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## Section 8(F) Prehire Agreements and the Exception to Majority Representation: Are Construction Workers Getting the Shaft?

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## SECTION 8(F) PREHIRE AGREEMENTS AND THE EXCEPTION TO MAJORITY REPRESENTATION: ARE CONSTRUCTION WORKERS GETTING THE SHAFT?

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Congress has neglected the federal labor rights of construction workers for half a century.<sup>1</sup> Back in 1959, Congress addressed the needs of construction workers and attempted to ensure that those workers, who were hired by construction employers for erratic and short periods of time, retained the right to organize in unions.<sup>2</sup> To that end, Congress added section 8(f) to the National Labor Relations Act ("NLRA"),<sup>3</sup> authorizing construction employers and unions to enter voluntarily into prehire collective bargaining agreements covering construction workers.<sup>4</sup> Additionally, Congress included a proviso permitting

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1. Construction workers include those employees who work in the four sectors of the construction industry: residential, commercial, industrial, and highway and heavy. *See* Steven G. Allen, *Developments in Collective Bargaining in Construction in the 1980s and 1990s*, in CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 411, 412 (Paula B. Voos ed., 1994).

2. *See generally* Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (stating the overall purpose of the National Labor Relations Act).

3. 29 U.S.C. § 158(f) (2006). Section 8(f) provides:

It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established . . . prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization . . . or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualification for employment . . . Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

*Id.*

4. *Id.*

employers to require, as a condition of employment, that their employees join the 8(f) union within seven days from the start of work provided that no state right-to-work laws were violated.<sup>5</sup> To date, section 8(f) is Congress' only exception to its requirement that the union obtain the support of a majority of employees before bargaining with an employer.<sup>6</sup> Section 8(f) has neither been modified nor critically reviewed by Congress since its enactment in 1959.

Congress added section 8(f) when the 1950s construction industry was characterized by local project agreements and bargaining agreements that typically required that construction workers be hired directly from a union's local hiring hall.<sup>8</sup> To the extent that this practice remains prevalent<sup>7</sup> in the industry, section 8(f) continues to provide a vital exception to time-consuming union elections and permits employees to be represented by their construction unions while working on individual projects.

However, over the course of this half-century, the construction industry has changed. The ad-hoc, disorganized framework initially envisioned by the 1959 Congress no longer reflects reality.<sup>8</sup> Developments, including the use of national and area-wide agreements over extensive periods of time, have meant that—at least potentially—construction employers maintain a stable or diverse work force not necessarily tied to a local union hiring hall.<sup>9</sup> Similarly, the National Labor Relations Board's ("Board") interpretations of section

5. *Id.*; accord 29 U.S.C. § 164(b) (2006) (allowing states to retain their power to outlaw the various forms of union security despite differing federal policies).

6. See JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 1036 (5th ed. 2006) ("Under conventional doctrine such an employer would be guilty of an unfair labor practice by extending recognition to a minority union, and any agreement executed under such circumstances would be invalid even if bargained for under the erroneous but good faith belief that the employer was dealing with a majority union.").

7. See David J. Lowe, *Prehire Agreements in the Construction Industry: Empty Promises or Enforceable Rights?*, 81 COLUM. L. REV. 1702, 1703 (1981).

8. See S. REP. 86-187, at 28 (1959) ("A substantial majority of the skilled employees in [the construction] industry constitute a pool of . . . help centered about their appropriate craft union."); 2 HIGGINS, *supra* note 6, at 2157 n.315 (noting the Board's dilemma in finding hiring hall referral systems lawful in the 1950s); Philip Ross, *Origin of the Hiring Hall in Construction*, 11 INDUS. REL. 366, 367 (1972) ("[C]onstruction hiring halls [were] . . . largely adopted in the period immediately preceding and following the 1959 Landrum-Griffin Act."); see also *infra* pp. 13-14 (noting consideration by the 1950s Congress of construction industry's use of hiring halls). The hiring hall is a prehire employee referral system. See ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING* 643 (1976); see also *infra* Part III.

9. See generally Daniel Quinn Mills, *Labor Relations and Collective Bargaining*, in *THE CONSTRUCTION INDUSTRY: BALANCE WHEEL OF THE ECONOMY* 59, 65-71 (Julian E. Lange & Daniel Quinn Mills eds., 1972) (discussing national and area-wide agreements in the context of the construction industry).

8(f) have changed over time.<sup>10</sup> The Board now permits 8(f) agreements to convert into much more permanent 9(a) agreements<sup>11</sup> based on the contract language, alone, and authorizes them to renew automatically upon expiration. Under the 2009 construction industry and Board framework, therefore, section 8(f) permits construction employers to enter into collective bargaining agreements with unions of their choice, for whatever period of time the employers and unions choose, without the construction employees ever receiving the opportunity to vote.<sup>12</sup>

This article discusses 8(f) prehire agreements and the developments in the construction industry, and argues that section 8(f) should be amended to reflect the construction industry's evolution. Part I of this article provides a brief framework of the NLRA provisions regarding union representation, and discusses the aspects of the construction industry necessitating its unique prehire agreements. Part II discusses the historical background and the legislative purposes of section 8(f), and reviews the Board's initial interpretations of 8(f) agreements, in which concerns of employee free-choice were assuaged by assurances of employees loyal to their local hiring halls. Part III discusses recent developments in Board law and bargaining in the construction industry, and argues that these developments undermine Congress' initial assumptions of employee support. Part IV contends that the purposes of the NLRA are best served by amending section 8(f) to provide greater flexibility to ensure employee free-choice, and proposes a four-part amendment that will allow 8(f) agreements, under contemporary construction bargaining, to continue providing construction workers the benefit of union representation while ensuring that these workers maintain their fundamental right to choose or refrain from union representation.

## I. THE UNION REPRESENTATION PROCESS AND CONSTRUCTION INDUSTRY NON-CONFORMITY UNDER THE NLRA

Throughout the NLRA's history, Congress and the Board have struggled to reconcile two oft-competing labor principles—labor stability and employee free-choice<sup>13</sup>—in attempts to strike a balance

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10. Lowe, *supra* note 7, at 1702.

11. See *infra* pp. 5-7 (explaining 9(a) agreements in greater detail).

12. See *infra* Part III (c).

13. See, e.g., John Deklewa & Sons (*Deklewa*), 282 N.L.R.B. 1375, 1380 (1987), *enforced sub nom.* Int'l Ass'n of Bridge v. NLRB, 843 F.2d 770 (3d Cir. 1988). Accordingly, the Board argues that:

[W]hen Congress considered the 1959 amendments it recognized that application of the

between keeping America's businesses and economy both functioning and productive while also ensuring that employees may band together and bargain collectively if they so choose.<sup>14</sup>

In making this balance, the NLRA has traditionally placed a high premium on employees' rights to choose or refrain from choosing their own labor representative.<sup>15</sup> Accordingly, section 7,<sup>16</sup> the "heart" of the NLRA,<sup>17</sup> provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all of such activities . . . ."<sup>18</sup> Further, section 9(a) requires that the employees' collective bargaining representative be "designated or selected for the purposes of collective bargaining by the majority of employees in a unit for such purposes . . .

pre-1959 Act to the construction industry would result in substantial instability in the industry by the invalidation of established industry practices while at the same time employees in the industry would be deprived of both the fruits of collective-bargaining as well as the freedom to express their desires concerning union representation.

*Id.*; see also *Shaw's Supermarkets, Inc.*, 350 N.L.R.B. 585, 589 (2007) (Member Liebman, dissenting) ("This balance of statutorily-recognized interests serves to protect the right of employees to self-determination and to promote the interests of labor stability."); *PSM Steel Constr., Inc.*, 309 N.L.R.B. 1302, 1304 (1992) ("PSM is correct in pointing to our concern for balancing the interests of labor stability and employee free choice . . . ."); *Deklewa*, 282 N.L.R.B. at 1378 ("The principles we advance today represent a more appropriate interpretation and application of Section 8(f), and they will better serve the statutory policies of protecting labor relations stability and employee free choice in the construction industry."); see generally S. REP. NO. 74-573, at 1-3 (1935).

14. See generally Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 587-88 (2007). While citing recent Board decisions, the author argues that:

[T]he Board has stated expressly, for the first time, that the exercise of employee free choice is superior in the statutory scheme to the stability of collective bargaining. This elevation of one of two competing ideals in the Act undoes the delicate balance long established in Board doctrine, and seems to signal a devaluing of what is unique about this statute—the protection of collective rights.

*Id.* (footnote omitted).

15. 29 U.S.C. § 157 (2006) (guaranteeing employees the right to bargain collectively "through representatives of their own choosing"); see also James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 821 (2005); Joseph E. Slater, *Do Unions Representing a Minority of Employees Have the Right to Bargain Collectively?: A Review of Charles Morris, The Blue Eagle at Work*, 9 EMP. RTS. & EMP. POL'Y J. 383, 387 (2005).

16. 29 U.S.C. § 157.

17. See William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 270 (2002) (section 7 is the "heart" of the NLRA); Lawrence D. Grewach, Comment, *The Guards Trilogy: The NLRB Lowers the Guard on Employee Rights*, 35 AM. U. L. REV. 175, 179-80 (1985) (section 7 is the "cornerstone" of the NLRA); LEE MODJESKA, NLRB PRACTICE 98 (1983) ("Section 7 is the heart of the Act"); JOSEPH ALTON JENKINS, *LABOR LAW: ITS EVOLUTION AND DEVELOPMENT FROM CRIMINAL CONSPIRACY TO PROTECTED RIGHTS AND MANDATORY DUTIES FOR UNIONS AND MANAGEMENT ALIKE* 63 (1968) (section 7 is the "guts" of the NLRA).

18. 29 U.S.C. § 157.

.”<sup>19</sup> Thus, a union must earn the support of a majority of employees before it may represent them.<sup>20</sup>

Typically, in order for the union to earn the support of a majority of the employees, the employer must have already hired a “substantial and representative complement of its projected work force,” and must be engaged in “normal business operations.”<sup>21</sup> The union (i.e., the “9(a) representative”<sup>22</sup> or “9(a) union”<sup>23</sup>) then campaigns for employee support and the employees indicate their choice by voting either in a Board-certified election,<sup>24</sup> or more controversially, through authorization cards.<sup>25</sup> It is only after more than fifty percent or more of these employees choose to be represented by a union that the employer and the union may bargain regarding the terms and conditions of employment, codified in a collective bargaining agreement (“9(a) agreement”).<sup>26</sup>

19. *Id.* § 159(a).

