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Comment

AN EXAMINATION OF SECTION 8(f) OF THE NATIONAL LABOR RELATIONS ACT

I. INTRODUCTION

In 1959, Congress amended the National Labor Relations Act (Act)\textsuperscript{1} to provide for the uniqueness of the construction industry by creating a limited exception to some of the provisions of that statute.\textsuperscript{2} Section 8(f) of the Act\textsuperscript{3} provides, in substance, that an employer and union in the construction industry may enter into a prehire agreement\textsuperscript{4} with a union-security clause,\textsuperscript{5} a hiring hall provision,\textsuperscript{6} or specifications for minimum employee qualifications.\textsuperscript{7}

Despite the limited and explicit words of section 8(f), there has been some confusion as to the effect of that provision. In particular, there have been questions as to the effect of a valid prehire agreement when there is a repudiation by one of the parties to that agreement.\textsuperscript{8} After some initial uncertainty,\textsuperscript{9} the National Labor Relations Board (Board) adopted the position that it is not an unfair labor practice for a party to repudiate a valid section 8(f) agreement for any reason at any time.\textsuperscript{10} Moreover, the Board has held that it might be an unfair labor practice for a party to use economic pressure in an attempt to enforce such an agreement.\textsuperscript{11} In cases where the union achieves majority status during the term of a section 8(f) agreement, however, the Board has held that a section 8(f) agreement becomes as enforceable as any other collective bargaining agreement made with a majority union.\textsuperscript{12}

\begin{enumerate}
\item For a discussion of the differences between the treatment of the construction industry and other industries under the Act, see notes 29-41 and accompanying text infra.
\item For a discussion of prehire agreements, see text accompanying note 15 infra, and note 31 and accompanying text infra.
\item For a discussion of union-security clauses, see notes 16 & 32 and accompanying text infra.
\item For a discussion of hiring hall provisions, see notes 17 & 33 and accompanying text infra.
\item For a discussion of provisions for minimum employee qualifications, see note 34 and accompanying text infra.
\item For a discussion of the various interpretations of a § 8(f) prehire agreement, see notes 42-80 and accompanying text infra.
\item For a discussion of the initial National Labor Relations Board decisions interpreting § 8(f), see notes 45-54 and accompanying text infra.
\item It had been suggested that it would be an unfair labor practice under § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976), and § 8(b)(3), id. § 158(b)(3), for a party to repudiate a § 8(f) agreement. See notes 44-61 and accompanying text infra. For a discussion of those sections, see note 82 and accompanying text infra.
\item See notes 65-69 and accompanying text infra.
\item For a discussion of the transformation of a § 8(f) agreement into one fully enforceable under the Act, see notes 81-113 and accompanying text infra.
\end{enumerate}
This comment will examine the history of section 8(f), the interpretation of that section by the Board, and the implications of that interpretation.

II. HISTORY OF SECTION 8(f)
A. The Development of Labor Patterns in the Construction Industry

The construction industry has posed special problems in the field of labor-management relations because of the unique circumstances which exist in that industry. These circumstances include: 1) the short duration of most construction jobs; 2) the need of employers in that industry to know their labor costs before bidding on a particular construction job and to have a supply of skilled employees ready for quick referral; and 3) the need of employees in that industry to know where and when jobs are available.13

The special needs of employers and employees in the construction industry led to the development of unique patterns of collective bargaining. Employees formed unions to offset job insecurity, and employers came to depend on those unions for skilled employees who could be supplied on short notice.14 Ultimately, the employers and unions reduced these relationships to a writing that usually took the form of a prehire agreement—a collective bargaining agreement covering a particular construction job and agreed upon by a union and employer before any employee had been hired for that job.15 Prehire agreements generally included either a union-security clause16 or a hiring hall provision.17 By signing a prehire agreement, an employer was guaranteed a work force when the job started and was able to calculate his labor costs before bidding on that job. The union, by entering into a number of such prehire agreements, could guarantee its members somewhat steady employment at union wages. Prehire agreements thus solved many of the problems that confronted employers and employees in the construction industry and brought needed stability to labor relations in that area.18

14. See note 13 supra.
15. For a discussion of prehire agreements, see note 31 infra.
16. A union-security clause requires that employees become members of the union after a set period of time—7 days in the construction industry; 30 days in other industries—and requires the employer to discharge an employee who does not become a union member after the specified period. W. Wilson, Labor Law Handbook 221-28 (1963). See note 32 and accompanying text infra.
17. A hiring hall provision provides that the union shall refer employees who are registered with it to the employer whenever the employer needs workers. W. Wilson, supra note 16, at 232-37. Such a provision can be exclusive, in which case the employer agrees to employ only those employees who are referred to it by the union, or nonexclusive, in which case the employer may hire all or some of its employees through referral by the union. Id. See note 33 and accompanying text infra.
When the Act first became law with the passage of the Wagner Act in 1935, the Board generally declined to exercise jurisdiction over employers and labor organizations in the construction industry. This decision was based on a determination that the policies of the Act would not be advanced by such an exercise of jurisdiction because the construction industry was more organized and stable at that time than were other industries.

After the passage of the Taft-Hartley amendments in 1947, the Board concluded that it could no longer decline to exercise its jurisdiction over the construction industry. The application of the Act to the construction industry resulted in substantial problems, however, since many of the patterns of bargaining that had developed in that industry, such as the prehire agreement, were considered to be unfair labor practices under prior interpretations of the Act. Congress eventually amended the Act by adding a special section which was designed to solve most of the problems of labor-management relations in the construction industry. That section was section 8(f).

