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The Enforceability of Prehire Agreements: Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Associated Wrecking Co.

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**THE ENFORCEABILITY OF PREHIRE
AGREEMENTS: CONTRACTORS,
LABORERS, TEAMSTERS & ENGINEERS
HEALTH & WELFARE PLAN v.
ASSOCIATED WRECKING CO.**

To protect the right of employees to select the bargaining representative of their choice,¹ Congress has made it an unfair labor practice for an employer or labor organization to sign a representation agreement if the union has not yet attained majority support.² Pursuant to section 8(f) of the National Labor Relations Act (the Act),³ however, the execution of an agreement with a minority

¹ See *Hearings on S. 2926 Before Senate Comm. on Education and Labor*, 73d Cong., 2d Sess. 27, 436-39 (1934), reprinted in I NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 464-73 (1949). See generally 1 J. JENKINS, LABOR LAW § 2.2, at 55 (1968); Keyserling, *The Wagner Act: Its Origins and Current Significance*, 29 GEO. WASH. L. REV. 199, 216-19, 232-33 (1961). Section 7 of the National Labor Relations Act (the Act) provides:

Employees shall have the right to self-organization, to form, join, or assist 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 [permissible union security clauses provide otherwise].

29 U.S.C. § 157 (1976).

² See, e.g., *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961); *NLRB v. Trosch*, 321 F.2d 692, 695-97 (4th Cir. 1963), cert. denied, 375 U.S. 993 (1964). Employers are prohibited from interfering with, or restraining employees' rights under section 7 of the Act, see 29 U.S.C. §§ 157, 158(a)(1) (1976); note 1 *supra*, and may not contribute support to or dominate a labor organization, see 29 U.S.C. § 158(a)(2) (1976). A grant of exclusive recognition by an employer to a minority union constitutes an impermissible interference with employees' section 7 rights. See 366 U.S. at 737-38. An employer who recognizes such a union, therefore, ordinarily is guilty of an unfair labor practice. E.g., *NLRB v. Retail Clerks Local 588*, 587 F.2d 984, 986 (9th Cir. 1978); *Komatz Constr., Inc. v. NLRB*, 458 F.2d 317, 322 (8th Cir. 1972). In 1947, Congress passed the Taft-Hartley Act to proscribe union unfair practices. See Labor Management Relations (Taft-Hartley) Act, ch. 120, § 8, 61 Stat. 136 (1947). This statute imposed upon unions those restrictions against violating employee rights which had been applicable to employers. 366 U.S. at 738; see S. REP. NO. 105, 80th Cong., 1st Sess. 50 (1947). Thus, Congress has provided for freedom of choice in the selection of bargaining representatives by ensuring that an unconsenting majority will not be represented by an agent selected by the minority. 366 U.S. at 737; see *NLRB v. Local 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 344 (1978).

³ See Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 705, 73 Stat. 519 (1959) (current version at 29 U.S.C. § 158(f) (1976)). Section 8(f) provides

union is permissible when the employer is "engaged primarily in the building and construction industry."⁴ Although section 8(f) legitimizes such "prehire" agreements,⁵ it preserves the employees'

in pertinent part:

It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement
Provided . . . [t]hat any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

29 U.S.C. § 158(f) (1976).

⁴ 29 U.S.C. § 158(f) (1976). Because Congress did not indicate how to determine whether an employer is "engaged primarily" in the construction industry, *see id.*, it had been unclear which employers could execute prehire agreements. *See, e.g.,* Witney, *LMRDA Title VII: Its Problems and Their Development*, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 630, 647-48 (R. Slovenko ed. 1961). Moreover, the statute merely states that such contracts can be executed "with a labor organization of which building and construction employees are members" *See* 29 U.S.C. § 158(f) (1976). Thus, commentators have been unsure whether a union was required to attain a certain percentage of construction workers as members before being able to benefit from section 8(f). *See, e.g.,* Witney, *supra*, at 647-48.

The NLRB has addressed the question concerning employer eligibility in a number of decisions. In *Forest City/Dillon-Tecon Pacific*, 209 N.L.R.B. 867 (1974), *modified on other grounds per curiam*, 522 F.2d 1107 (9th Cir. 1975), for example, the Board, looking to Congress' purpose in enacting section 8(f), concluded that "[t]here is no question that the intention of the legislature" was to exclude employers who used a continuous and regular complement of employees. 209 N.L.R.B. at 869-71. Section 8(f) clearly is not applicable to manufacturing employees even if their functions bear a substantial, intimate relation to the construction industry. 209 N.L.R.B. at 871; *Frick Co.*, 141 N.L.R.B. 1204, 1208 (1963); *see, e.g., Hoover, Inc.*, 240 N.L.R.B. 593, 599 (1979) (operator of sand, stone and gravel companies not within ambit of section 8(f) even though its products were used in construction industry).

Although apparently it has clarified the meaning of the term "employer," the NLRB has yet to describe the requirements a union must meet to fall within the operation of section 8(f). It appears that if the employee sought to be represented is a construction worker, the union may become a party to a prehire agreement. *See* *IBEC Housing Corp.*, 245 N.L.R.B. 1282, 1282-83 (1979). Whether an individual is a "construction employee," however, is a much litigated question. *See, e.g.,* *Construction, Building Materials & Misc. Drivers, Local 83*, 243 N.L.R.B. 328, 330-31 (1979); *Fenix & Scisson, Inc.*, 207 N.L.R.B. 752, 754-55 (1973), *enforced*, 87 L.R.R.M. 3276 (7th Cir. 1974); *Lion Country Safari, Inc.*, 194 N.L.R.B. 1227, 1231 (1972).