20. It is a joint violation of section 8(a)(2) of the NLRA (on the employer’s part) and section 8(b)(1)(A) of the NLRA (on the union’s part) if an employer and union execute a collective bargaining contract before the union has garnered the support of a majority of employees. *See Windsor Castle Health Care Facilities*, 310 N.L.R.B. 579 (1993), *enforced*, 13 F.3d 619, 622 (2d Cir. 1994); *Haddon House Food Prods., Inc.*, 269 N.L.R.B. 338, 340 (1984), *enforced*, 764 F.2d 182 (3d Cir. 1985).

21. *Hilton Inn Albany*, 270 N.L.R.B. 1364, 1365 (1984); *see also Dedicated Servs., Inc.*, 352 N.L.R.B. 753, 761 (2008).

Where a newly opened business has granted recognition, an issue concerning the timing of recognition can arise. The Board has long balanced competing interests in these cases. On the one hand, the Board seeks to vindicate the right of those employees, already employed, to engage in collective bargaining should they so choose. On the other hand, the Board seeks to have that choice made, not by a small, unrepresentative group of employees, but by a group that adequately represents the interests of the anticipated full complement of the unit employees—all of whom will be bound, at least initially, by the choice of those who were hired before them.

*Id.* at 761-62.

22. *See, e.g., Air Climate Sys., Inc.*, 352 N.L.R.B. 622, 624 n.8 (2008) (“[T]he Union is the 9(a) representative of the unit employees . . .”); *Allied Mech. Servs., Inc.*, 352 N.L.R.B. 662, 665 (2008).

23. *E.g., Caterair Int’l*, 322 N.L.R.B. 64, 65 (1996) (“[A]n affirmative bargaining order has been the standard Board remedy for more than 50 years when an employer has refused to bargain with an incumbent Section 9(a) union.”); *James Luterbach Constr. Co.*, 315 N.L.R.B. 976, 980 (1994).

24. *See* 29 U.S.C. § 159(c).

25. *See* Brudney, *supra* note 15, at 823 (acknowledging employer resistance to card check agreements owing to the charge that they “allow unions to exert undue pressure on individual employees . . .”); Rafael Gely & Timothy D. Chandler, *Card Check Recognition: New House Rules for Union Organizing?*, 35 FORDHAM URB. L.J. 247, 247 (2008) (“Critics describe [card checking] as anathema to basic democratic principles and accuse unions of wanting to deal from the bottom of the deck to secure undeserved representation of employees.”); *see also N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 601 (1969); HIGGINS, *supra* note 6, at 752.

26. *See, e.g., British Indus. Co.*, 218 N.L.R.B. 1127, 1141 (1975); *Lianco Container Corp.*, 173 N.L.R.B. 1444, 1448 (1969); *Englander Co.*, 114 N.L.R.B. 1034, 1042 (1955) (employer violated the Act by entering into a collective bargaining relationship with a union “at a time when

This certification process can be extremely time-consuming.<sup>27</sup> Questions of unit and eligibility must be settled and campaigns for and against unionization conducted before an election is held.<sup>28</sup> Card check campaigns may be even more time-consuming because the unions must first have the time to organize the employees, to earn their trust and, ultimately, their signature on an authorization card, and then try to convince the employer to accept the signed cards as proof of majority. Currently, when presented with cards, the employer may contest the validity of the union's signed cards and demand a Board-certified election.<sup>29</sup>

The construction industry is recognized as the only industry unable to conform to this time-consuming organizing framework.<sup>30</sup> Its diverse sectors,<sup>31</sup> spanning from single-family houses to major airports and

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the [employer] was not yet in production and had only a handful of employees . . ."); *see also* *Fruehauf Trailer Co.*, 162 N.L.R.B. 195, 196 (1966); *Lapeer Metal Prods. Co.*, 134 N.L.R.B. 1518, 1522 (1961).

27. *See* Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 *BERKELEY J. EMP. & LAB. L.* 369, 381 (2001) ("Unions identify delay during the organizing process as a leading impediment to their organizing efforts.").

28. *See, e.g.,* *Schneider Mills, Inc. v. NLRB*, 390 F.2d 375, 378 (4th Cir. 1968) (en banc) ("The key factor in setting aside an election, whether by virtue of the conduct of the parties or of the Board, is the failure of those in the bargaining unit to make their collective desire effective."); *Boston Insulated Wire & Cable Co.*, 259 N.L.R.B. 1118, 1118 (1982) ("A representation election is often the climax of an emotional, hard-fought campaign . . ."); *Carrom Div., Affiliated Hosp. Prods.*, 245 N.L.R.B. 703, 707 (1979) ("[T]he Board has long recognized that elections are vigorously contested and that emotions frequently run high . . ."); *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 224 n.6 (1962).

29. *E.g.,* *Audubon Reg'l Med. Ctr.*, 331 N.L.R.B. 374, 374 (2000) (union requested recognition from the employer, who declined and demanded a Board-certified election); *see also* *Brudney, supra* note 15, at 824-25 ("Employers, however, usually decline the union's request and exercise their right to demand a representation election, in which they will urge their employees to vote against unionization; the election is thus a contest challenging the union's assertion that it enjoys majority support.").

30. *See* Allen, *supra* note 1, at 418; GERALD FINKEL, *THE ECONOMICS OF THE CONSTRUCTION INDUSTRY* 73 (1997) (noting the costs of holding representation elections in the construction industry proved "staggering"); HERBERT R. NORTHRUP, ROBERT E. WILLIAMS & DOUGLAS S. MCDOWELL, *DOUBLEBREASTED OPERATIONS AND PRE-HIRE AGREEMENTS IN CONSTRUCTION: THE FACTS AND THE LAW* 5 (1987) [hereinafter *DOUBLEBREASTED*]; Ursula M. McDonnell, Comment, *Deference to NLRB Adjudicatory Decision Making: Has Judicial Review Become Meaningless?*, 58 *U. CIN. L. REV.* 653, 668 (1989) ("[B]ecause of the mobility of the workers in the [construction] industry, elections were often impracticable.").

31. *See* FINKEL, *supra* note 30, at 4 (noting that the construction industry includes mom-and-pop stores operating next to multi-billion dollar construction conglomerates); *Construction Industry Collective Bargaining Act of 1975: Hearing on S. 2305 Before the Subcomm. on Labor of the Comm. on Labor and Pub. Welfare*, 94th Cong. 1 (1975) [hereinafter *Hearing on Collective Bargaining Act*] (statement of Sen. Harrison A. Williams, Jr., Chairman, S. Subcomm. on Labor) (discussing the problem of high fragmentation in the construction industry based on the numerous crafts).

roads, are often characterized by seasonal<sup>32</sup> and cyclical fluctuations.<sup>33</sup> Therefore, construction workers have historically been employed on a short-term,<sup>34</sup> project-by-project basis,<sup>35</sup> and may be laid off at the conclusion of the project.<sup>36</sup> As a result, it is nearly impossible for unions to organize them.<sup>37</sup>

## II. LEGISLATIVE INTENT AND INTERPRETATIONS OF SECTION 8(F)

The nonconforming construction industry has been a problem for Congress since the post-World War Era, when the demand for construction increased dramatically along with construction costs.<sup>38</sup> Initially, in its “laissez faire” era,<sup>39</sup> Congress reacted to the fragmentation and ad hoc employment practices in the industry by steadfastly ignoring them.<sup>40</sup> However, by the early to mid-1950s, the construction industry garnered widespread attention, as labor and management lobbyists battled to control the developing construction labor laws.<sup>41</sup> Because Congress refused to regulate construction labor,

32. See DOUBLEBREASTED, *supra* note 30, at 1; WILLIAM HABER & HAROLD M. LEVINSON, LABOR RELATIONS AND PRODUCTIVITY IN THE BUILDING TRADES 11 (1956); M. R. LEFKOE, THE CRISIS IN CONSTRUCTION: THERE IS AN ANSWER 43 (1970); DANIEL QUINN MILLS, INDUSTRIAL RELATIONS AND MANPOWER IN CONSTRUCTION 15 (1972); Mills, *supra* note 9, at 59; McDonnell, *supra* note 30, at 667-68.

33. See Lynne C. Lamy, Comment, *Recent Developments in Construction Industry Bargaining: Doublebreasting and Prehire Agreements*, 53 MO. L. REV. 465, 465 (1988).

34. See Allen, *supra* note 1, at 412; Stephen Evans & Roy Lewis, *Union Organisation, Collective Bargaining and the Law: An Anglo-American Comparison of the Construction Industry*, 10 COMP. LAB. L.J. 473, 478 (1989) (“[C]ollective bargaining in construction, with its typically high labour turnover and brief periods of employment for particular crafts at any one site, is based on the principles which significantly diverge from the norm.”); McDonnell, *supra* note 30, at 667-68.

35. See Lowe, *supra* note 7, at 1703.

36. See *id.*; LEFKOE, *supra* note 32, at 27; Richard Murphy, Note, *Pre-Hire Agreements and Section 8(f) of the NLRA: Striking a Proper Balance Between Employee Freedom of Choice and Construction Industry Stability*, 50 FORDHAM L. REV. 1014, 1014 (1982).

37. See Lamy, *supra* note 33, at 468 (quoting David S. Barr & Craig Jacobson, *The Enforceability of Construction Industry Pre-hire Agreements After Higdon*, 3 INDUS. REL. L.J. 517, 518 (1979)); McDonnell, *supra* note 30, at 668.

38. See Evans & Lewis, *supra* note 34, at 474; William Gomberg, *The Construction Labor Force*, in THE CONSTRUCTION INDUSTRY: NEW ADAPTATIONS TO A CHANGING ENVIRONMENT 61, 83 (William Gomberg & Larry M. Robbins eds., 1977) (noting that, at the time of publication, “[c]ollective bargaining in the building trades [wa]s governed by the Taft-Hartley Act.”).

39. See Evans & Lewis, *supra* note 34, at 477 (noting that the laissez-faire period was from 1935 to 1947).

40. See Allen, *supra* note 1, at 418; MILLS, *supra* note 32, at 25 (discussing how the initial provisions in the NLRA “affected construction very little”).

41. See HIGGINS, *supra* note 6, at 49 (“Although both management and labor groups had in mind definite amendments to the NLRA during the early 1950s, neither side was able to generate



the industry was faced with increasing strikes and work stoppages;<sup>42</sup> national unions became more organized at the expense of a localized management.<sup>43</sup> As a result, Congress took action.<sup>44</sup>

### A. Legislative History of Section 8(f)

After initially declining to regulate it,<sup>45</sup> Congress authorized the Board to exercise jurisdiction over the construction industry in its Taft-Hartley Amendments in 1947.<sup>46</sup> Shortly thereafter, both management and labor lobbyists petitioned Congress to further clarify and regulate a construction industry struggling to adapt to increasing market demands.<sup>47</sup> Union corruption and unchecked power in the industry became chief concerns as Congress adjusted to its novel position as industry regulator.<sup>48</sup> At the same time, however, Congress acknowledged the “serious problems” of applying traditional principles of federal labor law to the construction industry:

The problems of the building and construction industry under the Taft-Hartley Act have been the subject of considerable comment by authorities in the field; and Congress in previous years has made several attempts to correct the shortcomings of the act as applied to the industry. The occasional nature of the employment relationship makes

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much support for its proposals. It was not until 1957 that the issue of labor legislation again came to the forefront.”).

