

THE CONSTRUCTION INDUSTRY UNDER THE NATIONAL LABOR RELATIONS ACT

The NLRB did not begin asserting its jurisdiction over the construction industry until 1948, 13 years after the enactment of the Wagner Act.¹ In subsequent years, it became apparent that the Act's provisions, both in the representation and the unfair labor practice areas, did not "fit" particularly well with the way employment relations were created and maintained in the construction industry. Thus, several of the 1959 amendments to the Act dealt specifically with the construction industry, and others have particular relevance to that industry. In addition, the Board itself has interpreted the Act, including the pre-1959 provisions, and its own procedures in different ways in order to accommodate the particular circumstances of construction industry employment.

This outline will briefly sketch the way the Act and Board decisions interpreting it have addressed some of the unique aspects of construction industry employment. It is divided into three parts. The first addresses the creation and maintenance of collective bargaining relationships in the construction industry, and how those so-called "representation" issues differ from representation issues in the non-construction sector. The focus of the first section is on Section 8(f) of the Act and the Board's interpretation of that provision in the Deklewa decision and subsequent cases. The second section deals with the regulation of picketing in the construction industry, as well as the regulation of secondary pressure and jurisdictional disputes, including the prohibition of so-called "hot-cargo" agreements under Section 8(e). Finally, the last section briefly outlines the regulation of union hiring halls, which are prevalent in the construction industry. In all of these areas, the statute and Board decisions have recognized characteristics of employment in the construction industry that are unique, and have attempted to accommodate those unique characteristics to the overriding purposes of the Act, to promote

industrial stability through the encouragement of collective bargaining and the fostering of employee free choice with regard to the selection of a bargaining representative.

I. The Collective Bargaining Relationship

Section 8(a)(2) of the Act prohibits an employer from recognizing and entering into a collective bargaining agreement with a union that does not represent a majority of the employer's employees in an appropriate unit. Correspondingly, the Board, with court approval, has determined that it is a violation of Section 8(b)(1)(A) for a Union which does not represent a majority to accept recognition from and enter into an agreement with an employer. See Ladies' Garment Workers (Bernhard-Altman Texas Corp.) v. NLRB, 366 U.S. 731 (1961); Haddon House Food Products, 269 NLRB 338 (1984), *enfd.* 764 F.2d 182 (3d Cir. 1985). In the construction industry, however, even before the Act was passed, employers have had a longstanding practice of entering into agreements with unions even before any employees are hired, before the union has even had a chance to establish that it represents a majority of the employer's employees. These so-called "prehire" agreements became the norm in the construction industry for a number of reasons. Employment in the construction industry is usually not permanent, but is rather temporary and often short-term, depending on the nature of the particular construction project involved, so it is often just not practical to wait until after employees are hired to begin collective bargaining. In addition, employers obtain their jobs by bidding, and they must know their labor costs before they bid on a job, which is also before they have hired any employees. Finally, construction employers must have an available supply of skilled labor which is ready for quick referral to their jobs.²

Recognizing these unique needs, as well as the historic practice of construction employers and unions to enter into prehire agreements, Congress enacted Section 8(f) of the Act in 1959. It provides that it shall not be unfair labor practice for an employer engaged primarily

in the construction industry to enter into an agreement with a union covering its construction employees, simply because the union has not established “majority status” as otherwise required by Section 9 of the Act; the agreement requires membership in the union after the seventh day of employment (as opposed to the thirtieth day, as authorized for non-construction industry employment by the proviso to Section 8(a)(3) of the Act); the agreement provides for referral of employees from a union hiring hall; or the agreement provides for minimum training or experience requirements for employment. A proviso to Section 8(f) states, however, that an agreement authorized by its terms shall not “bar” a petition for an election under Section 9 of the Act; thus, either party may petition for an election during the term of such a “prehire” agreement authorized by Section 8(f).³