⁵ A prehire agreement is an arrangement through which a union and an employer may agree to have a union shop prior to a showing of majority support for the union. R. GORMAN, *LABOR LAW* 647-48 (1976); *see* *Administrative Rulings of NLRB General Counsel*, Case No. SR-813, 46 L.R.R.M. 1515, 1515 (1960) (prehire agreement may be executed with minority union). A union may not picket or otherwise coerce an employer to execute a prehire con-

freedom to select a bargaining representative by expressly providing that these agreements shall not bar representation elections.⁶

tract, Local 542, Int'l Union of Operating Eng'rs, 142 N.L.R.B. 1132, 1135 (1963), *enforced*, 331 F.2d 99, 107 (3d Cir.), *cert. denied*, 379 U.S. 889 (1964), because the NLRB and the courts have construed section 8(f) as authorizing only voluntary agreements, NLRB v. Local Union 103, Int'l Ass'n of Bridge Workers, 434 U.S. 335, 348-49 & n.10 (1978); 142 N.L.R.B. at 1135. This interpretation appears to comport with the section's legislative history. See II NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1577-78 [hereinafter cited as II LEGIS. HIST.]; H.R. REP. NO. 741, 86th Cong., 1st Sess. 19-20, *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2424, 2442; CONFERENCE REPORT ON H.R. REP. NO. 1147, 86th Cong., 1st Sess. 41-42 (1959). Then Senator John F. Kennedy, referring to the archetype of the present section, stated:

It was not the intention of the Committee to require . . . the making of prehire agreements, but, rather, to permit them; nor was it the intention of the Committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a prehire agreement The purpose of this section is to permit voluntary prehire agreements.

104 CONG. REC. 1130 (1958) (Remarks of Sen. Kennedy).

Section 8(f) provides that prehire agreements may contain union security clauses, requiring that, as a condition of employment, prospective employees join the union after the seventh day of work. See 29 U.S.C. § 158(f) (1976). In the usual collective bargaining agreement, union security clauses cannot require union membership until after the thirtieth day of employment. 29 U.S.C. § 158(a)(3) (1976). The 7-day provision of section 8(f), therefore, appears to be a concession to the transitory nature of construction work. See notes 60-66 and accompanying text *infra*. Because prehire agreements are subject to section 14(b) of the Act, however, S. REP. NO. 187, 86th Cong., 1st Sess. 29, *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2318, 2345, union security clauses may not be executed if a violation of state law would result. See 29 U.S.C. § 164(b) (1976); see R. GORMAN, *supra*, at 663-64.

The availability of union security clauses in prehire agreements is problematical since the NLRB has indicated that an enforced security provision may give rise to a rebuttable presumption that a union has attained majority status. R.J. Smith Constr. Co., 191 N.L.R.B. 693, 695 n.5 (1971) (*dicta*), *enforcement denied*, 480 F.2d 1186 (D.C. Cir. 1973). This appears to conflict with the general rule that a union is not presumed to represent a majority under a prehire agreement. See, e.g., Davenport Insulation, Inc., 184 N.L.R.B. 908, 912 (1970); *cf.* International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 736 (1961) (agreement with minority union gives the organization "a deceptive cloak of authority with which to persuasively elicit additional employee support"). For a discussion of additional terms permitted to be included in prehire agreements, see Witney, *supra* note 4, at 646-49.

⁶ See 29 U.S.C. § 158(f) (1976) (prehire agreements do not bar petitions for representation elections provided for in 29 U.S.C. § 159(c), (e) (1976)). The original bill provided that the NLRB could certify a labor organization as the exclusive representative of construction employees whenever a petition was filed stating that a prehire agreement had been executed. II LEGIS. HIST., *supra* note 5, at 1578. The Act provides that certification constitutes a bar to representation elections for a 12-month period. 29 U.S.C. § 159(c)(3) (1976). See also General Cable Corp., 139 N.L.R.B. 1123, 1124-28 (1962). The bill was criticized, therefore, as an unreasonable restraint on employees' rights to select a bargaining representative. See II LEGIS. HIST., *supra* note 5, at 1578. Accordingly, to preserve "freedom of choice in situations where [representation] elections could be held," the bill was amended to include a proviso stating that a prehire agreement would not bar a petition for an election. *Id.* at 1750. The original Senate bill included such a proviso. See S. 3974, 85th Cong., 2d Sess.

In light of this preservation of employee rights, the National Labor Relations Board (NLRB or the Board) has determined that section 8(f) is not designed to substitute prehire agreements for those provisions of the Act pertaining to the recognition of a union as the exclusive bargaining representative for a group of workers.⁷ Thus, the NLRB has ruled that a union commits an unfair labor practice when it pickets an employer to secure enforcement of the prehire agreement because, in effect, it is seeking to gain recognition without demonstrating its majority status pursuant to the Act.⁸ In upholding this determination, the Supreme Court broadly

(1958); S. REP. No. 187, 86th Cong., 1st Sess. 21, *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2318, 2344.

⁷ See R.J. Smith Constr. Co., 191 N.L.R.B. 693, 694 (1971), *enforcement denied*, 480 F.2d 1186 (D.C. Cir. 1973); Oilfield Maintenance Co., 142 N.L.R.B. 1384, 1385-86 (1963). Section 9 of the Act provides the administrative machinery for the certification of an exclusive bargaining representative. R. GORMAN, *supra* note 5, at 40; see 29 U.S.C. § 159 (1976). Essentially, this statutory procedure provides that after the filing of a petition supported by a showing of interest, the NLRB will conduct an election and certify the results. *Id.* These formal processes need not always be used, however, because in many instances, an employer voluntarily recognizes the union. R. GORMAN, *supra* note 5, at 40. Voluntary recognition may subject an employer to unfair labor practice charges under sections 8(a)(1) and 8(a)(2) of the Act, if the union is not supported by a majority of the employees. *Id.*; see 29 U.S.C. § 158(a)(1) & (2) (1976). Section 8(f) expressly provides, however, that prehire agreements will not lead to unfair labor practice charges under section 8(a). 29 U.S.C. § 158(f) (1976).