21. MILLIS & BROWN, supra note 18, at 400-01.
23. See Plumbing Contractors Ass'n, 93 N.L.R.B. 1081 (1951), wherein the Board noted that it was the clear congressional intent that the Board should exercise its jurisdiction over employers and unions in the construction industry. Id. at 1085. See also S. Doc. No. 51, 86th Cong., 1st Sess. 18,127, reprinted in [1959] U.S. CODE CONG. & AD. NEWS 2503, 2513-14; Aaron, supra note 13, at 1121; Fleming, supra note 13, at 702.
24. For a discussion of prehire agreements, see text accompanying note 15 supra, and note 31 and accompanying text infra.
25. See notes 31-34 and accompanying text infra.
28. Section 8(f) provides:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with
B. Congress’ Answer to Labor Problems in the Construction Industry—Section 8(f)

Because it was intended to solve the very specific labor problems which existed in the construction industry rather than to exempt that industry from the coverage of the Act, section 8(f) was drafted in very narrow terms.\(^29\) Section 8(f) is restricted to protecting a labor agreement in the construction industry from four specific attacks.\(^30\) First, the section provides that it shall not be an unfair labor practice for a union and employer in the construction industry to enter into an agreement simply because the union fails to represent a majority of the employees in an appropriate unit.\(^31\) Section 8(f) also provides that entering into such an agreement shall not constitute an unfair labor practice if the agreement contains a union-security clause that requires employees to join the union within seven days after being hired, rather than within the thirty day period provided in the Act for other industries.\(^32\)


\(^31\) See notes 31-34 and accompanying text infra.

\(^32\) See text accompanying note 15 supra.

Section 9 of the Act, 29 U.S.C. § 159(a) (1976), provides for the designation by employees of their representative for collective bargaining purposes and the consequences of such action. See text accompanying note 81 infra. For industries other than the construction industry, it is an unfair labor practice for an employer to recognize a union as the collective bargaining representative of his employees if the union does not, in fact, represent a majority of the employees in an appropriate unit. International Ladies Garment Workers Union v. NLRB (Bernhard-Altman Tex., Corp.), 366 U.S. 731 (1961).

\(^81\) Id. This section allows employers and unions in the construction industry to enter into prehire agreements since when such agreements are made the union does not represent any of the employees as none has been hired at that time. For a discussion of prehire agreements, see text accompanying note 15 supra.
also not an unfair labor practice for such an agreement to contain an exclusive hiring hall provision \textsuperscript{33} or to provide for priorities in employment opportunities based on objective criteria, such as training and experience in the industry. \textsuperscript{34}

In addition to drafting the protections afforded collective bargaining agreements in the construction industry in such narrow terms, Congress further limited the scope of section 8(f) by restricting the class of employers and unions which may take advantage of its protection. To come within the scope of section 8(f), an employer must be "engaged primarily in the building and construction industry," \textsuperscript{35} and the union must be "a labor organization of which building and construction employees are members." \textsuperscript{36} Further, the union must not be a company union, which is a union "established, maintained, or assisted by any action [of the employer] defined in section 8(a) of this Act as an unfair labor practice." \textsuperscript{37} Moreover, section 8(f) will not protect an employer who discriminates against an employee on the basis of nonmembership in a union if the employer has reasonable grounds

\textsuperscript{33} 29 U.S.C. § 158(f) (1976). Section 8(f) provides in pertinent part:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer . . . to make an agreement . . . with a labor organization . . . because . . . (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.

\textsuperscript{34} 29 U.S.C. § 158(f) (1976). Section 8(f) provides in pertinent part:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer . . . to make an agreement . . . with a labor organization . . . because . . . (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area.


\textsuperscript{38} 29 U.S.C. § 158(f) (1976). Section 8(f) provides in pertinent part: "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer . . . to make an agreement . . . with a labor organization . . . (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice). . . ." Id. The prohibition against company unions does not prohibit an employer and union from entering into union-security clauses since those are not unfair labor practices under § 8(a) of the Act. Id. § 158(a).

Indeed, the first proviso to § 8(a)(3) specifically declares that nothing in the Act shall be construed as prohibiting such clauses. Id. § 158(a)(3). For a discussion of union-security clauses, see notes 16 & 32 and accompanying text supra. See also Luke Constr. Co., Inc., 211 N.L.R.B. 662 (1974); Loney Davenport, 13 N.L.R.B. 232, 233 (1966). For a discussion of unlawful assistance of a union by an employer, see notes 98-101 and accompanying text infra.
to believe that the employee was discriminated against by the union with respect to membership in that union. Nor does it appear that the union which so discriminates will be protected by section 8(f).

Section 8(f) further limits the special treatment afforded employers and unions in the construction industry by providing that an agreement which is valid only because of section 8(f)(1), i.e., the union does not represent a majority of employees in an appropriate unit, will not be a bar to a petition for election filed under sections 9(c) or 9(e). Furthermore, in amending the Act to add section 8(f), Congress mandated that that provision, like the rest of the Act, was not to be construed as authorizing union-security clauses in states where such clauses are illegal under right-to-work statutes.

Although section 8(f) is written in very explicit terms and is addressed to very specific problems, there has been some controversy over the proper interpretation of that provision. In particular, there has been confusion over the effect of a prehire agreement entered into pursuant to section 8(f)(1). A discussion of the special problems posed by section 8(f)(1) follows.

38. 29 U.S.C. § 158(f) (1976). Section 8(f) states in part: "Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act . . . ." Id. The final proviso to § 8(a)(3) states:

Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.


39. Section 8(f) does not provide any protection to the union in this respect and, therefore, the prohibitions of § 8(b)(2) apply. Section 8(b)(2) provides:

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

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.


40. 29 U.S.C. § 158(f) (1976). The provision states in part: "Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)." Id. Sections 9(c) and 9(e) provide that elections be conducted by the Board upon the filing of a petition for certification or decertification of a representative by an employee, employer, or union. Id. §§ 159(c), (e). See Carpenters Dist. Council of Detroit (Shepard Marine Constr. Co.), 195 N.L.R.B. 530, 531 n.7 (1972).