Section 8(f) thus fundamentally alters the statutory scheme as it applies to the establishment and maintenance of collective bargaining relationships in the construction industry. It allows construction industry employers and unions to enter into agreements regardless of whether it has been established that the union represents a majority of the employees in an appropriate unit; such an agreement would otherwise subject the employer and the union to liability under Sections 8(a)(2) and 8(b)(1)(A). After the enactment of Section 8(f), however, the question remained of whether the obligation to adhere to such a “prehire” agreement would be enforceable under Section 8(a)(5) of the Act. In the non-construction industry, a certified or recognized union enjoys an irrebuttable presumption of majority status during the term of a collective-bargaining agreement, and thus if the employer withdraws recognition and repudiates the agreement during the term, the employer violates Section 8(a)(5) of the Act. See Burger Pits, Inc., 273 NLRB 1001, 1002 (1984), enfd. 785 F.2d 797 (9th Cir. 1986). Section 8(a)(5), however, provides that an employer’s duty to bargain in good faith with

the representative of its employees is “subject to the provisions of Section 9(a),” which provides that a representative for purposes of collective bargaining shall be designated or selected by a majority of the employer’s employees in an appropriate unit. Thus, the statute contemplates that the imposition of enforceable contract obligations by virtue of Section 8(a)(5) is contingent on the signatory union being designated or selected by the majority of the employer’s employees.⁴ By definition, however, an agreement authorized by Section 8(f) is entered into by a union which has not demonstrated that it represents a majority of the construction industry employer’s employees.

The Board addressed the enforceability of collective bargaining agreements authorized by Section 8(f), along with other related issues, in John Deklewa and Sons, 282 NLRB 1375 (1987), enfd. sub. nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988). In Deklewa, the Board held that it would accord a bargaining relationship and collective bargaining agreement established under Section 8(f) limited protections under Section 8(a)(5) of the Act. Id. at 1387. Thus, during the term of a contract authorized by Section 8(f), neither party is allowed to repudiate the agreement without running afoul of either Section 8(a)(5) or Section 8(b)(3). Upon the contract’s expiration, however, neither party is required by Section 8(a)(5) or Section 8(b)(3) to bargain for or enter into a new collective bargaining agreement, because the union is not the majority representative of the employees under Section 9(a) of the Act. Id. at 1386. In addition, during the contract’s term, either party may petition for an election under Section 9(c) of the Act. Although ordinarily a collective bargaining agreement will bar such a petition, because of the proviso to Section 8(f), an agreement authorized by Section 8(f) will not act as such a bar. In addition, although the Employer, in order to file a petition for an election to determine if a majority of its employees still desire union representation, is ordinarily required to show

“objective considerations” which lead it to believe that the union no longer represents a majority⁵, under Deklewa, an employer which is party to an 8(f) contract does not have to satisfy such a requirement. Id. at 1385 fn. 42. Furthermore, the Board held in Deklewa that if the employees vote to reject the union, the 8(f) agreement will be void and the 8(f) relationship will be at an end. The parties will not be allowed to reestablish their relationship or enter into another agreement authorized by Section 8(f) for a one-year period following the rejection of the union in the Board-conducted election. Id. at 1385.⁶

Prior to the Deklewa decision, the Board had held that either party was permitted to repudiate an agreement authorized by Section 8(f) during its term. R.J. Smith Construction Co., 191 NLRB 693 (1971), enf. denied sub nom. Operating Engineers Local 150 v. NLRB, 480 F.2d 1186 (D.C. Cir. 1973). The Board had also determined, however, that a bargaining relationship established pursuant to an 8(f) agreement could “convert” to a bargaining relationship under Section 9(a) of the Act, if it could be shown that the union enjoyed majority support, whether or not the union had demanded, or the employer had granted, recognition to the union as the majority representative of its employees. See Deklewa, 282 NLRB at 1378; R.J. Smith Construction, 191 NLRB at 695 fn. 5; Ruttman Construction Co., 191 NLRB 701, 702 (1971). Thus, in practice, prior to the Deklewa decision, the union would attempt to establish that it had Section 9(a) status, and thus was entitled to protection against repudiation of the contract under Section 8(a)(5), in an unfair labor practice proceeding which was instituted after the employer repudiated the agreement. In Deklewa, however, the Board abandoned this so-called “conversion” doctrine, and held that an employer is not entitled to repudiate the agreement during its term, but that either party may test whether or not the union has the majority support of its employees, and thus is entitled to the “extra” protection accorded to a representative

established pursuant to Section 9(a) of the Act, by petitioning for a Board-conducted election. Deklewa, 282 NLRB at 1377, 1380-81.