⁸ NLRB v. Local 103, Int'l Ass'n of Bridge Workers, 434 U.S. 335, 341 (1978), *aff'g* 216 N.L.R.B. 45 (1975); see R. GORMAN, *supra* note 5, at 648. Originally, the NLRB took the position that prehire agreements could be challenged only through the Act's decertification provisions, regardless of whether the union demonstrated majority support. See, e.g., Oilfield Maintenance Co., 142 N.L.R.B. 1384, 1385-87 (1963). Later, the Board expressed the view that Congress intended section 8(f) to apply only to initial attempts at establishing a bargaining relationship. Bricklayers & Masons Local 3, 162 N.L.R.B. 476, 478 (1966), *enforced*, 405 F.2d 469 (9th Cir. 1968). It was emphasized that the duties incident to a collective bargaining contract do not apply to prehire agreements. 162 N.L.R.B. at 478-79; *accord*, Dallas Bldg. & Constr. Trades Council, 164 N.L.R.B. 938, 943 (1967), *enforced*, 396 F.2d 677 (D.C. Cir. 1968). The presumption that a union continues to enjoy majority support during the term of a collective agreement was later held not to apply to contracts formed with minority unions. See Davenport Insulation, Inc., 184 N.L.R.B. 908, 912 (1970). Finally, the Board rejected its original position, stating that absent a union's affirmative demonstration of majority support, an employer does not commit an unfair labor practice by repudiating a prehire agreement and refusing to bargain with the union. See R.J. Smith Constr. Co., 191 N.L.R.B. 693, 695 (1971), *enforcement denied*, 480 F.2d 1186 (D.C. Cir. 1973). The Board reasoned that since Congress expressly provided for inquiry into a labor organization's majority status in the section, see generally 29 U.S.C. § 158(f) (1976); note 6 and accompanying text *supra*, "it would be anomalous . . . to hold that Section 8(f) prohibits examination of [a union's majority] in the litigation of refusal-to-bargain charges." 191 N.L.R.B. at 694. In a companion case, the NLRB succinctly stated its position that a "prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship." Ruttman Constr. Co., 191 N.L.R.B. 701, 702 (1972). One commentator has suggested that these decisions demonstrate that, under the Board's view, "a

stated that the employer's duty to honor a prehire agreement is contingent upon the union's having attained majority support at a construction site.⁹ This statement has cast doubt upon a union's right to enforce the provisions of prehire agreements through con-

prehire contract is, in effect, almost no contract." King & LaVaute, *Current Trends in Construction Industry Labor Relations—The Double-Breasted Contractor and the Prehire Contract*, 29 SYRACUSE L. REV. 901, 934 (1978).

⁹ NLRB v. Local 103, Int'l Ass'n of Bridge Workers, 434 U.S. 335, 345 (1978). In *Local 103*, the Higdon Construction Company entered into a prehire agreement which purported to bind Higdon to the terms of a multi-employer understanding between Local 103 and an employers' association. *Id.* at 339. An alter ego corporation, Higdon Contracting Company, was created to allow the employer to undertake work using nonunion labor. *Id.* The union picketed two of these nonunion projects, asserting that Higdon violated the agreement. *Id.* Local 103 had never represented a majority of the employees at either jobsite, nor had it filed a petition for a representation election. *Id.* Higdon filed a charge with the NLRB, alleging that Local 103 violated section 8(b)(7)(C) of the Act, which makes it an unfair labor practice for an uncertified union to picket for recognition purposes for more than 30 days. 434 U.S. at 339; see 29 U.S.C. § 158(b)(7) (1976). The NLRB found that because picketing to enforce a prehire agreement is the "legal equivalent of picketing to require recognition as [an] exclusive [bargaining] agent," section 8(b)(7)(C) had been violated by the union. 434 U.S. at 346. The Supreme Court accepted this view of the Board, and further noted that the purpose of the 1959 amendments to the Act, including sections 8(f) and 8(b)(7), was to prevent unions from using "economic weapons to force recognition from an employer regardless of the wishes of his employees." 434 U.S. at 346-47 (quoting *Connell Constr. Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 632 (1975)). Reasoning that Congress was particularly concerned with the use of picketing as a method of coercion, 434 U.S. at 347-49 & nn.9 & 10, the Court concluded that picketing to enforce prehire agreements is not exempted from the operation of section 8(b)(7). *Id.* at 349. Moreover, the Court stated that section 8(f) does not "expand the duty of an employer under § 8(a)(5), which is to bargain with a *majority* representative . . ." 434 U.S. at 346. The Court noted:

[A] prehire agreement does not entitle a minority union to be treated as the majority representative of the employees until and unless it attains majority support in the relevant unit. Until that time the prehire agreement is voidable and does not have the same stature as a collective-bargaining contract entered into with a union actually representing a majority of the employees and recognized as such by the employer.

Id. at 341. Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . ." 29 U.S.C. § 158(a)(5) (1976). The duty to bargain, however, presupposes either the majority status of the union or the existence of a collective bargaining agreement. See R. GORMAN, *supra* note 5, at 399-401. Since prehire agreements do not fulfill either of these conditions, the employer does not violate the Act by repudiating such a contract. See 434 U.S. at 345-46. Notably, however, several courts have held that when an employer attains majority support during the term of a prehire agreement, the contract becomes a collective bargaining agreement which may not be repudiated unilaterally notwithstanding a lack of certification. *E.g.*, *Precision Striping, Inc. v. NLRB*, 642 F.2d 1144, 1147 (9th Cir. 1981); *NLRB v. Sac Constr. Co.*, 603 F.2d 1155, 1157 n.9 (5th Cir. 1979). The NLRB has yet to address this specific issue, but there are indications that it may agree with the courts. See *Amado Elec., Inc.*, 238 N.L.R.B. 37, 39 (1978) (prehire agreement matured into full bargaining agreement after employer had used union hiring hall for 9 months).

tract actions without first showing that majority support exists.¹⁰ Recently, however, in *Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Associated Wrecking Co.*,¹¹ the Court of Appeals for the Eighth Circuit held that the fringe benefit provisions of a prehire agreement are enforceable in contract notwithstanding the labor organization's failure to demonstrate majority support among the employer's workers.¹²

In *Associated Wrecking, Omaha-Council Bluffs Local No. 1140* (the union) and *Associated Wrecking & Salvage Company* (the employer) entered into a "participation agreement."¹³ In this contract, stipulated by the parties to be a prehire agreement, the employer agreed to abide by the provisions of several collective bargaining contracts between the union and various contractors' associations in the area.¹⁴ The agreement incorporated by reference the trust fund provisions of the collective bargaining contracts, thus obligating the employer to make health and welfare, pension, and holiday fund contributions to various trusts.¹⁵ Shortly after executing the agreement, the employer became delinquent in its payments to the several trust funds.¹⁶ Thereafter, one of the trusts and the union commenced an action seeking specific enforcement of the participation agreement and recovery of monies due thereunder.¹⁷ The employer interposed a motion for summary judgment,