41. The Landrum-Griffin Act of 1959, Pub. L. No. 86-257, § 703(b), 73 Stat. 541. The amendment provides: "Nothing contained in the amendment made by subsection (a) shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." Id. This is the same limitation that is placed on the rest of the Act by § 14(b), 29 U.S.C. § 164(b) (1976). See also Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) (holding that state right-to-work laws are not unconstitutional).
III. THE INTERPRETATION OF SECTION 8(f)(1)

Although section 8(f)(1) provides that it shall not be an unfair labor practice for an employer and union in the construction industry to enter into a prehire agreement, that section does not state the circumstances under which the agreement will or will not be enforced. There is no problem, of course, where the parties voluntarily comply with the terms of the agreement. Where one party, typically the employer, refuses to abide by the agreement, however, there is disagreement as to the binding effect of that agreement under the Act. One rather narrow interpretation is that section 8(f) only provides that it is not an unfair labor practice to enter into a prehire agreement, and does not proscribe failure to comply with the terms of that agreement. While section 8(f) therefore allows parties to enter into a prehire agreement, that section also permits either party to repudiate that agreement. Another interpretation of section 8(f) is that Congress, in allowing parties to enter into an agreement under section 8(f), intended such an agreement to have the same effect as any other collective bargaining agreement authorized under the Act.

The Board's early decisions expressed both the above-mentioned views of section 8(f). These views emerged in the context of whether a section 8(f) agreement is binding on a successor employer. In one early decision, Oilfield Maintenance Co., the Board held that a successor employer was...

42. NLRB v. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335 (1978).
44. See R.J. Smith Constr. Co., 191 N.L.R.B. 693, 696 (1971) (dissenting opinion of Members Fanning and Brown), enforcement denied sub nom. Local 150, Int'l Union of Operating Engr's v. NLRB, 480 F.2d 1186 (D.C. Cir. 1973). The dissent stated: [A] prehire agreement must be entered into voluntarily by both parties. However, once... petition filed under Section 9(c) or 9(e).
Id. To hold otherwise would, in the dissent's opinion, be to conclude that Congress had allowed parties to enter into a § 8(f) agreement without intending that the agreement have any effect. Id. at 695 (dissenting opinion of Members Fanning and Brown). See also notes 59-61 and accompanying text infra.
45. A successor employer is one who replaces the predecessor employer in running a business where there has been a substantial continuity in the business, including the retention of a substantial number of the employees of the predecessor employer. W. Wilson, supra note 16, at 22-25, 213. In certain circumstances, a successor employer has been held to have a duty to bargain with the union which represented those employees of the predecessor employer who are retained by the successor employer. See John Wiley & Sons v. Livingston, 376 U.S. 543 (1964). However, the Board has recently held that a successor employer is not bound to apply the terms of a predecessor employer's collective bargaining agreement which the successor employer has not voluntarily assumed. See NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272 (1972).
46. 142 N.L.R.B. 1384 (1963). In Oilfield, a predecessor employer had five § 8(f) contracts with five unions covering five different units of employees. Id. The successor employer, on taking over the business, repudiated the five contracts and entered into a § 8(f) contract with a sixth union. Id.
bound by the terms of a valid section 8(f) agreement which the predecessor employer had made with the union and which, by its terms, was still in effect.\textsuperscript{47} Soon thereafter, however, the Board held in \textit{Davenport Insulation, Inc.},\textsuperscript{48} that a successor employer was not bound by the terms of a valid section 8(f) agreement made by the predecessor employer and was not bound to bargain with the union signatory to that agreement.\textsuperscript{49} The \textit{Davenport} Board interpreted section 8(f) as not creating a presumption of union majority status, a presumption which, according to the Board, would have the effect of binding a successor employer to the predecessor employer's collective bargaining agreement.\textsuperscript{50}

Although both \textit{Oilfield} and \textit{Davenport} dealt with the special case of successor employers and their obligations under a predecessor employer's collective bargaining agreement,\textsuperscript{51} the Board has used those decisions as authority in situations where an employer was seeking to avoid a section 8(f) prehire agreement to which it was a signatory.\textsuperscript{52} Although \textit{Oilfield} has never been expressly overruled,\textsuperscript{53} the Board has generally followed the more restrictive interpretation of section 8(f) announced in \textit{Davenport}.\textsuperscript{54}

\textsuperscript{47} Id. The Board began its analysis by finding that the contract made by the successor employer with the sixth union was not a valid § 8(f) contract because the union had been unlawfully assisted by the successor employer. \textit{Id.} For a discussion of unlawful assistance of a union by an employer, see note 37 and accompanying text supra; notes 98-101 and accompanying text infra. The Board then concluded that the successor employer had unlawfully repudiated the contracts made by the predecessor employer. 142 N.L.R.B. at 1384. The Board would not order the successor employer to abide by the terms of four of the contracts made by the predecessor employer, however, because the agreements had expired by the time the Board issued its decision. \textit{Id.} Further, the Board held that the successor employer was not bound to bargain with those four unions because there was no proof of their majority status. \textit{Id.} With respect to the fifth union, whose contract was still in effect, the Board held that the successor employer was bound by that agreement even though there was no evidence that the union had ever enjoyed majority status. \textit{Id.} The Board held that the fact that the predecessor employer had signed a valid § 8(f) contract was enough to bind the successor employer to it. \textit{Id.} But see note 45 supra.

\textsuperscript{48} 184 N.L.R.B. 908 (1970). In \textit{Davenport}, an employer sold a division of its business to a former employee who had previously operated that business for the employer. \textit{Id.} at 909. The Board held that the new owner was a successor employer. \textit{Id.} at 911. The successor employer refused to abide by the terms of a contract executed by the predecessor employer and the union. \textit{Id.}

\textsuperscript{49} \textit{Id.} at 908.