42. See generally *id.* (discussing the “stalemate years” when management and labor took matters into their own hands in response to Congress’ inaction).

43. See DONALD CULLEN & LOUIS FEINBERG, *THE BARGAINING STRUCTURE IN CONSTRUCTION: PROBLEMS AND PROSPECTS* 9 (U.S. Dept. of Labor 1980) (noting that balance of power has always been heavily weighted in favor of unions because, for the most part, contractor associations are composed of small, undercapitalized employers).

44. See *id.* at 5.

45. See, e.g., *Johns-Manville Corp.*, 61 N.L.R.B. 1, 2 (1945) (“It is apparent, as the record discloses, that the operations [of the employer] are part of the building and construction industry, one over which the Board does not customarily assert jurisdiction.”); *W.S. Bellows Constr. Co.*, 51 N.L.R.B. 820, 820 (1943) (noting that the board declines jurisdiction as it “would [not] effectuate the policies of the Act.”).

46. See *United Bhd. of Carpenters and Joiners of Am. (Wadsworth Bldg. Co.)*, 81 N.L.R.B. 802, 804 (1949), *enforced*, 184 F.2d 60 (10th Cir. 1950) (citing *Local 74, United Bhd. of Carpenters and Joiners of Am. (Watson’s Specialty Store)*, 80 N.L.R.B. 533, 534 (1948), *enforced*, 181 F.2d 126 (6th Cir. 1950), *aff’d*, 341 U.S. 707 (1951)); S. REP. NO. 86-187, at 27 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2344; see also *Lowe*, *supra* note 7, at 1705-06.

47. See, e.g., HIGGINS, *supra* note 6, at 52 (“Testimony indicated that certain high officials within these unions were engaged in misconduct ‘ranging from embezzlement to illicit secret profits.’”); *Ross*, *supra* note 8, at 376-77.

48. See HIGGINS, *supra* note 6, at 52 (discussing how congressional hearings “gradually began to center on corruption in several strong unions”).

this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.<sup>49</sup>

The Senate and House both agreed that Congress needed to curtail union power abuses, and both also acknowledged that they needed an additional union “sweetener” to win support for the legislation from labor as well as management.<sup>50</sup> Each house of Congress proposed its own “sweetener” bill.

The Senate proposed the Kennedy-Ervin bill, passed in 1959, introducing the 8(f) prehire agreement virtually identical to the one eventually adopted by Congress.<sup>51</sup> This proposal authorized employers engaged primarily in the construction industry to enter into prehire agreements with construction unions—as the employers and unions had been doing up to that point unlawfully—before the union garnered support from a majority of the employees.<sup>52</sup> It further provided that, as opposed to 9(a) agreements, 8(f) agreements would not serve as a “contract bar”<sup>53</sup> to a subsequent petition from any union seeking an election through the Board.<sup>54</sup>

The House disagreed with the Senate’s proposal,<sup>55</sup> instead preferring a more restrictive amendment supported by the Eisenhower

49. S. REP. NO. 86-187, at 27 (1959), *reprinted in* 1959 U.S.C.C.A.N. at 2344; H.R. REP. NO. 86-741, at 19 (1959).

50. See, e.g., Debra L. Willen, *Regulation of Section 8(f) Contract Negotiations After the NLRB’s Decision in Deklewa*, 4 LAB. LAW. 797, 800-801 (1988); Mark D. Meredith, Note, *From Dancing Halls to Hiring Halls: Actors’ Equity and the Closed Shop Dilemma*, 96 COLUM. L. REV. 178, 231 (1996).

51. S. 505, 86th Cong. § 603(a) (1959).

52. S. 1555, 86th Cong. § 602(a) (1959); S. 1555, 86th Cong. § 702(a) (1959); see also DOUBLEBREASTED, *supra* note 30, at 84.

53. Once the 9(a) union and employer have agreed to the terms of a collective bargaining agreement, that contract may serve as a “contract bar” to preclude potential challenges lodged by the employer, a rival union, or employees for up to three years following certification of the union. See, e.g., *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272, 290 n.12 (1972); *Pick-Mount Laurel Corp. v. NLRB*, 625 F.2d 476, 480 (3d Cir.1980) (“As a result of the contract-bar rule and the presumption of majority status, under ordinary circumstances no challenge to the Union’s status could have been launched by the employer, employees, or a competing union during the pendency of the contract in this case, which did not exceed three years.”); *VFL Tech. Corp.*, 329 N.L.R.B. 458, 460 (1999) (“[T]he key is the union’s attainment of full 9(a) status as the employees’ designated representative, at which point the normal contract-bar rules apply . . . .”); *Gen. Cable Corp.*, 139 N.L.R.B. 1123, 1125 (1962) (“Contracts for definite duration for terms up to 3 years will bar an election for their entire period; contracts having longer fixed terms will be treated for bar purposes as 3-year agreements and will preclude an election for only their initial 3 years.”).

54. S. 1555, § 702.

55. H.R. 8400, 86th Cong. § 702(b) (1959).

Administration.<sup>56</sup> This amendment permitted Board certification of construction industry unions only after “joint petition by the employer and union” was filed, and it required that the employer and union have a history of prior collective bargaining.<sup>57</sup> Additionally, it prohibited union certification if “a substantial number of the employees in the unit in question asserted that the union was not designated or selected as bargaining agent by a majority of such employees.”<sup>58</sup> This amendment was designed to protect:

[T]he right of employees to be free of coercion in the selection of their own bargaining representatives; the will of the employees in this respect would be required to be evidenced by a history of prior collective bargaining between the union and the employer and by the absence of substantial objection on the part of the employees in the bargaining unit . . . .<sup>59</sup>

The Senate, in turn, disagreed with the House’s bill, concerned that requiring a prior history of collective bargaining would preclude new industry employers from entering into agreement with unions under section 8(f).<sup>60</sup> When the House and Senate finally squared off, they presented a variety of competing political interests.<sup>61</sup> Employers needed a steady pool of skilled labor and predictable labor costs,<sup>62</sup> but were nevertheless concerned about unchecked union picketing and boycotts.<sup>63</sup> Construction unions needed to establish collective bargaining relationships without resorting to time-consuming Board elections.<sup>64</sup> Employees needed a voice regarding their representation.<sup>65</sup>

Ultimately, Congress adopted the Senate’s Kennedy-Ervin bill and

56. See Willen, *supra* note 50, at 800.

57. 105 CONG. REC. S5767 (1959) (statement of Sen. Goldwater), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1082 (1959).

58. *Id.*

59. *Id.*

60. See 105 CONG. REC. H15541 (1959) (statement of Rep. Smith), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1578 (1959). “This is a cynical attempt by certain employer associations to discriminate against new businesses and contractors seeking to expand into new areas.” *Id.*

61. See DOUBLEBREASTED, *supra* note 30, at 81.

62. See *id.* at 5, 81; S. REP. NO. 86-187, at 28 (1959), *reprinted in* 1959 U.S.C.C.A.N., at 2345; Timothy Volk, Note, *Prehire Agreements in Construction Industry: The Deklewa Decision*, 9 J.L. & COM. 243, 245 (1989).

63. See HIGGINS, *supra* note 6, at 55 (“Organized employers thus demanded further statutory restrictions on union activities, especially picketing and boycotts.”).

64. DOUBLEBREASTED, *supra* note 30, at 81.

65. See *id.*

incorporated it into its 1959 Landrum-Griffin Amendments.<sup>66</sup> That meant that Congress decided not to require a prior bargaining history nor allow for a substantial number of employees to invalidate the agreement based on their assertion that the union did not represent them. Conceding that 8(f) prehire agreements were “not entirely consistent with [prior] rulings of the NLRB” permitting bargaining only “after a representative number of employees have been hired,”<sup>67</sup> Congress reasoned that employee free-choice remained protected for three reasons.<sup>68</sup> First, the nature of the construction industry required the employers to utilize the union’s hiring halls.<sup>69</sup> The construction workers hired out of these halls would presumably support the same union that had assigned them the work.<sup>70</sup> Second, employees had an “escape hatch” that allowed them to contest the union’s majority status at any time, even during the terms of the bargaining agreement, by filing an election petition.<sup>71</sup> Third, employers, unions, and employees could challenge prehire agreements, because these agreements would not serve as a “contract bar.”<sup>72</sup>

As noted above, section 8(f) authorized employers and unions to lawfully enter into collective bargaining agreements that were similar to the unofficial agreements these parties commonly used<sup>73</sup> before Congress began regulating the industry.<sup>74</sup> As such, section 8(f) merely codified the informal construction bargaining practice already in place, in which employers and unions bargained with one another directly before employees on the project were hired. Importantly though, rather than trusting the administration of prehire agreements to the Board,

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66. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959).

67. S. REP. NO. 86-187, at 28 (1959), *reprinted in* 1959 U.S.C.C.A.N., at 2345.

68. *See generally id.* (discussing ways in which section 8(f) of the National Labor Relations Act protects employee free choice); John Deklewa & Sons (*Deklewa*), 282 N.L.R.B. 1375, 1380-82 (1987) (discussing the legislative history and the structure of section 8(f)).

69. *Labor-Management Reform Legislation: Hearing on S. 76, S. 505, S. 748, S. 1002, S. 1137 and S. 1311 Before the Subcomm. on Labor of the Comm. on Labor and Pub. Welfare*, 86th Cong. 136-37 (1959) (statement of Archibald Cox, Professor, Harvard Law School); S. REP. NO. 86-187, at 28 (1959), *reprinted in* 1959 U.S.C.C.A.N., at 2345.

70. *See Volk*, *supra* note 62, at 256 (“Majority support could be presumed because the employees came from a union hiring hall.”).

71. *See Deklewa*, 282 N.L.R.B. at 1380-81; *DOUBLEBREASTED*, *supra* note 30, at 84.

72. *See Deklewa*, 282 N.L.R.B. at 1387.

73. *See DOUBLEBREASTED*, *supra* note 30, at 81-82; James M. Wilton, Survey, *Changed Interpretation of Section 8(f) of the National Labor Relations Act: Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 31 B.C. L. REV. 114, 116 (1989).

74. *See Allen*, *supra* note 1, at 418 (“Well before the Wagner Act, the prehire agreement was the principal instrument to commit contractors to use union labor.”).