¹⁰ See, e.g., *Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co.*, 108 L.R.R.M. 2634, 2639 (5th Cir. 1981); *Vermeer v. Aloha Contractors, Inc.*, 107 L.R.R.M. 2895, 2897 (D. Or. 1980); *Paddock v. Clark*, 107 L.R.R.M. 2325, 2327 (D. Or. 1980). But see *New Mexico Dist. Council of Carpenters v. Mayhew Co.*, 107 L.R.R.M. 2931, 2933 (10th Cir. 1981); *Western Wash. Cement Masons Health & Sec. Trust Funds v. Hillis Homes, Inc.*, 26 Wash. App. 224, 612 P.2d 436, 441 (1980). See also *Precision Striping, Inc. v. NLRB*, 642 F.2d 1144, 1147 & n.3 (9th Cir. 1981) (Ninth Circuit has not yet had occasion to decide whether *Local 103* opinion precludes enforceability).

¹¹ 638 F.2d 1128 (8th Cir. 1981).

¹² *Id.* at 1134.

¹³ *Id.* at 1129.

¹⁴ *Id.* The participation agreement was a standard form contract drafted by the union and contained a provision imposing upon the employer an obligation to pay pension fund contributions as specified in certain collective bargaining agreements. *Id.* The employer also was bound to abide by any amendments to the collective bargaining contracts which related to the trust fund contributions. *Id.* The participation agreement did not limit itself to any particular projects and did not contain a termination date. *Id.*

¹⁵ *Id.* The trusts were reorganized pursuant to section 302 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186 (1976). 638 F.2d at 1129 n.2. Contributions to the trust funds were made by factoring the numbers of hours worked by all of the employer's workers. See *id.* at 1129.

¹⁶ See 638 F.2d at 1130.

¹⁷ *Contractors, Laborers, Teamsters & Eng'rs Health & Welfare Plan v. Associated*

asserting that neither the union nor the trust could enforce the agreement without first showing that the labor organization had acquired majority support among the employees.¹⁸ Agreeing that a prehire agreement is wholly unenforceable until such time as the union achieves majority status in the bargaining unit, and having determined as a matter of law that the union had never attained such status, the district court granted the employer's motion and dismissed the action.¹⁹

On appeal, the Court of Appeals for the Eighth Circuit reversed, holding that prehire agreements are enforceable in contract, even if the union has not demonstrated majority support.²⁰ Judge Bright, writing for a unanimous panel,²¹ initially noted that the Supreme Court's decision in *NLRB v. Local Union No. 103, International Association of Bridge Workers*²² was not dispositive of the issue, as the district court erroneously had concluded.²³ Although Judge Bright conceded that the *Local 103* decision contained broad language to the effect that prehire agreements are voidable until a union attains majority support,²⁴ he noted that these statements "must be read in light of the specific issue before the Court."²⁵ The *Associated Wrecking* court emphasized that *Local 103* merely determined that picketing to enforce a prehire agreement was susceptible to unfair labor practice proceedings under section 8(b)(7)(C) of the Act because such conduct essentially is recognitional picketing.²⁶ Judge Bright observed that the

Wrecking Co., 484 F. Supp. 582, 583 (D. Neb. 1980), *rev'd*, 638 F.2d 1128 (8th Cir. 1981).

¹⁸ 484 F. Supp. at 583. The employer alternatively moved to compel answers to interrogatories. *Id.*

¹⁹ *Id.* at 587. The district court relied upon the Supreme Court's *Local 103* opinion for the proposition that prehire agreements are "noneffective" unless the union achieves majority status in the bargaining unit. *Id.* at 584-85, 587; see *NLRB v. Local 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 345-46 (1978); note 9 *supra*. In determining that the union in *Associated Wrecking* did not have such support, the Court relied on the uncontroverted affidavit of the employer's president indicating that "at no time have a majority of [the] employees elected or chosen the plaintiff union to act as their collective bargaining representative." 484 F. Supp. at 587.

²⁰ 638 F.2d at 1134. The Eighth Circuit remanded for consideration questions regarding "the interpretation, application, or duration of the parties' agreement . . ." *Id.*

²¹ The *Associated Wrecking* panel consisted of Senior Judge Gibson and Judges Heaney and Bright.

²² 434 U.S. 335 (1978); see note 9 and accompanying text *supra*.

²³ 638 F.2d at 1132.

²⁴ *Id.*; see 434 U.S. at 341; note 9 *supra*.

²⁵ 638 F.2d at 1132.

²⁶ *Id.* at 1133. The *Associated Wrecking* court reasoned that since the *Local 103* Court looked to the NLRB's "view of the relationship between sections 8(f) and 8(b)(7)(C)," the

Supreme Court's opinion was designed to further the congressional policy of protecting employees' freedom to select a bargaining representative.²⁷ Distinguishing the impermissible situation in *Local 103*, where the union indirectly sought to obtain majority status for its own benefit, the court concluded that the present litigation would not implicate the countervailing policy concern of preserving employee freedom since the union sought only to enforce benefits inuring directly to individual employees.²⁸ Moreover, the *Associated Wrecking* panel emphasized that although an employer may challenge a union's majority status as a defense to unfair labor practice allegations, such a contention should not defeat an action sounding in contract.²⁹ Therefore, having determined that the *Local 103* decision was of no precedential value in the instant case, the court focused upon the equities involved in deciding whether prehire agreements are enforceable.

Noting that a prehire agreement is negotiated reciprocally on behalf of the union and the employer, Judge Bright stressed that the employer's acceptance of the benefits thereunder created a contractual obligation to abide by the terms of the agreement.³⁰ Furthermore, the court considered the union's recognized interest in maintaining standards of employment a sufficient predicate, regardless of majority status, to preclude the imposition of a per se bar to an action for the breach of a section 8(f) agreement.³¹ Thus, Judge Bright concluded, the absence of majority status is without legal significance in determining the enforceability of a prehire agreement under contract principles.³²

The *Associated Wrecking* decision brings the Eighth Circuit into conflict with various courts which have considered the con-

Supreme Court "did not purport to decide the enforceability of all section 8(f) agreements but only those which implicated the provisions of section 8(b)(7)(C)." 638 F.2d at 1133.

