7-1-1981

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Union Representation in
Construction: Who Makes
the Choice?

JAN STIGLITZ*

This article deals with the particular problems inherent in the
construction industry that prevent employees from choosing
whether to be represented by unions. The article examines three
recent Supreme Court decisions that have given employers the
freedom to choose whether or not their employees will be repre-
sented by a union. While the Court was motivated by a desire to
prevent union domination of employees, the Court failed to per-
ceive the unique role that unions play in the construction indus-
try and the protection that unions provide for the worker.
Moreover, the goal of employee free choice is, in fact, subverted by
these decisions.**

INTRODUCTION

One of the central features of the National Labor Relations Act1
(NLRA or the Act) is its emphasis on employee choice in the selec-
tion of a representative for collective bargaining.2 In the para-

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School, 1980.

** This paper was prepared, in its original form, as the author’s LLM. thesis.
The author wishes to acknowledge the assistance of his advisor, Professor Paul C.
Weiler, Mackenzie King Professor of Canadian Studies at Harvard Law School.
The author also wishes to thank Professor D. Quinn Mills of the Harvard Business
School for his time and valuable suggestions.
(1970)).
2. Section 7, the cornerstone of the Act, provides:
    Employees shall have the right to self-organization, to form, join, or assist

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digmatic industrial setting, such as the factory, the system can function so as to give employees an opportunity to select a representative (or choose not to be represented at all). This system does not and cannot work in the construction industry. Because of the unique nature and structure of the industry, employees are not given an opportunity to participate in an organizational campaign and express their preferences in an election. Instead, by custom, case law and statute, and, out of necessity, alternative arrangements have developed.

Unions in the construction industry organize employers rather than employees. In this and in other ways, unions are truly a part of the industry. Several recent decisions of the Supreme Court and the National Labor Relations Board3 (NLRB or the Board) have demonstrated a lack of understanding of the nature of the industry, the role played in it by the unions, and the role that unions play in providing for the needs of the employees. Under the rubric of employee free choice, the Court and the Board may have changed the balance of power between employers and unions in the industry effectively giving free choice to the employers. This article will examine those decisions and their probable impact.

First, the article will look at the structure of the construction industry. Specifically, it will discuss how the product of the industry has determined the industry’s organization and how its organization affects labor relations. Second, the article will scrutinize how the law has developed in regard to the construction industry. Attention will be paid to the ways in which Congress, the Board and the courts have made or have failed to make special accommodations for the problems that are created by the structure of the industry. Finally, the article will examine three recent cases, NLRB v. Local 103, Iron Workers,4 South Prairie Construction Co. v. Local 627, Operating Engineers,5 and Connell Construction Co. v. Plumbers & Steamfitters Local 100,6 which illustrate the organizational and representational problems in the industry.

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labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition to employment as authorized in section 8(a)(3).


3. Hereinafter referred to as the “Board” or the “NLRB.”


and how the Board and the Supreme Court have, in various ways, failed to pay heed to those problems. It will be shown that the decisions reduce industrial democracy without any compensating benefit to the employees.

The article concludes that the National Labor Relations Act, as construed by the Board and the Supreme Court, does not adequately allow for employee free choice in the construction industry. Rather, employers in the industry are being allowed to choose whether to be unionized or not. This is a perversion of the Act caused by its uncritical application in a unique context.

**Structure of the Construction Industry**

*Industry Characteristics*

The construction industry occupies a major place in the nation's economy. The amount spent on construction in the United States ranges between 13-14% of the Gross National Product. The industry provides employment for 5-6% of the total labor force and 7-10% of the male labor force. In terms of employment, as of 1970, it was the largest industry in the United States.

Most of the distinguishing features of the industry and the labor relations systems that have evolved are directly related to the characteristics of the products of construction. Buildings, from small houses to skyscrapers, are the industry's major products, but a significant sector of the industry is organized for the construction of roads, bridges, dams, oil refineries, etc. While generalizations are particularly difficult in an industry characterized by diversity, it will be helpful, for analysis and discussion, to describe the industry with some basic and general terms.

The industry and its products are generally broken down into four categories:

1. Residential—single family units, apartments, dormitories and hotels;

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7. W. Haber & H. Levinson, Labor Relations and Productivity in the Building Trades 6 (1956); D.Q. Mills, Industrial Relations and Manpower in Construction 4 (1972); D.Q. Mills, Construction, in Collective Bargaining: Contemporary American Experience 60 (Somers ed. 1980); (all percentages herein are estimates because of the nature of the industry).

8. D.Q. Mills, Industrial Relations and Manpower in Construction, supra note 7, at 5.

9. Id.

10. These categories are taken from the organization used in H. Northrup & H.G. Foster, Open Shop Construction 8 (1975).
2) Commercial—stores, office buildings, warehouses, small factories;  
3) Industrial—large factories, power plants, refineries; and  
4) Heavy and Highway—roads, bridges, dams, pipelines, subways, etc.

The lines between these categories are not always clear. An apartment building and an office building may have more in common than an apartment building and a single family house. But for statistical purposes, apartments are usually included in references to residential construction.

As diverse as these various structures are, they have a number of features that unify them and distinguish them from the typical products of manufacturing. These features also lead to the industry's special labor relations systems and problems.11

Immobility

The products of construction are generally quite large and incapable of being moved. Accordingly, they are produced at the buyer's location. This means that the work of the industry takes place at numerous, changing places. One result is the existence of construction firms in every part of the country. Another result is the relative absence of large national firms.12

Another consequence is that there is no one central location at which to find and organize employees. An electrical contractor, for example, may have employees at fifteen different construction sites and those sites could be hundreds of miles apart. In addition, the locations will change as the projects are completed and new projects are undertaken. To go out and "organize" the employees, as that term is known, is virtually impossible in construction.

Complexity

Even the simplest house requires a variety of skills to construct. Foundation work is dissimilar from carpentry, electrical and plumbing operations. As the product grows, so does the complexity. A further factor is the custom made nature of the product. Each structure is designed and made to order. Little or no mass production exists in the industry.13

11. HABER & LEVINSON, supra note 7, at 11.
12. Id. at 9. "No firm does more than 1 percent by volume of receipts of the work in the industry nationally." MILLS, INDUSTRIAL RELATIONS AND MANPOWER IN CONSTRUCTION, supra note 7, at 7. In the Heavy and Highway sector, however, there are firms that gross in the hundreds of millions of dollars annually. NORTHUP & FOSTER, supra note 10, at 102.
13. There is a type of mass production in the residential housing sector where a large number of identical houses may be built in one location. In this type of development some of the techniques of mass production may be used.
One main consequence of this complexity or diversity is the organization of construction companies by specialty. There are general contractors who may bid on and arrange for the construction of a building, but no large building is ever built by one organization. Instead, parts of the work are subcontracted to firms that specialize in one phase of construction. Accordingly, at any one location there will be a multiplicity of employers.

A concomitant feature is the organization of employees in the industry along craft lines. Each employer in construction will have one or more crafts or trades represented in its work force. Therefore, for purposes of organizing for unionization, a union must not only deal with geographical constraints; it must identify the employees on a site by employer and by craft. These problems may make traditional organizing impossible.

The multiplicity of employers and employee trades at a construction site and the problems that are caused in terms of labor relations cannot be overstated. More than 44% of all construction receipts are subcontracted, with general contractors subcontracting out over 63% of their gross receipts. There are nineteen major unions that are represented in construction.

The potential for labor disputes at any given site is readily apparent. In addition, a dispute between any employer and any group of employees will affect all other firms and employees at the site. If the union with a grievance pickets a site and the picket line is honored, the job will be shut down immediately. Even if this does not happen, a strike by one trade will prevent an item of work from being completed. In a very short time, that unfinished step in the project will prevent other work from going forward.

Finally, and of utmost importance in terms of the system of labor relations, the organization of employers and employees by task affects the duration of employment. Employment relationships in construction are transitory. A worker will be hired when his or her services are needed on a project and let go when that phase of the project is completed. Construction workers drift

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15. Haber & Levinson, supra note 7, at 31.
17. Id.
from project to project, employer to employer and even from one geographical location to another.

In this setting, a union cannot possibly go and organize the employees of a particular employer. But the union can serve as an employment service and provide employees to construction firms and distribute jobs to members. This, in fact, is one of the key roles that unions play in the industry. By performing this service, they provide security to employees and stability and flexibility to the industry.19

Seasonality

Because construction takes place outside, and because many operations cannot be performed in cold or wet weather, the industry is seasonal. This exacerbates the need to have flexibility in terms of the duration of the employment relationship. Once again, the union will serve the industry and the employees by distributing available jobs.

The Anatomy of a Construction Project20

A typical project will start with a buyer, or owner, contacting a design professional to create plans for a structure that will meet its needs. This design professional, generally but not necessarily an architect, will produce a set of plans and, perhaps, some cost estimates. Often, the design process of a building will involve the services of many firms: architectural and engineering firms which may specialize in every phase of construction from landscaping and site development to structural and mechanical design.

Once the plans are set, they will be given out for bid. Bidders on projects are typically general contractors who will do some of the work and serve as brokers for the work to be performed by subcontractors. The project is usually awarded to the lowest bidder, so accurate bidding is essential to getting business and staying in business.

In order to bid, the contractor (either the general or sub) will do a “take-off” of the work it plans to do with its own forces. This “take-off” is an estimation of the amount of labor and materials necessary to perform the work. Materials will be priced and labor will be calculated based on negotiated or estimated wage rates.

19. Haber & Levinson, supra note 7, at 45. There is, however, a large nonunion sector of the construction industry that exists without the services of the unions. See generally H. Northrup & H.G. Foster, supra note 10. See also discussion of the nonunion sector, notes 31-49 and accompanying text infra.

20. The information contained in this section was learned by the author while practicing in the area of construction contract litigation.
Here one can see the advantage of having contracts with a union so that labor rates are known and total labor costs can be predicted with some degree of certainty. In addition, a labor agreement with a union ties the contractor into a source of skilled laborers assuring an adequate supply of workers for the project. Special provisions in the law have been enacted in order to allow a contractor to enter into agreements with unions even before the contractor has any employees.21

Once the project gets under way, it will have its own particular flow of work and operations. Changing work will require changing work forces. For example, plumbers may do a little work prior to the pouring of the foundation and then be off the project for weeks while the structural steel is being erected. It is very possible that, except for the superintendent, no plumber who worked on the project initially has any contact with it when the later plumbing work is installed.

Unions in Construction

Unions in construction are organized along craft lines because of the variety of skills needed in any construction project. Many of these craft unions were organized in the early 1800's, and by the beginning of the twentieth century, the major craft unions were established nationally.22

Craft consciousness is still important in construction as each union guards its domain or jurisdiction with great zeal. As early as 1908, the major craft unions joined together to form the Building and Construction Trades Department to take care of jurisdictional disputes that arose.23 Even though jurisdictional strikes are illegal today,24 they account for between 30-40% of the strikes in the industry. Fortunately, these strikes tend to be brief and may only involve a few workers.25

By guarding its jurisdiction, a union is protecting jobs for its members, which is one of the union's main functions. Jobs are also procured when a contractor is organized by the union and signs a collective bargaining agreement with it. As more contrac-

21. See notes 82-144 and accompanying text infra.
22. HABER & LEVINSON, supra note 7, at 30.
23. Id. at 31.
tors are organized, the unions are better able to distribute work to their members and ensure continuous employment opportunities.

The various craft unions are organized in a variety of ways. The basic unit is the local, whose geographical jurisdiction could be a part of a city or an entire county. The local organization has historically been fairly autonomous in terms of wage negotiations. This has given the individual union member some meaningful input into the operations and goals of the union.