A question which the Board has addressed since the Deklewa decision is whether a union can establish that it is in actuality the majority representative of a construction employer's employees without going to an election under Section 9(c). In Deklewa, the Board held that, in light of "the traditional prevailing practice in the construction industry," it would require a party seeking to establish that there is a Section 9(a) relationship to prove it. Deklewa, 282 NLRB at 1385 fn. 41. This has resulted, effectively, in a presumption that a collective bargaining relationship in the construction industry is not a relationship established pursuant to Section 9(a), which has the "extra" protection afforded by the bargaining obligation in Section 8(a)(5), but is rather a relationship authorized by Section 8(f). See Casale Industries, 311 NLRB 951, 952 (1993). The party asserting that the relationship is a 9(a) relationship, however, can rebut that presumption by showing that the union has expressly demanded, and the employer has voluntarily granted, recognition to the union based on a contemporaneous showing of union support among a majority of the employer's employees in an appropriate unit. Deklewa, 282 NLRB at 1387 fn. 3; Pierson Electric, Inc., d/b/a Golden West Electric, 307 NLRB 1494, 1495 (1988); Brannan Sand & Gravel Co., 289 NLRB 977, 979-980 (1988). This is ordinarily shown by proof that the union has demonstrated to the employer that it has authorization cards signed by a majority of its current employees, designating the union as their representative for the purposes of collective bargaining.

The Board has recently, in a series of cases, addressed the issue of whether the union must prove that it actually presented authorization cards signed by a majority of the employees to the employer, or whether it can rely on language, either in the collective bargaining agreement or

in a separate recognition agreement, which states that the employer has recognized the union as the majority representative of its employees. See Decorative Floors, Inc., 315 NLRB No. 25 (Sept. 30, 1994); Hayman Electric, Inc., 314 NLRB No. 145 (Aug. 25, 1994); Casale Industries, 311 NLRB 951 (1993). Although the Board has not definitively resolved that issue, it has held that if there is contractual language which states that the employer has recognized the union as the majority representative pursuant to Section 9(a), then a party which seeks to challenge the majority status of the union is barred from doing so if it has not raised its challenge within 6 months of the recognition agreement. Casale Industries, supra, 311 NLRB at 953. This is based on the 6-month statute of limitations contained in Section 10(b) of the Act, which has been interpreted, in non-construction industry cases, to mean that the Board will not entertain a challenge to the majority status of a union more than 6 months after the employer has granted recognition. Id., citing NLRB v. Bryan Mfg. Co., 362 U.S. 411 (1960).

With regard to the procedure for selecting a representative under Section 9 of the Act, the Board has applied different rules to the construction industry in determining who is eligible to vote in a Board-conducted election. Because of the intermittent, project-by-project nature of employment in this industry, the Board has concluded that it cannot limit voting eligibility to employees who are currently employed by the employer. A construction employer's current employees are just those who happen to be employed on the employer's current construction projects, and thus are not the only employees who have an interest in terms and conditions of employment. Thus, the Board applies a formula for determining eligibility to vote in elections in the construction industry which includes employees who have been employed by the employer over a longer period of time, but who might not be currently employed. This formula is called the "Daniel" formula, because it was first enunciated in Daniel Construction Co., 133 NLRB 264

(1961). As subsequently modified, it provides that employees will be eligible to vote if they have been employed by a construction employer for 30 days or more during the 12-month period preceding the eligibility date for the election, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date. It excludes from eligibility any employees who have been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. See Steiny and Company, Inc., 308 NLRB 1323, 1326 (1992).

When the Board processes a petition for an election to determine if a union should be certified as the majority representative, it normally requires the union to show that it has obtained support from at least 30% of the employer's employees before it will process the petition and conduct the election. In construction industry cases, the issue has arisen as to whether this showing of support should be measured against the current employees, or against all the employees who are potentially eligible to vote according to the Daniel formula. In a recent case, the Board decided that this so-called 30% "showing of interest" would be measured only against the employer's current employee complement, not against all those eligible to vote under Daniel. The Pike Company, 314 NLRB 691 (1994). The Board determined that different purposes are served by the showing of interest requirement and the rules concerning voter eligibility, and that it would be simply too much of a burden upon both the Board and the petitioning union, with resulting delays in the representation process, to require them to go back for two years to determine if the union has sufficient support for its petition. Id.

