

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Builders and Contractors (ABC), the Council on Labor Law Equity, the National Right to Work Legal Defense Foundation, the Building and Construction Trades Department of the AFL-CIO, and the Teamsters. *Id.*

142. The conversion doctrine involved the concept that once a section 8(f) agreement was entered, it could "convert" to section 9(a) status. Three stages existed. In the preconversion stage, the agreement was unprotected. It did not confer a presumption of majority status, could be repudiated by either party at any time, could not be enforced in § 8(a)(5) or § 8(b)(3) proceedings, and did not raise an election bar. The employer could challenge the union's status simply by repudiating the agreement and litigating it when § 8(a)(5) charges were filed. In the conversion stage, the § 8(f) agreement changed to a § 9(a) agreement. This could occur immediately upon the adoption of the § 8(f) agreement or at any time thereafter (prior to repudiation) without notice or the awareness of either party. Several things have been held to constitute conversion, including an actual attainment of majority support by the union, exclusive hiring hall referrals, and enforcement of a union security clause. The conversion was not necessarily tested at repudiation, but could have occurred at an earlier "relevant period" during the agreement. The appropriate unit for the conversion was the employer's entire workforce if they were "permanent and stable" or the workforce on a particular project if they were "project by project." If the employer joined a multi-employer association, the appropriate unit could have become the entire workforce of the association, depending on the result of a majority support inquiry. This was called the "merger doctrine." In the post conversion stage, the employer could no longer repudiate the agreement or withdraw union recognition; "an irrebuttable presumption of majority status" arose and lasted until the agreement expired. Additionally, a rebuttable presumption arose when the agreement expired that the union had majority support. The converted agreement served as an election bar for its duration. *Deklewa*, 282 N.L.R.B. No. 184, 124 L.R.R.M. (BNA) at 1188-89 (citations omitted).


144. 191 N.L.R.B. 701 (1971).


146. *Id.*, 124 L.R.R.M. (BNA) at 1189.

147. *Id.*, 124 L.R.R.M. (BNA) at 1189-90.

148. *Id.* Congress recognized two reasons for the use of prehire agreements: 1) the necessity for a construction employer to know his labor costs before bidding on projects and 2) the need for an available pool of labor, particularly because of the
Board, after making this finding, asserted that the text of section 8(f), though designed to deal with the particular characteristics of the construction industry, had been considered only briefly. In fact, the Board found that "this law now often operates in a manner that contradicts the apparent congressional intent." It found "a critical distortion of the significance of the second proviso to Section 8(f) and its role in preserving employee free choice." Although the proviso permits inquiry into the majority status of a union signatory to a prehire agreement, the Board noted that:

There is . . . a significant distinction between permitting such an inquiry through the Board's representational processes — the mechanism expressly mentioned in the proviso — and permitting unilateral anticipatory repudiation of an inquiry in unfair labor practice proceedings. Because such a right of unilateral repudiation is so antithetical to traditional principles of collective-bargaining under the Act, it seems likely that Congress would have expressly stated such a right if it intended to create one.

Hence, the Board adopted the view that the second proviso to section 8(f) is merely an "escape hatch" for employees to utilize through the decertification process if they do not want representation from a union selected prior to their employment. They may also select another representative through the election process.

The Board's second problem with section 8(f) law was that it did not further the two overarching objectives of the NLRA. The Board felt that em-

sporadic employment patterns necessary in the industry. Congress also recognized the difficulty of holding a representational election in the industry because of the seasonal nature of the work and its short duration. Id., 124 L.R.R.M. (BNA) at 1190.

149. Id. The Board explained the decision in R.J. Smith Constr. Co., 191 N.L.R.B. 693 (1971), enf. denied sub nom., Operating Engineers Local 150 v. NLRB, 480 F.2d 1186 (D.C. Cir. 1973), as follows:

[T]he Board merely recited the aforementioned congressional language recognizing the contemporary contractual practice in the construction industry and the reasons for that practice. Then, after quoting Section 8(f) in full, the Board summarily identified the second proviso as the lynchpin to interpreting the entire section and concluded that the proviso must have meant that Congress intended to permit testing an 8(f) signatory union's majority status during a contract term either by election or by litigation of refusal to bargain charges.