In many areas, the locals have formed district councils and have bargained as such. This is particularly true in large cities where there are many locals. The unions benefit by added size and strength. The employers approve of this arrangement because it eliminates the need for negotiating many contracts in order to work in different parts of the city. One recent trend in the industry has been towards expanding the size of the bargaining unit.

The national organization provides assistance in legal matters and in lobbying for beneficial labor legislation. It also negotiates agreements with large contractors that work all over the country so that they need not negotiate with a local or district council in order to bid on work in a new area.

Nonunion Construction

Though unions play a dominant role in labor relations in the construction industry, it is not an exclusive one. There are many areas of the country where unions do not have any strength and where contractors operate an “open shop.” The extent of open shop competition has increased in the past and may increase in the future as a result of Supreme Court and National Labor Relations Board decisions to be discussed. An understanding of the open shop sector will be helpful in evaluating those decisions.

The extent of open shop construction varies both by geography and by type of construction. The northern, eastern, and far western sections of the country are more widely unionized than the

26. See generally Mills, Construction, supra note 7, at 58-60.
28. See generally Mills, Industrial Relations and Manpower in Construction, supra note 7, at 31-55.
32. See generally H. Northrup & H.G. Foster, supra note 10.
southern and certain central areas. Within any given geographical area, the extent of open shop competition will increase as the distance from a metropolitan center increases.

The open shop sector of the industry is strongest in residential construction, accounting for approximately 80-90% of the single family homes built and approximately 50% of all multiple residence construction. The success of the open shop in residential construction is due to the limited size of the projects and contractors who engage in them. A small project requires a limited amount of labor and thus access to the union hiring hall is not essential. In addition, the unions lack the resources to police this area of construction.

Industrial construction, on the other hand, is a union stronghold, and it has only recently felt a challenge from the open shop movement. These larger projects need many skilled workers which the unions can supply, and the unions are willing to fight for these projects since the money involved in each is great. In addition, construction of industrial facilities generally takes place in or around cities, where unions generally have great strength. Yet, as the open shop contractors grow in size and strength, and as industrialization moves to the nonunion sunbelt, the extent of open shop industrial construction has increased and will continue to increase.

Commercial construction has traditionally been a union stronghold but the open shop movement has made great gains here. Heavy and highway construction have also felt the effects of the open shop movement despite state and federal laws which prevent the open shop contractors from paying substandard wages.

As indicated earlier, the unions assist the industry by providing a ready source of skilled labor. They also help to train labor

34. Id. at 349.
35. Id. at 64-65.
36. Id. at 99-120.
37. Id.
38. Id., generally at 72-78 and at 350.
39. Id., generally at 72-78 and at 350.
40. See e.g., Davis-Bacon Act, 46 Stat. 1494 (1935), 40 U.S.C. §276a and §220 of the New York Labor Law, both of which provide that wages paid shall be the prevailing rate. This most often means the union rate.
through apprenticeship programs. The open shop sector does not have access to the hiring hall and must use other, less efficient means to procure and train employees. Current and past employees provide one source of labor and a reference point for additional help.41 State employment services and vocational schools provide other sources of labor. Recently, employer organizations have created more formal job referral systems which are modeled after the hiring hall.42 Training, where necessary, is usually conducted on an informal, on-the-job basis.43 Because training and recruitment are significant problems, open shop contractors will try to keep their employees for as long as possible.44

Despite the problems of labor recruitment, the open shop contractors can be extremely competitive because their labor costs average substantially less than union shops doing the same work.45 Wages in open shop construction are lower but the precise amount is not easily ascertainable.46 Fringe benefits are also lower (there are, obviously, no union pension fund contributions) but again, the difference is not known.47

Other ways in which the open shop contractor can reduce labor costs include:

(1) the employment of helpers or learners at low rates of pay; (2) the use of laborers to do... journeyman work...; (3) the absence of premium pay for such things as shift work... and the use of certain types of equipment; (4) [reduced overtime payment]; (5) avoidance of... jurisdictional... lines; (6) absence of minimum-crew-size rules; (7) absence of stand-by men; and (8) absence of... journeyman to foremen ratios.48

It has been estimated that the above factors, including reduced wages, can lead to a 50% savings in labor costs which enables open shop contractors to bid approximately 8% less for any given project.49

Open shop competition has increased and formalized to the point where open shop contractors are able to provide themselves with training and labor allocation arrangements that supplant the need for unions. This sector of the open shop has been referred to as the merit shop construction.50 But while an increase in open

42. Id. at 214-17.
43. Id. at 237.
44. Id. at 122.
45. Id. at 319. See also Foster, Industrial Relations in Construction: 1970-77, 11 INDUSTRIAL RELATIONS 1, 4 (1978).
47. Id.
50. Mills, Construction, supra note 7, at 49 and 89-91.
shop construction has helped contractors who want to be open shop, no similar benefits have accrued to employees.

From the standpoint of the employee, the union shop offers more money. The local, which has been characterized as “workably democratic,” offers the individual employee some say in the incidences of his or her employment. No analogous form of input exists in the open shop, and there is no reason to assume that the open shop is preferred to the union shop by employees generally. Thus, the decisions examined, which may shift the balance in the industry towards open shop, may not further the interests of the employees.

LEGAL HISTORY OF LABOR RELATIONS IN THE CONSTRUCTION INDUSTRY

Though the construction industry has a unique structure that creates special problems in labor relations, the law has not followed a consistent course in its treatment of the construction industry. This section of the article will briefly sketch the legal history of labor relations in the construction industry.

The Wagner Act

The Wagner Act made no special provisions for the construction industry. As written, all of its provisions should have been fully applicable to labor relations in construction. Yet the National Labor Relations Board, for reasons that were never made explicit, refused to assert jurisdiction in cases involving the construction industry.52

Under this policy of laissez faire, the unions had great strength, and the closed shop became prevalent in the industry. It has

been estimated that as of 1945, 80% of the industry was unionized and 95% of all union contracts had closed shop provisions. In this situation, the union hiring hall became firmly entrenched as the source of all jobs in construction. This inured to the benefit of unions and was also accepted by the employers who were assured of adequate numbers of skilled workers.

Taft-Hartley

Taft-Hartley did not effectuate any changes in the jurisdiction of the National Labor Relations Board, but the inclusion of a prohibition against jurisdictional strikes and the legislative history of other unfair labor practice provisions made it clear that Congress intended that the construction industry be regulated. The industry was not, however, amenable to a full scale application of the NLRA.

One of the first problems arose with Taft-Hartley's prohibition of the closed shop provision. The union shop provision, under which employees did not have to join the union until thirty days after employment commenced, did not give the union much security where the term of employment was often less than thirty days. In addition, the union security provision could only be included in a contract if it were authorized by employees in a special election. With job tenure severely limited and with construction taking place at numerous sites, the election requirement posed a great problem.

The first General Counsel to confront the election problem estimated that the cost of elections in the industry would be between 1-1.5 million dollars. A pilot program of his actually cost 16 dollars per vote and that was with the full cooperation of the unions and employers involved. Ultimately, he recommended that the Board ignore the statute.

The Board refused to heed that advice, and in Guy F. Atkinson,
Co., it invalidated a union security clause because no special referendum had been held. Congress solved the specific problem raised in Atkinson when it eliminated the special union security clause election requirement. But the thirty day waiting period was still a problem for unions, and elections were still possible, though inappropriate, where employers did not voluntarily recognize a union.

In practice, through 1955, the unions and employers in the industry ignored the law and continued to operate under closed shop arrangements. Even if the collective bargaining agreements only referred to industry experience as a hiring criteria, the union members were bound to have more experience. Where such a qualification did not aid the union members, the dispatchers at the hiring halls just ignored the written agreements and referred nonunion personnel only when all union members were fully employed.

The Board did not give serious attention to this problem until 1956 when it imposed severe penalties in the case of Plumbers Local 231 (Brown-Olds). In Brown-Olds the Board determined that the remedy for the operation of an illegal closed shop provision would be a reimbursement of all dues and fees paid during that period. The Brown-Olds remedy was eventually overruled by the Supreme Court, but it prodded the unions and employers into some revision of the closed shop practice.

The Board also attacked the operation of union hiring halls even where no illegal closed shop provision was in effect. In NLRB v. Mountain Pacific Chapter of the Assoc. General Contractors, the Board held that hiring hall agreements would not be legal unless they contained the following language:

1. Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership.
2. The employer retains the right to reject any job applicant referred by the union.

62. 90 NLRB Dec. 27 (1950).
63. Id.
64. See note 59 supra.
65. HABER & LEVINSON, supra note 7, at 71-72; BERTRAM, supra note 53, at 70-71.
66. See generally BERTRAM, supra note 53, at 70-77.
68. Id. at 597.
The parties to the agreement post... all provisions relating to the functioning of the hiring arrangement, including the safeguards we deem essential...71

The Board was partially overruled, but absent appropriate language in the hiring hall provision, the burden fell on the parties to show that the contract was not discriminatory.72

A totally separate problem raised by Taft-Hartley and the construction industry's inclusion in the law's coverage arose in the area of secondary boycotts. The logic of the primary-secondary distinction, which precludes concerted activity against a neutral employer in order to put indirect pressure on a primary employer, falls apart in the construction industry context. This was most clearly illustrated in NLRB v. Denver Building & Construction Trades Council.73

In Denver Building Trades, a district council of unions struck a general contractor because it engaged a nonunion subcontractor on the project in question. The union claimed that it had a primary dispute with the general contractor since it had determined to retain the nonunion subcontractor. The Court held that the real dispute was with the nonunion subcontractor and that "an object" of the strike was to force the general contractor to sever relations with the subcontractor. Accordingly, the union violated section 8(b)(4)(A).74

Justice Douglas argued in dissent that the basic protest was against nonunion men working on the job. Had the general contractor hired the nonunion men directly, the strike would not have been illegal. Why, therefore, should the fact that the general contractor used the indirect employment device of a subcontract change the result?75 The Denver Building Trades problem has never been remedied, and primary-secondary distinctions are still troublesome.76

Landrum-Griffin77

In Landrum-Griffin, the Congress finally recognized that the construction industry needed some special legislation. The most

71. Id. at 897.
72. 270 F.2d 425, 429-30 (9th Cir. 1959). Eventually, even the presumptive rule was overturned. Local 357, Teamsters v. NLRB, 365 U.S. 667, 676 (1961).
73. 341 U.S. 675 (1951).
74. Id. at 686-88.
75. Id. at 692-93.
important feature of relevance here was Landrum-Griffin's inclusion of section 8(f) which allowed the prehire agreement.\footnote{78. 29 U.S.C. §158(f) (1976).}

Employers need to know their labor costs in order to accurately bid on projects. Yet at the time of bidding, they may not have any employees. Prior to the enactment of section 8(f), an agreement between an employer and a union prior to the hiring of any employees would have been illegal.\footnote{79. See §§8(a)(1) & (3) and 8(b)(1) of the NLRA, 29 U.S.C. §158 (1976).} Section 8(f) solved this problem and others by providing in pertinent part that:

\begin{quote}
It shall not be an unfair labor practice under subsection (a) and (b) of this section for an employer... in the... construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building... industry with a labor organization of which... construction employees are members... because (1) the majority status of such labor organization has not been established under... section 9 prior to the making of such an agreement, or (2) such agreement requires... membership in such labor organization after the seventh day... of such employment, 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.... \footnote{80. 29 U.S.C. §158(f) (1976).}
\end{quote}

A second area in which Landrum-Griffin accommodated the construction industry was in regard to hot cargo agreements. The hot cargo agreement was one in which an employer agreed not to handle certain goods, generally those not manufactured under a union contract.\footnote{81. This kind of agreement was prevalent in the trucking industry where the teamsters used them to force neutral employers to assist them in their organizing campaigns. See generally Aaron, supra note 53, at 1116-21.} When Congress outlawed them by adding section 8(e), the construction industry was exempted.