\textsuperscript{50} \textit{Id.} The Board reasoned that since § 8(f) allows an employer to enter into a contract with a minority union, no presumption of majority status could arise from the fact that a union had executed such a contract with the employer. \textit{Id.} Without majority status, the union could not compel the employer to bargain with it or abide by the terms of a contract to which it was a party. \textit{Id.}

\textsuperscript{51} See notes 45-50 and accompanying text supra.

\textsuperscript{52} See NLRB v. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335 (1978).

\textsuperscript{53} The Board has indicated that it does not consider its decision in \textit{Oilfield} as requiring the finding of an unfair labor practice by an employer who refuses to honor a § 8(f) contract to which it was a signatory. See Ruttman Constr. Co., 191 N.L.R.B. 701, 701 n.5 (1971). See notes 57 & 58 and accompanying text infra.

\textsuperscript{54} See notes 55-69 and accompanying text infra.
In *R.J. Smith Construction Co.*, the Board applied *Davenport* to a situation where an employer repudiated a section 8(f) agreement which it had made with a union. The Board held that since a section 8(f) agreement carries no presumption of majority status, the employer was not bound by the terms of that agreement in the absence of other proof of such status. In a companion case, *Ruttmann Construction Co.*, the Board held that an employer who had made section 8(f) agreements with two different unions was free to decide which agreement it intended to apply to any given project.

55. 191 N.L.R.B. 693 (1971), *enforcement denied sub nom.* Local 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186 (D.C. Cir. 1973). In *R.J. Smith*, the employer and union had maintained a relationship for six years, signing contracts in 1964, which expired in 1966 but which the parties treated as still in effect until 1968, and in 1968. 191 N.L.R.B. at 693. However, the employer had never complied with the terms of those contracts and the union had never insisted that the employer do so until the union filed the charges in that case. *Id.*

56. 191 N.L.R.B. at 693. The Board rejected the assertion that a § 8(f) contract is as enforceable during its term as a contract made with a majority union. *Id.* at 694. The Board stated that Congress intended to immunize from liability only the preliminary contractual steps which precede an employer's acquisition of a work force on a project in that it expressly permits the testing of the signatory union's majority status at any time after employees have been hired and an election might, therefore, be conducted ... Inasmuch as Congress clearly intended to permit a test, by petition, of majority status and unit appropriateness at any time during the contract, it would be anomalous, indeed, to hold that section 8(f) prohibits examination of those questions in the litigation of refusal-to-bargain charges. *Id.* (emphasis in original). The Board thus held that since there was no evidence that the union enjoyed majority status, "the contract was not enforceable through 8(a)(5) proceedings." *Id.* at 695.

Board members Fanning and Brown dissented in *R.J. Smith*, criticizing the majority for having based its opinion on the premise that "Congress permitted such prehire contracts without intending them to have any effect." *Id.* at 695 (dissenting opinion of Members Fanning and Brown). The dissent interpreted congressional intent as giving a bonus to the construction industry, a bonus which could only be accomplished by interpreting § 8(f) contracts as being enforceable. *Id.* Therefore, under the dissent's view of § 8(f):

[A] prehire agreement must be entered into voluntarily by both parties. However, once lawfully entered into, a valid prehire agreement differs from other bargaining agreements only in the fact that, under the second proviso of Section 8(f), it is not a bar to a representation petition filed under Section 9(c) or 9(e). *Id.* at 696 (dissenting opinion of Members Fanning and Brown).

57. 191 N.L.R.B. 701 (1971). In *Ruttmann*, the employer had made two § 8(f) contracts for the same project with two different unions. *Id.* The employer chose to apply one of the contracts to a future project, and the other union filed unfair labor practice charges. *Id.*

58. The Board reiterated its position on § 8(f) contracts and its interpretation of Congress' intent in passing that section:

It is clear, however, that in enacting Section 8(f) to assist in resolving such problems, Congress merely permitted parties to enter into such prehire agreements without violating the Act. It does not mean that a failure to abide by such agreement is automatically a refusal to bargain. In essence, therefore, this prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship; such actions may include the execution of a supplemental agreement for certain projects or covering a certain area and the hiring of employees who are usually referred by the union or unions with whom there is a prehire agreement.

*Id.* at 702. Since such subsequent actions had never transpired with respect to the union in *Ruttmann*, the Board held that the employer was not bound by the contract between it and the...
The United States Court of Appeals for the District of Columbia Circuit refused to enforce the Board's order in R.J. Smith, holding that a section 8(f) agreement is enforceable as against the employer and that an employer signatory to such an agreement should be held to the same standard of conduct as an employer who has signed a collective bargaining agreement with a majority union. The court observed that any other interpretation of section 8(f) would render that section meaningless. The Board accepted the court's decision on remand but noted that it did so only for the purposes of that particular decision and that it reserved the right to apply its own interpretation of section 8(f) in future cases.

The Board was quick to reiterate its interpretation of the effect of a section 8(f) agreement. In *The Irvin-McKelvy Co.*, the Board held that a union. *Id.* Board member Fanning concurred in *Ruttmann* because he found that "all future projects were, by the terms of the contract, excludable to suit the convenience of the parties" and, therefore, it could not be said that the contract clearly applied to the project in dispute. *Id.* at 703 (concurring opinion of Member Fanning) (emphasis added). However, Member Fanning reiterated his belief that a § 8(f) contract is enforceable and imposes obligations on the employer under § 8(a)(5). *Id.* Board member Brown dissented for the reasons set forth in the dissenting opinion in *R.J. Smith*. For a discussion of the dissenting opinion in *R.J. Smith*, see note 56 supra.