II. Picketing, Jurisdictional Disputes, and Secondary Boycotts

Several other provisions of the Act apply with equal weight to the construction and the non-construction industries, but specific aspects of them have particular applications to union-employer relationships and disputes in the construction industry. For example, Section 8(b)(4)

of the Act, which regulates certain union activities, was enacted in 1947 as part of the Taft-Hartley amendments.⁷ Section 8(b)(4)(A), (B), and (C) outlaw picketing and other activity which is directed at certain specified purposes, all of which are often lumped together in the term “secondary boycotts.” The Board has developed certain rules regarding the circumstances when such picketing will be prohibited which are particularly relevant to the construction industry. Section 8(b)(4)(D), also added in 1947, addresses jurisdictional disputes, and its companion provision, Section 10(k), provides a mechanism whereby the Board resolves competing jurisdictional claims to certain work. Such jurisdictional disputes often arise in the construction industry. Finally, Section 8(e) prohibits certain types of agreements between unions and employers, known as “hot cargo” agreements, but exempts such agreements if they arise in the construction industry and meet certain requirements.

Issues regarding secondary boycotts in the construction industry arise most frequently in cases alleging violations of Section 8(b)(4)(B). Briefly summarized, that provision prohibits a union, inter alia, from inducing employees of any employer (e.g., by picketing) to withhold their services, or restraining or coercing those employees, where an object of that inducement, restraint or coercion is to force or require the employer to cease doing business with any other person. As applied to the construction industry, it prohibits picketing which is directed at one employer in order to force that employer either to stop contracting with another employer, or not to contract with that employer at all. In secondary boycott jargon, the employer with which the union has its dispute is known as the “primary” employer, and the union is allowed to direct its picketing against that employer. The employer which is either actually or potentially doing business with the primary employer is known as the “secondary” or “neutral” employer, and the union is prohibited from directing its picketing against the neutral employer in order to affect the

union's dispute with the "primary" employer. The Supreme Court has held that, on a construction job, the general contractor at a construction site is a "neutral" employer with relation to its subcontractors on the project, so that picketing directed at the general contractor in order to influence it to do business only with union subcontractors is a violation of Section 8(b)(4)(B). NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675 (1951).

A problem arises on construction job sites because they are usually comprised of many employers doing business at the same site, and picketing directed against one employer is difficult to separate from other employers on the site for the purposes of the 8(b)(4)(B) prohibition against "secondary" picketing. Picketing at a site such as a construction site where several employers are working alongside each other is known as "common situs" picketing, and the Board has developed general guidelines which it uses to determine if the picketing is "primary," i.e., directed only at the primary employer and thus lawful, or "secondary," i.e., directed at the neutral employer in whole or in part, and thus unlawful. See Sailors' Union (Moore Dry Dock), 92 NLRB 547 (1950). Under these guidelines, which have come to be known as the "Moore Dry Dock standards," the Board will generally find that picketing at a common situs is lawful primary picketing if:

- (a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises;
- (b) at the time of the picketing the primary employer is engaged in its normal business at the situs;
- (c) the picketing is limited to places reasonably close to the location of the situs; and
- (d) the picketing discloses clearly that the dispute is with the primary employer.

Id. at 549 (footnote omitted) (emphasis in original).

The Board has decided that these standards, although they were developed in a non-construction industry case, have particular application to construction job sites, and should be

applied to common situs picketing on those sites. Building & Construction Trades Council of New Orleans (Markwell & Hartz, Inc.), 155 NLRB 319 (1965), enfd. 387 F.2d 79 (5th Cir. 1967), cert. denied, 391 U.S. 914 (1968). Roughly translated, they mean that the Board will look at the evidence to determine if the primary employer is working at the job site at the time of the picketing; the picketing is in the vicinity of where the employer is performing its work; and if the picket signs and other communications clearly state that the union's dispute is with the primary employer, and do not either fail to indicate at all who the picketing is directed at, or indicate that the picketing is directed at the neutral. Often, an employer at the construction site will designate what is called a "reserved gate," which is a separate gate where only the employees and suppliers of the primary employer can enter the facility. This is an attempt by the employer to limit the picketing to that particular entrance to the job site, because that is the only location where the primary employer is engaged in its normal activity at the site. Whether or not the union limits its picketing to that entrance is one factor the Board uses to determine if the union is applying unlawful pressure to the secondary employer. The Board examines the union's picketing with regard to the reserved gate, in addition to all the Moore Dry Dock guidelines, to determine whether, under all the circumstances, an object of the union's picketing is to pressure the neutral employer. In doing so, the Board considers a failure to comply with any one of the Moore Dry Dock guidelines as creating a presumption that the picketing has an unlawful secondary purpose. Iron Workers Local 433 (United Steel), 293 NLRB 621 (1989).