In summary, the application of the NLRA to the construction industry has had three stages: laissez faire under the Wagner Act, total regulation under Taft-Hartley, and accommodation with the passage of Landrum-Griffin. The question to be examined now is the extent to which the Board and the Supreme Court have accepted the concept of special accommodation for the needs of the construction industry.

**RECENT CASE LAW**

The answer to the question raised at the end of the previous section can be found in three cases. Each of these cases presents...
the organizational and representational problems that are unique to the construction industry.

**Higdon**

Because the employment relationship in construction is transitory, representation elections are inappropriate; and the prehire agreement has, instead, been authorized. At first, the Board treated the prehire agreement as it would any collective bargaining agreement entered into between a certified bargaining representative and an employer. In *Oilfield Maintenance Co.*, the employer tried to defend unfair labor practice charges filed against it arising from its unilateral abrogation of certain prehire agreements it had with several unions by questioning the unions' majority status. During the pendency of the proceedings, all but one of the collective bargaining agreements expired. The Board did not issue a bargaining order where the agreements had expired and where the union clearly did not represent a majority of the employees in the unit. The Board, however, did find that section 8(f) validated the unexpired agreement and made it enforceable until its expiration date despite the fact that the union lacked majority status.

That position was suddenly reversed by the Board in the case of *R.J. Smith Construction Co.* Beginning in 1964, Smith and the operating engineers had entered into memorandum agreements incorporating the terms of a master collective bargaining agreement negotiated by an organization of contractors and a multi-union bargaining organization. During the pendency of the then current agreement, Smith unilaterally changed the rates that it had been paying some of its operating engineers. Though the union had ignored Smith's past failure to pay the wages required under the agreements, it chose to file unfair labor practice

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82. 142 NLRB Dec. 1384 (1963).
83. There was some question raised as to whether one or two employers were involved. The Trial Examiner found, and the Board agreed, that one was the alter ego of the other and both were bound by either's labor contracts. *Id.* at 1385-87. For a more complete discussion of the alter ego or double-breasted problem in construction see notes 145-202 and accompanying text infra.
84. 142 NLRB Dec. at 1387.
86. One prevalent pattern of bargaining in the construction industry is between an employers' association, such as the Association of General Contractors, and a union or multi-union group, such as a District Council or a Trades Council. Employers who do not authorize the multi-employer organization to bargain for them, often enter into simple agreements, known as memorandum agreements, that adopt the provisions of the multi-employer collective bargaining agreement. See generally Mills, *Construction*, supra note 7, at 57-77.
charges based on new violations.\textsuperscript{87}

Smith defended the charges by questioning the union's majority status. The union contended that section 8(f) validated the agreement in the absence of any showing that it represented a majority of the employees. In fact, prehire agreements are valid in the absence of any employees. Therefore, the union argued, the employer could not defend an unfair labor practice charge by questioning the union's majority status.\textsuperscript{88}

Relying in part on the fact that an 8(f) agreement would not bar a representation election,\textsuperscript{89} the Board held that the employer could raise the question of the union's majority status by refusing to bargain. The Board reasoned that since the 8(f) agreement could be executed before any employees were hired, there was no reason to give the union any irrebuttable presumption of majority status.\textsuperscript{90} Since it was conceded that the operating engineers did not represent a majority of the employees, the charges could not be sustained.

Members Fanning and Brown dissented.\textsuperscript{91} They argued that since a prehire agreement was valid without a majority showing, it would be anomalous to allow the employer to question the union's majority status when the union sought to enforce the agreement. In essence, the Board was saying that "Congress permitted such prehire contracts without intending them to have any effect."\textsuperscript{92}

The D.C. Circuit refused to enforce the Board's decision in \textit{Local No. 150, Internat'l Union of Operating Engineers v. NLRB (R.J. Smith)}.\textsuperscript{93} The court found section 8(f) to have been enacted in light of the special needs of the construction industry such that "a construction company typically hires a union before commencing a particular project and before hiring any individual employee in

\begin{footnotes}
\item[87] The union also filed §8(a)(3) charges based on the firing of several union members. Perhaps the firing prompted the union to take the matter of contract compliance more seriously, 191 NLRB Dec. at 693.
\item[88] 191 NLRB Dec. at 693-94.
\item[89] The final proviso to §8(f) states: "[A]ny agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(e) or 9(e)."
\item[90] The Board did suggest that the presence and enforcement of a union security clause in the agreement might give the union a rebuttable presumption of majority status. 191 NLRB Dec. at 693-94.
\item[91] \textit{Id. at} 695.
\item[92] \textit{Id.}
\item[93] 480 F.2d 1186 (D.C. Cir. 1973).
\end{footnotes}
the union." If the employer wants to question the union's majority status at any future point in time, it would be free to do so by petitioning for an election; the one year waiting period set by section 9(c)(3) does not apply to 8(f) agreements. Similarly, the employees may at any time petition for an election. Thus, argued the court, the employer has no justification for challenging the union's majority status by refusing to bargain and prompting an unfair labor practice charge. Echoing the dissenters on the Board, the court stated: "we cannot conceive of such an exercise in futility on the part of Congress as to validate a contract with a union having minority status, but to permit its abrogation because of the union's minority status."

On remand, the Board indicated that it would abide by the circuit court's decision in the case before it, but it stated that it would not follow the D.C. Circuit's ruling in future cases. The Board got its opportunity to reaffirm its R.J. Smith holding in Higdon Contracting Co.

Higdon Construction Company and the iron workers had entered into a contract, negotiated pursuant to section 8(f), in 1958. That agreement expired, and the union refused to refer workers to Higdon Construction until it agreed to the terms of a collective bargaining agreement that the union had negotiated with an employers' association. Higdon Construction agreed. But shortly thereafter, the sole owner of Higdon Construction incorporated Higdon Contracting Co. to perform work outside of the union contract.

When Higdon Contracting refused to extend the terms of Higdon Construction's collective bargaining agreement to its projects,

94. Id. at 1189.
95. See note 89 supra.
96. Id.
97. 480 F.2d at 1190.
98. 208 NLRB Dec. 615 (1974). The Board also determined that the appropriate bargaining unit would be employer-wide. At the time, the company had construction underway in fourteen different counties. This decision is ironic given later holdings on the unit question. See notes 129-34 and accompanying text infra.
100. 216 NLRB Dec. 45 (1975).
the union picketed. Higdon Contracting waited until thirty days had elapsed, and, when no election petition had been filed, it went to the Board with section 8(b)(7)(C) charges.

The Board cited its decision in *R.J. Smith* for the proposition that section 8(f) only establishes the legality of the prehire agreement and that an employer can ignore the agreement without violating sections 8(a)(5) or 8(d) when the union does not represent a majority of its employees. *Ruttman Construction Co.*, decided the same day as *R.J. Smith*, was cited for the proposition that further action was necessary for a prehire agreement to blossom into a full collective bargaining relationship.

These cases established that Higdon was free to ignore the section 8(f) agreement for the projects not yet underway, and the union could not get a section 8(a)(5) bargaining order. If the union was not entitled to a bargaining order, it could not force bargaining by picketing in contravention of section 8(b)(7). To allow such picketing, reasoned the Board, would be to allow the union to get by induction what it could not get directly. In reaching that conclusion, the Board disagreed with the administrative law judge who had found that the picketing had been for the purpose of enforcing a valid contract and therefore not an 8(b)(7) violation. In rejecting this finding, the Board determined that the prehire agreement was without meaning where the union had not achieved majority status at a project.

Not surprisingly, the D.C. Circuit reversed and let the Board know that it was unhappy about the Board’s ignoring the court’s decision in *Local 150 (R.J. Smith)*. The court viewed the issue as simply whether an employer could walk away from a valid

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101. The Administrative Law Judge found that the two companies were alter egos. *Id.* See notes 145-202 and accompanying text *infra.*
103. *Id.*
104. *Id.*
105. 216 NLRB Dec. at 46.
107. 216 NLRB Dec. at 46.
108. *Id.*
109. *Id.* at 49-50. The Administrative Law Judge did not mince words when he found that the employer “only” sought to avoid the contract on nonunion jobs “by subterfuge and chicanery.” *Id.* at 50.
110. Local Union No. 103, etc. v. NLRB, 535 F.2d 87 (D.C. Cir. 1976). The Court called attention to the fact that the NLRB had neither appealed *Local 150* nor requested a hearing *en banc.* *Id.* at 88.
agreement without any consequences. The court reaffirmed its position in *Local 150 (R.J. Smith)* that an employer could either abide by the prehire agreement, or, if it was troubled by the union's lack of majority status, petition for an election.\(^{111}\)

The Supreme Court reversed in a six to three decision in *NLRB v. Local 103, Ironworkers (Higdon).*\(^{112}\) Justice White, writing for the majority, found that the Board's construction of the Act was "reasonable" and "acceptable" albeit not the only "tenable reading."\(^{113}\) Justice White spoke about the general statutory policy of giving representational rights to a union that was the "voice of the majority."\(^{114}\) Since section 8(f) was an exception to this rule and would not bar an election to determine majority status, the employer could condition its obligation to bargain and to honor the prehire agreement "on the union's [attainment of a majority] at the various construction sites."\(^{115}\)

White cited the legislative history of section 8(b)(7) in support of this conclusion: "[I]ts major purpose was to implement one of the Act's principal goals—to ensure that employees were free to make an uncoerced choice of bargaining agent."\(^{116}\) White acknowledged that section 8(f) "was motivated by . . . the unique situation in [the construction] industry," but stated that "Congressional concern about coerced designations . . . did not evaporate" when Congress acted in regard to the situation in the construction industry.\(^{117}\) He maintained that section 8(f) was prompted by the contractor's need to know labor costs when bidding and its need to be ensured of access to adequate amounts of skilled labor. White mentioned that representation elections to demonstrate majority status were not feasible in construction. But he concluded that the Board's determination that section

\(^{111}\) Id. at 90.
\(^{112}\) 434 U.S. 335 (1978).
\(^{113}\) Id. at 341. Throughout the opinion, the Court accepts the Board's holding with language that evinces a reluctance to embrace the holding. Perhaps the Court is unhappy about the decision but feels compelled to abide by it for institutional reasons. It is equally possible, however, that the Court is just being defensive because it recognizes that its arguments don't quite bear up to any scrutiny.
\(^{114}\) Id. at 344.
\(^{115}\) Id. at 345.
\(^{116}\) Id. at 346. White also cited *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616* (1974), for the proposition that one of the main purposes of Landrum-Griffin "was to limit 'top down' organizing campaigns." *NLRB v. Local 103, Ironworkers,* 434 U.S. 335, 346 (1978). The Court's reference to *Connell* and its quotation of its conclusion in *Connell* that a major aim of Landrum-Griffin was to limit top down organizing is disingenuous. *Connell* did not involve section 8(f) of the NLRA. See notes 77-80 and accompanying text infra. It was thus easy for the Court to ignore the fact that section 8(f), a top down organization tool, was enacted as a part of Landrum-Griffin.
\(^{117}\) Id. at 347-48.
8(b)(7) applies to a "minority union picketing to enforce a prehire contract" (so as to ensure uncoerced employee selection) could not be faulted.\textsuperscript{118}

The Court dealt with the argument that section 8(f) is rendered meaningless if unenforceable, in part, by citing \textit{NLRB v. Enterprise Association of Pipefitters, Local 638 (Enterprise)}\textsuperscript{119} and \textit{Local 1976, United Brotherhood of Carpenters v. NLRB (Sand Door)}\textsuperscript{120}. In \textit{Sand Door}, picketing to enforce a valid hot cargo was prohibited. Similarly, in \textit{Enterprise}, the Court upheld a secondary boycott charge where the union picketed to enforce a valid work preservation agreement. It was also argued that the prehire agreement was not meaningless because the employer could voluntarily abide by it. Finally, the opinion stated that "\[i\]t is also undisputed that when the union successfully seeks majority support, the prehire agreement attains the status of a collective-bargaining agreement. . . ."\textsuperscript{121}

Justice Stewart wrote a brief dissenting opinion which was joined by Justices Blackmun and Stevens\textsuperscript{122}. He agreed that the employer in the construction industry was free to choose whether to enter into a prehire agreement and could not be compelled or coerced into signing one, but he found nothing in the legislative history of section 8(f) to support the proposition that an employer could render a collective bargaining agreement a "nullity."\textsuperscript{123}

Even assuming that the Board was correct in concluding that a prehire agreement would not support a bargaining order, he also disagreed with the conclusion that the picketing here violated section 8(b)(7). Primary picketing is not unlawful unless it falls within a specific statutory prohibition. Prior cases had interpreted section 8(b)(7) as applying only where a union was seeking an initial bargaining relationship.\textsuperscript{124} If nothing else, the prehire agreement meant that the parties had passed the initial bargaining relationship stage.