Id. In reference to R.J. Smith and Ruttman Constr. Co., 191 N.L.R.B. 701 (1971), the Board continued, "[I]t simply does not necessarily follow that because an 8(f) agreement can only be entered into voluntarily either party to the agreement is unfettered in its right 'voluntarily' to repudiate the agreement." Deklewa, 282 N.L.R.B. No. 184, 124 L.R.R.M. (BNA) at 1191.

150. Id., 124 L.R.R.M. (BNA) at 1191.
151. Id.
152. Id.
153. Id. The Board also abandoned the conversion doctrine, the workforce distinctions of "permanent and stable" and "project by project," and the merger doctrine as either contrary to legislative intent or at least insubstantiable from legislative history. Id.

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ployee free choice and labor relations stability were not aided by existing law. Thus the Board decided that its own argument that the *R.J. Smith* decision was based on employee free choice was "simply wrong." In addition, the Board concluded that *R.J. Smith* and the conversion doctrine did not further labor relations stability but instead fostered uncertainty and disruption.

The third problem with section 8(f) law was a practical one. Because conversion could occur at any "relevant" time during the course of the prehire agreement, the outcome of subsequent litigation on the conversion issue hinged on looking back upon the employment relationship. The Board noted that evidence gathered through this process, especially because of the sporadic nature of the industry, was "often incomplete, contradictory, or unavailable."

The Board rejected two alternatives to the conversion doctrine as extreme and inappropriate. It then adopted four new basic principles that "provide an overall framework for the interpretation and application of Section 8(f) which will enable parties to 8(f) agreements and employees to know their respective rights, privileges, and obligations at all stages in their relationship."

The four basic principles are:

1. A collective bargaining agreement permitted by Section 8(f) shall be

154. *Id.*, 124 L.R.R.M. (BNA) at 1192.

155. *Id.* The Board found that both the employer ability to repudiate before conversion and the union presumption of majority status after conversion impaired employee free choice.

156. *Id.* (unilateral repudiations cause disruption and do not emphasize stability). The Board commented that under the conversion doctrine, "neither the parties to the agreement nor the employees working under it can know with any degree of certainty what their respective rights and obligations are at any given time." *Id.*, 124 L.R.R.M. (BNA) at 1193.

157. *Id.*

158. *Id.* The Board also questioned whether the evidence gathered merited application of 9(a) status.

159. The Board noted:

- The first alternative would provide that an 8(f) representative can never possess or acquire any majoritarian rights absent Board certification or voluntary recognition pursuant to Section 9(a). This view would retain the *R.J. Smith* holding that an 8(f) agreement is unenforceable but would reject the conversion doctrine by providing for the achievement of 9(a) status only through traditional 9(a) processes.

- The second alternative would provide that Section 8(f) represents an "alternative means" for a construction industry employer and union to establish the functional and legal equivalent of certification or 9(a) recognition subject only to Section 8(f)'s second proviso that the agreement cannot act as a bar to an election petition. The signatory union would enjoy immediate and complete 9(a) status (subject to the proviso) including a rebuttable presumption of majority status upon the contract's expiration.


161. *Id.*, 124 L.R.R.M. (BNA) at 1194.
enforceable through Sections 8(a)(5) and 8(b)(3).

2. Such agreement will not act as a contract bar to a representation petition.

3. In processing such representation petitions the unit normally will be the single employer's employees covered by the contract, rather than any multi-employer unit.