Section 8(e) is, in effect, a companion to Section 8(b)(4)(B). It prohibits agreements between employers and unions, inter alia, in which the employer agrees not to do business with another person. In other words, it prohibits a so-called "neutral" employer and a union from agreeing that the neutral employer will not do business with a "primary" employer. Once again,

the issue regarding these so-called “hot cargo” agreements, particularly in the construction industry, is often whether the agreement has a “primary” or a “secondary” purpose. In National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967), the Supreme Court distinguished a so-called “work preservation” clause from a prohibited “hot cargo” agreement. The Court held that if a purpose of a contract clause is to preserve work which the employees of the primary employer have traditionally performed, rather than to reach out and “capture” work that they have never performed, or to influence the employer not to do business with other employers who are performing that work, then the clause has a lawful “primary” purpose and is not prohibited by Section 8(e). In National Woodwork, the Court upheld a contract clause which prohibited the members of the union from handling doors which had been prefitted before they arrived at the job site. The Court concluded that this clause was a lawful “work preservation” clause, because the union members had traditionally performed the work under their collective bargaining agreement with the union. Thus, the clause was addressed to the labor relations of the contracting employer with its own employees, and was not directed only at improving terms and conditions of employment for union members in general, making it a lawful primary clause. Id. at 645. Section 8(e) contains a proviso which applies specifically to employers in the construction industry. That proviso states that the prohibition on “hot cargo agreements” does not apply “to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.” This provision allows a construction industry employer to enter into an agreement with a union which provides that the employer will not subcontract work to any other employer at a construction job

site unless that employer has an agreement with the union covering that work. Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 648-49 (1982).

A recurring issue regarding Section 8(e) is whether it prohibits so-called “anti-dual shop” or “anti-double-breasting” clauses in the construction industry. By obtaining the employer’s agreement to such a clause, a construction union attempts to prevent an employer from giving work which it would otherwise perform under the terms of its agreement with the union to another, affiliated company which does not have a collective-bargaining agreement with the union. The practice of siphoning off such work to an affiliated, non-union company is called “double breasting.” In Painters District Council 51 (Manganaro Construction Corp.), 321 NLRB 158 (1996), the Board decided that one particular clause which seeks to prevent this practice was not a violation of Section 8(e), on its face, because it was a lawful “work preservation” clause.

The clause provided s follows:

Section 1. To protect and preserve, for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement, and to prevent any device or subterfuge to avoid the protection and preservation of such work, it is agreed as follows: If the Contractor performs on-site construction work of a type covered by this Agreement, under its own name or the name of another, as a corporation, company, partnership, or other business entity, including a joint venture, wherein the Contractor, through its officers, directors, partners, owners and stockholders exercises directly or indirectly (including but not limited to management, control or majority ownership through family members), management, control or majority ownership, the terms and conditions of this Agreement shall be applicable to all such work.

Id. at 161-162.

The Board held that this clause is not unlawful on its face because it can be interpreted in such a way that it meets the two requirements that the Board and the courts have established for a lawful “work preservation” clause: it has as its objective the preservation of work traditionally

performed by employees represented by the union, and the contracting employer has the power to give the employees the work in question (the so-called “right of control” test). Id. at 164, citing NLRB v. Longshoreman ILA, 445 U.S. 490, 504-506 (1980). The Board held that this clause meets this test because, by its express terms, it applies to the “Contractor” if it “performs ... work ... covered by this Agreement, under its own name or the name of another ... wherein the Contractor ... exercises directly or indirectly ... management, control, or majority ownership.” Most significantly, the clause only applies if the contractor actually exercises “management, control, or majority ownership” over another entity which “presumptively means the contractor has the right or the power to control the assignment of work of that entity’s employees,” and if the Contractor actually exercises that right through the other entity. Id. at 164. See also Carpenters (Mfg. Woodworkers Assn.), 326 NLRB 321 (1998); Southwestern Materials, 328 NLRB No. 142, slip op. at 3 (July 19, 1999) (discussing NLRB v. Longshoreman ILA, 447 U.S. 490).