Little can be said in support of the Court's position in this case.

\textsuperscript{118} \textit{Id.} at 348-49. Note again the Court's language which fails to endorse the Board's holding but does not overrule the Board.

\textsuperscript{119} 429 U.S. 507 (1977).

\textsuperscript{120} 357 U.S. 93 (1958).

\textsuperscript{121} \textit{Id.} at 349-50.

\textsuperscript{122} \textit{Id.} at 352.

\textsuperscript{123} \textit{Id.} at 353.

\textsuperscript{124} \textit{Id.} at 354.
It seems to directly contradict its stated ends, and it ignores the realities of the construction industry. The decision also raises some questions with regard to the appropriate unit for bargaining that the Court does not even consider.

**Employee Choice and Elections**

The Court clearly states that it is upholding the Board's interpretation of section 8(b)(7) and section 8(f) so as to effectuate a "major purpose" and "principal goal" of Congress—"to ensure that employees were free to make an uncoerced choice of bargaining agent." But the Court never suggests how the employees may exercise that free choice. In the standard industrial setting, the election procedure can be effective. But in the construction industry, elections cannot work.

Senator Kennedy, who led the Senate drive for labor legislation in 1959, stated quite clearly that section 8(f) was needed "because of the inability to conduct representation elections in the construction industry." The Court notes that the Senate report on section 8(f) found that representation elections were not feasible in a large section of the industry due to short periods of employment by a worker with any given employer, but then the Court ignores the problem and turns the issue upside down, stating that: "Privileging . . . prehire agreements in an effort to accommodate the special circumstances in the construction industry may have greatly conveienced unions and employers, but in no sense can it be portrayed as an expression of the employees' organizational wishes."

This is absurd reasoning. First it forgets that section 8(f) exists because employees have no opportunity to express organizational wishes. Second, it assumes that the desires of the union are totally divorced from the interests of the workers. Notwithstanding the existence of corrupt unions, most unions are composed of and run by workers, or workers' employees, for the benefit of workers. Third, it results in the choice going to the employers, whose interests are directly contrary to those of the employees: no employer abandons a union agreement in order to be free to pay workers more money. It may be true that the prehire agreement or the union shop is not necessarily the choice of employees, but there

125. Id. at 346.
127. 434 U.S. at 349.
128. Id.
is no evidence that the open shop and lower wages are what employees would prefer.

The Appropriate Unit

A second problem raised by the Higdon decisions and one that will help determine the ultimate impact of these decisions on labor relations in the construction industry is the unit question. Must the union demonstrate majority status at each site or on a company-wide basis?

In Daniel Construction Co.,129 decided in 1961, the Board held that a company-wide unit was appropriate even though the employer was engaged in construction in a six-state area. The Board found that the “working conditions, skills, and nature of employment” were similar at all sites.130 The employer argued for a unit limited to a specific project. The Board rejected this request stating:

While many of the Employer's projects may be under construction for 18 months or longer, a great number of these are of much shorter duration. To recognize the Employer's contention and direct an election only in a single-project unit would in many instances be a meaningless ritual and serve no useful purpose.131

In a case decided just before the Supreme Court's decision in Local 103 (Higdon) that position was apparently abandoned. In Dee Cee Floor Covering, Inc.132 the union challenged the employer's decision not to abide by a prehire agreement when it commenced work at a new site. The Board reiterated its Higdon view that prehire agreements carry no presumption of majority status and stated: “the mere fact that the Union might indeed have represented a majority of the employees at Respondent Dee Cee's previous jobsites is of no consequence inasmuch as the Union must demonstrate its majority at each new jobsite in order to invoke the provisions of Section 8(a)(5) of the Act.”133 This position was thereafter acknowledged in Local 103 (Higdon) when the Supreme Court said that the duty to bargain was “contingent on the union's attaining majority support at the various construction sites.”134

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130. Id. at 265.
131. Id.
133. Id. at 422.
If this position is maintained, the unions in construction will face the "meaningless ritual" that the Board rejected in Daniel Construction. There is no way that a union will be able to mount an organizational campaign at each construction site. Nor does the union have any leverage with the employer at a site where the employer wants to operate nonunion—the employer would not decide to operate nonunion unless it knew that it could get sufficient labor without the union. The union's leverage exists and its basic bargain is struck when it offers to supply labor in return for its labor being used at all of the contractor's present or potential sites. The decisions in Local 103 (Higdon) and Dee Cee take away the package deal.

It is also unrealistic to speak about the need to demonstrate a majority at each new site when one realizes that the section 8(f) prehire agreement was designed to allow for a union contract where no employees had been hired at all. If section 8(f) permits an employer with no current employees to agree to a contract covering all future employees at all future sites, there is no rationale for allowing the employer to justify an abandonment of the agreement because the union cannot demonstrate a majority at each site.

Majority Status and Previous Bargaining Relationship

The Higdon decisions leave open questions as to how a union may demonstrate majority status and what constitutes an 8(f) agreement. Resolution of these issues may also determine the ultimate effect that the Higdon decisions will have on the industry.

In Bricklayers & Masons Local 3135 the Board distinguished between an initial bargaining relationship and a situation where the parties had previously executed collective bargaining agreements. According to the Board, section 8(f) only applied to initial attempts to establish a relationship. This view was followed in Dallas Building & Construction Trades Council136 where successive prehire agreements were treated as full-fledged collective bargaining agreements.

In Haberman Construction Co.,137 decided after Higdon, the Board reaffirmed this distinction in a rather striking situation. In Haberman, the employer hired union employees (though not always through the union hiring hall) and paid union wage rates and benefits from 1973 on, although it never negotiated with the

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union or signed a union agreement. In 1977 the employer decided to go open shop and stop paying union rates. The employer argued, of course, that no contract existed; but it also maintained that if one did exist, it was a prehire agreement, and that the union needed to prove that it represented a majority of the employees. The administrative law judge found, however, that if there was a contract (and one was found), it was adopted in 1973 and there would be an "established relationship" between the parties so as to make section 8(f) inapplicable.

The decisions in these three cases would be encouraging if they could be relied upon. Unfortunately, the decisions in Higdon seem to go against any such distinction based on prior bargaining history. Although the precise argument was not discussed by the Supreme Court, it rejected an argument that section 8(b)(7) was inapplicable because the union was not seeking initial acceptance. Further clarification on this question will be needed.

As to how a union might prove majority status, there are several possibilities. Certification through the election procedure remains a possibility in some circumstances. More promising is the possibility that a union security clause, that has been enforced, will give the union some presumption of majority status. Such a result was intimated in R.J. Smith and adopted by the Supreme Court in Local 103 (Higdon): "One-time majority status, coupled with a union security clause that has been enforced, gives rise to a rebuttable presumption of continued majority status."

The problem with elections, however, is that they will only be possible in rare situations. Also, if the appropriate unit is the individual site, elections will not be worth the effort even when possible. The presumption of majority status, if rebuttable, is equally inadequate if a site by site determination is required. If the employer is allowed to ignore an 8(f) agreement and it hires nonunion workers at a new site, it can easily defeat the presumption.

138. Id. at 81.
139. Id. at 83.
140. Id.
141. See Stewart's dissenting opinion, 434 U.S. at 354 and the opinion of the Court, 434 U.S. at 351-52.
142. An excellent discussion on the possibilities left open to the unions after Higdon is contained in Barr & Jacobsen, supra note 99, at 526-34.
143. 191 NLRB Dec. 693, 695 n.8 (1971).
144. 434 U.S. at 351 n.12.
Only a rule giving an irrebuttable presumption based on past projects can serve to avoid the problem of giving the employer a means to justify its own actions.

As it now stands, the employer's position is strong, although one could conceive of unions using the *Higdon* decisions offensively. Suppose, for example, that Higdon bid on a job in a union area and needed a prehire agreement in order to get workers and calculate labor costs. The union agrees to a certain rate and Higdon submits a bid based on that rate. What would prevent the union from thereafter repudiating the contract and demanding more in wages before employees are referred to the job?

But the possibility that *Higdon* will lead to industrial warfare is not the main reason that it is to be condemned. The problem that the Court and the Board never face is how the employee is supposed to be given a voice or an opportunity to express an uncoerced choice in representation. That is the stated justification for the holdings, but the result of the decision is to sanction, if not encourage, the employers to follow their own desires.

*Peter Kiewit*

In recent years, contractors have used the device of the double-breasted company in order to avoid the burdens of a union agreement. A double-breasted company is one which has two separate corporate identities—one will operate under a union agreement, the other will be an open shop.145 Both companies will be owned, controlled and/or managed by the same interests and the decision as to which company will bid on a project will be determined by whether the project will be union or not.

Since employees in a construction company are hired on a project by project basis, it is quite easy to maintain a second corporate shell. Both companies can use the same equipment, share office space and divide the cost of ancillary services. Independent identities can easily be maintained through careful bookkeeping.

From the contractor's point of view, the double-breasted company is extremely advantageous. No work need be turned away because it requires or prohibits the use of union labor. The contractor can compete in both markets. From the union's (and employees') point of view, the double-breasted operation is a nightmare. Organizing a contractor will not help to organize the

market. On the contrary, it allows the expansion of the open shop sector.

In *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers (Kiewit)*\(^\text{146}\) the Supreme Court finally reviewed the Board's position on the legal issues raised by the use of the double-breasted company in construction. The decisions of the Board and the Court fail to take the structure and needs of the industry into consideration, and their decisions will have significant consequences for labor relations in the industry. Once again, the interests of the employees are alleged to justify the results, but in fact, the decisions only serve the employers to the ultimate detriment of employees and their free choice.

