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Interest Arbitration Clauses in §8(F) Pre-Hire Agreements: Effective for Achieving Genuine Collective Bargaining or Enabling Parties to Underhandedly Gain Majority Bargaining Power?

*Sheet Metal Workers' Int'l Ass'n, Local Union No. 2 v. McElroy's, Inc.*¹

I. INTRODUCTION

In *Sheet Metal Workers' International Ass'n, Local Union No. 2 v. McElroy's Inc.*, the United States Court of Appeals for the Tenth Circuit considered whether an employer was required to submit to interest arbitration with a union under the pre-hire agreement entered into by the parties. The applicability of the statutory standards for pre-hire agreements to bargained-for labor and employment contracts is an essential element of this case. When interpreting federal statutory law, the majority of jurisdictions permit unilateral repudiation upon the expiration of a pre-hire agreement and a small minority of jurisdictions allow for the agreement to be repudiated unilaterally during its term. However, in considering these principles, the courts have not provided as clear a standard as to how interest arbitration clauses can be used contractually to provide for non-reputable pre-hire agreements between employers and unions. Consequently, it is a question that must be resolved to achieve uniformity in federal labor law. In the instant decision, the Tenth Circuit upheld the application of the interest arbitration clause in a pre-hire agreement as consistent with the decisions of other circuit courts that had been presented with similar contract language.² Unfortunately, the court left open the question of whether a pre-hire agreement that provides for no avenue of repudiation upon the contract's expiration date and rather a duty to negotiate or accept arbitrated terms, is an inappropriate waiver of the rights statutory policy sought to provide in bargaining relationships.

II. FACTS AND HOLDING

McElroy's, Inc. ("McElroy's") and Sheet Metal Workers' International Association, Local Union No. 77 ("Union") "entered into a pre-hire agreement authorized by § 8(f)³ of the National Labor Relations Act ("NLRA")."⁴ The pre-hire

1. 500 F.3d 1093 (10th Cir. 2007).

2. See generally *id.* at 1096-1099.

3. See 29 U.S.C. § 158(f) (2004) (this is referred to below as Section 8(f) of the NLRA). Section 8(f) of the NLRA states:

agreement had an expiration date of May 31, 2005, an “extension clause,” and an “interest arbitration clause.”⁵ The relevant portion of the extension clause, Article XIII, Section 1(A), provided that the agreement:

“shall continue in force from year to year” after the expiration date “unless written notice of reopening is given [to the other party] not less than ninety (90) days prior to the expiration date.” If such notice is given, the agreement continues in force and effect “until conferences relating thereto have been terminated by either party, provided, however, that the contract expiration date . . . shall not be effective in the event proceedings under Article X[,] Section 8 are not completed prior to that date.”⁶

Article X, Section 8, the interest arbitration clause, provided that “any controversy or dispute arising out of failure of the parties to negotiate a renewal of this agreement shall be settled’ pursuant to the procedure set forth in that section.”⁷ The interest arbitration clause also provided that if “negotiations for renewal of this Agreement become deadlocked . . . either party may submit the dispute to the [National Joint Adjustment Board (NJAB)]” for arbitration and that the decision of the NJAB is final and binding on the parties.⁸

The parties performed under the contract for almost three years.⁹ On February 25, 2005, McElroy’s notified the Union that it intended to terminate the agreement on its expiration date.¹⁰ In response, the Union sent notice to McElroy’s that same day indicating that the Union sought to reopen negotiations pursuant to Article XIII of the agreement.¹¹ McElroy’s did not respond, and thereafter, the Union made numerous other requests to McElroy’s to negotiate a renewal, which McElroy’s either denied or ignored.¹² When McElroy’s refused to negotiate, the Union submitted the dispute to the NJAB asserting that under the terms of the agreement, McElroy’s was obligated to negotiate for the renewal of the

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged . . . in the building and construction industry with a labor organization . . . 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 . . .

Id.