In Carpenters District Council of Northeast Ohio (Alessio Construction), 310 NLRB 1023 (1993), by contrast, the Board held that a union violates Section 8(e) by insisting to impasse on an integrity clause whose objective is to affect the labor relations of non-union companies over which the employer has no control, rather than to preserve the work of the employer’s bargaining unit. The Board noted that the clause would bind neutral companies to the employer’s collective-bargaining agreement based solely on common ownership, a factor which, standing alone, is insufficient to establish a single employer relationship. Thus, the proposed clause would apply, “even in circumstances where the signatory employer did not have the power to assign the disputed work to employees.” Id. at 1026. In Alessio Construction, 321 NLRB 158 (1996), the Board found unlawful a contract provision requiring that if partners,

stockholders or beneficial owners participated in the formation of another company engaging in the same or similar business or employing the same or similar classifications of employees, the new business would be covered by the contract. The Board reasoned that the agreement unlawfully reached neutral employers by applying to companies bound to the signatory solely by common ownership, rather than only to those over which the signatory had a right of control. See Southwestern Materials, 328 NLRB No. 142, slip op. at 3 (clause unlawfully bound “any person, firm or corporation owned or financially controlled”).

Job targeting or recovery programs, intended to protect employees’ jobs and wage scales, are protected by Section 7 of the Act. In Manno Electric, 321 NLRB 278 (1996), the job targeting program made it possible for union employers to competitively bid for jobs against non-union employers with lower wage scales because the union supplemented the wages paid by targeted employers so those employers could obtain new work for union members and maintain union wage scales on those jobs. Job targeting programs thus are not unlawful unless they are employed improperly as a weapon to coerce a neutral employer to cease doing business with another employer. In Sheet Metal Workers Local Union No. 91 (Schebler), 194 NLRB 766 (1989), enfd. in part and remanded 905 F.2d 417 (D.C. Cir. 1990), on remand 301 NLRB 1055 (1991), for example, the Board found that the union had violated Section 8(b)(4)(B) by conditioning its job recovery program on an unlawful integrity clause that required the signatory employer to enforce neutral businesses to grant contractual wages, hours and working conditions to their employees. When the signatory employer refused to sign the clause, the union rescinded its agreement and refused to offer the job recovery program to the employer.

Section 8(b)(4)(D) prohibits a union from picketing, threatening to picket, or engaging in restraint or coercion which has an object of forcing or requiring an employer to assign certain

work to one group of employees rather than to another. This provision is most often brought into play when one union threatens to picket or pickets an employer because the employer has assigned or intends to assign certain work to employees represented by another union; this type of dispute is frequently raised in the construction industry. If such a dispute arises, the employer or the other union, or any other interested party, can file a charge alleging a violation of Section 8(b)(4)(D).

If all the parties have not already agreed on a common method of deciding which group of employees is entitled to the work, the Board then convenes a hearing pursuant to Section 10(k) of the Act, which authorizes the Board to determine which group of employees is entitled to the work assignment. If the Board determines as a result of this hearing that “reasonable cause” exists to conclude that the charged union has engaged in picketing or has threatened to picket in order to force the employer to assign the work to employees it represents, the Board goes ahead and decides which group of employees to award the work to.

Sometimes it can be difficult to determine if there are actually two unions or two groups of employees making a claim that they are entitled to work which is allegedly in dispute. In Laborers District Council (Capitol Drilling Samples), 318 NLRB 809 (1995), a general contractor subcontracted a certain work to an employer whose employees were represented by a Laborers local. The general contractor, however, had an agreement with an Operating Engineers local which provides that the general contractor would only subcontract to employers that were willing to sign the agreement between the general contractor and the Operating Engineers (i.e., a lawful “union signatory subcontracting” clause under the proviso to Section 8(e) of the Act). The Operating Engineers brought a grievance under its contract with the general contractor, alleging a breach of the union signatory subcontracting clause, and the Laborers responded by

threatening to picket the subcontractor if the work was reassigned. The Board held, however, that even though the threatened picketing by the Laborers was conduct which would normally trigger a Section 10(k) proceeding, nevertheless the grievance by the Operating Engineers did not constitute a competing claim to the subcontractor for the assignment of the work. Instead, it was a contractual claim against the general contractor for breach of its union signatory subcontracting clause. Accordingly, there were no “competing claims” to the work, and thus the Board held a Section 10(k) proceeding would be unwarranted. Id. at 810.