Peter Kiewit Sons' Co. (Peter Kiewit), a wholly owned subsidiary of Peter Kiewit Sons' Inc. (Kiewit Inc.), had been engaged in highway construction in Oklahoma since at least 1960.\(^\text{147}\) During that time, it had entered into various collective bargaining agreements with Local 627 of the Operating Engineers.\(^\text{148}\) When the parties were in the process of negotiating an agreement to cover the 1970-73 period, the area manager for Peter Kiewit told the union that unless the union could sign up more contractors, Peter Kiewit could not remain competitive with other contractors, and it would be forced to cease doing business in Oklahoma.\(^\text{149}\) At that time, Peter Kiewit was the only union contractor doing highway construction in the state.\(^\text{150}\)

Kiewit Inc. thereafter decided to have South Prairie Construction Co., another wholly owned subsidiary, come into Oklahoma and compete for highway construction work on an open shop basis. South Prairie had been active as an open shop contractor in other states.\(^\text{151}\) South Prairie and Peter Kiewit did not bid against each other on any projects but South Prairie did bid on and receive awards for projects that Peter Kiewit could have performed.\(^\text{152}\)

The union complained to Peter Kiewit, stating that the use of

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146. 425 U.S. 800 (1975).
147. 206 NLRB Dec. 562, 563-64 (1973). All facts are taken from the decision of the administrative law judge.
148. *Id.* at 563.
149. *Id.* at 564.
150. *Id.*
151. *Id.*
152. *Id.* at 565-66.
South Prairie was an attempt to undermine the collective bargaining agreement. The union also wrote to the president of South Prairie, the former area manager of Peter Kiewit, claiming that South Prairie and Peter Kiewit were one employer within the meaning of the National Labor Relations Act and that the terms of the collective bargaining agreement between the union and Peter Kiewit should be applied to South Prairie.\textsuperscript{153} South Prairie maintained its position that it was going to operate open shop, so Local 627 filed charges under sections 8(a)(1) and (5).\textsuperscript{154}

The administrative law judge found that South Prairie had taken over the facilities formerly occupied by Peter Kiewit, that South Prairie's supervisory and office staffs had previously been employed by Peter Kiewit, and that the president of South Prairie had been the area manager for Peter Kiewit.\textsuperscript{155} In addition, she found that when supervisory personnel were without work at Peter Kiewit, South Prairie was informed and these people were hired by South Prairie if it had an opening. The reverse situation had not occurred, but the president of South Prairie testified that transfers of supervisory personnel from South Prairie to Peter Kiewit could occur if the need arose.\textsuperscript{156}

Equipment was freely interchanged between the companies. South Prairie maintained a list of available Peter Kiewit equipment. Rental charges were imposed, but, owing to the fact that the companies were both wholly owned subsidiaries of Kiewit, Inc., the rental charges were little more than paper transactions.\textsuperscript{157}

Employees who performed construction work were hired by both companies on a job by job basis. There was little evidence that transfer of construction employees had taken place.\textsuperscript{158} Labor policy for Peter Kiewit was set by Kiewit, Inc. South Prairie's labor policy was set by its own Board of Directors, but these directors received instructions from Kiewit, Inc.\textsuperscript{159} The employees of South Prairie received an average of $0.50 to $1.00 per hour less than the employees of Peter Kiewit, and South Prairie's employees did not receive any health or welfare benefits.\textsuperscript{160}

On these facts, the administrative law judge found that South Prairie was an attempt to undermine the collective bargaining agreement. The union also wrote to the president of South Prairie, claiming that South Prairie and Peter Kiewit were one employer within the meaning of the National Labor Relations Act and that the terms of the collective bargaining agreement between the union and Peter Kiewit should be applied to South Prairie. South Prairie maintained its position that it was going to operate open shop, so Local 627 filed charges under sections 8(a)(1) and (5). The administrative law judge found that South Prairie had taken over the facilities formerly occupied by Peter Kiewit, that South Prairie's supervisory and office staffs had previously been employed by Peter Kiewit, and that the president of South Prairie had been the area manager for Peter Kiewit. In addition, she found that when supervisory personnel were without work at Peter Kiewit, South Prairie was informed and these people were hired by South Prairie if it had an opening. The reverse situation had not occurred, but the president of South Prairie testified that transfers of supervisory personnel from South Prairie to Peter Kiewit could occur if the need arose. Equipment was freely interchanged between the companies. South Prairie maintained a list of available Peter Kiewit equipment. Rental charges were imposed, but, owing to the fact that the companies were both wholly owned subsidiaries of Kiewit, Inc., the rental charges were little more than paper transactions. Employees who performed construction work were hired by both companies on a job by job basis. There was little evidence that transfer of construction employees had taken place. Labor policy for Peter Kiewit was set by Kiewit, Inc. South Prairie's labor policy was set by its own Board of Directors, but these directors received instructions from Kiewit, Inc. The employees of South Prairie received an average of $0.50 to $1.00 per hour less than the employees of Peter Kiewit, and South Prairie's employees did not receive any health or welfare benefits. On these facts, the administrative law judge found that South Prairie was an attempt to undermine the collective bargaining agreement. The union also wrote to the president of South Prairie, the former area manager of Peter Kiewit, claiming that South Prairie and Peter Kiewit were one employer within the meaning of the National Labor Relations Act and that the terms of the collective bargaining agreement between the union and Peter Kiewit should be applied to South Prairie. South Prairie maintained its position that it was going to operate open shop, so Local 627 filed charges under sections 8(a)(1) and (5). The administrative law judge found that South Prairie had taken over the facilities formerly occupied by Peter Kiewit, that South Prairie's supervisory and office staffs had previously been employed by Peter Kiewit, and that the president of South Prairie had been the area manager for Peter Kiewit. In addition, she found that when supervisory personnel were without work at Peter Kiewit, South Prairie was informed and these people were hired by South Prairie if it had an opening. The reverse situation had not occurred, but the president of South Prairie testified that transfers of supervisory personnel from South Prairie to Peter Kiewit could occur if the need arose. Equipment was freely interchanged between the companies. South Prairie maintained a list of available Peter Kiewit equipment. Rental charges were imposed, but, owing to the fact that the companies were both wholly owned subsidiaries of Kiewit, Inc., the rental charges were little more than paper transactions.

\textsuperscript{153} Id.
\textsuperscript{155} 206 NLRB Dec. at 566-67.
\textsuperscript{156} Id. at 567.
\textsuperscript{157} Id. at 567-68.
\textsuperscript{158} Id. at 567. But there were some cases of employee interchange. In one instance, a Peter Kiewit employee worked for South Prairie at full salary, which was paid by Peter Kiewit. Id. at 568.
\textsuperscript{159} Id.
\textsuperscript{160} Id. at 567.
Prairie was brought in to maximize the profits of Kiewit, Inc. by operating in Oklahoma without the burden of a union contract. Work performed by South Prairie's employees was work that would have been performed by Peter Kiewit's employees under the union agreement.\textsuperscript{161} The administrative law judge stated:

\begin{quote}
Where, as here, a particular legal entity has participated in or has been used as a means of circumventing a statutory duty imposed on an at least nominally separate entity, cases \ldots have held both entities answerable for an unfair labor practice \ldots While the \ldots liability is usually couched in terms of a finding that the nominally separate entities occupy single-employer status, or that one is the \textit{alter ego} or successor of the other, liability may be imposed without selecting any of these labels.\textsuperscript{162}
\end{quote}

Without applying any such label, the administrative law judge found violations of sections 8(a)(1) and (5).\textsuperscript{163}

The Board disagreed with the administrative law judge and dismissed the charges.\textsuperscript{164} The Board noted the practice in the construction industry of operating separate union and nonunion companies and cited cases where it had failed to require the nonunion company to adhere to the union agreement.\textsuperscript{165} The Board also cited previous decisions where it had refused to include the employees of the union and nonunion companies in the same bargaining unit.\textsuperscript{166}

The issue, according to the Board, was whether the two companies constituted a single employer. A "critical factor" in making such a determination was the "degree of common control of labor relations policies," which control had to be "actual" or "active" rather than "potential."\textsuperscript{167} Here, the Board found that South Prairie determined its own labor policies and that it had operated independently. Accordingly, the Board found that South Prairie and Peter Kiewit were separate employers and that the employees of each constituted a separate bargaining unit.\textsuperscript{168} With that finding, it was not improper for South Prairie to refuse to abide by Peter Kiewit's collective bargaining agreement with Local 627.

The D.C. Circuit disagreed with the Board and vacated its deci-
On the single employer question, the court found that under prior case law, the controlling criteria were "interrelation of operations, common management, centralized control of labor relations and common ownership."\textsuperscript{169} The single employer determination should be based on all of the circumstances; not all of the controlling criteria need be found in order to make a single employer determination.\textsuperscript{171} The court of appeals also pointed to the importance of seeing whether there was an "arm's length" relationship between the two companies, such as there would be with nonrelated entities.\textsuperscript{172}

The court did not feel that the degree of common control over labor policies was the critical factor in the sense of it being the "sine qua non of 'single employer status.'"\textsuperscript{173} It was merely one of the controlling criteria. Moreover, the fact that Kiewit, Inc. determined that South Prairie would operate in Oklahoma on a non-union basis constituted a "very substantial qualitative degree of centralized control of labor relations."\textsuperscript{174}

The court reviewed some of the ways in which Peter Kiewit and South Prairie were related and used each other's presence to their mutual benefit. It found that such an "interrelationship of operations and common management . . . would not be found in [an] arm's length relationship existing among unintegrated companies."\textsuperscript{175} The court therefore held that Peter Kiewit and South Prairie were a single employer for the purposes of the NLRA.\textsuperscript{176} In addition, the circuit court held that the employees of both companies would constitute an appropriate unit for collective bargaining.\textsuperscript{177}

The Supreme Court reversed in a per curiam opinion.\textsuperscript{178} The Court viewed the case as containing two separate questions. One involved whether Peter Kiewit and South Prairie were a single

\begin{itemize}
  \item \textsuperscript{169} Local No. 627, International Union of Operating Engineers v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975). One circuit court judge dissented, finding that the difference between the court's determination and the Board's was merely factual, both the court and the Board were in accord as to the appropriate legal standard to be applied. Circuit Court Judge Tamms felt, therefore, that the court should defer to the agency charged with the principal responsibility for administering the labor laws. \textit{Id.} at 1050 (Tamms, J., dissenting).
  \item \textsuperscript{170} \textit{Id.} at 1045.
  \item \textsuperscript{171} \textit{Id.}
  \item \textsuperscript{172} \textit{Id.} at 1046.
  \item \textsuperscript{173} \textit{Id.}
  \item \textsuperscript{174} \textit{Id.}
  \item \textsuperscript{175} \textit{Id.} at 1047.
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} \textit{Id.} at 1048. The court backed into this conclusion stating that the Board had given no indication that with a single employer finding it would have disagreed with the determination of the Administrative Law Judge.
  \item \textsuperscript{178} South Prairie Constr. v. Operating Engineers, 425 U.S. 800 (1976).
\end{itemize}
employer within the meaning of the Act. The second and distinct question was whether the employees of both companies constituted the appropriate bargaining unit, given a holding on the first question that the companies were a single employer. According to the Court, the circuit court's allegedly improper determination of the unit question was the main contention of the petitioners.\footnote{179. \textit{Id.} at 803. This is probably correct since the single employer finding would be irrelevant to the petitioners if the Board or the Court were to decide in its favor on the unit question.}

The Supreme Court reluctantly affirmed the circuit court's determination on the single employer question.\footnote{180. \textit{Id.} at 803-04, \textit{see especially} note 5.} But the circuit court was reversed on its unit determination. The Supreme Court did not believe that the Board had addressed that question in the context of a single employer determination. Previous Board decisions had not made the single employer finding determinative of the unit question.\footnote{181. \textit{Id.} at 805.} Since the selection of an appropriate unit was largely within the Board's discretion, the circuit court erred in not sending the question back to the Board for a decision in light of the circuit court's single employer determination.\footnote{182. \textit{Id.} at 805-06.} The Supreme Court also made specific reference to the fact that Board determinations on unit questions, while not final, "should rarely be disturbed."\footnote{183. \textit{Id.} at 805.} The message to the circuit court was clear.