Congress regulated the issue itself.<sup>75</sup>

### *B. Board and Court Interpretations*

Immediately following the passage of the Landrum-Griffin Amendments, the Board enforced the terms of 8(f) prehire agreements, binding the signatories to the agreement until expiration.<sup>76</sup> Thus, neither the employer nor union could abrogate the terms of their 8(f) agreement while the agreement was in force. The Board soon shifted course, however, and found that non-majority unions could enforce the terms of the 8(f) agreements only if they had somehow “converted” into the employees’ 9(a) representatives before the agreements expired.<sup>77</sup>

#### 1. Repudiation At-Will or Automatic Conversion

In 1971, in *R.J. Smith Construction Co.*<sup>78</sup> and *Ruttmann Construction Co.*,<sup>79</sup> the Board developed the conversion doctrine, in which 8(f) agreements were viewed as predecessors to 9(a) agreements.<sup>80</sup> Either party (most likely, the employer) could unilaterally repudiate the 8(f) agreement, contending that the union lacked majority support.<sup>81</sup> However, the union could “convert” into the 9(a) representative during the terms of the 8(f) agreement if it filed “an unfair labor practice charge claiming: (1) that the prehire relationship had converted into a full 9(a) relationship; and (2) that the employer had committed an unfair labor practice by failing to treat it as such.”<sup>82</sup> If the Board determined that the union in fact enjoyed majority support, the union would be held retroactively as the employees’ 9(a) representative, and after that “the employer could not lawfully repudiate the agreement

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75. See *Hearing on Collective Bargaining Act*, *supra* note 31, at 1 (statement of Sen. Harrison A. Williams, Jr, Chairman, S. Subcomm. on Labor) (“The construction industry is too important in meeting our national housing and industrial needs to be left without a firm national labor policy which is calculated to protect the rights of construction tradesmen, while promoting stability and continuity within the industry.”).

76. See *Lowe*, *supra* note 7, at 1708.

77. See *id.* at 1708-09; *Wilton*, *supra* note 73, at 115.

78. 191 N.L.R.B. 693 (1971).

79. 191 N.L.R.B. 701 (1971).

80. See HIGGINS, *supra* note 6, at 1037; Brian A. Caufield, *Reversion to Conversion? The Board’s Interpretation of the Interplay Between Sections 8(f) and 9(a) in the Construction Industry*, 8 U. PA. J. LAB. & EMP. L. 413, 420 (2006); *Volk*, *supra* note 62, at 248.

81. E.g., *McWhorter Trucking*, 273 N.L.R.B. 369, 370-77 (1984); *Hageman Underground Constr.*, 253 N.L.R.B. 60, 60 (1980); *Ruttmann Constr. Co.*, 191 N.L.R.B. at 701; *R.J. Smith Constr. Co.*, 191 N.L.R.B. at 695; HIGGINS, *supra* note 6, at 1037; *Volk*, *supra* note 62, at 248.

82. *Volk*, *supra* note 62, at 249.

or refuse to bargain with the union.”<sup>83</sup>

Once the Board found conversion, it determined the appropriate employee unit based on the nature of the employer’s work force.<sup>84</sup> For instance, if the employer hired its employees strictly on a “project by project” basis, employing various employees at any given time, the Board would find that the union enjoyed majority support only with respect to those specific employees covered under the project subject to the agreement.<sup>85</sup> On the other hand, if the employer retained a “stable and permanent work force,” (i.e., the same employees who worked on various projects over extended periods of time) the Board would find that the union was the 9(a) representative for all of the employees,<sup>86</sup> and the employer thereafter had to recognize the union as the 9(a) representative at existing and future job sites.<sup>87</sup>

The Supreme Court accepted the Board’s new conversion doctrine seven years later in *NLRB v. Local Union No. 103, International Ass’n of Bridge Workers (Higdon)*,<sup>88</sup> although it found that the Board’s interpretation of 8(f) was not the only defensible one.<sup>89</sup> The Supreme Court subsequently reaffirmed its agreement that 8(f) agreements were voidable by either party at will, barring 9(a) conversion, in *Jim McNeff, Inc. v. Todd*.<sup>90</sup>

## 2. Deklewa: the Board’s Change of Mind

The Board’s conversion doctrine was sharply criticized. Unions and some appellate courts complained that the doctrine permitted employers to abrogate their contractual obligations.<sup>91</sup> Employers, in turn, complained that neither the Board, the courts, nor the Supreme Court provided specific indicators of conversion;<sup>92</sup> rather, the judicial body (the Board or courts) found conversion only after the parties litigated the issue, and it applied, retroactively, the converted 9(a) status

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83. *Id.* at 248.

84. *Id.* at 249.

85. *Id.* (citing *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421 (1977)).

86. *Id.* (citing *Const. Erectors, Inc.*, 265 N.L.R.B. 786 (1982)).

87. *Id.*

88. 434 U.S. 335 (1978).

89. *Id.* at 341.

90. 461 U.S. 260, 269 (1983).

91. *See, e.g., Local Union No. 103, Int’l Ass’n of Bridge Workers v. NLRB*, 535 F.2d 87 (D.C. Cir. 1976), *rev’d, Higdon*, 434 U.S. at 352; *John Deklewa & Sons (Deklewa)*, 282 N.L.R.B. 1375, 1377 (1987) (“The AFL-CIO, its Building and Construction Trades Department, and the Teamsters argue that the Board should overrule *R. J. Smith* and abandon the conversion doctrine.”); *Lowe*, *supra* note 7, at 1718.

92. *See Volk*, *supra* note 62, at 250.

to whichever point in time it deemed conversion had occurred.<sup>93</sup>

Conceding that its conversion doctrine “exposed significant deficiencies” that created “administrative and litigational difficulties,” the Board overruled its own doctrine in *Deklewa* in 1989.<sup>94</sup> In *Deklewa*, the Board found that the terms of 8(f) agreements would be as enforceable as those in 9(a) agreements.<sup>95</sup> Thus, the Board no longer required the union to have achieved majority status prior to binding the employer to the bargaining agreement. Further placing 8(f) agreements on equal ground with 9(a) agreements, the Board reversed its “bifurcated” approach to determining appropriate bargaining units (i.e., distinguishing between “project by project” and “stable work” forces).<sup>96</sup> Although the Board acknowledged that “Congress described the construction industry generally as one that hires employees on a project-by-project basis,”<sup>97</sup> it decided that it would no longer distinguish between those types of work forces.<sup>98</sup>

While the Board overruled its conversion doctrine and made 8(f) agreements resemble 9(a) agreements with respect to enforceability, it also established several important distinctions between 8(f) and 9(a) agreements.<sup>99</sup> First, the Board established that the enforceable 8(f) contract rights would only be “coextensive with the bargaining agreement that is the source of its exclusive representational authority.”<sup>100</sup> Therefore, the employers would have no bargaining obligations after the agreement’s expiration.<sup>101</sup> The Board reasoned that, absent an election, the signatory union enjoyed no presumption of majority support and either party was free to repudiate the 8(f) relationship upon expiration of the bargaining agreement.<sup>102</sup> This distinction between 8(f) and 9(a) is significant,<sup>103</sup> because the parties in a 9(a) agreement have a continuing duty to bargain, even after the expiration of their agreement.<sup>104</sup>

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93. See *id.* at 248-50.

94. *Deklewa*, 282 N.L.R.B. at 1377-80.

95. *Id.* at 1377.

96. *Id.* at 1382.

97. *Id.*

98. *Id.* at 1385.

99. See *id.* at 1377-78.

100. *Id.* at 1387.

101. *Id.* at 1388.

102. *Id.* at 1386.

103. See *Madison Indus., Inc.*, 349 N.L.R.B. 1306, 1307 (2007) (“The distinction between a union’s representative status under Section 8(f) and under Section 9(a) is significant because an 8(f) relationship may be terminated by either the union or the employer upon the expiration of their collective-bargaining agreement.”).

104. *Levitz Furniture Co. of the Pac.* 333 N.L.R.B. 717, 721 (2001) (quoting *United States*

Second, the Board reaffirmed that, unlike 9(a) agreements, 8(f) agreements would not act as a contract bar.<sup>105</sup> In doing so, the Board relied heavily on 8(f)'s legislative history and Congressional intent,<sup>106</sup> in which Congress sought to preserve employee free-choice by specifying that 8(f) agreements would not bar an election petition during its terms.<sup>107</sup> Then, once a Board election was held, a vote in favor of the signatory union or a rival union "will result in that union's certification and the full panoply of Section 9 rights and obligations."<sup>108</sup> Further, a vote against union representation would void the 8(f) agreement and terminate the 8(f) relationship between the employer and union, prohibiting those parties from reestablishing an 8(f) agreement for one year.<sup>109</sup>

As often occurs, the heart of the Board's decision was relegated to the footnotes.<sup>123</sup> The Board acknowledged, in footnote forty-five, that it was requiring the employees to use the Board's election processes to repudiate the 8(f) agreement during its terms, conceding that this requirement appeared to contradict Congress' view that section 8(f) was necessary "because of difficulties in conducting the Board elections in the construction industry."<sup>110</sup> However, argued the footnote, this rule was not "undermined" by Congress' concerns, because Congress was focused mainly on the "pre-hire" stages of the 8(f) relationship, and the requirement here invoked the election processes *after* the employment relationship was established.<sup>111</sup> Further, the Board found that "since 1959 the Board has gained substantial expertise and developed detailed procedures for conducting elections in the construction industry" such that the Board could "accommodate short-term and sporadic employment patterns."<sup>112</sup>

### III. THE NEW CONSTRUCTION INDUSTRY AND ITS LEGAL IMPLICATIONS: CONSTRUCTION WORKERS' FREE CHOICE ABANDONED

When section 8(f) was enacted in 1959, Congress envisioned local construction firms bargaining with unions in a project-by-project

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Gypsum Co., 90 N.L.R.B. 964, 966 (1950)).

105. *Deklewa*, 282 N.L.R.B. at 1386.

106. *Id.* at 1380.

107. *Id.* at 1381.

108. *Id.* at 1385.

109. *Id.*

110. *See Deklewa*, 282 N.L.R.B. at 1386 n.45.