4. *McElroy’s*, 500 F.3d at 1095. McElroy’s is a mechanical contractor with its principal place of business in Topeka, Kansas and is organized under the laws of Kansas. Sheet Metal Workers’ Int’l Ass’n, Local Union No. 2 v. McElroy’s Inc., No. 05-4086-RDR, 2006 WL 1044465, at *1 (D. Kan. Apr. 18, 2006). Union is the successor in interest to the Sheet Metal Workers’ International Association, Local Union No. 77 by virtue of a voluntary merger of Local Union No. 2 and Local Union No. 77 supervised by the parent organization of the two Locals, the Sheet Metal Workers’ International Association. *Id.*

5. *McElroy’s*, 500 F.3d at 1095.

6. *Id.*

7. *Id.*

8. *Id.* at 1095-96.

9. *Id.* at 1095.

10. *Id.*

11. *Id.* at 1096.

12. *Id.*

contract.¹³ This submission was five days before the date the agreement was set to expire.¹⁴ The NJAB issued an order directing the parties to execute a three-year renewal agreement with specified terms.¹⁵ McElroy's refused to comply and, in response, the Union filed an action in federal district court to enforce the NJAB's decision.¹⁶

The United States District Court for the District of Kansas rejected the contention set forth by McElroy's that McElroy's had the right to repudiate the contract on the expiration date and accepted the Union's argument that the agreement would not expire on May 31, 2005, without both parties' consent.¹⁷ The District Court found that a failure of one side to participate in negotiations for a renewal of an agreement amounted to a "failure of the parties to negotiate a renewal" which triggered the interest arbitration provision in Article X, Section 8.¹⁸ Additionally, the court held that while employers in a § 8(f) pre-hire agreement with a union do not have a statutory obligation to negotiate for a successor contract, a binding contractual obligation to do so may be created under the terms of a labor agreement.¹⁹ Thus, the court denied McElroy's motion for summary judgment and granted the Union's motion to confirm the arbitration award.²⁰

McElroy's appealed the order of the district court.²¹ The Tenth Circuit affirmed, holding that because the plain language of the agreement obligated the parties to negotiate a renewal agreement or to have one imposed upon them if one party gave a timely notice of a desire to renew, the submission to arbitration was proper since the agreement had not been terminated and the NJAB's order directing the parties to enter into a renewal agreement was correct.²²

III. LEGAL BACKGROUND

A. *Administrative and Judicial Interpretation of Pre-Hire Agreements*

In general, a collective bargaining representative or union must be designated by a majority of the employees in a given unit before that representative can have the exclusive right to represent the employees in bargaining with the employer.²³ An exception to this general rule for the construction industry arose when the NLRA added Section 8(f) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA").²⁴ LMRDA intended for 8(f) to rectify certain problems

13. *Id.* McElroy's did not attend the June 27 hearing, but did send a letter and memorandum to the NJAB which set forth its view that it was not obligated to negotiate with the Union. *Id.*

14. *Id.*

15. Sheet Metal Workers' Int'l Ass'n, Local Union No. 2 v. McElroy's Inc., No. 05-4086-RDR, 2006 WL 1044465, at *2 (D. Kan. Apr. 18, 2006).

16. *McElroy's*, 500 F.3d at 1096.

17. *McElroy's Inc.*, 2006 WL 1044465, at *2-3. The district court framed the issue before it as, "[W]hen did or when does the agreement expire[?]" and stated that this issue would require construction of the contract. *Id.* at *2.

18. *Id.* at *5.

19. *Id.*

20. *Id.* at *6.

21. *McElroy's*, 500 F.3d at 1096.

22. *Id.* at 1098-99.