As might be expected, the Board on remand found that South Prairie's employees constituted a separate, appropriate bargaining unit.\footnote{184. 231 NLRB Dec. 76, 95 L.R.R.M. 1510 (1977).} According to the Board, different questions were raised by the single employer and appropriate unit questions. In the single employer inquiry, the ownership, structure and integrated control of the companies were at issue. In the unit question, the concern was the "community of interest of the employees."\footnote{185. \textit{Id.} at 77, 95 L.R.R.M. at 1511.}

The factors to be considered on the unit question in order to determine the community of interest were:

- the bargaining history;
- the functional integration of the operations;
- the differences in the types of work and the skills of the employees;
- the extent of centralization of management and supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations; and
the extent of interchange and contact between the groups of employees. 186

Though the circuit court had found the operations of the two companies to be interrelated, the Board found that with respect to the employees, the companies were substantially separate. While both companies engaged in road construction, Peter Kiewit also performed airport, mill and bridge construction. From that fact, the Board concluded that the interests of South Prairie's employees were "more narrowly drawn." 187 As for control of labor relations, the Board found that from the employees' perspective, the day-to-day control exercised by each company over its own employees was more significant than any common control at the corporate level. 188

The circuit court affirmed. 189 The court was careful to note that it could not substitute its judgment for that of the Board. The Board's determination of the unit question could only be overturned if it was "arbitrary and unreasonable." 189 All that the Board needs to do is choose an appropriate unit.

The union tried to argue that a single employer determination necessitated the finding of an employer wide unit determination. The circuit court dismissed that argument because Board precedent to the contrary had been cited with approval by the Supreme Court in its related decision. 191 The circuit court also dismissed the contention that the Board's decision was inconsistent with the Board's own precedent. The Board's decision here could be explained by reference to factual differences sufficient to justify their contrary conclusions. 192

The potential impact of the Kiewit decisions cannot be understated. Since elections are not feasible to demonstrate employee preference in the industry, the employees depend on unions to secure agreements with contractors. Under the Kiewit decisions, the employers can now make a unilateral decision whether to operate under a union agreement on a project by project basis, with no regard given to the desires of employees. Where Higdon severely curtailed the enforceability of the prehire agreement, the Kiewit decisions have given employers a back door exit from agreements that are, in principle, fully enforceable.

186. Id.
187. Id., 95 L.R.R.M. at 1512.
188. Id.
189. Local 627, Int'l Union, etc. v. NLRB Dec., 595 F.2d 845, 100 L.R.R.M. 2792 (D.C. Cir. 1979).
189. Id. at 848, 100 L.R.R.M. at 2795.
191. Id.
192. Id. at 850, 100 L.R.R.M. at 2796.
What is most disturbing about the treatment of the double-breasted issue is that the result is not compelled by statute. Rather, the Board and the Supreme Court are applying flexible standards in a way that approves a practice that is clearly contrary to the spirit of the Act.

Since the Board was reversed on the single employer question and since the single employer holding will not necessarily result in an extension of the contract, the Board's view on the single employer question does not warrant extensive comment here, but it has been subject to criticism. The Board's emphasis on "actual control" of labor relations merely requires that the potential double-breasted contractor designate certain individuals as being in charge. Surely, the Board should show a little more concern as to the substance or reality of the situation. Here, the first opinion of the circuit court makes more sense. In essence, the circuit court said that form is irrelevant: if you claim to be separate, act towards each other at "arm's length," i.e., as truly separate organizations would.

On the unit question the absurdity of the Board's decision is most obvious. The standard enunciated by the Board is the community of interest of the employees. Yet the interests of the employees have nothing to do with the results reached.

For example, one test of the common interests of the employees is the differences in labor relations. Yet, as has been pointed out:

To ignore the employer's motive and the context in which these cases arise in analyzing them from a unit standpoint is to engage in a totally frivolous exercise. To rely on the differing labor relations (union versus nonunion) in deciding the unit issue, begs the very question to be decided and ignores the improper employer motivation in the first instance.

The union here is saying that South Prairie should be operating under a union agreement. The Board says no because South Prairie is not operating under a union agreement.

The Board is equally blind in its application of the factor regarding differences in the work of the two companies and the skills of the employees of each. The Board acknowledges that there is nothing to indicate a significant difference between the

194. 206 NLRB Dec. at 562.
195. 518 F.2d 1040, 1046-47.
skills of the employees of the two companies.\textsuperscript{188} It states that because the employees of South Prairie only do highway construction (as opposed to airport, bridge and mill construction which Peter Kiewit has done in addition to highway work), the "interests of South Prairie's employees are more narrowly drawn than those of Kiewit's employees."\textsuperscript{199} But that statement is meaningless. Why would a machine operator care whether the product of his or her work was a road or a runway? What would such a difference in the product of construction mean in regard to an employee's interests in collective bargaining? Just because the Board cites a difference does not mean that it has any relevance.

The Board is correct when it points towards the difference between working for a union and nonunion employer. Here, the pay scales were different. Other differences may exist with regard to work rules, fringe benefits and grievance rights. But the existence of such differences should lead to an attempt to give the employee a meaningful opportunity to decide whether to work under a union agreement or not. Instead, the Board has given that choice to the employer.

It is shocking that the Board is allowing this result when the employer has not even attempted to hide the fact that its purpose is to avoid the union agreement.\textsuperscript{200} While Peter Kiewit claimed that it could not remain competitive under the union agreement, the facts belied that claim. Only one contractor in Oklahoma had more work than Peter Kiewit, and Peter Kiewit contracts totalled forty percent more than the third-ranking contractor.\textsuperscript{201}

The Board in \textit{Kiewit} has said: you can lie about the need to be nonunion, you can admit that you are trying to get out of your union agreement, and you can use the fact that you are operating the second company nonunion to legitimate its operation as a nonunion company. The ultimate insult is that the Board states that it is acting "in order to assure to employees the fullest freedom in exercising the rights guaranteed by (the) Act."\textsuperscript{202} Once again we have employee rhetoric and employer free choice as the reality.

\textsuperscript{188} 231 NLRB Dec. 76, 77, 95 L.R.R.M. 1510, 1512 (1977).
\textsuperscript{199} Id., 95 L.R.R.M. at 1512.
\textsuperscript{200} In P.A. Hayes, 226 NLRB Dec. 230 (1976), the Board refused to allow an employer to go out of business and reform so as to avoid its collective bargaining agreement. Similarly, in Allied Mills, Inc., 218 NLRB Dec. 281 (1975) \textit{petition for review denied}, 543 F.2d 417 (D.C. Cir. 1976), \textit{cert. denied}, 431 U.S. 937 (1977), an attempt to avoid a union agreement by closing a plant and reopening at a new location was proscribed even where there were other legitimate business reasons for the move.
\textsuperscript{201} 518 F.2d 1040, 1044 n.6.
Connell

As a result of the Higdon and Kiewit decisions, there are few legal restraints on an employer’s unilateral decision to operate as an open shop contractor. The practical restraints imposed by the need for skilled employees still exist. In addition, general union strength in an area of the country or in a sector of the construction industry can limit or at least inhibit the spread of the open shop movement. But it is fair to say that employers can help themselves whenever the market allows.

In contrast, unions have been subjected to increasing regulation which restricts the use of economic muscle. Taft-Hartley promulgated union unfair labor practices and proscribed the secondary boycott. Landrum-Griffin curtailed organizational and recognition picketing. Section 8(e), which outlawed the hot cargo agreement, was also added by Landrum-Griffin. The construction industry, however, received a special exemption from section 8(e).

While section 8(e) broadly proscribed any agreement by which an employer refused to do business with another employer, the construction industry proviso stated: “[N]othing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of construction...” The legislative history of the construction industry proviso to section 8(e) is meager, but it seems to have been put in to permit a union to negotiate a clause preventing the subcontracting of work to a nonunion contractor.

Such clauses are needed by unions in the construction industry because of the way that the industry operates. If a carpenters’ union has a contract with ABC Construction Co. and does not have a union only subcontracting clause, nothing could prevent ABC from subcontracting out its carpentry work to another con-

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207. Aaron, supra note 53, at 1119.
tractor in order to avoid its collective bargaining agreement with the carpenters. 208

Senator Kennedy, the floor manager of the Senate version of Landrum-Griffin stated:

Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relationship between them. ... 209

A similar interpretation can be found in the report of the House Conference Committee. 210

In Connell Construction Co. v. Plumbers & Steamfitters Local 100 (Connell), 211 the Supreme Court used a narrow interpretation of section 8(e) and the antitrust laws to severely restrict this kind of union self-help. Once again, employers are protected from any need to comply with the choice of the employees insofar as such choice is reflected by union action. Because the decision here is activist in its regulation of labor relations, it also negates any benign interpretation of Higdon and Kiewit as being a new kind of free market approach to labor relations.

Labor and Antitrust

Because Connell involved some antitrust questions and because the labor-antitrust conflict has been especially prevalent in the construction industry, 212 a brief review of some labor-antitrust law is necessary. 213 That there is an inherent conflict between the labor and antitrust laws is one of the few propositions in this field that meets with unanimous agreement. The antitrust laws are designed to favor competition. Labor unions strive to eliminate

208. Remember that Denver Building Trades prevents picketing by stranger employees in protest of nonunion workers.


212. "The frequency of the alleged trade restraints in the industry may be seen from the fact that in the thirty years before 1946, nearly one-fourth of all antitrust cases brought up by the government involved construction in some manner." Ha- ber & Levinson, supra note 7, at 19.

competition based on wage differentials. Early decisions interpreting the Sherman\textsuperscript{214} and Clayton\textsuperscript{215} Antitrust Acts did not accord labor any special treatment.\textsuperscript{216}

In \textit{Apex Hosiery Co. v. Leader}\textsuperscript{217} the Supreme Court broke from past precedent and held that the curtailment of competition based on wage competition was consistent with national policy.\textsuperscript{218} \textit{United States v. Hutcheson},\textsuperscript{219} decided shortly thereafter, recognized a statutory exemption for labor based on the Norris-La-Guardia\textsuperscript{220} and Clayton Acts. The Supreme Court held:

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under §20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.\textsuperscript{221}

An approach to the labor-antitrust conflict using the NLRA as a touchstone of allowable activity was rejected by the Supreme Court in the companion cases of \textit{United Mine Workers v. Pennington (Pennington)}\textsuperscript{222} and \textit{Local 189, Meatcutters v. Jewel Tea Co. (Jewel Tea)}.\textsuperscript{223} In \textit{Pennington} the union had agreed to impose its wage settlement with the large coal companies on the smaller companies. The Court split into three groups.