The Supreme Court has held that Section 10(k) of the Act requires the Board to apply factors based on its accumulated experience and, based on these factors, to make an affirmative award of the work to one of the groups of employees. NLRB v. Broadcast Engineers Local 1212 (Columbia Broadcasting System), 364 U.S. 573, 579, 583 (1961). The Board balances several factors relating to the work in dispute in making such an affirmative award, including the employer’s preference, the relative skills of the competing groups of employees, certifications by the Board, provisions of any relevant collective bargaining agreements, employer past practice, area and industry practice, and other relevant factors. Based on the relative weight it awards to these various factors in the circumstances of each case, it awards the work to one or the other group of employees. See Machinists Lodge 1743 (J.A. Jones Construction Co.), 135 NLRB 1402, 1410-11 (1962).

Once the award is made, if the union which has made a competing claim to the work does not give assurances that it will comply with the award, and persists in its efforts to obtain the work, the Board’s General Counsel will issue a Complaint alleging a violation of Section 8(b)(4)(D) by virtue of the union’s original picketing or threats to picket. NLRB Rules & Regulations and Statements of Procedure, § 102.91; See Iron Workers Local 595 (Bechtel

Corp.), 112 NLRB 812 (1955). If proven, those allegations will establish a violation of Section 8(b)(4)(D).

One other provision which has particular application to the construction industry is Section 10(l) of the Act, which requires the General Counsel to seek injunctive relief if he determines that there is reasonable cause to believe that a union has violated any of the secondary boycott provisions of Section 8(b)(4)(A), (B), or (C), or has picketed or threatened to picket in order to force a work assignment in violation of Section 8(b)(4)(D). If the Federal District Court grants the injunction, the union will be enjoined from engaging in the proscribed picketing or threats to picket until the Board has finally adjudicated the alleged violations. This provision differs from the corresponding provision that governs the seeking of injunctive relief for all other unfair labor practices, Section 10(j) of the Act. Section 10(j) permits the Board (by vote of its five Members in Washington) to seek injunctive relief enjoining the commission of unfair labor practices pending final Board adjudication in all cases not covered by Section 10(l), on the recommendation of the General Counsel. Thus, the seeking of a 10(l) injunction, covering many disputes in the construction industry, is mandatory in all cases in which the General Counsel finds enough evidence to justify issuance of a Complaint, whereas the seeking of a Section 10(j) injunction is discretionary, and must be approved by the five-member Board in Washington.

III. Union Hiring Halls

Employers and unions in the construction industry often agree that the employer will obtain its employees from the union hiring hall. Under such an agreement, whenever a construction employer needs an employee for a particular project, it will call the union and ask for a referral. Depending on the rules governing the particular union's hiring referral practices, the employee or employees will be chosen from a hiring hall list or register kept by the union.

The choice will be made based on criteria which are determined by the rules of the particular hiring hall, which may or may not be set out in writing, and may or may not be included in the collective bargaining agreement between the employer and the union. These hiring halls and referral practices are utilized in other industries as well, but they are particularly prevalent in the construction industry, because employers have historically agreed to them in order to assure that they will have a ready supply of trained and experienced employees in the construction trades when they are ready to start a construction project.

An immense body of law has built up around the regulation of union hiring halls, and these legal principles have particular application to the construction industry because of the prevalence of hiring halls in construction employment. Basically, the prohibitions apply in general to what are called “exclusive” hiring hall arrangements, in which the employer agrees that the union hiring hall will be its sole or primary source of employees. Such a hiring hall arrangement is legal unless it discriminates against applicants for employment based on union membership, in violation of Section 8(a)(3) and 8(b)(2) of the Act, or unless it involves a violation of the union’s duty of fair representation, in violation of Section 8(b)(1)(A).

In order to avoid a violation of the latter duty, the union must operate its hiring hall and make its referrals based on rules and criteria that are not arbitrary, invidious, or in bad faith. In effect, an exclusive hiring hall arrangement is presumed to “encourage” union membership in violation of Sections 8(a)(3) and 8(b)(2), simply by virtue of the fact that it is operated by the union. See Operating Engineers Local 18 (Ohio Contractors Association), 204 NLRB 681 (1973), remanded per curiam, 496 F.2d 1308 (6th Cir. 1974), reaffirmed, 220 NLRB 147 (1975), enf. denied 555 F.2d 552 (6th Cir. 1977). Thus, the union has the burden of showing that the

referral rules are based on some objective criteria, and that referrals are not made in bad faith or in an arbitrary or invidiously discriminatory manner. Id. at 681.