4. Upon the expiration of that Section 8(f) agreement, the signatory union will enjoy no presumption of majority status, and either party may repudiate the Section 8(f) bargaining relationship. 162

Finally, the Board determined that the above principles should be applied retroactively, "to all pending cases in whatever stage." 163 Although the Board acknowledged the new principles are "a sharp departure from past precedent," 164 retroactive application was justified because the old rules were so confusing. 165

The total impact of Deklewa remains to be seen. The NLRB has been applying and expanding upon its principles. 166 Additionally, the Third Circuit affirmed Deklewa. 167 Other circuit courts, however, have no obligation to fol-


163. Deklewa, 282 N.L.R.B. No. 184, 124 L.R.R.M. (BNA) at 1198 (quoting Deluxe Metal Furniture Co., 121 N.L.R.B. 995, 1006-07 (1958)).

164. Id.

165. Id.


Since Deklewa, the Board has decided two cases which had been open questions following the decision. In Yellowstone Plumbing, Inc., 286 N.L.R.B. No. 93 (1987), the Board determined that whether the employer's withdrawal at the expiration of a prehire agreement is tainted by bad faith is irrelevant under Deklewa principles. In W.B. Skinner, Inc., 283 N.L.R.B. No. 149 (1987) the Board, applying the Deklewa principle that a § 8(f) prehire agreement has § 9 status for its duration, held that a construction employer unlawfully refused to allow an audit of its books at the union's request to determine whether fringe benefit contributions were being made in compliance with the agreement's terms.

low the Deklewa decision. In fact, even the Ninth Circuit Court of Appeals declined to do so; although full panel review of the decision is pending to determine if the circuit will follow Deklewa. Additionally, a Seventh Circuit court has refused retroactive application of Deklewa in a case before it, despite the Board's expressed intent the principles be so applied. The Eleventh Circuit has also declined to abandon the doctrines surrounding prehire agreements and their repudiation which Deklewa seeks to extinguish. Thus, it is certain the courts have not seen the last of Deklewa.

IV. PROPOSED LEGISLATION

Recently, legislative attention has focused on the construction industry. Construction interests have tried to amend the NLRA so as to gain more favorable treatment of construction unions.

168. Mesa Verde Constr. Co. v. Northern California Dist. Council of Laborers, 820 F.2d 1006 (9th Cir.), opinion withdrawn,reh'g granted en banc, 832 F.2d 1164 (9th Cir. 1987). Cf. Northern District Council of Laborers v. Strauss Constr. Co., 672 F. Supp. 430 (N.D. Cal. 1987) (prehire agreement's repudiation by the employer was allowed where there was actual notice to the union and not more than one employee in the bargaining unit).

169. Construction Indus. Welfare Fund v. Jones, 672 F. Supp. 291 (N.D. Ill. 1987) (Employer who had repudiated a prehire agreement prior to the union's attainment of majority status should not be audited or responsible for employee benefit fund contributions which would have accrued from the date of repudiation to the expiration of the prehire agreement. The court based its decision on the employer's reliance on pre-existing law and its belief that Deklewa's policies would not be advanced by their application to this case.).


171. Plumbers Local Union 72 v. John Payne Co., 850 F.2d 1535 (11th Cir. 1988) (outlining pre-Deklewa standards of judicial enforcement of § 8(f) agreements, the Court held in effect, that Deklewa did not change the § 301 jurisdiction of the federal district courts and remanded to the district court for decision on pre-Deklewa grounds).

172. For discussion of the proposed legislation from the employer perspective, see generally H. Northrup, supra note 5, at 93-108. For summary and analysis of the legislation, see V. Treacy, Construction Industry Labor Legislation: Summary and Analysis of H.R. 281, 99th Congress (July 1, 1986) (available from U.S. Library of Congress, Congressional Research Service); G. McCullion, Construction Industry Collective Bargaining: Prehire Agreements and Double Breasting (updated Oct. 14, 1987) (available from U.S. Library of Congress, Congressional Research Service). To trace the progress of the legislation to date in the 100th Congress, see generally 45 Cong. Q. Weekly (1987). The bill as it stands now will either live or die in the current (100th) Congress by the end of 1988. It is scheduled to go to the full Senate “early” in 1988. Given that is has passed the House in both of the last two Congresses, even if it dies in 1988, it will be interesting to see what happens to it in the 101st Congress with a new administration.