59. Local 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186, 1189-90 (D.C. Cir. 1973). The court found that the only difference between a § 8(f) contract and a contract made with a majority union is that the former is not a bar to an election under § 9. *Id.* This was the same view that Board members Fanning and Brown expressed in their dissent in *R.J. Smith*. See note 56 supra. The court therefore concluded:

Since the company has this remedy [of filing for a representation election], we can find no sanction in the language, history, or policy of § 8(f) for permitting an employer to abrogate unilaterally a validly executed prehire agreement, or for permitting the employer to commit what is otherwise an unfair labor practice even though at the time of either the union has not achieved majority status. . . .

We hold therefore that an employer, who has entered into a validly executed § 8(f) prehire agreement may, after a reasonable period, seek a representation election to challenge an enduring minority union, but until he does and prevails, he should be held to the same standard of conduct in regard to unfair labor practices as an employer who has entered into a collective bargaining agreement with a union certified to have majority status.

480 F.2d at 1189-91.

60. *Id.* at 1190. The court stated that it "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." *Id.*


The Board, for reasons it deems sufficient, has not filed a petition for certiorari to review the court's decision and will here apply the court's view, respectfully reserving for future cases its position that an employer may not be found guilty of a refusal to bargain with respect to a union with which it has executed a valid 8(f) prehire contract but which has failed to achieve majority status.

*Id.* (footnote omitted).

62. 194 N.L.R.B. 52 (1971). In *Irvin-McKelvey*, the employer entered into a contract for a term of years with a union, District 50, which contained a union-security clause and a "most-favored nations" clause. *Id.* A "most-favored nations" clause provides, in effect, that if a union executes an agreement with another employer which is more favorable to that employer than is the agreement with the present employer, then the present employer would be entitled to have the more favorable provisions inserted into its contract. *Id.* In *Irvin-McKelvey*, District 50 executed a "project agreement" with another employer, which applied only for the duration of
section 8(f) agreement that contained a union-security clause was binding on the employer for those projects already begun at which the union had obtained majority status through the operation of the union-security clause. 63 The employer was not bound, however, to apply the terms of the agreement to future projects because the union had not achieved majority status as to those projects. 64

In Higdon Contracting Co., 65 the Board extended its view of the limited effect of section 8(f) agreements. The Board in Higdon held that a nonmajority union had violated section 8(b)(7)(C) 66 when it picketed an

specific projects rather than for a term of years. Id. The employer signatory to the initial contract thereupon notified District 50 that it considered the project agreement with the other employer to be a more favorable provision. Id. The employer therefore claimed that the "most-favored nations" clause converted the term of years contract into a project contract and that the employer was thus free to terminate that contract upon completion of any project presently covered by that agreement. Id. at 52-53.

63. Id. at 53. The Board again stated its position that a § 8(f) contract is not enforceable unless there is independent proof of the majority status of the union. Id. at 52-53. In this case, where the contract had been applied to projects already begun, the union had achieved majority status through the operation of the union-security clause. Id. at 53. The Board therefore held that the contract was enforceable as to those projects. Id. With respect to future projects, however, the Board held that the employer was not bound by the contract because the union did not represent a majority of those employees, the workers not having been hired at the time the union brought the unfair labor practice charges. Id. See also Roberts & Schaefer Co., 193 N.L.R.B. 860 (1971); notes 81-113 and accompanying text infra.

64. 194 N.L.R.B. at 53. On appeal, the United States Court of Appeals for the Third Circuit reached the same conclusions as the Board but employed a different analysis. See NLRB v. Irvin & McKelvy, 475 F.2d 1285 (3d Cir. 1973). The Third Circuit held that the employer was bound by the terms of the § 8(f) contract at projects already begun because "nothing in either the text or the legislative history of § 8(f) suggests that it was intended to leave construction industry employers free to repudiate contracts at will. . . . [A]n employer is not free to repudiate his § 8(f) contract during its term." Id. at 1271. However, the court agreed with the Board's conclusion that the employer was not bound by the terms of the § 8(f) contract as to future projects. Id. According to the Third Circuit, § 8(f) contemplates that the employees or union will file an election petition under § 9 if they are dissatisfied with the employer's decision as to the union, if any, with which it will bargain at any given construction job. Id.

65. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers (Higdon Contracting Co.), 216 N.L.R.B. 45 (1975), enforcement denied, 535 F.2d 87 (D.C. Cir. 1976), rev'd, 434 U.S. 335 (1978). In Higdon, the employer, Higdon Construction Co., was party to a § 8(f) contract with a union. 216 N.L.R.B. at 45. The employer established another company, Higdon Contracting Co., in order to avoid the terms of that agreement. Id. The union, claiming that Higdon Contracting Co. was the alter ego of Higdon Construction Co. and was therefore bound by the terms of the contract, picketed the site of one of its projects. Id.

66. Section 8(b)(7)(C) provides in part:

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

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

(C) where such picketing has been conducted without a petition under section 9(c)

being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing.

employer who had refused to honor a section 8(f) agreement to which the employer was a party.67 The Board reasoned that since the section 8(f) agreement is not directly enforceable by the nonmajority union by way of unfair labor practice charges, such an agreement is similarly unenforceable by such indirect means as picketing.68 Consequently, having concluded that the picketing had no legitimate objective, the Board held that the union's activity had to be viewed as being done for "recognitional" purposes and that under the facts such picketing violated section 8(b)(7)(C).69

On petition for review, the United States Court of Appeals for the District of Columbia Circuit denied enforcement of the Board's order in Higdon and declined to overrule its previous decision in R.J. Smith with respect to the effect of section 8(f) agreements.70 On appeal, the Supreme Court reversed the decision of the D.C. Circuit, holding that the Board's interpretation of section 8(f), as expressed in R.J. Smith, Ruttmann, and Irvin-McKelvy, as well as in Higdon, was not an unreasonable one.71