Hiring hall agreements do not have to be reduced to writing,⁸ and the union is not necessarily required to keep the criteria for referral in writing or to keep written records of the order of past referrals, although the union always bears the burden of proving that objective, non-discriminatory criteria were used in making referrals. Laborers Local 394 (Building Contractors Association), 247 NLRB 97 (1980), *aff'd w/o opinion*, 659 F.2d 252 (D.C. Cir.), *cert. denied*, 454 U.S. 861 (1981). The Board and the courts have held that several different types of criteria for making referrals are lawful, and do not run afoul of the prohibitions against arbitrary or discriminatory conduct in violation of Section 8(a)(3) and Section 8(b)(2), or violate the duty of fair representation under Section 8(b)(1)(A). The details of these rulings are beyond the scope of this outline. The vast majority of these cases, however, understandably arise in the construction industry, where the operation of hiring halls has traditionally been a way of life.

IV. Conclusion

The original National Labor Relations Act, the 1935 Wagner Act, was not designed with the construction industry in mind, and the NLRB did not even see fit to assert its jurisdiction over construction employers until 13 years later, in 1948. Thus, even the 1947 amendments to the Act, including the prohibitions against secondary boycotts and jurisdictional picketing, were not initially directed at employment and collective bargaining relationships in the construction industry. As the law has developed since 1948, however, a patchwork of statutory provisions and NLRB and court rulings have sprung up which are either particularly aimed at construction industry relationships or have particular relevance to those relationships. Because the law as it relates to this industry has not had as long a history as the law relating to the rest of the employment world, it has not necessarily developed as fully or as rationally as the rest of the law

under the Act, and has not necessarily been integrated with that other law in a particularly rational manner.

The construction industry, however, will undoubtedly continue to have characteristics which are unique and serve to differentiate it from other industries, and thus the Board and the courts will have to continue to strive to develop this “parallel track” of jurisprudence that applies particularly to construction industry relationships. The Institute Sponsors acknowledge and appreciate the contribution to this paper by the following person: Dennis P. Walsh, Chief Counsel, Office of Board Member Margaret A. Browning, National Labor Relations Board, Washington, D.C. Any views expressed in this paper are those of Mr. Walsh, and do not necessarily reflect the views of Member Browning or any other current Member of the National Labor Relations Board.

ENDNOTES

1. This discussion does not address the question of whether employers and unions may enter into and enforce members-only agreements.
2. See John Deklewa & Sons, 282 NLRB 1375, 1380 (1987), enfd. sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988) (hereinafter referred to as “Deklewa”).
3. See generally, Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., U.S. ____, 113 S.Ct. 1190, 142 LRRM 2649, 2654 (1993); Deklewa, 282 NLRB at 1380.
4. See Deklewa, 282 NLRB at 1385; See Deklewa, 282 NLRB 1386 fn. 49.
5. See United States Gypsum Co., 157 NLRB 652-54 (1966).
6. This prohibition is based, in part, on the policy considerations underlying the so-called “election bar” which is contained in Section 9(c)(3) of the Act, which provides, “No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve month period, a valid election shall have been held.” See Deklewa, 282 NLRB 1385 and fn. 43.
7. Regarding the history of the development of the National Labor Relations Act and its amendments, see generally, The Developing Labor Law, Fourth Edition.

8. Iron Workers Local 10 (Guy F. Atkinson Co.), 196 NLRB 712, enfd. w/o opinion, ___ F.2d ___, 83 LRRM 2409 (8th Cir. 1973).

¹ See John Deklewa & Sons, 282 NLRB 1375, 1380 (1987), enfd. sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988) (hereinafter referred to as “Deklewa”).

² See generally, Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., ___ U.S. ___, 113 S.Ct. 1190, 142 LRRM 2649, 2654 (1993); Deklewa, 282 NLRB at 1380.

³ See Deklewa, 282 NLRB at 1385.

⁴ See Deklewa, 282 NLRB 1386 fn. 49.

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⁶ This prohibition is based, in part, on the policy considerations underlying the so-called “election bar” which is contained in Section 9(c)(3) of the Act, which provides, “No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.” See Deklewa, 282 NLRB 1385 and fn. 43.

⁷ Regarding the history of the development of the National Labor Relations Act and its amendments, see generally, P. Hardin, Ed., The Developing Labor Law, Third Edition, Part I, p. 3-66 (1992).

⁸ Iron Workers Local 10 (Guy F. Atkinson Co.), 196 NLRB 712, enfd. w/o opinion, ___ F.2d ___, 83 LRRM 2409 (8th Cir. 1973).