173. During the 99th Congress, the House of Representatives passed H.R. 281, the “Construction Industry Labor Law Amendments of 1986.” H.R. 281, 99th Cong., 2d Sess. (1986). However, the bill received strong opposition in the Senate and it never came to a vote. H. Northrup, supra note 5, at 94. An identical bill was reintroduced
The legislation seeks to change the NLRA and its interpretation in three

in the 100th Congress. The text of the bill is set out *infra*. This bill was passed by the House on June 17, 1987, but only by a 30-vote margin. 45 CONG. Q. WEEKLY 1333 (1987). This was 26 votes less than H.R. 281 garnered in the 99th Congress. *Id.* The legislation has subsequently gone to the Senate. It was approved by the Senate Labor and Human Resources Committee on December 9, 1987 and is to be reported to the full Senate. 45 CONG. Q. WEEKLY 3046 (1987). No action has yet been taken by the full Senate, although the bill was to be taken up in early 1988. *Id.* Also introduced in the 100th Congress was an amended version of H.R. 281 in response to "legitimate concern about ambiguities in the original bill." H. NORTHRUP, *supra* note 5, at 103 (quoting statement of Rep. Clay, Mar. 31, 1987). *See id.* at app. C for the text of the suggested amendment. It clarifies some of the language in H.R. 281. However, it is substantively the same and has not been adopted.


A BILL
To amend the National Labor Relations Act to increase the stability of collective bargaining in the building and construction industry.

_Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,_ That this Act may be referred to as the "Construction Industry Labor Law Amendments of 1985".

SEC. 2. (a) Section 2(2) of the National Labor Relations Act (29 U.S.C. 152(2)) is amended by adding at the end thereof the following new sentence: "In the construction industry, any two or more business entities performing or otherwise conducting or supervising the same or similar work, in the same or in different geographical areas, and having, directly or indirectly—

"(a) substantial common ownership;

"(b) common management; or

"(c) common control;

shall be deemed a single employer.".

(b) Section 8(d) of such Act (29 U.S.C. 158(d)) is amended by adding at the end thereof the following new sentence: "Whenever the collective bargaining involves employees of a business entity comprising part of a single employer in the construction industry, as defined in section 2(2) of this Act, the duty to bargain collectively, for the purposes of this section, shall include the duty to apply the terms of a collective bargaining agreement between such business entity and a labor organization to all other business entities comprising the single employer within the geographical area covered by the agreement.".

(c) Section 8(f) of such Act (29 U.S.C. 158(f)) is amended—

(1) by striking out "geographical area:" in clause (4) and inserting in lieu thereof the following: "geographic area. An agreement lawfully made pursuant to this subsection shall impose the same obligations under this Act as an agreement made with a majority representative pursuant to section 9(a);";

and

(2) by inserting before the period at the end of such section and the following new proviso: ": _Provided further_, That any agreement lawfully made pursuant to this subsection may be repudiated only after the Board certifies the results of an election conducted pursuant to section 9(e), in which a majority of employees in an appropriate bargaining unit selects a bargaining representative other than the labor organization with which such agreement was made or chooses not to be represented by a labor organization".

SEC. 3. (a) Except as provided in subsection (b), the amendments made
major respects. First, it would amend the definition of "employer" under the NLRA. This change would virtually wipe out doublebreasting, whether legitimate or sham. It would do so by making the factors traditionally weighed by the Board to determine whether an employer was legitimately doublebreasted (i.e. the interrelation of operations, common management, centralized control of labor relations, common ownership) applicable in the disjunctive. Any one of the factors would make a construction employer the employer for any number of his operations under the NLRA.