23. See 29 U.S.C. § 158(a)(3); 28 U.S.C. § 159(a) (2006).

24. See 29 U.S.C. §§ 141-144, 167, 172-187 (2006).

in the building and construction industry by allowing for employers and unions to enter into agreements before any employees are hired and prior to a showing of majority support by the union, circumstances that would have otherwise constituted unfair labor practices.²⁵ In the construction industry today there is a presumption that a union and an employer intend their relationship to be governed by 8(f).²⁶ Following the expiration of a collective bargaining agreement, this presumption has substantial impact on the parties' bargaining relationship.²⁷

The NLRB construed 8(f) narrowly for many years, holding that a pre-hire agreement was voidable-at-will since it was "merely a preliminary step to the creation of a full collective bargaining agreement."²⁸ This interpretation was formalized in *Jim McNeff, Inc. v. Todd*, where the United States Supreme Court recognized that a party has an "undoubted right to repudiate a prehire agreement"²⁹ However, the Court did not clarify when a specific act or acts were sufficient to accomplish repudiation.³⁰ Since *McNeff*, there has not been a consistent delineation of the specific acts necessary before a court will recognize the repudiation of a pre-hire agreement.³¹

A major development in the NLRB's approach to Section 8(f) was pronounced in *John Deklewa & Sons*.³² *Deklewa* established the principle that "upon the expiration of such [pre-hire] agreements, the signatory union will enjoy no presumption of majority status, and either party [may] repudiate the 8(f) bargaining relationship."³³ The concept that an "8(f) signatory employer may unilaterally repudiate following the expiration of the 8(f) agreement" is a distinct aspect of agreements in construction industry, which rely on § 8(f) agreements, compared to the other industries covered by the NLRA, which are governed by § 9(a).³⁴ The *Deklewa* decision pronounced that Section 8(f) agreements would be enforceable through the mechanism of Sections 8(a)(5) and 8(b)(3)³⁵ and could not be unilate-

25. THE DEVELOPING LABOR LAW 958 (Patrick Hardin & John E. Higgins, Jr. eds., 4th ed. 2001) (citing King & La Vaute, *Current Trends in Construction Industry Labor Relations, The Double-Breasted Contractor and the Prehire Contract*, 29 SYRACUSE L. REV. 901 (1978)). See also *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266 (1983) (explaining that the exceptions granted by section 8(f) are due to special factors, such as the "uniquely temporary, transitory and sometimes seasonal nature of much of the employment in the construction industry.").

26. See *Casale Indus., Inc.*, 311 N.L.R.B. 951, 952 (1993). "[T]he Board presumes that parties in the construction industry intend their relationship to be an 8(f) relationship. Thus, the burden is on the party who seeks to show the contrary, i.e., that the parties intend a Section 9 relationship." *Id.* (citations omitted).

27. *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375, 1381-84 (1987).

28. James M. Wilton, *Changed Interpretation of Section 8(f) of the National Labor Relations Act: Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 31 B.C. L. REV. 114, 115 (citing *Ruttman Constr. Co.*, 191 N.L.R.B. 701, 702 (1971) and *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693, 695 (1971)).

29. *McNeff*, 461 U.S. at 269-70.

30. *Id.*

31. THE DEVELOPING LABOR LAW, *supra* note 25, at 961-62 n.1115.

32. 282 N.L.R.B. 1375 (1987).

33. *Id.* at 1377-78.

34. Brian A. Caufield, *Reversion to Conversion? The Board's Interpretation of the Interplay Between Sections 8(f) and 9(a) in the Construction Industry*, 8 U. PA. J. LAB. & EMP. L. 413, 418 (2006).

35. See 29 U.S.C. §§ 158(a)(5) & (b)(3). Section 8(b)(3) of the Act provides that it shall be an unfair labor practice for a labor organization that represents employees "to refuse to bargain collectively with an employer." 29 U.S.C. § 158(b)(3). Like section 8(a)(5), the counterpart provision prohibiting

rally repudiated during their term.³⁶ It was noted by commentators following the opinion's release that *Dekelewa's* principles "will increase stability by preventing repudiation of pre-hire agreements" and will lead to employers and unions being more cognizant of their rights and obligations during the terms of their agreements.³⁷ The interpretations of § 8(f) set forth in *Deklewa* have been consistently enforced by the NJLB.³⁸ However, courts' application of the rules of *Deklewa* has not been without conflict in the circuits and the Supreme Court has not yet resolved the issue.