²⁷ 638 F.2d at 1133.

²⁸ *Id.* at 1133-34. The court noted that the payments to the trust funds would "inure to the benefit of the individual employees" whether or not the union attained majority status. *Id.* at 1133.

²⁹ *Id.*

³⁰ *Id.* at 1134. The court stated that "the benefits of a prehire agreement do not travel down a one-way street." *Id.* Noting that employers obtain the advantages of realizing their labor costs in advance of project bidding, and of having access to a pool of workers, the court stated that the corresponding obligations under a prehire agreement must be honored. *Id.*

³¹ *Id.*

³² *Id.*

tractual enforceability of prehire agreements.³³ This conflict arises from varying judicial interpretations of the Supreme Court's *Local 103* opinion, in which the enforceability of such contracts purportedly had been denied.³⁴ It is suggested that the Eighth Circuit justifiably recognized that the *Local 103* decision bears little precedential value in contexts not implicating representation questions and the unfair labor practices which may flow therefrom. Indeed, it seems that the split of authority in this area has resulted from a failure to draw a distinction between the contractual and representational aspects of prehire agreements.³⁵

The National Labor Relations Act contains a substantial number of provisions prescribing the rights and liabilities of employers and unions with respect to bargaining and representation questions.³⁶ Section 9(a) of the Act, for example, provides that a union may become the exclusive representative of all employees within a bargaining unit when a majority thereof designate the union as such.³⁷ Once a labor organization is so designated, the employer is

³³ See, e.g., *Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co.*, 108 L.R.R.M. 2634, 2639-40 (5th Cir. 1981); *Vermeer v. Aloha Contractors, Inc.*, 107 L.R.R.M. 2895, 2897 (D. Or. 1980); *Paddack v. Clark*, 107 L.R.R.M. 2325, 2327 (D. Or. 1980). A number of courts are in accord with the *Associated Wrecking* panel's view. See, e.g., *New Mexico Dist. Council of Carpenters v. Mayhew Constr. Co.*, 107 L.R.R.M. 2931, 2931-32 (10th Cir. 1981); *Eastern Dist. Council of the United Bhd. of Carpenters & Joiners v. Blake Constr. Co.*, 457 F. Supp. 825, 829 (E.D. Va. 1978); *Western Wash. Cement Masons Health & Sec. Trust Funds v. Hillis Homes, Inc.*, 26 Wash. App. 24, 612 P.2d 436, 441 (1980).

³⁴ See note 10 and accompanying text *supra*.

³⁵ See generally *Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co.*, 108 L.R.R.M. 2634 (5th Cir. 1981). In *Baton Rouge*, the Fifth Circuit noted that the *Associated Wrecking* court distinguished *Local 103* as involving unfair labor practice charges rather than a breach of contract. *Id.* at 2639. Although the Fifth Circuit perceived this distinction, it declined to follow the approach of the Eighth Circuit in *Associated Wrecking*, stating:

We acknowledge that neither [*Local 103* nor a previous Fifth Circuit case] directly dealt with the question of the nonenforceability of a prehire agreement as a defense to a breach of contract suit; these cases are not, therefore, squarely in point. But this distinction makes no difference. If the goal is the maintenance and insurance of employee free choice, it matters not whether the sword dangling above the employer's head is an unfair labor practice charge or a breach of contract suit. The direction of the pressure is the same—toward treatment of a non-majority union as the employee's agent for collective bargaining.

Id. at 2639.

³⁶ See 29 U.S.C. §§ 151-169 (1976).

³⁷ Section 9(a) of the Act provides in pertinent part:

Representatives designated or selected for the purpose 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

statutorily obligated to bargain with that union,³⁸ and breach of this duty constitutes an unfair labor practice.³⁹

Unfair labor practices principally involve attempts to evade or breach these statutory provisions relating to the employees' representational rights.⁴⁰ The effect of an unfair labor practice upon the enforceability of a contract can be seen in the Supreme Court's opinion in *International Ladies' Garment Workers' Union v. NLRB*.⁴¹ In *Garment Workers*, the employer and the union were accused of unfair labor practices because an agreement was formed which recognized the union as an exclusive bargaining representative before a majority of the employer's workers designated the union as such.⁴² The Supreme Court affirmed the District of Columbia Circuit's enforcement of the NLRB's order, which required that the agreement be given no effect.⁴³ The Court observed that the Act's guarantee of free choice in the selection of a bargaining representative does not permit a minority of employees to "impress [a union] upon the nonconsenting majority."⁴⁴ Thus, the

of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

29 U.S.C. § 159(a) (1976). For a brief description of the means by which employees designate a union as its exclusive representative, see note 7 *supra*.

³⁸ See, e.g., *NLRB v. A.W. Thompson, Inc.*, 449 F.2d 1333, 1335 (5th Cir. 1971); 29 U.S.C. § 158(d) (1976).

³⁹ See 29 U.S.C. § 158(a)(5) (1976). Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." *Id.* Through its definition of collective bargaining, the Act mandates that an employer bargain "in good faith with respect to wages, hours, and other terms and conditions of employment" and execute "a written contract incorporating any agreement reached if [so] requested." 29 U.S.C. § 158(d) (1976). The duty to bargain in good faith imposes upon the employer an obligation to refrain from making unilateral changes in an agreement. R. GORMAN, *supra* note 5, at 419, 439-43. If a contract is modified or terminated, there are requirements that both the union and governmental mediation agencies be notified. *Id.* at 419; see 29 U.S.C. § 158(d)(1)-(3) (1976). It is clear, therefore, that apart from unusual contractual obligations, an agreement which implicates employees' rights to representation carries with it significant bargaining obligations. Notwithstanding the existence of bargaining obligations, however, the Supreme Court has noted that "[t]he Act does not compel any agreement whatsoever between employees and employers." See *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 402 (1952) (citation omitted). The intent of the Act is to encourage the formation of voluntary agreements by requiring unions and employers to bargain in good faith. *Id.*; see *Newspaper Guild Local 10 v. NLRB*, 636 F.2d 550, 561 n.35 (D.C. Cir. 1980); *Glomac Plastics, Inc. v. NLRB*, 592 F.2d 94, 97-98 (2d Cir. 1979); *Continental Ins. Co. v. NLRB*, 495 F.2d 44, 47-48 (2d Cir. 1974).