Following the Supreme Court's decision in Higdon, the Board's interpretation of the limited effect of a section 8(f) agreement became settled law.72 In brief, that interpretation is that a section 8(f) agreement, without more, is voidable at will by either party.73 Under the Board's decisions, the union may not seek to enforce the agreement by filing an unfair labor practice charge against the employer for breaching the contract or by picketing the employer.74 The union thus has no guarantee that the employer will

67. 216 N.L.R.B. at 45. The Board, while agreeing with the union that Higdon Contracting Co. was the alter ego of Higdon Construction Co., held that the former was not bound by the terms of the § 8(f) contract because the latter was not bound by that agreement. Id. The Board found that Higdon Construction Co. was not bound because the union could not prove that it represented a majority of employees at the project. Id. at 46. The union's picketing, therefore, could not be construed as being for the purpose of forcing the employer to abide by a legally enforceable contract, but rather had to be interpreted as being for recognitional purposes. Id. The union's activities thus violated § 8(b)(7)(C) because the union had failed to file an election petition within thirty days of the commencement of picketing. Id. See note 66 supra.

68. 216 N.L.R.B. at 46.

69. Id. See note 67 supra. For the text of § 8(b)(7)(C), see note 66 supra.


71. NLRB v. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335 (1978). Writing for the Court, Justice White discussed the history of the Board's decisions interpreting § 8(f) and concluded that "[n]othing in the language or purposes of either § 8(f) or § 8(b)(7) forecloses this application of the statute." Id. at 346. Furthermore, the Court did not agree that the Board's interpretation of § 8(f) rendered that section meaningless because the Board's view permitted the voluntary execution of such agreements and allowed enforcement once the union achieved majority status. Id. at 349. Although the Court noted that other interpretations of § 8(f) were possible, Justice White concluded that the Board's interpretation was entitled to considerable deference and would therefore be upheld. Id. at 350. Justices Stewart, Blackmun, and Stevens dissented. Justice Stewart, writing for the dissenters, stated that although an employer in the construction industry was not obligated to bargain with a minority union, once it did so it should be held to the terms of any completed agreement. Id. at 353 (Stewart, J., dissenting).


73. See notes 55-69 and accompanying text supra.

74. Id.
abide by the terms of the agreement or that the employer will not recognize and bargain with another union.\textsuperscript{75} The employer may elect to abide by the agreement or may repudiate it, whichever it deems most advantageous.\textsuperscript{76} The employer may feel compelled to enter into a prehire agreement because it needs the guarantee of a ready supply of labor when the job begins.\textsuperscript{77} When the employer believes it no longer needs the agreement, which usually occurs once the work force is hired, the employer may abrogate its agreement with the union without committing an unfair labor practice or subjecting itself to retaliatory picketing.\textsuperscript{78}

Although a union has little protection under the Board's interpretation of section 8(f) agreements,\textsuperscript{79} the Board has given some hope to unions in the construction industry by indicating that a section 8(f) agreement, coupled with something more, might be enforceable.\textsuperscript{80} That something more is simply the attainment of majority status by the union, which transforms the union into the section 9(a) representative and entitles it to the full protection of the Act. Such a transformation is discussed in the following section.

IV. THE TRANSFORMATION TO SECTION 9(a) STATUS

Section 9(a) of the Act provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.\textsuperscript{81}

When a union achieves sections 9(a) status, the employer and union come under a mutual obligation to bargain in good faith and abide by the terms of

\textsuperscript{75} Id. But see notes 81-113 and accompanying text infra.

\textsuperscript{76} See notes 55-69 and accompanying text supra. Although Higdon would seem to suggest that the union is likewise free to refuse to abide by the terms of a § 8(f) contract, it seems unlikely that it would be to the union's advantage to do so. In any event, there appear to be no cases in which the employer or employees complained about the refusal of a union to abide by a § 8(f) contract. But cf. Bricklayers & Masons Int'l Union, Local 3, 162 N.L.R.B. 476 (1966), in which the employer charged the union with a § 8(b)(3) violation for refusing to bargain in good faith. Id. The union defended on the ground that it had no duty to bargain in good faith because its relationship with the employer was governed by § 8(f). Id. The Board found that since the union and employer had had a long and continuous bargaining relationship, the union was under an obligation to bargain in good faith under § 8(b)(3). Id. at 478. For a discussion of Bricklayers, see notes 104-09 and accompanying text infra.

\textsuperscript{77} See notes 13-18 and accompanying text supra.

\textsuperscript{78} See notes 55-69 and accompanying text supra.

\textsuperscript{79} Id.

\textsuperscript{80} See The Irvin-McKelvy Co., 194 N.L.R.B. 52 (1971), in which the Board held that a § 8(f) contract was enforceable with respect to those projects already begun at which the union did, in fact, represent a majority of the employees. For a discussion of Irvin-McKelvey, see notes 62-64 and accompanying text supra. See also notes 81-113 and accompanying text infra.

\textsuperscript{81} 29 U.S.C. § 159(a) (1976).
any agreement reached as a result of those negotiations. The failure to fulfill these duties by the union or the employer would constitute an unfair labor practice under section 8(a)(5) and 8(b)(3) of the Act. Further, such an agreement operates as a bar to a petition for a representation election.

To achieve section 9(a) status, with its attendant protections and obligations, a union need only prove that it represents a majority of the employees in an appropriate unit. Even though a union began its relationship with the employer as a minority union under a section 8(f) prehire agreement, the union’s achievement of majority status during the term of that agreement will elevate the union to the status of a section 9(a) representative and render the agreement enforceable under that provision. The union can attain majority status by obtaining cards from the employees as or after they are hired, by operation of a union-security clause, or by operation of a hiring hall provision.