In *Industrial Turnaround Corp. v. NLRB*,³⁹ the Fourth Circuit Court of Appeals rejected the findings of the NLRB where the Board had interpreted § 8(f) of the NLRA as prohibiting either party to a pre-hire agreement under § 8(f) from unilaterally revoking the agreement.⁴⁰ The court stated that it was precluded from adopting *Deklewa* as the law of the circuit because it was bound by prior Supreme Court and Fourth Circuit precedent.⁴¹ The Fourth Circuit found that a party's letter notifying the other party to a pre-hire agreement of its intent to terminate operated as an effective repudiation even though the letter did not comply with the termination provision of the agreement.⁴² The court interpreted Fourth Circuit precedent as making it clear that "an employer's notification of repudiation need not comply with the termination provision of the agreement 'if the agreement is a pre-hire agreement under section 8(f).'"⁴³ This decision was in contrast to the majority of circuits who had accepted the *Deklewa* interpretation of § 8(f) pre-hire agreements either expressly or implicitly.⁴⁴

B. Interest Arbitration and Labor Agreements

In pre-hire agreements governed under Section 8(f), parties often include an interest arbitration clause in their agreements.⁴⁵ In a collective-bargaining agreement, an interest arbitration clause "authorizes binding arbitration of deadlocks

employers from refusing to bargain, section 8(b)(3) has been interpreted to require good-faith bargaining.

36. *Deklewa*, 282 N.L.R.B. at 1389. See also *Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir. Banc 1988) (finding that the Act prohibits the unilateral repudiation of prehire collective bargaining agreements prior to termination of contract).

37. See, e.g., *Wilton*, *supra* note 28, at 125.

38. THE DEVELOPING LABOR LAW, *supra* note 25, at 962-63 n.1120.

39. 115 F.3d 248 (4th Cir. 1997).

40. *Id.* at 253-55.

41. *Id.* at 254. The court found that the *Deklewa* decision stood in conflict with *Clark v. Ryan*, 818 F.2d 1102 (4th Cir. 1987), and that one panel of the circuit cannot overrule a prior panel decision. *Id.* It is noted, however, that the court's reasoning has not gone without criticism and skepticism from commentators and other courts. See generally J. Mitchell Armbruster, *Deference Defiantly Denied: The Fourth Circuit Rejects NLRB Position on 8(f) Pre-Hire Agreements in Industrial Turnaround Corp. v. NLRB*, 76 N.C. L. REV. 2331 (1998).

42. *Turnaround*, 115 F.3d at 255.

43. *Id.* (citing *Clark*, 818 F.2d at 1106-07).

44. See generally Armbruster, *supra* note 41, at 2332-52.

45. See *Sheet Metal Workers Local Union No. 20 v. Baylor Heating and Air Conditioning, Inc.*, 877 F.2d 547, 555 ("We find no 'well defined and dominant . . . explicit public policy' that prevents employers and unions from voluntarily agreeing to include an interest arbitration clause in a prehire agreement.") (citations omitted).

that occur during renewal negotiations.”⁴⁶ “The rationale for interest arbitration . . . is to protect the [involved] parties themselves from the harm caused by employing economic power to resolve impasses.”⁴⁷

“The . . . NLRB has ruled that [a] provision [for interest arbitration to settle bargaining impasses] is not a mandatory topic of bargaining.”⁴⁸ Consequently, although parties are free to voluntarily negotiate a provision for interest arbitration to settle bargaining impasses, neither side can insist on the provision to the point of deadlock.⁴⁹ Thus, this bargaining principle operates under the assumption that the parties will come to an agreement over the provision only if each side finds it advantageous.⁵⁰ While there has been little controversy with voluntary agreement to interest arbitration, mandatory interest arbitration clauses have generated considerable debate as contradictory to the principles of genuine collective bargaining.⁵¹