111. *Id.*

112. *Id.*



industry.<sup>113</sup> It further assumed that the local construction workers, hired directly from the union's hiring halls to work on specific projects, would support the unions that had hired them out.<sup>114</sup> To ensure that construction workers retained their right to choose their own representatives, the Board clarified in *Deklewa* that the 8(f) bargaining relationship would expire along with the 8(f) agreement.<sup>115</sup> The Board was convinced that, if all else failed, the employees had an "escape hatch" in which they could choose to decertify the union through the Board's election procedures at any point in the bargaining relationship.<sup>116</sup>

### *A. Post-Deklewa: the Erosion of Distinctions*

Immediately following *Deklewa*, the Board diligently policed its new 8(f) principles, consistently finding that unions could not convert from 8(f) representatives into 9(a) representatives by their conduct alone.<sup>117</sup> Eventually, however, the Board found that construction unions could nevertheless convert into 9(a) representatives during the 8(f) agreement's terms assuming certain criteria were met.<sup>118</sup> In *Pierson Electric, Inc. (Golden West Electric)*,<sup>119</sup> the Board found that an 8(f) union could achieve 9(a) status under a voluntary agreement with the employer—without a Board election or card check—by establishing that the union expressly demanded 9(a) recognition and that the employers voluntarily granted such recognition, "based on a contemporaneous showing of union support among [the] majority of employees in an appropriate unit."<sup>120</sup> Thus, in order to become the 9(a) representative, the union essentially had to take the same steps it would have taken absent the 8(f) agreement: it had to demand recognition from the employer based on evidence that it currently enjoyed the support of a majority of the employees.<sup>121</sup>

The policed line between 8(f) and 9(a) began to disappear, however, as the Board's requirement of a "contemporaneous showing" of majority support and demand for recognition gave way to an

113. See *id.* at 1382; S. REP. NO. 86-187, at 28 (1959), reprinted in 1959 U.S.C.C.A.N. 2345.

114. See Volk, *supra* note 62, at 263 ("One reality is that usually the employees hired under a prehire arrangement will support the union as their bargaining representative.").

115. See *Deklewa*, 282 N.L.R.B. at 1387.

116. *Id.* at 1381.

117. See HIGGINS, *supra* note 6, at 1042.

118. See *id.*

119. 307 N.L.R.B. 1494 (1992).

120. *Id.* at 1495.

121. *Id.*

increasingly broad definition of “contemporaneous.”<sup>122</sup> In *Goodless Electric Co. (Goodless I)*,<sup>123</sup> the employer and the union signed an 8(f) agreement stating that if a majority of the unit employees “authorize the Local Union to represent them in collective bargaining, the Employer will recognize the Local Union as the NLRA Section 9(a) collective bargaining agent . . . .”<sup>124</sup> One year later, however, the employer indicated its intent to terminate the 8(f) relationship upon expiration of the agreement.<sup>125</sup> In response, the union obtained signed authorization cards from the employees authorizing the union to represent them in bargaining.<sup>126</sup> The Board found that the union had unequivocally demanded recognition as the 9(a) bargaining representative (a “continuing request”)<sup>127</sup> and that the employer, in the above provision, had voluntarily accepted such demand.<sup>128</sup>

The First Circuit reversed and remanded the decision back to the Board, finding that, under *Deklewa* and its progeny, the one-year hiatus between the 8(f) agreement and the union’s acquisition of the authorization cards did not satisfy the requirement of a “contemporaneous” showing of majority support, demand and recognition.<sup>129</sup> Surprisingly, in *Goodless Electric Co. (Goodless III)*,<sup>130</sup> the Board rebuked the First Circuit and reaffirmed its initial holding on remand, finding that the “prospective 9(a) recognition clause” in the 8(f) agreement was sufficient to “trigger the employer’s contractual obligation to grant 9(a) recognition to the union.”<sup>131</sup> Not amused, the court reversed the Board’s decision yet again, finding that “the Board has chosen to ignore our earlier ruling and disregard the law of the case.”<sup>132</sup>

The Board did not let the court’s disapproval change its direction, and it has subsequently relaxed further the line between 8(f) and 9(a) agreements.<sup>133</sup> In 2001, in *Staunton Fuel & Material, Inc.*,<sup>134</sup> the Board

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122. See *id.* at 1496.

123. 321 N.L.R.B. 64 (1996).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 66.

128. *Id.*

129. NLRB v. Goodless Elec. Co. (*Goodless II*), 124 F.3d 322, 329-30 n.8 (1st Cir. 1997).

130. 332 N.L.R.B. 1035 (2000).

131. *Id.* at 1038.

132. NLRB v. Goodless Bros. Elec. Co. (*Goodless IV*), 285 F.3d 102, 111 (1st Cir. 2002).

133. See, e.g., *Reichenbach Ceiling & Partition Co.*, 337 N.L.R.B. 125, 126 (2001) (“[A]s to this contemporaneous showing the Board has held that an employer’s acknowledgment of such majority support is sufficient to preclude a challenge to majority status.”); *Hovey Elec., Inc.*, 328 N.L.R.B. 273, 274 (1999) (permitting the union “to convert the 8(f) agreement to a 9(a) agreement

held that a union may establish 9(a) status solely through the terms of a written agreement:

[W]here the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support.<sup>135</sup>

Since *Staunton Fuel*, the Board has dropped its "contemporaneous" requirement all together.<sup>136</sup>

Recently, in *Allied Mechanical Services, Inc.*,<sup>137</sup> the Board held that a union was the employees' 9(a) representative, and not the 8(f) representative as contended by the employer.<sup>138</sup> It based this holding, in part, on the language of an informal settlement agreement between the union and employer stipulating that the employer would "recognize and, upon request, bargain with [the union] 'as the exclusive bargaining representative of the [unit] employees.'"<sup>139</sup> The parties engaged in bargaining but never reached agreement.<sup>140</sup> Shortly thereafter, the employer withdrew recognition, stating that the parties had an 8(f) relationship that it was free to terminate.<sup>141</sup> The Board found otherwise, finding that "the bargaining relationship established by settlement of the complaint logically would be premised on the notion that [the union] represented a majority of unit employees" and that "the settlement agreement incorporated language indicative solely of a 9(a) relationship."<sup>142</sup>

The Board now permits construction employers and unions to enter into 8(f) agreements, and convert those into 9(a) agreements, voluntarily based on the language of the agreements.<sup>143</sup> Accordingly, *Deklewa's*

at any time in the future" based on a clause in the agreement).

134. 335 N.L.R.B. 717 (2001).

135. *Id.* at 720.

136. See, e.g., *Saylor's, Inc.*, 338 N.L.R.B. 330, 331 (2002) (Member Cowen, dissenting) ("I would adopt the *Goodless Electric* criteria for obtaining 9(a) status with the additional requirement that . . . the 'contemporaneous showing' of majority status . . .").

137. 351 N.L.R.B. 79 (2007).

138. *Id.* at 82.

139. *Id.*

140. *Id.* at 80.

141. *Id.* at 81.

142. *Id.* at 82.

143. See *id.* at 83 (finding that the language of the 8(f) agreement imposed obligations upon the employer reminiscent of a 9(a) agreement and, thus, converted the agreement into a 9(a) agreement); *Madison Indus., Inc.*, 349 N.L.R.B. 1306, 1308 (2007) (finding that the "agreement will

assurance that the 8(f) bargaining relationship would expire with the 8(f) agreement has eroded with time: the parties may currently contract into a 9(a) bargaining relationship.<sup>144</sup>

Concurrently, however, the Board steadfastly enforces the *Deklewa* principle that, during the terms of the 8(f) agreements, employers may not *exit* the agreement, or abrogate their terms, in the absence of a Board-certified election.<sup>145</sup> In *Precision Striping, Inc.*,<sup>146</sup> for example, the employer “conducted a secret ballot poll of its unit employees, who voted four to one against union representation . . . .”<sup>147</sup> The employer accordingly refrained from bargaining with the union under its contention that the union did not enjoy the support of a majority of its employees.<sup>148</sup> Finding the employer’s refusal to bargain unlawful, the Board noted that the employer “never petitioned the Board for an election.”<sup>149</sup>

### *B. Developments in Construction Collective Bargaining*

Along with the Board’s enforcement of 8(f) agreements, described above, bargaining in the construction industry has experienced other fundamental changes over the past few decades.<sup>150</sup> These changes include: (1) the structure of construction employers’ bargaining; (2) the structure of construction collective bargaining agreements; and (3) the composition of the construction workers.<sup>151</sup> These changes are important because they establish that Congress’ initial assurances of employee support no longer necessarily hold true.

First, the structure of construction bargaining has become, in many

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be independently sufficient to establish a union’s 9(a) representation status” where the agreement satisfies the three requirements (citing *Staunton Fuel & Material, Inc.*, 335 N.L.R.B. 717, 719-20 (2001))).

144. See, e.g., *Pierson Elec., Inc. (Golden West Electric)*, 307 N.L.R.B. 1494, 1494 (1992) (“[T]he relationship between a union and a construction industry employer will be presumed to be governed by Section 8(f) unless the Union shows it is the 9(a) majority representative of the employees in question.”).

145. See *Precision Striping, Inc.*, 284 N.L.R.B. 1110, 1112 (1987) (“*Deklewa* requires a Board election (that a union loses) before an employer may lawfully repudiate an 8(f) agreement.” (citing *John Deklewa & Sons (Deklewa)*, 282 N.L.R.B. 1375, 1385 (1987))).

146. *Id.* at 1110.

147. *Id.* at 1112.

148. *Id.* at 1110.

149. *Id.* at 1112.

150. See David Weil, *The Contemporary Industrial Relations System in Construction: Analysis, Observations and Speculations*, 46 LAB. HIST. 447, 464 (2005).

151. See generally *id.* at 464-66 (discussing fundamental changes within the construction industry over the past few decades).

respects, more organized. In the 1960s, construction unions bargained collectively through seventeen national unions.<sup>152</sup> Alternatively, construction employers bargained individually, they focused on a single craft or specialty area, and were otherwise separated from one another.<sup>153</sup> To remedy their bargaining disadvantage,<sup>154</sup> construction employers began to likewise organize in the early 1970s.<sup>155</sup> Since then, these employers have bargained increasingly through local and national contractors associations<sup>156</sup> or multi-employer associations.<sup>157</sup> Although individual bargaining certainly remains a viable option for construction employers, many employers now have representatives of contractors' associations replace them at the bargaining table.<sup>158</sup>

Second, the structure of the construction industry's collective bargaining agreements (i.e., the products of the above bargaining) has evolved. The individual, local project agreements resulting from local bargaining have been replaced in part by area-wide or national agreements.<sup>159</sup> The agreements cover all projects performed by the signatories within the specified geographic location,<sup>160</sup> typically for

152. See *Hearing on Collective Bargaining Act*, *supra* note 31, at 38 (statement of John T. Dunlop, Secretary of Labor of the United States) (discussing the seventeen national unions affiliated with the building and construction trades department of the AFL-CIO and the International Brotherhood of Teamsters).

153. See FINKEL, *supra* note 30, at 54; CULLEN & FEINBERG, *supra* note 43, at 17 (referring to dissension among the individual types of contractors contributed to instability in the construction industry and permitted unions to have a bargaining advantage).