⁴⁰ See 29 U.S.C. § 158(a)(1)-(5), (b)(1)-(7) (1976).

⁴¹ 366 U.S. 731 (1961).

⁴² *Id.* at 732-33.

⁴³ *Id.* at 740.

⁴⁴ *Id.* at 737.

Court noted, a contract which purports to grant exclusive recognition, absent majority status, abridges the representational rights of employees and is unenforceable because of its "unlawful genesis."⁴⁶

Notably, the Supreme Court in *Local 103* described section 8(f) as creating an exception to the rule enunciated in *Garment Workers*.⁴⁶ The Court hastened to add, however, that the exception was a limited one, for although the mere formation of a prehire agreement cannot be considered an unfair labor practice under *Garment Workers*,⁴⁷ it can neither expand the employer's duty to bargain nor bind employees to a particular representative.⁴⁸ Hence, the Court held that a mere prehire agreement cannot serve to dissipate the illegality of recognitional picketing, a practice deemed "to interfere with . . . employees' freedom of choice" in selecting a bargaining representative.⁴⁹ Thus, it seems clear that the *Local 103* Court was concerned solely with the bargaining and representational obligations associated with prehire agreements.⁵⁰ Although the Court noted that such agreements are "voidable," this statement was not made in the context of contractual enforceability. Rather, the Court addressed only the question of whether prehire agreements can be used to defend against unfair labor practice charges implicating representational rights.⁵¹

⁴⁶ *Id.* Writing for the Court, Justice Clark noted that the unfair labor practice involved "was the grant by the employer of exclusive representative status to a minority union, as distinguished from an employer's bargaining with a minority union for its members only." *Id.* at 736. Refusing to hold the contract enforceable as against those employees who acquiesced in the agreement, Justice Clark stated that the element of illegality "preclude[d even] its partial validity." *Id.* at 737. Justices Black and Douglas dissented in part, asserting that the majority was unjustified in holding that the entire contract was invalid. *Id.* at 743 (Douglas & Black, JJ., dissenting in part). Reasoning that minority unions always had been able to represent their own members, the dissenting justices noted that the Court's holding went "beyond the competency of the Board under the Act and [was] unsupported by any principle of contract law." *Id.* at 743-44 (Douglas & Black, JJ., dissenting in part).

⁴⁶ *NLRB v. Local 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 345 (1978).

⁴⁷ *See id.*

⁴⁸ *See id.* The *Local 103* Court noted that the section 8(f) exception to the *Garment Workers* doctrine was "of limited scope, for the usual rule protecting the union from inquiry into its majority status during the terms of a collective-bargaining contract does not apply to prehire agreements." *Id.*

⁴⁹ *Id.* at 347, 352.

⁵⁰ *See id.* at 341.

⁵¹ The *Local 103* Court noted that the issue in the case was whether the NLRB misapplied section 8(b)(7)(C) of the Act. 434 U.S. at 341. Indeed, the Court stated that the Board and the D.C. Circuit "differ[ed] principally on the legal question of how § 8(f) is to be construed and of what consequences the execution of a prehire agreement has on the enforcement of other sections of the Act, primarily §§ 8(a)(5) and 8(b)(7)(C)." 434 U.S. at 341.

Moreover, it is significant that the *Local 103* majority did not wholeheartedly endorse the NLRB's interpretation of section 8(f), but adopted its view as "a defensible construction."⁵² Because the NLRB is charged with the responsibility of effectuating federal labor policy in the areas of bargaining and representation, its views are given considerable deference by the courts in unfair labor practice cases.⁵³ Since the Board has the power "to prevent any person from engaging in an unfair labor practice,"⁵⁴ it may become involved when a contractual obligation implicates bargaining or representation issues.⁵⁵ Nevertheless, the NLRB "has no general commission to police" labor contracts and "strike down contractual provisions in which there is no element of an unfair labor practice."⁵⁶ It therefore would seem anomalous to remove the *Local 103*

It is suggested, therefore, that the Court's decision should be read to affect contractual obligations only to the extent that it imposes a condition precedent of majority status to the employer's duty to recognize the union as the employees' bargaining representative.

⁵² The *Local 103* Court noted that the Board's resolution of the alleged conflict between sections 8(a)(5), 8(b)(7) and 8(f) "represent[ed] a defensible construction" of the Act, which was entitled to deference since unfair labor practices were involved, 434 U.S. at 350, but stated that the NLRB's interpretation of section 8(f) was "not the only tenable one." *Id.* at 341.

⁵³ *E.g.*, *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965); *NLRB v. National Ass'n of Broadcast Employees & Technicians Local 31*, 631 F.2d 944, 949 (D.C. Cir. 1980). In construing the Act, the Board must not stretch the statute's provisions "far beyond their functions of protecting the rights of employee organizations and collective bargaining." *American Ship Bldg. Co. v. NLRB*, 380 U.S. at 317; *accord*, *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 497-98 (1960).

⁵⁴ 29 U.S.C. § 160(a) (1976).

⁵⁵ *See, e.g.*, *American Oil Co. v. NLRB*, 602 F.2d 184, 188 & n.4 (8th Cir. 1979); *Sheet Metal Workers Int'l Ass'n, Local 59 v. Employees Ass'n of Roofers & Sheet Metal Workers, Inc.*, 430 F. Supp. 540, 544 (D. Del. 1977); *Brewery Delivery Employees Local 46*, 236 N.L.R.B. 1160, 1160 (1978); *Supreme Equip. & Sys. Corp.*, 235 N.L.R.B. 244, 251-52 (1978). When contract rights and liabilities are adjudicated, the Board's views are entitled to deference if unfair labor practices also are involved. *See, e.g.*, *NLRB v. Local 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 350 (1978); *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 886 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 2058 (1981); *Marriott Corp. v. NLRB*, 491 F.2d 367, 370 (9th Cir. 1974).