Three Justices found this to be within the "combining with non-labor" caveat to the exemption enunciated in \textit{Hutcheson}.\textsuperscript{224} They considered but rejected an argument that because the agreement was over a mandatory subject of bargaining, it was entitled to immunity. According to this group, the fact that the subject was

\textsuperscript{214} 26 Stat. 209 (1890), (current version at 15 U.S.C. §§1-7 (1976)) [hereinafter referred to as the Sherman Act].
\textsuperscript{216} In fact, in Duplex Printing Press v. Deering, 254 U.S. 443 (1921), the Supreme Court interpreted the Clayton Act so as to eliminate its clear labor exemption.
\textsuperscript{217} 310 U.S. 469 (1940).
\textsuperscript{218} "[A]n elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act." \textit{Id.} at 503-04.
\textsuperscript{219} 312 U.S. 219 (1941).
\textsuperscript{220} 47 Stat. 70 (1932) (current version at 29 U.S.C. §§101-15 (1976)).
\textsuperscript{221} \textit{United States v. Hutcheson}, 312 U.S. 219, 232 (1941).
\textsuperscript{222} 381 U.S. 657 (1965).
\textsuperscript{223} 381 U.S. 676 (1965).
\textsuperscript{224} Justice White wrote the opinion which was joined by Justices Warren and Brennan.
mandatory was of "great relevance" in deciding the antitrust question, but the union had lost whatever antitrust immunity it might have had by agreeing to impose a settlement on other bargaining units.\textsuperscript{225} A group of three Justices, headed by Justice Douglas, agreed that antitrust immunity was lost because of the combination with non-labor but would have found liability even if no attempt had been made to impose the settlement on other units.\textsuperscript{226}

Justice Goldberg wrote a dissenting opinion which stressed the need for judicial restraint and deference to a congressional intent to eschew antitrust regulation of labor activity.\textsuperscript{227} He argued that the antitrust laws should not apply to collective bargaining activity covering mandatory subjects of bargaining.\textsuperscript{228}

\begin{quote}
[M]andatory subjects of bargaining are issues as to which union strikes may not be enjoined by either federal or state courts. To say that the union can strike over such issues but that both it and the employer are subject to possible antitrust penalties for making collective bargaining agreements concerning them is to assert that Congress intended to permit the parties . . . to wage industrial warfare but to prohibit them from peacefully settling their disputes. This would not only be irrational, but would fly in the face of clear congressional intent. . . .\textsuperscript{229}
\end{quote}

He also noted that the combination with non-labor language was senseless because unions could never achieve any of their goals unilaterally.\textsuperscript{230}

In \textit{Jewel Tea} the dispute involved a provision in an agreement which restricted the marketing hours for meat. The opinion of the Court stated the issue as:

\begin{quote}
[W]hether the marketing-hours restriction, like and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.\textsuperscript{231}
\end{quote}

The restriction was found to be within this nonstatutory exemption as it was within the legitimate concerns of the union.\textsuperscript{232}

Thus, \textit{pre-Connell}, labor's antitrust exemption was dependent on whether labor acted alone, and if not, whether the union was pursuing a legitimate interest. The mere fact that conduct may be

\begin{footnotes}
\textsuperscript{225} United Mine Workers v. Pennington, 381 U.S. 657, 665 (1965).
\textsuperscript{226} Id. at 672-73. Justice Douglas' opinion was joined by Black and Clark.
\textsuperscript{227} Id. at 672-73.
\textsuperscript{228} Justice Douglas' dissenting opinion appears in Local 189, Meatcutters v. Jewel Tea Co., 381 U.S. 676, 697 (1965).
\textsuperscript{229} Id. at 710.
\textsuperscript{230} Id. at 712.
\textsuperscript{231} Id. at 721.
\textsuperscript{233} Id. at 694, 697.
\end{footnotes}
regulated by the labor laws was not determinative of the applicability of the antitrust laws.

**Impact of Connell Construction Co. v. Plumbers & Steamfitters Local 100**

*Connell* arose out of an organizational drive by Local 100, the representative of the plumbing and mechanical trades in the Dallas area. While Local 100 had a multi-employer collective bargaining agreement with the representatives of about seventy-five mechanical contractors, it wanted to ensure that most, if not all, mechanical contracting work in the area was performed by its members. It therefore tried to get Connell Construction Co., and other general contractors, to enter into an agreement that they would only subcontract to firms that were parties to an agreement with the union.

Connell did not employ any members of Local 100 and none of Connell's employees performed any plumbing work. Accordingly, Local 100 did not seek to represent any of Connell's employees. The agreement sought by the union specifically referred to itself as "applying in the event of subcontracting in accordance with Section 8(e)."

In the district court, Connell alleged that the contract violated the antitrust laws of Texas, the Texas "Right to Work" law and the Sherman Antitrust Act. The plaintiff sought to permanently enjoin the picketing and also sought a declaratory judgment stating that Local 100's efforts to obtain the agreement were illegal. The union took the position that the agreement was lawful by reason of section 8(e).

In its findings, the district court noted that Local 100 had previously pressured another contractor into signing such an agreement. That contractor had filed charges with the Board, but no complaint was issued and the contractor was unsuccessful in its appeal of the Board's failure to issue a complaint. This led the district court to conclude that section 8(e) authorized the agree-

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234. *Id.* at 620.
235. *Id.*
236. 78 L.R.R.M. 3012 (1971).
237. *Id.*
238. *Id.* at 3013.
239. *Id.* at 3014.
The court also concluded that if the agreement was lawful, the picketing to secure the agreement was lawful.

The fact that Local 100 was a "stranger" and not interested in representing any of Connell's employees was not a problem. The court cited Norris-LaGuardia's broad definition of the phrase "labor dispute" which does not limit itself to employer-employee relationships. The court also found the construction industry proviso to section 8(e) evidenced an intent by Congress to return to Norris-LaGuardia's expanded scope of immunity without the need for the parties to be in a proximate employer-employee relationship. The district court concluded its analysis by holding that the agreement, being authorized by Congress, was not violative of the federal antitrust laws. The court also held that both the Texas antitrust law and the Texas "Right-to-Work" laws were preempted.

The circuit court affirmed. On the antitrust issue, the court reviewed previous Supreme Court holdings and determined that here, where there was no conspiracy allegation (and none was or could have been alleged here), the issue was whether the agreement sought involved a "legitimate union interest." The court found that Local 100 was merely trying to organize subcontractors in order to eliminate wage competition. Since the elimination of competition based on wages was the primary objective of all unions, the interest of the union was legitimate.

In its analysis, the court recognized that the unique nature of the construction industry was relevant in determining whether the agreement sought and its benefits were legitimate. According to the court, the "core" of the problem was the "ambulatory" nature of the industry—the lack of continuity in and duration of

240. Id.
241. Id.
242. Section 13(c) of the Norris-LaGuardia Act, 29 U.S.C. §§101-15 (1976) provides:

The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee.

244. 78 L.R.R.M. at 3014.
245. 483 F.2d 1154 (5th Cir. 1973).
246. Id. at 1165. This, however, does not mean that the agreement would necessarily be safe from attack by an injured third party, such as a nonunion subcontractor.
247. Id. at 1164.
248. Id. at 1167-68.
249. Id. at 1168.
the employment relationship. Because of this, the union who represented a trade which usually performed work that was subcontracted had a difficult problem. The subcontractor, who is the immediate employer of the worker, can only employ the worker if the general contractor retains the subcontractor for the project. Local 100's contracts with mechanical subcontractors were useless unless these subcontractors received work. Thus Local 100 had a direct interest in seeing that Connell retained firms that had union contracts.

At the very least, section 8(e) indicated that the union's goal was legitimate. If section 8(e) allowed a union representing workers employed by a general contractor to negotiate a union only subcontracting clause despite the fact that such a clause would have an anticompetitive effect, why should an outside union be prohibited from seeking the same clause? The anticompetitive effect would be the same. Moreover, the only competition eliminated by Local 100's efforts would be that caused by lower standards or wages, the sine qua non of unionization.

The court did not decide the straight labor law question. It merely decided that section 8(e) either approved the agreement or that the union's actions to secure the agreement was a violation of section 8(b)(4). That issue should have been left for the Board to determine.

There was a dissenting opinion in the circuit court which concluded that Local 100 had violated both the labor and antitrust laws. It acknowledged that the agreement in question came within the literal terms of section 8(e) but rejected the application of section 8(e) where the employer could not bargain for something in return. Connell could get no concession from Local 100 since they were not bargaining over a collective agreement. All Connell could get was relief from Local 100's coercive actions. Nor, said the dissent, did Local 100's lack of interest, as

250. Id.
251. Id.
252. Id. at 1168-69. This argument is a little disingenuous because unions negotiate over work practices, crew size, technological changes and other cost items.
253. Id. at 1172-73. Specifically, the Court refers to §8(b)(4)(ii)(B) of the NLRA, 29 U.S.C. §158 (1976).
254. 483 F.2d 1154, 1174-75 (5th Cir. 1973).
255. Id. at 1176.
256. Id. at 1181.
257. Id.
to whether other trades were unionized, comport with Congressional intent underlying section 8(e)—to prevent the friction that arises when union and nonunion employees work side by side on a construction project.258

On the antitrust issue, the dissent did not state that there was liability, but it failed to find antitrust immunity for the union’s actions. It is unclear whether the judge would have wanted a new trial or whether he viewed nonimmunity as coterminous with liability, a proposition that has been feared and condemned by at least one commentator in the antitrust field.259

The Supreme Court reversed and held against Local 100 on both the antitrust and labor issues.260 On the antitrust question, the Court found that the Hutcheson “statutory” exemption was inappropriate where there was an agreement with nonlabor.261 The “nonstatutory” exemption, illustrated by Jewel Tea, recognizes that a national labor policy favoring the elimination of wage competition will lessen business competition. This nonstatutory exemption, however, does not countenance or “require that a union have freedom to impose direct restraints on those who employ its members.”262

The Court determined that Local 100 through its organizing campaign and with the agreement signed by Connell used “direct restraints on the business market” by “indiscriminately exclud[ing] nonunion subcontractors . . . even if their competitive advantages were not derived from substandard wages . . . but rather from more efficient operating methods.”263 Moreover, since the union had no interest in representing any of Connell’s employees, it could not find shelter in the strong federal labor policy favoring collective bargaining.264

On the question of whether the agreement was authorized by section 8(e), the Court acknowledged that on its face, the construction industry proviso seemed applicable. Justice Powell, writing for the majority, however, felt compelled to look at the circumstances surrounding the enactment of that provision.265 According to the majority, the construction industry proviso to section 8(e) was included to solve the problems raised by the

258. Id. at 1182.
261. Id. at 622.
262. Id. at 622.
263. Id. at 623.
264. Id. at 626.
265. Id. at 628. Justice Powell did not feel compelled to justify his jump into the legislative history.
Denver Building Trades decision. An amendment to section 8(b)(4), which was introduced with the proviso to section 8(e), would have allowed common situs picketing, but it did not survive the legislative process. Presumably section 8(e), by allowing subcontracting agreements, would prevent the need for picketing if the contractor complied.

The majority noted, however, that the proviso was limited to work done at the site and was designed to alleviate the problems that might arise “when union men work continuously alongside nonunion men. . . .” Local 100's agreement did not limit itself to site work and did not seek to prevent Connell from hiring non-union workers for work that did not involve plumbing or steamfitting. Therefore, the opinion held that the agreement was not within the rationale of section 8(e).

Justice Powell also expressed fear that a broader reading of section 8(e) would give the construction unions “an almost unlimited organizational weapon.” Since one of the major aims of Landrum-Griffin was to limit “top down” organizing, the Court should not allow such a “glaring loophole” without a clear indication of congressional intent. The majority concluded that the construction industry proviso to section 8(e) is limited to agreements “within the context of collective bargaining relationships” and “possibly to common situs relationships on particular jobsites as well.”

The last argument raised by Local 100 was that even if the agreement was not authorized by section 8(e), the remedies provided by the Act should be exclusive and that antitrust liability should be precluded. The union argued that Congress expressly rejected antitrust remedies when it passed Taft-Hartley and instead created remedies under the Act. Justice Powell rejected that argument because he found no similar legislative intent in 1959 when section 8(e) was enacted.

268. Id. at 630, quoting from Drivers Local 595 v. NLRB, 361 F.2d 547, 553 (1966).
269. Id. at 630-31.
270. Id. at 631.
271. Id. at 632-33.
272. Id. at 633.
273. Id. at 633-34.
The main dissenting opinion, written by Justice Stewart, argued that the agreement was governed by section 8(e) and that the union’s picketing was secondary activity governed by section 8(b)(4). He believed that Congress had clearly rejected antitrust remedies in that area and had determined that the labor laws should provide the exclusive remedy for any violation of the Act.

According to Justice Stewart, during the fifteen years between Norris-LaGuardia and Taft-Hartley, both primary and secondary activity were immune to antitrust sanction. Labor's abuse of this freedom helped prompt Taft-Hartley. During the Taft-Hartley debates, antitrust sanctions were proposed and rejected. Instead, injured parties could get injunctive relief and actual damages.