154. See CULLEN & FEINBERG, *supra* note 43, at 18 (explaining that unions had an edge over construction contractors because they were organized and able to bargain as a "single voice.").

155. See Allen, *supra* note 1, at 420 (discussing the origins of national contractors associations).

156. For example, membership in the Associated General Contractors of America, one of the largest national contractor's associations, rose in 2007 and 2008. Telephone interview with Denise S. Gold, Assoc. Gen. Counsel, Associated Gen. Contractors of Am. (Oct. 23, 2008) (on file with author); Membership Report, Denise S. Gold, Assoc. Gen. Counsel, Associated Gen. Contractors of Am. (Oct. 23, 2008) (on file with author); see also CULLEN & FEINBERG, *supra* note 43, at 21.

157. A multi-employer bargaining association is a group of employers that bargain as one unit with the union or unions that represent their employees. These associations are legal under the NLRA. See *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409 (1982). Also, They are now common in the construction industry. See, e.g., *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 90 F.3d 238, 241 (7th Cir. 1996).

158. See MILLS, *supra* note 32, at 28 ("Collective bargaining agreements in construction are normally negotiated between a local union in a single craft and an association of contractors who employ men of that craft.").

159. See *id.* ("The agreement normally covers a geographic area (the geographic jurisdiction of the local) and specific types of work operations (the work jurisdiction of the craft)."). It is not clear to what extent area-wide agreements have replaced individual project agreements. See also Mills, *supra* note 9, at 69.

160. See Mills, *supra* note 9, at 69; Weil, *supra* note 150, at 465 (noting a recent "shift in focus of competition to a regional/national rather than local basis in many sectors."); see, e.g., US

automatically-renewable<sup>161</sup> three-year terms.<sup>162</sup>

Finally, the composition of the construction work force covered by these collective bargaining agreements has become more diverse. Since at least the 1980s, fewer collective bargaining agreements stipulate that all subcontractors in a project will be selected from unionized firms.<sup>163</sup> This is due, at least in part, to the construction industry's replacement of general contractors—who directly employed the construction workers and ensured the exclusive hiring of union workers—with construction managers who merely contract with basic trades.<sup>164</sup> As a result, construction unions have been less able to establish “wall-to-wall” agreements exclusively permitting union workers on the sites,<sup>165</sup> and construction managers have had greater flexibility to seek labor from both unionized and nonunionized contractors.<sup>166</sup>

### *C. Legal Implications: Section 8(f)'s Failure to Adapt to a Changing Industry*

Section 8(f)'s assurances that employees will not be subjugated to unelected representation are undermined both by the Board's increasingly liberal view that 8(f) agreements may convert into 9(a) agreements,<sup>167</sup> and by the Board's dropped distinction between individual project agreements and area-wide agreements.<sup>168</sup> Section 8(f) also fails to contemplate the contemporary construction industry, which has become more national and organized over the past fifty years. By failing to account for these changes, section 8(f) does not protect the labor rights of construction workers as presupposed by the 1959 Congress.

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Reinforcing, Inc., 350 N.L.R.B. 404, 405 (2007) (“Redmond, acting for Reinforcing, executed the area agreement between the Unions and the Upstate Iron Employers Association, covering the period May 1, 2003, through April 30, 2006.”).

161. HIGGINS, *supra* note 6, at 1049.

162. See MILLS, *supra* note 32, at 28.

163. Weil, *supra* note 150, at 452.

164. *Id.*; see also Stephen L. Bulzomi & John L. Messina, Jr., *Washington's Industrial Safety Regulations: The Trend Towards Greater Protection for Workers*, 17 U. PUGET SOUND L. REV. 315, 339 (1994) (“[I]n construction there has been a recent trend towards hiring ‘construction managers,’ rather than general contractors.”); Lawrence Ponoroff, *Construction Claims in Bankruptcy: Making the Best of a Bad Situation*, 11 BANKR. DEV. J. 343, 345 n.5 (1995) (“An alternative model which has gained some measure of popularity in recent years is to substitute a construction manager for a general contractor.”).

165. Weil, *supra* note 150, at 452.

166. *Id.* at 455.

167. Wilton, *supra* note 73, at 117.

168. John Deklewa & Sons (*Deklewa*), 282 N.L.R.B. 1375, 1379 (1987).

First, considering the developments in construction bargaining and the composition of the work force it is apparent that area-wide agreements, over an extended period of time, may encompass a broad composition of construction employees. These employees, contrary to Congress' initial assumption,<sup>169</sup> have not necessarily been hired out of the union's hiring hall.<sup>170</sup> For example, construction managers may have hired both union and nonunion employees for different projects within the defined geographic area.<sup>171</sup> Or, over an extended period of time, construction firms may have employed the same local employees<sup>172</sup> who they transfer from job to job,<sup>173</sup> and who make up the employer's stable work force.<sup>174</sup> These employees are tied to the employer, not necessarily the union.<sup>175</sup>

Employees tied to a construction employer, rather than to the union, may not necessarily support a union that the employer has chosen for them. A recent case highlights how these employees can be deprived of their right to choose their own representative under broad 8(f) agreements.<sup>176</sup> In *Garner/Morrison, LLC*,<sup>177</sup> the construction employer hired its employees locally and then immediately entered into a three-

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169. Academics that supported *Deklewa* used this assumption of majority support to contend that 8(f) unions had, in reality, majority status. See, e.g., Lowe, *supra* note 7, at 1714; Volk, *supra* note 62, at 259.

170. See, e.g., *Garner/Morrison, LLC*, 353 N.L.R.B. No. 78, slip op. at 2 (Jan. 27, 2009) (stating that the employer hired its painters and tapers locally and then entered into an 8(f) agreement with a construction union); Murphy, *supra* note 36, at 1024 ("[Congress' presumption of majority support in 8(f) agreements] does not apply to a stable work force employer because the employer, rather than hiring from a union hiring hall, merely contracts with a union that then acts on behalf of employees already retained by the employer.").

171. See Allen, *supra* note 1, at 433; DOUBLEBREASTED, *supra* note 30, at 4.

172. Dale Belman & Paula B. Voos, *Union Wages and Union Decline: Evidence from the Construction Industry*, 60 INDUS. & LAB. REL. REV. 67, 72 (2006) ("Even when the contractors hire directly, they usually use local sources . . .").

173. See, e.g., *United Steel Workers of Am., Local 14693*, 345 N.L.R.B. 754, 758 (2005) ("The Employer had 40 to 50 employees on the job, all of whom were represented by the Respondent and most of whom were members of the Respondent."); *Gimrock Constr., Inc.*, 344 N.L.R.B. 1033, 1034 (2005); *Operating Eng'rs, Local Union No. 3 (Specialty Crushing, Inc.)*, 331 N.L.R.B. 369, 371 (2000) ("Pursuant to project agreements and subcontractor clauses, the Union has referred union workers to the Employer for work on covered jobsites. Apparently, employees so referred have continued to work for the Employer on nonunion jobsites.").

174. See Weil, *supra* note 150, at 464 ("[Current construction industry operations] differ[] markedly from the situation present through much of the last century where building trade unions played a role throughout a construction worker's time in the trades, from offering initial training in apprentice classes, to helping them find work, to providing for retirement security."); Murphy, *supra* note 36, at 1024.

175. See, e.g., *Garner/Morrison*, 353 N.L.R.B. at 2.

176. See, e.g., *id.*

177. *Id.* at 1.

year, area-wide 8(f) agreement with the Painters Union.<sup>178</sup> Before the terms of the agreement expired, however, the employer became disenchanted with the Painters Union and determined that the Carpenters Union was the better alternative.<sup>179</sup> Two months before the Painters Union's 8(f) agreement expired, a majority of employees signed authorization cards designating the Painters Union as their 9(a) representative.<sup>180</sup> The employer did not accept these authorization cards<sup>181</sup> and, one day after the bargaining agreement expired, directed its employees to meet with the Carpenters Union.<sup>182</sup> Disregarding the choice of its employees, the employer ultimately signed a bargaining agreement, covering those employees, with the Carpenters Union.<sup>183</sup> Because the employees were tied to the *employer*, and not to the *union*, they remained with the employer despite their own preference for the Painters Union as their union representative.<sup>184</sup>

Next, bargaining agreements with three-year terms and automatic renewal clauses<sup>185</sup> permit employers to easily renew 8(f) agreements without soliciting the approval of their employees.<sup>186</sup> In fact, these 8(f) agreements may renew automatically.<sup>187</sup> While the Board has refused to

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178. *Id.* at 2.

179. *Id.* at 3.

180. *Id.* at 2.

181. *Id.* (finding that the employer said he would consider granting the Painters 9(a) recognition, but really he had no plans to grant them that status).

182. *Id.* at 3.

183. *Id.* at 2-3.

184. *Id.* at 2 (stating the employer, Garner/Morrison, hired employees and immediately entered into the collective bargaining agreements with the Painters Union without the Painters first obtaining majority support from the employees). The Board ultimately found that the employer violated the NLRA, but on the grounds that the employer unlawfully assisted the Carpenters Union by requiring its employees to attend a meeting with Carpenters representatives and by remaining in the room while the employees were solicited, and signed, Carpenters' authorization cards. *Id.* at 5-6. Thus, the Board did not address the fact that the employer disregarded the employees' preference for the Painters Union—the preference previously demonstrated when they signed Painters Union authorization cards. *Id.* at 2.

185. *See, e.g.,* Asbestos Workers Local No. 84 (DST Insulation, Inc.), 351 N.L.R.B. 19, 19 n.2 (2007) (providing an example of an automatic renewal clause which stated: "[t]his Agreement shall become effective July 1, 2001, and shall be rigidly observed until its expiration, June 30, 2004, and from year to year thereafter unless either party notifies the other ninety (90) days prior to expiration of this contract in writing.").

186. *See, e.g.,* Sheet Metal Workers' Int'l Ass'n v. McElroy's Inc., 500 F.3d 1093, 1098 (10th Cir. 2007) (explaining the agreement provided the employer the option of automatic renewal upon expiration); James Luterbach Constr. Co., 315 N.L.R.B. 976, 978 (1994) ("[A]n employer may, however, *obligate itself* to abide by a successor agreement . . .").