A question that arises as to the effect of interest arbitration on labor agreements is its effect on the parties’ negotiation behavior. A specific inquiry into this general question deals with the potential for what has been called the “chilling effect,” or how parties’ willingness to engage in serious bargaining is affected by the availability of interest arbitration as the final step in the process of negotiation.⁵² One hypothesis is that “one or both parties may not want to bargain because they believe that they can receive a better award in arbitration than in a negotiated settlement.”⁵³ Another query arises over the “narcotic effect,” that is, how subsequent negotiations are impacted by interest arbitration experience.⁵⁴ A suggested theory is that when parties have negotiations that end in interest arbitration, these parties “will be more likely to rely on arbitration to resolve impasses in future negotiations.”⁵⁵ While these hypotheses are applicable to interest arbitration in all labor agreements, the theories seem especially relevant to pre-hire agreements given how much a party’s statutory bargaining rights and obligations under § 8(f) agreements can be altered by contractual provisions.

46. See *W. Coast Sheet Metal, Inc. v. NLRB*, 938 F.2d 1356, 1357 (D.C. Cir. 1991).

47. J. Joseph Loewenberg, *Interest Arbitration: Past, Present, and Future*, in *LABOR ARBITRATION UNDER FIRE* 111 (James L. Stern & Joyce M. Najita eds., 1997).

48. *Id.* at 113 (citing *Lathers Local 42 of Wood, Wire, & Metal Lathers Int’l Union v. Lathing Contractors Ass’n of S. Cal.*, 223 N.L.R.B. 37 (1976)).

49. *Id.*

50. *Id.* at 114.

51. *Id.* (quoting BENJAMIN J. TAYLOR & FRED WITNEY, *LABOR RELATIONS LAW* 573-74 (5th ed. 1987) (“If there is one fixed principle of labor relations, and one that is underscored by incontrovertible evidence, it is that a system of compulsory arbitration is incompatible with genuine collective bargaining. Realistic compromises, concessions, and counterproposals designed to reach settlement are simply not made out of the fear that by such action a party will prejudice its position before the arbitrator.”)).

52. *Id.* at 117-18.

53. *Id.* Additionally, the hypothesis contends that “any change in each party’s initial bargaining position may reduce the likelihood of obtaining a favorable award, especially if the arbitrator is expected to split the difference in the parties’ positions in the award.” *Id.* at 118.

54. *Id.*

55. *Id.*

C. Contractual Obligations in Pre-Hire Agreements

While the *Deklewa* decision makes it clear that repudiation is not permitted during the term of agreements governed by 8(f), there has not been a universal rule accepted by all of the circuits as to how the principles of the decision should be applied when a pre-hire agreement contains terms that alter the parties' statutory rights and obligations. Interest arbitration is but one of the restrictions that can be contractually imposed upon a party's ability to terminate an 8(f) agreement unilaterally.⁵⁶ Some circuits have held that "an employer cannot escape the interest arbitration clause by refusing to negotiate, because the contract imposes" an obligation to actively participate in negotiations or accept the decision imposed by the arbitrators.⁵⁷ This is because some courts have interpreted these agreements, which often contain very similar provisions, as providing that the agreement will continue in force until negotiations have produced a renewal agreement and, if one party refuses to negotiate, for a renewal contract imposed by the NJAB.⁵⁸ Cases where there is a clause in the agreement providing for interest arbitration when a notice of reopening has been properly served have been strict in their requirements of proper notice before requiring arbitration.⁵⁹ However, in these cases when proper notice has been timely served pursuant to the agreement, the other party has not been able to successfully argue that negotiations have not begun until both parties have actually begun negotiating.⁶⁰

While many courts have addressed questions over when interest arbitration is triggered from a lack of one party's participation in negotiation, there has been less in-depth analysis by courts as to the consequences for the parties to a pre-hire agreement when the agreement has been contractually altered so that there is no provision that can be interpreted as allowing for termination at the agreement's expiration date. Specifically, when the parties' agreement contains an interest arbitration clause, statutory issues pertaining to pre-hire agreements have been found to come into conflict with contract principles. For example, the 7th Circuit Court of Appeals in *Sheet Metal Workers Local Union No. 20 v. Baylor Heating and Air Conditioning, Inc.*,⁶¹ in upholding an interest arbitration award, stated that