The scope of proscribed activities was set, in part, by section 8(b)(4). Section 8(e) was enacted to plug "technical loopholes" in section 8(b)(4) and the remedies under section 303 of the LMRA were simultaneously expanded to be coextensive with section 8(b)(4). Justice Stewart conceded that the amendment was not specifically for section 8(e) but that the union would have had to have violated section 8(b)(4) if its agreement was not protected by section 8(e). Thus, if the agreement was not allowable under section 8(e), Local 100 had violated section 8(b)(4) and Connell should seek its remedies under the labor law. If the agreement was within the scope of the construction industry proviso to section 8(e), there was no reason to consider antitrust remedies.

The decision in Connell has been severely criticized, especially in regard to its handling of the antitrust issues. Since the construction industry will have to live with this holding and its progeny, some brief attention should be given to this criticism before any comment is made on the Court's interpretation of section 8(e) and its failure to understand the realities of construction.

Since there was an agreement with nonlabor, and since no conspiracy was alleged, neither United States v. Hutcheson nor

274. Justice Douglas wrote a dissenting opinion which focussed on the antitrust issues. Id. at 638.
275. Id. at 639-40.
277. 421 U.S. 616, 639-46.
278. Id. at 646.
279. Id. at 647-48.
281. 312 U.S. 219 (1941).
United Mine Workers v. Pennington\textsuperscript{282} is applicable. Instead, Local 189, Meatcutters v. Jewel Tea Co.\textsuperscript{283} is the appropriate starting point. Jewel Tea allowed an antitrust exemption for agreements intimately related to wages, hours and working conditions, even where there was a direct restraint on the product market.\textsuperscript{284} It is difficult to see how an agreement to extend the terms of a collective bargaining agreement to other employees would not be within this rationale.\textsuperscript{285}

The fact that there was an organizational purpose should not have changed the test. Organizational agreements have previously withstood antitrust scrutiny.\textsuperscript{286} The test should have been whether the agreement was broader than the union's legitimate interest.\textsuperscript{287} Instead, the Court acknowledged that the goals were legitimate but balked because the means were too effective.

The second focus of criticism has been on the question of whether Congress intended the labor law remedies to be exclusive in this situation.\textsuperscript{288} Both Justices Powell and Stewart agree that Congress chose not to allow antitrust remedies for secondary activity when it passed Taft-Hartley. They disagree only in regard to the 1959 amendments. Justice Powell, however, argues that the 1959 amendments were only intended to close technical loopholes in section 8(b)(4). Surely allowing antitrust damages is more than closing a technical loophole. Justice Powell's conclusion here seems to contradict his premise.

On a more general level, allowing a further intrusion of the antitrust law into the field of labor relations frustrates the achievement of any centralized labor policy. As one writer notes, there is an irony in the Court's preemption of Texas law for fear that it will interfere with comprehensive federal labor legislation, when the Court allows the antitrust law to interfere with federal labor policy.\textsuperscript{289}

The decision is equally bad in its interpretation of section 8(e). The Court reviews the legislative history of section 8(e) and con-

\textsuperscript{282} 381 U.S. 657 (1965).
\textsuperscript{283} 381 U.S. 676 (1965).
\textsuperscript{284} Lovett, supra note 280, at 862.
\textsuperscript{285} St. Antoine, supra note 280, at 626.
\textsuperscript{286} See, e.g., Hunt v. Crumboch, 325 U.S. 821 (1945).
\textsuperscript{287} St. Antoine, supra note 280, at 622.
\textsuperscript{288} Id. at 626; see also Bartosic, supra note 280, at 597-98, and HARV. L. REV., supra note 280, at 239.
\textsuperscript{289} Bartosic, supra note 280, at 592. See also Lovett, supra note 280, at 875.
tends that it includes only "bare references" to the pattern of bargaining in the construction industry.\textsuperscript{290} Senator Kennedy's statement of bargaining patterns\textsuperscript{291} is cited in a footnote of the opinion but otherwise ignored. That remark lends support to the contention of Local 100 that the agreement was within the intention of Congress in enacting section 8(e).

The Court's remarks in regard to the \textit{NLRB v. Denver Building & Construction Trades Council (Denver Building Trades)}\textsuperscript{292} situation shows a similar kind of token approach to the problem. The problem in \textit{Denver Building Trades} was caused by the fact that work is freely subcontracted. Union agreements without subcontracting clauses are useless—the contractor can always choose to have a subcontractor do the union's work and avoid the collective bargaining agreement. For the union that works for subcontractors, the problem is slightly different. That union wants work to be subcontracted, but subcontracted to a union firm. Even if Congress did not amend section 8(b)(4) to allow picketing in the absence of the clause, there is nothing in a reference to an attempt to get construction unions out from under the problem illustrated by \textit{Denver Building Trades} which could lead to a narrow construction of section 8(e).

The majority's naivete also shows in its reference to the problem of union and nonunion men working side by side. The conflict is caused, if one exists, by the fact that nonunion workers threaten to take away union jobs. They do not respect established craft lines and do not belong to an organization that will support the other worker's union in a struggle against contractors. The Court, however, seems to view the problem as similar to that of mixing people of different races, religions or political philosophy.

The Court complains that Local 100 does not seek to insure that all workers on the job are union, yet it finds fault with Local 100 being a stranger to the situation, i.e., not trying to represent any of Connell's employees. Surely Local 100 would be even further removed and out of place if it tried to impose working conditions or union membership on those outside of its craft, which is what the Court's criticism suggests.

The Court also complains that the agreement was not limited in scope to work at a construction site. Assuming that the agreement only applied to plumbing and mechanical work, this complaint is inappropriate. Connell was a general contractor. It only

\begin{footnotes}
\textsuperscript{290} 421 U.S. 616, 628-29 (1974).
\textsuperscript{291} See text accompanying note 209 \textit{supra}.
\textsuperscript{292} 341 U.S. 675 (1951).
\end{footnotes}
worked at construction sites. There is no nonsite work that members of Local 100 could have performed for it. Perhaps the Court means a particular job site. But that is to suggest site by site negotiations, a concept which would "confound anyone even remotely familiar with the construction industry."\(^{293}\)

Ultimately, the Court seems most concerned with the fact that Local 100's organizing tactics would be too effective and in contradiction of Landrum-Griffin's intention to limit "top down" organizing. But Landrum-Griffin contained section 8(f) which in essence said that top down organizing is proper if not necessary in construction. Section 8(f) is a recognition of the needs of the industry and the inability of traditional industrial democracy to work in the construction industry. Congress clearly allowed unions in the industry to do the organizing from the top. Yet the Court ignores section 8(f) and narrowly construes section 8(e) under the guise of employee free choice. Again, the Court never deals with how the employee is to express any choice in deciding whether to support the union.

If the desires of Local 100 were so out of step with the wishes of the workers, the picketing by Local 100 would not have had any effect on Connell. Workers can express such a negative choice if Local 100 is allowed to try to organize. If no attempt to organize is allowed by the Court, the worker gets no opportunity to support or ignore the union and once again, the contractor is given free rein.

Ultimately, if Connell allows agreements that are limited in scope to specific jobsites and/or collective bargaining relationships, its impact on labor relations in the construction industry may be minimal. (Local 100's tactic was novel and the Court was not eliminating a traditional union weapon.) Such a reading of Connell is almost invited by the Court; at three points in the opinion, Justice Powell notes the absence of a collective bargaining relationship, and at two of these points, the agreement's failure to be restricted to site work is mentioned.\(^{294}\)

So far this distinction has proved critical in several cases. In Donald Schriver, Inc. v. NLRB,\(^ {295}\) the D.C. Circuit upheld the validity of a broad subcontracting clause even though it was con-

\(^{293}\) Bartosic, supra note 280, at 596.

\(^{294}\) 421 U.S. at 625-26, 633 & 635.

\(^{295}\) 105 L.R.R.M. 2818 (D.C. Cir. 1980).
tained in a Section 8(f) prehire agreement and not limited to particular jobsites or jobsites where union employees were working. Two federal district courts have reached similar conclusions and ratified subcontracting clauses in the face of a challenge under Connell. Similarly, in Larry V. Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council, the absence of a collective bargaining relationship between an owner and a local trades council left an agreement between the parties subject to antitrust scrutiny.

One circuit court initially took a broad view of Connell. In Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB, the court said agreements prohibiting the use of nonunion workers will be allowed “only when the employer or his subcontractor has employees who are members of the signatory union at work at some time on the jobsite at which the employer wishes to engage a nonunion contractor.” Reargument was granted, however, and the full bench has reversed and ren-

296. The employers had argued that a section 8(f) relationship was different than the “collective bargaining relationship” required by Connell. Id. at 2828. The court agreed with the Board’s conclusion that section 8(f) agreements were the means by which collective bargaining relationships were established in the construction industry. Id. The court also rejected the employers’ attempt to limit valid section 8(e) agreements to particular jobsites. Broad subcontracting agreements were part of the industry before 1959 and therefore ratified by the Landrum-Griffin bill. Id. at 2832-33. Moreover these kinds of agreements were needed because of the nature of the industry; subcontracting was the “usual rather than the extraordinary practice.” Id. at 2834.


298. 609 F.2d 1368 (3d Cir. 1979).


300. 609 F.2d 1341 (9th Cir. 1979). The court reversed two Board decisions allowing agreements which prohibited the subcontracting of work to nonunion firms. The court held that such agreements were only sheltered by the construction industry proviso to section 8(e) “when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subcontractor.” Id. at 1347. The court found the construction industry proviso to be directed solely at the problems engendered by union employees working alongside nonunion workers. But a closer reading suggests that the court’s real objection was with the scope of the agreement and therefore its effectiveness:

The agreement between the AGC [Association of General Contractors] and Engineers, for instance, forecloses to nonunion firms employment opportunities with any of 200 construction contractors throughout Oregon and southwest Washington. The potential coercive effect of such an agreement is manifest. Id. at 1350.

301. 105 L.R.R.M. 2496 (1980).

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ordered a decision that is in accord with *Schriver* and *Muko*. Judge Canby, writing for the majority, felt that *Connell* should be viewed in light of the fact that it arose outside of the collective bargaining relationship.

**CONCLUSION**

It should be evident that the construction industry is not amenable to an uncritical application of the labor laws. The industry's structure creates some unique problems, especially in regard to employee free choice as to representation. Congress has recognized this and has made some special accommodations to the needs of the industry. Unfortunately, the Supreme Court and the Board have not. Rather, they have promoted the employer's ability to evade contractual obligations and avoid union pressure.

This is extremely disturbing because the Court and the Board are espousing employee free choice. Are we to assume that they honestly fail to perceive that their decisions do not implement that stated purpose? If they are choosing to restrict union power because it does not necessarily reflect the desires of the employees, they should devise some means of effectuating employee free choice. As of now, the solutions devised leave the workers at the mercy of the employers; there is no indication that workers would prefer unilateral employer determination of wages, hours and working conditions.

In reading the opinions, one gets a sense that the hidden agenda is to decrease union power in the construction industry. The unions are viewed as too big, too powerful, economically and societally counterproductive. Even assuming that the Court is correct in assuming that our society would benefit from a diminution of union muscle in construction (a position that is probably based more on construction union myth than reality), the Court must look at the unions in terms of what they do for the employees.

An employee in construction has no job security or tenure. The union provides a home base. In the open shop or merit shop sector, the employees have no pension benefits, and, most often, no health and welfare benefits outside of statutorily determined

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303. *Id.* at 1762.
worker's compensation. The unions provide these benefits. A union employee need not worry about accruing a fixed number of years' employment with one company in order to have a pension upon retirement. There is no analogous security in the open shop.

The Court should not leave the workers at the mercy of the employers because of some vague notions of unions in construction being bad or too powerful. The issue stated by the Court and the Board should be adhered to in fact—employee choice. At present this is demonstrated in very strong terms whenever a picket line is honored. Until there is evidence to the contrary and until a new mechanism for evaluating employee choice is devised, union preference should be presumed and the Court and the Board must go back to a neutral position in regard to labor relations in the construction industry.