187. *See, e.g.,* Reliable Elec. Co., 286 N.L.R.B. 834, 836 (1987) ("Authorization continued unless the [employer] subsequently took some action effectively withdrawing the multiemployer group's authority to bargain on the [employer]'s behalf."); Thomas Riske, Note, *Interest Arbitration Clauses in §8(f) Pre-Hire Agreements: Effective for Achieving Genuine Collective Bargaining or*



bind employers to subsequent 8(f) agreements based on mere inaction,<sup>188</sup> it will bind an employer if the employer has committed any “distinct affirmative act that would reasonably lead the union to believe that the employer intended to be bound by the upcoming or current negotiations.”<sup>189</sup> This “distinct affirmative act” involves compliance with the previous agreements’ terms.<sup>190</sup> Regardless of whether a construction employer engages in this “distinct affirmative act,” one thing is clear: the construction employer may renew and, thereby, extend the terms of its 8(f) agreements with a union without having to solicit approval from its employees who are covered by the agreement.<sup>191</sup>

While the employer may easily renew 8(f) agreements, the employees’ task of terminating the 8(f) agreement has proven difficult, if not impossible. Again, Congress and the *Deklewa* Board felt assured that employees had an “escape hatch” in the 8(f) framework (i.e., the ability to decertify the union through Board elections), which ultimately

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*Enabling Parties to Underhandedly Gain Majority Bargaining Power?*, 2008 J. DISP. RESOL. 333, 341 (2008) (finding that upon expiration of the agreement, automatic renewal is an alternative).

188. *James Luterbach Constr. Co.*, 315 N.L.R.B. at 980.

189. *Id.*

190. See, e.g., *Cimato Bros., Inc.*, 352 N.L.R.B. 797, 800 (2008) (“Whether particular conduct in a given case demonstrates adoption of a contract is a question of fact.”); *DST Insulation, Inc.*, 351 N.L.R.B. at 20 (“DST adopted the terms of the 2004-2008 master agreement by its conduct. DST adhered to significant substantive terms of the successor union contract, deliberately held itself out as a union contractor, and obtained the benefits of a union contractor.”); *Cab Assocs.*, 340 N.L.R.B. 1931, 1932 (2003) (finding that the was employer bound to the successive agreement, even though it withdrew from the association, based on its compliance with certain agreement terms); *E.S.P. Concrete Pumping, Inc.*, 327 N.L.R.B. 711, 713 (1999); *Dist. Council of Plasterers and Cement Masons of N. Cal. (Marina Concrete)*, 312 N.L.R.B. 1103, 1105 (1993); *Haberman Constr. Co.*, 236 N.L.R.B. 79, 87 (1978).

191. See, e.g., *Williams Insulation Co.*, 344 N.L.R.B. 898, 898 (2005).

[T]he Respondent entered into [an 8(f)] collective-bargaining agreement whereby it agreed to abide by the terms of the collective-bargaining agreement between the Union and the Heat and Cold Insulators Independent Contractors Asbestos Abatement, Removal Contractors, effective for the period September 19, 1998, to September 18, 2001, whereby it recognized the Union as the exclusive collective-bargaining representative of the unit and agreed to continue the agreement in effect from year-to-year thereafter unless timely notice was given.

*Id.* See also *R. L. Reisinger Co.*, 312 N.L.R.B. 915, 917 (1993) (“[I]t is clear the involved 8(f) construction industry contract continued to automatically renew itself during those periods when Respondent had, at most, a ‘one man unit’ because Respondent failed to repudiate the 8(f) agreement during any of those periods of time.”).

[U]nder the principles enunciated in *Deklewa*, in view of the Union’s status as an 8(f) bargaining representative, and the fact that the contract had been automatically renewed, these actions of the Respondent were clear violations of its duty to bargain with the Union unless, as the Respondent contends, there was no bargaining duty by reason of a one-man unit.

*Wilson & Sons Heating & Plumbing, Inc.*, 302 N.L.R.B. 802, 802 (1991).

preserved the employees' free choice.<sup>192</sup> However, an assumption that employees may "escape" from unwanted 8(f) representation through Board elections first presupposes that the construction employees will know they have the right to decertify the union, and will further know how to do so. Even the Board has acknowledged that employees are not necessarily equipped with this legal knowledge.<sup>193</sup> Moreover, unlike 9(a) relationships, where the employees have been exposed to the Board's processes through a Board election or card check certification, construction workers under an 8(f) agreement enter their employment already represented by the 8(f) union.<sup>194</sup> Further, assuming that the employees are discontented with their 8(f) union, but the employer is not, it is unlikely that either the 8(f) union or the employer will assist the employees in gaining the necessary information to terminate their negotiated bargaining agreement.

Finally, assuming that somehow discontented construction workers successfully learn of and enforce their rights to demand a decertification election, one obvious problem remains: Board-certified elections still take a lot of time.<sup>195</sup> Again, section 8(f) was enacted under the assumption that prehire agreements would cover such a short time that Board elections would be either impossible or unnecessary.<sup>196</sup> It is, therefore, counterintuitive to require the employees wishing to terminate this agreement to go through the very time-consuming procedure in the tail-end of bargaining deemed impossible at the front-end. The Board acknowledged this tension in *Deklewa*, but merely found that Congress was concerned only with the "pre-hire" stages of the industry.<sup>197</sup> This finding, however, nearly assures construction workers that, once hired, their representation preferences are no longer protected. The Board also found that "since 1959 the Board has gained substantial expertise and developed detailed procedures for conducting elections in the construction industry."<sup>198</sup> However, the Board has failed to make use of its newfound "substantial expertise," ostensibly making elections possible in the industry, and undermining the very need for prehire

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192. John Deklewa & Sons (*Deklewa*), 282 N.L.R.B. 1375, 1381 (1987).

193. See *Bridgestone/Firestone, Inc.*, 335 N.L.R.B. 941, 941 (2001) ("Although experienced labor lawyers may know about the . . . right to file a UD petition, it is unrealistic to expect that [the employee] would know of these rights.").

194. See, e.g., *Garner/Morrison, LLC*, 353 N.L.R.B. No. 78, slip op. at 2 (Jan. 27, 2009).

195. See *DOUBLEBREASTED*, *supra* note 30, at 101 (noting that by the time decertification process is completed, the project will have been finished).

196. S. REP. NO. 86-187, at 28 (1959), *reprinted in* 1959 U.S.C.C.A.N., at 2345; H.R. REP. NO. 86-741, at 19 (1959).

197. *Deklewa*, 282 N.L.R.B. at 1386 n.45.

198. *Id.*

agreements.<sup>199</sup> The construction industry either affords the time for elections and bargaining or it does not: the Board should not have it both ways.

In sum, there is a disconnect between the direction the Board has taken with 8(f) agreements—making them increasingly easy to enter into yet remaining difficult to terminate—and the direction that bargaining in the construction industry has taken, in which employees covered by the 8(f) agreement are not necessarily loyal to the local union and hiring hall. This disconnect undermines the construction employees who, as members of the bargaining unit, have been left with no choice.

Concededly, there is no current data to prove the extent that 8(f) agreements are used on a national, long-term basis, rather than individual-project basis. However, one may infer that the use of national 8(f) agreements has increased as membership in national contractors associations continues to expand. Further, the Board has been confronted with cases such as *Garner/Morrison*, illustrating that construction employers may, and in fact do, maintain local and stable work forces that are thereafter deprived of the fundamental right to select their own union representation under these national 8(f) agreements.<sup>200</sup> As long as an employee's right to choose its union representation remains the heart of labor law, section 8(f) needs to be amended to take into account the contemporary industry and the possibilities of abuse.

#### IV. SECTION 8(F) REFORMATION: GIVING CONSTRUCTION WORKERS CHOICE

Federal labor law aims to strike a balance between industrial stability and employee free choice.<sup>201</sup> With respect to the latter, employees may freely choose to be represented by the union that employers and unions voluntarily select for them;<sup>202</sup> this article does not intend to suggest otherwise. Construction unions remain vitally important to construction workers.<sup>203</sup> They provide a collective voice in

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199. *Id.* at n.46.

200. *See Garner/Morrison, LLC*, 353 N.L.R.B. No. 78, slip op. at 2 (Jan. 27, 2009).

201. *See Deklewa*, 282 N.L.R.B. at 1378; Willen, *supra* note 50, at 807.

202. *See generally* Willen, *supra* note 50, at 807 (stating that employees may voluntarily enter into a relationship with a union and that they may change their union representation at any time by going through the Board's election procedures).

203. *See generally* Lowe, *supra* note 7, at 1703-04 (explaining that the union provides stability to construction workers in an unstable industry by acting as an employment agency and a

an otherwise fragmented industry, help the workers achieve higher wages<sup>204</sup> and better working conditions,<sup>205</sup> and provide training through their apprenticeship programs that are currently unrivaled in the non-union sectors.<sup>206</sup> Further, construction unions continue to serve as the employees' employment agency through the continuing use of union hiring halls.<sup>207</sup>

However, federal labor law has always placed a high premium on the employees' free choice—not on that of the employer or union—by requiring that a majority of the employees support their bargaining representatives.<sup>208</sup> To that end, Board elections and preelection procedures have always been highly regulated, and the Board and Congress have grappled with ensuring a fair forum for the employees to express their representation designations.<sup>209</sup>

#### *A. A Call for Change*

In 1959, Congress, in section 8(f), authorized its one exception to majority support, in the construction industry.<sup>210</sup> The construction industry, however, has changed since then and the presumptions supporting current 8(f) agreements are sagging with age. Just as Congress initially determined that it should regulate prehire agreements in the 1959 construction industry,<sup>211</sup> it is only fitting for Congress to now amend section 8(f) to protect construction workers in the contemporary industry.<sup>212</sup> Currently, politicians, management, and labor are lobbying Congress regarding new labor legislation entitled the Employee Free Choice Act ("EFCA"),<sup>213</sup> which would, among other things, require the employer to recognize and bargain with a union based on 9(a)

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representative in collective bargaining negotiations).

204. See Belman & Voos, *supra* note 172, at 67.

205. See Lowe, *supra* note 7, at 1704.

206. See Allen, *supra* note 1, at 422; Belman & Voos, *supra* note 172, at 69; Weil, *supra* note 150, at 465-66 ("The growth of the nonunion sector and the emergence of large and sophisticated contractors have not thus far generated an alternative solution to the skill problem.").

207. See Lowe, *supra* note 7, at 1703-04.

208. See *supra* pp. 5-7.

209. See HIGGINS, *supra* note 6, at 473.

210. Lowe, *supra* note 7, at 1717 (citing S. REP. NO. 86-187, at 55-56 (1959)).

211. See *id.*

212. See generally Abigail Evans, Note, *Cooperation or Co-optation: When Does a Union Become Employer-Dominated Under Section 8(a)(2) of the National Labor Relations Act?*, 100 COLUM. L. REV. 1022, 1059 (2000) ("[T]he modification of labor legislation is most appropriately undertaken in the democratic processes of the legislature, not left up to the executive discretion of the NLRB or the judicial interpretations of the courts.").