56. See Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp., 380 F.3d 1084, 1090 n.5 (8th Cir. 2004).

57. See *Beach Air Conditioning & Heating, Inc. v. Sheet Metal Workers Int'l Ass'n, Local Union No. 102*, 55 F.3d 474, 477 (9th Cir. 1995). See also *Sheet Metal Workers Int'l Ass'n Local 110 Pension Trust Fund v. Dane Sheet Metal, Inc.*, 932 F.2d 578, 581-82 (6th Cir. 1991) (concluding that "Article X, § 8 does seem to embody a requirement that the parties engage in negotiations"); *Sheet Metal Workers Local Union No. 20 v. Baylor Heating & Air Conditioning, Inc.*, 877 F.2d 547 (7th Cir. 1989) (rejecting the employer's argument that such an imposition violated public policy favoring voluntary bargaining and voluntary agreement because the duty to negotiate had been voluntarily accepted by the employer).

58. See *Cedar Valley Corp. v. NLRB*, 977 F.2d 1211, 1219 (8th Cir. 1992) (holding that an automatic renewal provision extends the life of a pre-hire agreement thereby extending the duration of *Deklewa's* no-unilateral-repudiation rule).

59. See *Beach Air Conditioning*, 55 F.3d at 478 (quoting *Sheet Metal Workers Int'l Ass'n, Local Union No. 150 v. Air Systems Eng'g, Inc.*, 948 F.2d 1089, 1092 (9th Cir. 1990) ("In the absence of such notice, [the party who did not serve the notice] had no obligation to submit to arbitration, and neither the NJAB nor the courts had jurisdiction over the dispute.")).

60. *Id.* at 478 n.3. ("[T]he dispositive factor was the agreement's clear requirement that negotiations or arbitration take place only after one party has given timely notice to reopen.").

61. 877 F.2d 547 (7th Cir. 1989).

it found it “unnecessary to determine whether *Deklewa* expresses the current law governing repudiation of pre-hire agreements. . . . [because] *Deklewa* [does not] control when the parties voluntarily agree to a broad interest arbitration clause with an automatic renewal provision.”⁶² Additionally, in *Beach Air Conditioning & Heating, Inc. v. Sheet Metal Workers Intern. Ass’n, Local Union No. 102*,⁶³ the Court of Appeals for the 9th Circuit upheld an interest arbitration award and, in so concluding, rejected the employer’s argument that “reading the agreement to include a duty to negotiate a renewal contravenes the parties’ intent because no employer would enter into a self-perpetuating relationship with no avenue of escape.”⁶⁴ Although many pre-hire agreements contain common renewal language that provides for negotiation over a renewal agreement or to have a subsequent agreement imposed by an arbitrator, in light of the varying interpretations found in these cases and the cases of other jurisdictions faced with interest arbitration clauses in pre-hire agreements, questions remain. Consequently, parties continue to enter into pre-hire agreements and raise issues as to their rights to repudiate their agreements because there is no universal rule as to the effect of an interest arbitration clause on pre-hire agreements when taking into account the applicability of the principles and policy considerations set forth by *Deklewa* and its progeny.

IV. INSTANT DECISION

In *Sheet Metal Workers’ International Ass’n, Local Union No. 2 v. McElroy’s Inc.*,⁶⁵ the United States Court of Appeals for the Tenth Circuit was faced with the question of whether McElroy’s, after submitting a notice of intent to terminate a pre-hire agreement upon its expiration date, had a contractual obligation to negotiate a renewal contract.⁶⁶ McElroy’s did not have a statutory obligation to negotiate.⁶⁷ However, upon receiving notice of McElroy’s intentions, Union provided McElroy’s with notice of reopening pursuant to the time provisions of the agreement.⁶⁸ The Court, in considering the issues presented, formulated the fundamental question to be whether McElroy’s was bound under the agreement to engage in interest arbitration.⁶⁹

On appeal, McElroy’s argued that it did not have an obligation to negotiate for a renewal agreement because it had an absolute right to terminate the agreement on the date of expiration.⁷⁰ In addition, McElroy’s argued that since the

62. *Id.* at 556. The court denied the request of the National Labor Relations Board to stay the appeal because the Board wanted to consider the effect of an interest arbitration clause on *Deklewa*. *Id.* at 554 n.5.