⁵⁶ *Local 1976, United Bhd. of Carpenters & Joiners v. NLRB*, 357 U.S. 93, 108 (1958). While the courts must fashion from the policy of federal labor laws a substantive law to apply in contract actions under section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1976); *e.g.*, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957); *see, e.g.*, *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 470 (1960); *United Steelworkers v. Blaw-Knox Foundry & Mill Mach., Inc.* 319 F. Supp. 636, 640 (W.D. Pa. 1970), there is no requirement that they accept the NLRB's construction of a statute in traditional contract litigation. 357 U.S. at 101-02; *NLRB v. Heyman*, 541 F.2d 796, 800-01 (3d Cir. 1976); *see United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 657 (1954); *Fibreboard Paper Prod. Corp. v. East Bay Union of Machinists Local 1304*, 344 F.2d 300, 304 (9th Cir.), *cert. denied*, 382 U.S. 826 (1965). It has been stated that recovery in a contract action is predicated upon the existence

opinion from its context of unfair labor practices and concomitant deference to the NLRB, only to place it in the context of bare contractual obligations in which the Board's view is immaterial. Thus, it is suggested that the Eighth Circuit in *Associated Wrecking* properly refused to extend *Local 103* to deny enforcement of a prehire agreement in a case which did not implicate unfair labor practices.

Since reference to *Local 103* will not dispose of the question regarding the enforceability of prehire contracts, it is necessary to examine the policies behind the enactment of section 8(f). It appears that the legislative history accompanying section 8(f), as well as the congressional purpose in enacting the provision, support the *Associated Wrecking* court's view that prehire agreements are enforceable. Enacted primarily in response to the NLRB's determination that the Act applies to the construction industry,⁵⁷ section 8(f) was designed to account for the unique, transitory employment relationships which typify construction work.⁵⁸ Congress real-

of an agreement and its concomitant obligations, which are issues not properly before the NLRB absent unfair labor practice implications. See 541 F.2d at 800; 344 F.2d at 304. Moreover, since Congress intended bargaining orders of the Board to "be in addition to, and not in lieu of, other remedies," H.R. REP. NO. 510, 80th Cong., 1st Sess. 52, reprinted in [1947] U.S. CODE & CONG. AD. NEWS 1135, 1158, it has been held that contract violations are to be determined by the "usual processes of the law," independent of administrative decisions, *Charles Dowd Box. Co. v. Courtney*, 368 U.S. 502, 513 (1962). Finally, it is significant that the Supreme Court has noted previously that since NLRB decisions deal with unfair labor practices, not ordinarily implicated by contract breaches, a union's inability to invoke a valid agreement to defend against charges made by the Board does not necessarily lead to the conclusion that contractual relations do not exist between the parties. See *Local 1976, United Bhd. of Carpenters & Joiners v. NLRB*, 357 U.S. at 108.

⁵⁷ See II LEGIS. HIST., *supra* note 5, at 1577-78. Originally, the NLRB declined to exercise jurisdiction over the construction industry. *NLRB v. Irvin*, 475 F.2d 1265, 1267 (3d Cir. 1973). As a result, the development of national labor policy matured without reference to the complexities inherent in the construction industry. S. REP. NO. 187, *supra* note 6; H.R. REP. NO. 741, 86th Cong., 1st Sess. 19 (1959), reprinted in I NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 777 [hereinafter cited as I LEGIS. HIST.]. After the Taft-Hartley amendments were passed, however, the Board reversed its prior view and applied the provisions of the Act to the building and construction industry. *Id.*; *NLRB v. Irvin*, 475 F.2d at 1267. Thus, a labor policy formulated for a stable work force was thrust upon an industry characterized by intermittent employment relationships. II LEGIS. HIST., *supra* note 5, at 1577-78; see *Local No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186, 1189 (D.C. Cir. 1973). Because the Act has incorporated the principles of majority rule concerning the selection of a bargaining representative, which are based upon the premise of long term continuous employment relationships, the negotiation of collective bargaining agreements in the construction industry was impracticable. II LEGIS. HIST., *supra* note 5, at 1577-78.

⁵⁸ *NLRB v. Local 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 347-49 (1978); *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693, 694 (1971), *enforcement denied*, 480 F.2d 1186 (D.C.

ized that the short duration of construction projects severely impeded the NLRB's ability to conduct representation elections in this industry.⁵⁹ Moreover, the legislature recognized that in order to assess labor costs and to ensure that a ready supply of skilled craftsmen will be available, the construction employer normally hires a union before hiring an individual.⁶⁰ Therefore, notwithstanding the typical application of the Act in an industrial context, Congress responded to the realities of the construction industry by legitimizing prehire agreements between unions and construction employers.⁶¹ In manifest disregard of the general proscriptions against agreements with minority unions embodied in sections 8(a)(1), 8(a)(2) and 8(b)(1)(A) of the Act,⁶² Congress conceded that it was necessary to permit construction "employers to enter into collective bargaining agreements for [projects] which had not been started," even if such work had not yet been contemplated.⁶³

Cir. 1973).

⁵⁹ Witney, *supra* note 4, at 646; see I LEGIS. HIST., *supra* note 57, at 777; II LEGIS. HIST., *supra* note 5, at 1578.

⁶⁰ *E.g.* Local 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186, 1189 (D.C. Cir. 1973); II LEGIS. HIST., *supra* note 5, at 1577. Congress realized that it had been "customary for [construction] employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years." S. REP. NO. 187, *supra* note 6. Moreover, the legislature recognized that the "relatively short duration" of the "vast majority of building projects," I LEGIS. HIST., *supra* note 57, at 777, made it manifestly inefficient to bargain a new contract at each construction site, II LEGIS. HIST., *supra* note 5, at 1578.

⁶¹ See notes 1-6 and accompanying text *supra*.

⁶² See note 2 and accompanying text *supra*.