213. S. 1041, 110th Cong. § 1 (2007).

authorization cards.<sup>214</sup> It is refreshing to see labor law issues once again taking center stage, but this proposal fails to help construction workers because it addresses only Board elections and card checks in the 9(a) context.<sup>215</sup> Oddly, while employee free-choice reemerges on the political landscape, none of the players have focused on its major exception.

*B. Proposed Congressional Amendments: Striking a Balance Between Union Representation and Ensuring Construction Workers' Right to Choose*

This article proposes a four-part amendment to section 8(f) that, broadly put, will allow 8(f) agreements to facilitate representation in circumstances not otherwise amenable to Board elections or card checks, while still providing construction workers the freedom to choose or refrain from choosing union representation. Further, to keep abreast of the current construction industry's unique nature, such as its continuing use of local hiring halls, this article proposes that 8(f) unions be afforded minority bargaining rights to continue representing their members even in the event of decertification.

1. Scope of 8(f) Agreements: Limited to Individual Projects

First, section 8(f) should be amended to limit prehire representation to the terms of the initial 8(f) agreement.<sup>216</sup> This limited scope would further Congress' initial intent of permitting construction employers and unions to enter into a bargaining relationship only where traditional Board elections and 9(a) card checks are not feasible. Any successive agreement thereafter should be predicated on a card check or Board-certified election to establish that the 8(f) union enjoys the support of a majority of the employees under the agreement. This proposal, therefore, ensures that 8(f) unions may represent construction workers during individual projects that do not allow the time for Board elections and card checks, while also ensuring that the workers have the opportunity to choose their own representatives, through traditional section 9(a) procedures, once the bargaining relationship becomes long-

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214. *Id.* § 2(a).

215. *Id.* § 4(b)(2)(B).

216. Previously, academics have similarly urged that section 8(f) be limited to project agreements. See Mills, *supra* note 9, at 69; Murphy, *supra* note 36, at 1031 ("In the project-by-project employment setting, there is little potential of adverse effect upon employee freedom of choice resulting from a pre-hire agreement . . .").

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## 2. Decertification Posting and Card Check

The next two proposals concern the 8(f) decertification procedure. First, construction employers should be required to post a notice providing basic decertification information, such as contact information for the applicable NLRB Regional Office, so that the construction workers who may wish to decertify the 8(f) union are able to easily find the necessary procedural information. This notice will be limited to basic NLRB contact information, so that it is nationally consistent and the construction employer cannot be accused of unlawfully providing assistance to the decertification process.<sup>217</sup>

Second, the decertification of an 8(f) union should be permitted where a majority of employees has signed decertification cards. As noted above, currently, employees may decertify an 8(f) union only in a Board-certified election.<sup>218</sup> However, assuming that 8(f) agreements are limited to individual projects, a Board election will not be feasible due to time constraints. Instead, employees wishing to decertify the 8(f) union should be permitted to circulate de-authorization cards.

Critics may contend that these proposals will encourage employees to decertify their 8(f) union. However, assuming that Congress and the Board are correct, and 8(f) unions enjoy the majority support of the employees they assign from their hiring halls for specific projects, the employees will have no incentive to break their tie with their union and hiring hall.<sup>219</sup> Rather, these proposals are intended to assist those employees discontent with the 8(f) union, either because they do not wish to be represented by the union or because, as in *Garner/Morrison*, they do not wish to be represented by the union that their employer has chosen for them.<sup>220</sup>

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217. See, e.g., *Cintas Corp.*, 344 N.L.R.B. 943, 954-56 (2005) (noting that the employer's assistance was lawful by merely telling its employees that it had the address of the union and the Board in case they wanted their authorization cards back); see also *Mickey's Linen & Towel Supply, Inc.*, 349 N.L.R.B. 790, 791 (2007) ("It is well settled that an employer violates Section 8(a)(1) of the Act by 'actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative.'" (quoting *Wire Prods. Mfg. Corp.*, 326 N.L.R.B. 625, 640 (1998))); *E. States Optical Co.*, 275 N.L.R.B. 371, 372 (1985) ("In addition, while an employer does not violate the Act by rendering what has been termed 'ministerial aid,' [to employees engaged in decertification efforts] its actions must occur in a 'situational context free of coercive conduct.'").

218. See *John Deklewa & Sons (Deklewa)*, 282 N.L.R.B. 1375, 1385 (1987).

219. See *NLRB v. Goodless Bros. Elec. Co. (Goodless IV)*, 285 F.3d 102, 104 (1st Cir. 2002).

220. See *Garner/Morrison, LLC*, 353 N.L.R.B. No. 78, slip. op. at 5 (Jan. 27, 2009).

### 3. Minority Bargaining Rights

The final, and perhaps most controversial, proposal is to afford minority bargaining rights to 8(f) unions. Although construction bargaining has become more organized in many respects, union hiring halls and accompanying union loyalty remain prevalent in the industry.<sup>221</sup> Therefore, it is extremely important that construction workers who are tied to their union's hiring hall—and not to the employer—retain the option to stay with their union, particularly in the event of decertification by non-members. Under this proposal, 8(f) unions retain minority bargaining rights to bargain on a members-only basis, but are precluded from bargaining as the exclusive representative of the entire unit.

Academics have recently debated the issue of minority bargaining rights outside of the construction industry context.<sup>222</sup> Specifically, Professor Charles Morris contends that minority bargaining rights were common before and immediately after passage of the NLRA,<sup>223</sup> and that “it has been long established by both Supreme Court and NLRB authority that *voluntary* members-only bargaining and its resulting contracts are legal under the Act.”<sup>224</sup> Critics of minority union bargaining rights contend that these rights would violate section 8(a)(3) of the NLRA,<sup>225</sup> which prohibits an employer from treating its union and non-union employees differently.<sup>226</sup> Others complain that employers have no statutory duty<sup>227</sup> to bargain with minority unions anyway, because this duty applies only to 9(a) unions.<sup>228</sup> Finally, critics may

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221. See generally Allen, *supra* note 1, at 423 (discussing that most hiring by union contractors is still done through informal procedures even though contracts usually state to go through hiring halls).

222. See CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 26 (2005) (discussing the existence of minority bargaining rights before and after the NLRA was passed).

223. *Id.* at 26, 30.

224. Charles J. Morris, *Minority Union Collective Bargaining: A Commentary on John True's Review Essay on The Blue Eagle at Work, and a Reply to Skeptics Regarding Members-Only Bargaining Under the NLRA*, 27 BERKELEY J. EMP. & LAB. L. 179, 187 (2006).

225. 29 U.S.C. § 158(a)(3) (2006) (making it an unfair labor practice for an employer to “discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.”).

226. See, e.g., Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 137 (2003) (arguing that any agreement that only applies to union members would violate statute 8(a)(3)).

227. 29 U.S.C. § 158(a)(5) (2006) (making it 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 the Act).

228. See, e.g., John M. True, III, *The Blue Eagle at Work: Reclaiming Democratic Rights in*

worry that employers will be faced with the daunting task of bargaining with multiple minority unions representing the same unit of employees.

These criticisms should not apply to 8(f) agreements. First, as Professor Morris points out, section 8(a)(3) has been applied by the Board and the courts only to *majority* unions that bargain for and attain better benefits for their members than for their non-members.<sup>229</sup> Therefore, section 8(a)(3) will not apply to 8(f) agreements<sup>230</sup> because, as noted above, 8(f) agreements are Congress' sole exception to majority support.<sup>231</sup> Second, with respect to the duty to bargain, the Board declared in *Deklewa* that construction employers have the duty to bargain with 8(f) unions during the terms of their 8(f) agreements.<sup>232</sup> Finally, these agreements are *voluntary*. Thus, if an employer is faced with multiple minority unions, or otherwise does not wish to bargain with any minority union, its decision is simple: it will not sign the 8(f) agreement.

In sum, these proposals are designed to modernize 8(f) agreements to reflect today's construction industry. While bargaining in the construction industry may be more organized than it was in the late 1950s, the industry will never be uniformly stable; cyclical and seasonal fluctuations will continue, and employees will continue to be hired in the short-term for individual projects. Therefore, section 8(f) must continue to take into account, and support, employees in a fluctuating industry. Thus, these proposals allow for bargaining in prehire stages, while precluding employees who maintain a long-term or otherwise stable relationship with the employer from being represented without having a voice. As so modified, section 8(f) will ensure that construction workers—who would not be able to select union representation under traditional Board mechanisms—have the right to be represented while maintaining their right to terminate or modify that representation.

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*the American Workplace*, 26 BERKELEY J. EMP. & LAB. L. 181, 192 (2005) ("Section 8(a)(5) was added to the original NLRA, and it *does* apply, as we know, 'subject to the provisions of Section 9(a)' of the Act.").

229. See Morris, *supra* note 224, at 192.

230. See *Albuquerque Insulation Contractor, Inc.*, 256 N.L.R.B. 61, 63 (1981) (ruling that a union's request that an employer sign an 8(f) contract did not constitute a claim for recognition as a majority representative pursuant to section 9(a) of the Act).

231. Lowe, *supra* note 7, at 1717.

232. *John Deklewa & Sons (Deklewa)*, 282 N.L.R.B. 1375, 1385 (1987) ("When parties enter into an 8(f) agreement, they will be required, by virtue of Section 8(a)(5) and Section 8(b)(3), to comply with that agreement unless the employees vote, in a Board-conducted election, to reject (decertify) or change their bargaining representative.").



## V. CONCLUSION

The right to elect or refrain from electing a union is at the heart of American labor law. It is therefore perplexing that this right has not been assured for construction workers, who have been largely forgotten by Congress over the past half-century. As the Supreme Court has observed, “[p]rivileging unions and employers to execute and observe prehire agreements in an effort to accommodate the special circumstances in the construction industry may have greatly inconvenienced unions and employers, but in no sense can it be portrayed as an expression of the employees’ organizational wishes.”<sup>233</sup>

Bargaining in the construction industry has changed since 1959, when Congress sought to ensure the rights of construction workers by amending the NLRA to add section 8(f).<sup>234</sup> The industry has become more organized and, to that end, the collective bargaining product has broadened to encompass wide geographic areas and a more diverse work force over an extensive period of time. But section 8(f) has not changed. It still presupposes the trends of collective bargaining witnessed by Congress in the 1950s. Therefore, 8(f) agreements must be amended to reflect the contemporary construction industry and to preserve employee free-choice, while remaining flexible enough to take into account, and support, employees in a fluctuating industry. By amending section 8(f) accordingly, Congress will ensure that construction workers, as any other American worker, enjoy the fundamental right of choice.

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233. *Higdon*, 434 U.S. 335, 349 (1978).

234. *Lowe*, *supra* note 7, at 1717.