The significance of this change becomes apparent once the second proposed amendment is examined. It would amend section 8(d) of the Act to make the employer's bargaining obligation extend to all entities found to be within "single employer" status under the above definition. While the original proposal did not clearly limit the geographic impact of the clause, substitute proposals have. This would automatically extend an agreement negotiated for one group of employees to other groups of employees, without regard to the needs of subsequent groups or their working conditions.

The third major effect of the proposed NLRA amendments would be to give prehire agreements the same effect as a collective bargaining agreement negotiated after a section 9 election. This result was expressly rejected by the

by section 2 shall take effect upon the date of the enactment of this Act.
(b) The requirement imposed by the amendment made by section 2(b) shall take effect—
(1) one year after such date of enactment with respect to any building and construction project for which the contract was entered into by an employer before the date of the enactment of this Act; and
(2) on the date on which the contract is entered into with respect to any new building or construction project for which the contract is entered into by an employer on or after the date of the enactment of this Act.

174. Compare infra note 175 with 29 U.S.C. § 152(2) (1982) ("The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.").

175. See supra note 21.
176. 29 U.S.C. § 158(d) (1982) provides in pertinent part:
(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

Id.

177. See supra note 175.
178. Id.
179. See H. Northrup, supra note 5, at 98-100.
NLRB in *John Deklewa & Sons*.\(^{180}\)

Supporters of the legislation argue it is necessary to prevent construction employers from using the doctrine of doublebreasting to funnel work from union shops to nonunion shops, and to ensure prehire agreements have protection upon their expiration.\(^{181}\) Opponents of the legislation argue it unreasonably broadens single employer status, and may thus permit common-situs picketing. They also argue it imposes unionization by sacrificing employee free choice, and extinguishes a doctrine (doublebreasting) that is effectively striking a balance between the unions' right to seek to represent and the employers' right to diversify.\(^{182}\)

V. CONCLUSION

The Board, the courts, and the legislature have recently focused their attention on this area of labor law where exceptions swallow rules. Thus, in dealing with the issues presented, caution and careful balancing should be exercised in determining the appropriate changes. As Justice Holmes put it, in describing the overarching principles of labor relations:

>[O]ne of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.\(^{183}\)

This “battle” is particularly poignant in the construction industry today. Recent trends away from unionization,\(^ {184}\) accomplished largely by the use of doublebreasting and the (questionably extinct) opportunity to repudiate prehire agreements, have awakened construction interests to push for more favorable legal treatment. Decisions such as that in *Deklewa*, forcing construction employers to honor prehire agreements for their duration, strike a logical

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180. Compare supra note 175 with supra note 159 and accompanying text.


184. See supra note 27 and accompanying text.
balance between the interests of all concerned. After all, both sides voluntarily entered the prehire agreement and fairness dictates it should have some protection. However, an important aspect of the Deklewa decision is the escape hatch for employees; the opportunity to decertify. Equally important is the "escape" for employers available at the expiration of the prehire.\textsuperscript{185} A voluntarily entered prehire agreement is simply not a section 9 contract. The effect of the proposed legislation would be to remove this distinction. The legislation would also effectively wipe out doublebreasting, a doctrine developed to protect both the free choice of American workers and the economic liberty of employers. Both legislative effects would skew the "eternal conflict" heavily in favor of construction unions — when they already enjoy exceptions to otherwise applicable rules.

\textbf{Lynne C. Lamy}

\textsuperscript{185} The balance established by this escape may be chiseled away by a so-called "bargaining dispute" exception to Deklewa wherein if an employer and union are renegotiating a § 8(f) agreement the union may be permitted to use economic pressure otherwise permitted by the Act. \textit{Quarterly Report of the General Counsel}, [4 Labor Relations] Lab. L. Rep. (CCH) ¶ 9351 at 19,227 (Apr. 29, 1988); Address by Charles E. Murphy, Esq., District of Columbia Bar - Labor Relations Section (May 20, 1988).