The Board has indicated that it might be more lenient in applying some of the established criteria for attaining majority status to the construction

82. It is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)," and for a labor organization "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)." 29 U.S.C. §§ 158(a)(5), (b)(3) (1976).


84. The Board stated that it has normally refused to proceed to an election, in the presence of a collective bargaining contract, where the contract granted exclusive recognition, is to be effective only for a reasonable period and was negotiated by a union representing at the time a majority of the employees [in an appropriate unit].


86. For a discussion of prehire agreements, see notes 15 & 31 and accompanying text supra.

87. See Ellis Tacke Co., 229 N.L.R.B. 1296 (1977), wherein the Board stated:

The relationship between Respondent [employer] and the Union ripened from the initial prehire agreement in 1958 into a series of four successive collective-bargaining agreements . . . . The Union represented a majority of the employees employed by Respondent in the unit set forth above at least from June 26, 1972 to July 11, 1973. Consequently, upon the attainment of majority status, the Union completed all of the requirements needed to perfect its status as a 9(a) representative. As such 9(a) representative, the Union was entitled to the protection and stability afforded by Section 8(a)(5) of the Act. Thus, the Carpenter’s agreement carries with it a conclusive presumption of the Union’s majority status and the collective-bargaining unit for the term of the agreement and for successor agreements.

Id. at 1303.


89. See Bricklayers & Masons Int’l Union, Local 3, 162 N.L.R.B. 476, 478 (1966). For a discussion of Bricklayers, see notes 104-09 and accompanying text infra.

90. See Shepard Decorating Co., 196 N.L.R.B. 152 (1972). In Shepard Decorating, the union had demonstrated that it represented a majority of the employees. Id. Thereafter, the employer used the union’s nonexclusive hiring hall for a number of years. Id. For a discussion of hiring hall provisions, see note 17 supra. The Board held that such a contract was not a § 8(f) prehire agreement "but rather . . . [was] a continuation of a referral system based on a majority showing some 6 years previously." 196 N.L.R.B. at 155.
industry. In Fenix & Scisson, Inc., the Board indicated that the general rule, which required that a "representative complement" of employees be hired and that the union establish that it represents a majority of that complement before it is deemed to have attained section 9(a) status, may not be strictly applied in the construction industry, where employment at a given project is not stable and is often short-lived. In Fenix & Scisson, a union had brought unfair labor practice charges against the employer and a second union, alleging that the second union had coerced the employer into becoming a party to an agreement after the employer had signed a prehire agreement containing a union-security clause with the first union. The Board affirmed the decision of the administrative law judge, holding that the section 8(f) agreement with the first union was enforceable after that union had obtained cards from eight of the nine employees hired on the first day, though up to forty-five employees were eventually hired during the course of the project. Both the employer and the second union were therefore found guilty of unfair labor practices.

The Board, however, has placed some limits on the attainment and effect of section 9(a) status in the construction industry. For example, the union must prove that it represents an "uncoerced" majority of the employees, as does any other union which seeks the protection of the Act. The Board applied that principle in Loney Davenport, where the union had a section 8(f) agreement but had attained majority status through conduct of the employer, allegedly in violation of the "unlawful assistance"

91. See notes 92-97 and accompanying text infra.
92. 207 N.L.R.B. 752 (1973). In Fenix & Scisson, the employer had signed a contract containing a union-security clause with a union. Id. The employer hired nine employees, eight of whom joined the union. Id. Subsequently, a second union, through threats of violence, forced the employer to repudiate its contract with the first union and to sign a new contract. Id. This second contract also contained a union-security clause. Id. Thereafter, all the employees joined the second union pursuant to the union-security clause of the second contract. Id.
94. 207 N.L.R.B. at 759. The administrative law judge stated: "Such doctrine is hardly appropriate to the usual construction project which frequently operates with a transient work force normally building up to a peak employment as the construction progresses and then decreasing thereafter. . . ." Id. The judge then noted that because the first union had a union-security clause in its contract, its representative status as majority representative of the employees was not affected by the fact that the employer had not yet hired a representative complement of employees. Id.
95. Id. For a discussion of prehire agreements and union-security clauses, see notes 15-16 & 31-32 and accompanying text supra.
96. 207 N.L.R.B. at 759.
97. Id.
98. See Loney Davenport, 173 N.L.R.B. 232 (1969). Section 7 protects the right of employees to "refrain from" as well as to participate in union or other concerted activities. 29 U.S.C. § 157 (1976). It is an unfair labor practice under § 8(b)(1)(A). Id. § 158(b)(1)(A), for a labor organization to coerce employees into joining a union. Id. Likewise, it is an unfair labor practice for an employer to coerce employees into joining a union. Id. § 158(a)(3). Union-security clauses represent a limited exception to the rights guaranteed employees under § 7. Id. § 157. See notes 16 & 32 and accompanying text supra.
prohibitions of section 8(f)(2) of the Act. The Board affirmed the administrative law judge's finding that the employer's conduct was not unlawful assistance and, therefore, did not disqualify the union as the section 9(a) representative of the employees at the jobsite.

A further limitation on the effect of the attainment of majority status by a union in the construction industry was expressed in The Irwin–McKeley Co. Under the holding of that decision, a union's achievement of majority status will not render a section 8(f) agreement enforceable as to future projects for which the union has not demonstrated majority status.