⁶³ S. REP. NO. 187, *supra* note 5, at 29. Congress exempted the construction industry from the ambit of section 8(e) of the Act also in deference to the nature of employment relationships in the industry. 105 CONG. REC. 17899 (1959) (remarks of Sen. J. Kennedy); *id.* at 18134 (remarks of Rep. Thompson). See generally 29 U.S.C. § 158(e) (1976); II LEGIS. HIST., *supra* note 5, at 1791. Section 8(e) was enacted as "part of a legislative program designed to plug technical loopholes in § 8(b)(4)'s general prohibition of secondary" boycotts. *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 628 (1975). Section 8(b)(4) provides that a labor organization may not strike, engage in certain concerted activity, or induce employees to do the same in order to compel an employer to refrain from transacting business with someone having a dispute with the union. See 29 U.S.C. § 158(b)(4)(B) (1976). Section 8(b)(4), however, did not outlaw voluntary agreements of this nature. *Local 1976, United Bhd. of Carpenters & Joiners v. NLRB*, 357 U.S. 93, 98-99 (1958). The enactment of section 8(e) proscribed such "hot cargo" provisions, as well as union coercion designed to force an employer to accept them. R. GORMAN, *supra* note 5, at 263. Section 8(e) provides, however, that its proscription against hot cargo agreements shall not "apply to an agreement between a labor organization and an employer in the construction industry." See 29 U.S.C. § 158(e) (1976). One court, reasoning *sub silentio* that Congress intended similar treatment to be accorded to sections 8(e) and 8(f), concluded that prehire agreements should be judicially enforceable. *Western Wash. Cement Masons Health*

It is suggested that to deny the enforceability of prehire agreements would render meaningless Congress' concession to the realities of the construction industry.⁶⁴ Nothing in the text or legislative history of section 8(f) indicates that Congress intended to benefit construction employers to such a degree that they would be able to reap the benefits of a ready workforce while remaining free to repudiate prehire agreements at will, incurring no corresponding obligation.⁶⁵ On the contrary, section 8(f) seems to have been designed to allow the formation of binding contracts which differ from usual collective bargaining agreements only if they do not constitute a contract bar to a representation election.⁶⁶ Moreover, it is suggested that this proviso concerning the contract bar was

& Sec. Trust Funds v. Hillis Homes, Inc., 26 Wash. App. 224, 612 P.2d 436, 440-41 (1980).

⁶⁴ The employer who raises a union's lack of majority status to defeat the enforcement of a prehire agreement today may find that the same defense will be used against him tomorrow. Indeed, 4 months after the *Associated Wrecking* case was decided, the Eighth Circuit, in *W.C. James, Inc. v. Oil, Chem. & Atomic Workers Int'l Union*, 646 F.2d 1292 (8th Cir. 1981), affirmed a summary judgment against an employer suing for breach of a prehire agreement. *Id.* at 1296. In *James*, the union repudiated its prehire agreement with the employer and raised its own lack of majority status as a defense in the resulting breach of contract action. *Id.* at 1293-94. Noting that the employer sought prospective enforcement of the agreement, the Eighth Circuit distinguished *Associated Wrecking* as involving only retrospective enforceability. *Id.* at 1295 n.4. The *James* court then looked to the *Local 103* case, stating that "[w]e are persuaded that [its] holding controls the outcome of this case." *Id.* at 1295.

Notably, Judge Bright, who authored the opinion in *Associated Wrecking*, concurred in the judgment of the *James* court, but on an alternative ground. *Id.* at 1296 (Bright, J., concurring). Judge Bright disagreed with the majority's holding regarding the enforceability of prehire agreements, noting that *Local 103* "does not control the outcome of this case, as the present controversy arises in the context of an alleged breach of contract, not in the context of an unfair labor practice." *Id.* (Bright, J., concurring); see notes 46-56 and accompanying text *supra*.

It seems that the *James* case illustrates that the *Local 103* defense is a double-edged sword. More importantly, however, the case demonstrates that the nonenforceability of prehire agreements frustrates congressional objectives. Indeed, given that Congress enacted section 8(f) to permit employers to obtain workers and to gauge costs, see notes 57-63 and accompanying text *supra*, it seems that a union's ability to dishonor prehire contracts negates an employer's capacity to undertake projects while retaining the sense of certainty that Congress intended to confer.

⁶⁵ See, e.g., *Local 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186, 1189-90 (D.C. Cir. 1973); *NLRB v. Irvin*, 475 F.2d 1265, 1271 (3d Cir. 1973). But see *NLRB v. AAA Elec., Inc.*, 472 F.2d 444, 448-49 (6th Cir. 1973).

⁶⁶ See *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). In *Connell*, the Supreme Court considered the legislative history of section 8(f), concluding that the availability of a representation election was a "careful [safeguard] preserving workers' rights to decline union representation." *Id.* at 632 (dicta). This statement markedly contrasts the language in *Local 103*. See *Local 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 343-44 (1978).

intended not to cast doubt upon the enforceability of prehire agreements, but to provide employees with a method to rescind a union's purported majority support or to attain protected bargaining status when the construction project is to be of extended duration.⁶⁷ Although employers also are permitted to petition for a certification or decertification election under this section,⁶⁸ no mention is made in the legislative history of an employer's absolute right to terminate prehire agreements.⁶⁹ Since section 8(f) permits a test of support through a petition for an election, therefore, it is submitted that employers should not be given the option of terminating the agreement and litigating the question of majority status in a breach of contract action.

CONCLUSION

The differing views concerning the contractual enforceability of prehire agreements demonstrate a need to separate the related, but distinct, questions of representational rights and contractual obligations. Reference to the substantial body of law arising out of the adjudication of unfair labor practices may be required in some cases involving contract rights and liabilities. Nevertheless, it is submitted that in contract cases not implicating questions of bargaining or representation, reference to unfair labor practice principles is inappropriate. This appears to have been the underlying premise of the *Associated Wrecking* decision. It is hoped that other courts will follow this analytical approach when faced with the issue of the enforceability of prehire agreements.

John F. Finnegan

⁶⁷ See note 6 and accompanying text *supra*.

⁶⁸ See 29 U.S.C. §§ 158(f), 159(c)(1)(B) (1976).

⁶⁹ See generally *Hearings on S. 1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare*, 82d Cong., 2d Sess., pts. 1-6 (1953-1954); S. REP. No. 1211, 83d Cong., 2d Sess. 1 (1954); S. REP. No. 1509, 82d Cong., 2d Sess. 1 (1952).