Another important decision with respect to the relationship between a section 8(f) agreement and the attainment of section 9(a) status was Bricklayers & Masons International Union, Local 3. In Bricklayers, the Board held that the section 8(f) agreement between the union and employer was enforceable by the union. Although Bricklayers is consistent with the other Board decisions holding such agreements enforceable when the union has achieved majority status during the term of the agreement, the Board in Bricklayers did not base its decision on that ground, relying instead on the fact that the union and employer had had a long and continuous bargaining relationship. The Board stated that Congress intended that section 8(f) apply to "an initial attempt by a union and an employer in the construction industry to commence a relationship," and that Congress did not intend that the section apply where "the parties are continuing an existing bargaining relationship under which employees have previously been

100. Id. at 233. The action of the employer consisted of talking with the employees and lending two of them money to enable them to pay their initiation fees and union dues. Id. The administrative law judge found that absent evidence that the employer had requested that the employees join the union or in any other way pressured them to join, the employer's conduct was not enough to support a finding that it had unlawfully assisted the union. Id. The Board therefore found that the union was the representative of the employees. Id.

101. Id. But cf. Barwise Sheet Metal Co., Inc., 199 N.L.R.B. 372 (1972), in which the administrative law judge refused to consider the employer's argument that the union did not represent an uncoerced majority because "[i]t is an elementary proposition of law that no one may assert a defense predicated on his own unlawful conduct." Id. at 379.


103. 194 N.L.R.B. at 52.

104. 162 N.L.R.B. 476 (1966). In Bricklayers, the employer charged the union with committing a violation of § 8(b)(3) by bargaining to impasse on a nonmandatory subject of negotiation. Id. at 476-77. Specifically, the employer alleged that the union had refused to bargain about subjects which the parties had a mandatory duty to negotiate under the Act until the employer agreed to the union's demands on a subject about which the employer was under no duty to bargain. Id. Such action is an unfair labor practice under § 8(b)(3), 29 U.S.C. § 158(b)(3) (1976). See NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958). In defense, the union contended that it was under no obligation to bargain in good faith under § 8(b)(3) since its contractual relationship with the employer was governed by § 8(f) and not by § 9(a) and the other provisions of the Act. 162 N.L.R.B. at 477.

105. 162 N.L.R.B. at 477.

106. See id. at 478. The Board noted that the union was the recognized bargaining agent and that one of the previous agreements had contained a lawful union-security clause. Id. See notes 81-97 and accompanying text supra.

107. See 162 N.L.R.B. at 478.
hired.” 108 In the latter situation, Congress intended that “the tests to be applied in determining the fulfillment of the bargaining obligations of the parties . . . are those generally used under Section 8(a)(5) and (b)(3),” which are the tests used where the union is the section 9(a) representative of the employees.109

An interesting question is raised by the Board’s decision in *Bricklayers* as to the position of a union which has had a long and continuous relationship with an employer but which has never attained majority status. Clearly, under *R.J. Smith*, *Ruttmann*, and *Higdon*, a union which has not achieved the status of a section 9(a) representative is powerless to enforce a section 8(f) agreement.110 Under the Board’s reasoning in *Bricklayers*, however, the status of a union which has had a long and continuous relationship with an employer cannot be adjudged under section 8(f) since that provision was meant to apply only to the initial steps in the formation of a relationship between an employer and union in the construction industry.111 Such a union, without the protection of section 8(f), would thus be guilty of an unfair labor practice for bargaining with the employer while not representing a majority of the employees.112 A literal reading of *Bricklayers* leads to the conclusion that a union which initiates a section 8(f) relationship with an employer must attain majority status within a reasonable time or risk losing the minimal protection of section 8(f).113

V. CONCLUSION—THE STATUS AND EFFECT OF COLLECTIVE BARGAINING AGREEMENTS IN THE CONSTRUCTION INDUSTRY

The effect of the Board’s decisions on collective bargaining agreements in the construction industry is to take away much of the force and effect of those agreements. Although under section 8(f) Congress gave a union in that industry the right to bargain and contract with an employer before that union attains majority status,114 the Board has made that right ephemeral by holding that any contract executed under section 8(f) is unenforceable until that union attains majority status.115 The Board has also held that section 8(f) immunizes only the initial attempt by an employer and union in the construction industry to commence a collective bargaining relationship,116 thereby suggesting that the union and the employer may lose that immunity if the union fails to achieve majority status within a reasonable time after the

108. 162 N.L.R.B. at 478.
109. Id. For a discussion of § 8(a)(5) and § 8(b)(3), see notes 81-84 and accompanying text supra.
110. See notes 55-71 and accompanying text supra.
111. 162 N.L.R.B. at 478. See notes 106-09 and accompanying text supra.
112. See notes 31-34 supra.
113. See notes 104-09 and accompanying text supra.
115. See notes 55-71 and accompanying text supra.
116. See notes 104-09 and accompanying text supra.
preliminary negotiations are begun. The Board has even curtailed the force of a section 8(f) collective bargaining agreement where the union does achieve majority status, since such an agreement has been held unenforceable as to future projects for which employees have not yet been hired.

The Board’s decisions with respect to collective bargaining agreements in the construction industry have thus only served to limit an already narrow section of the Act. This result does not appear to be in harmony with the intent of Congress in enacting section 8(f). For while the general policy of the labor laws is not to force a minority union on employees but rather to allow a majority of them to determine their representative for collective bargaining purposes, Congress, in enacting section 8(f), created a clear exception to that policy to accommodate the special needs of the construction industry. The Board’s interpretation of section 8(f), which allows an employer to avoid without liability a valid prehire agreement to which it is a signatory, seems to be at odds with this congressional policy, and does not appear to advance any other policy of the labor laws, such as promoting stability in labor-management relations. Indeed, holding such agreements voidable at will is likely to create the type of instability and uncertainty in the construction industry that the labor laws generally, and section 8(f) in particular, were designed to eliminate.

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117. See notes 110-13 and accompanying text supra.
118. See notes 62-64 & 102-03 and accompanying text supra.
119. For a discussion of the limited scope of § 8(f), see notes 29-41 and accompanying text supra.
120. See notes 13-28 and accompanying text supra.
122. Id. § 158(f). See notes 29-41 and accompanying text supra.
123. See notes 13 & 24-28 and accompanying text supra.
125. Id.