63. 55 F.3d 474 (9th Cir. 1995).

64. *Id.* at 478.

65. 500 F.3d 1093 (10th Cir. 2007).

66. *Id.* at 1096.

67. *Id.* at 1097. The Court based this conclusion on the *Deklewa* interpretation of §8(f) agreements as not unilaterally voidable prior to their expiration date which was upheld by the Tenth Circuit Court of Appeals in *NLRB v. Viola Indus. Elevator Div., Inc.*, 979 F.2d 1384, 1394 (10th Cir. 1992) (en banc). *Id.*

68. *Id.*

69. *Id.* at 1096.

70. *Id.* at 1097.

parties had not negotiated for the renewal of the contract, the “deadlock” that would initiate the Article X, Section 8 procedures did not occur and, as a result, McElroy’s did not have an obligation under the clause to arbitrate the dispute.⁷¹

The Court expressly stated that there is “nothing in the NRLA [that] prohibits either party from repudiating a pre-hire obligation upon the [agreement’s] expiration.”⁷² However, the Court noted that “[w]hether the [agreement] itself permits repudiation . . . is another matter.”⁷³ The Court stated that there was “nothing in the NLRA, the NLRB’s decision, or [their] precedent [that would] release[] McElroy’s from [its] . . . contractual obligation[s].”⁷⁴

The Court rejected the argument set forth by McElroy’s that the agreement provided for unilateral termination upon expiration or negotiation for renewal.⁷⁵ The Court dismissed McElroy’s arguments, basing its determination on the fact that the language of the agreement in question was “materially indistinguishable” from that of cases brought before the Sixth, Seventh, Eighth, and Ninth Circuit Courts.⁷⁶

In interpreting the pre-hire agreement from a plain meaning analysis, the Court found that there could be only two alternatives upon the expiration of the agreement: automatic renewal on an annual basis, or, if notice was given ninety-days prior to the expiration date, the other party would have an obligation to engage in the negotiation of a renewal agreement.⁷⁷ Moreover, the Court found that McElroy’s notice of intent to terminate the agreement on the expiration date did not affect the contractual obligations of the parties under the agreement.⁷⁸ This interpretation was consistent with the understanding of the agreement raised by McElroy’s in its brief and conceded by Union in its reply that there was “nothing the employer [could] do to effectively repudiate the agreement upon its expiration.”⁷⁹

71. *Id.* at 1099.

72. *Id.* at 1097.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1098-99 (citing *Sheet Metal Workers, Int’l Ass’n, Local Union No. 24 v. Architectural Metal Works, Inc.*, 259 F.3d 418, 428-29 (6th Cir. 2001); *Sheet Metal Workers Local Union No. 20 v. Baylor Heating & Air Conditioning, Inc.*, 877 F.2d 547, 551 (7th Cir. 1989); *Int’l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp.*, 380 F.3d 1084, 1090 n.5 (8th Cir. 2004); *Beach Air Conditioning & Heating, Inc. v. Sheet Metal Workers Int’l Ass’n, Local Union No. 102*, 55 F.3d 474, 478 (9th Cir. 1995)).

77. *Id.* at 1098.

78. *Id.*

79. *See* Plaintiff’s Reply in Support of Motion to Confirm Arbitration Award, *Sheet Metal Workers’ Int’l Ass’n v. McElroy’s, Inc.*, No. 5:05-cv-04086-RDR-KGS (D. Kan. Nov. 18, 2005), 2005 WL 3623194 (Union stated: “McElroy’s complains: ‘[I]n effect, the three-year agreement signed by the parties is actually a six-year agreement under this approach because there is absolutely nothing the employer can do to effectively repudiate the agreement upon its expiration.’ . . . That is exactly what Article X, section 8 means.”) *See also* Brief in Support of Defendant’s Motion for Summary Judgment, *Sheet Metal Workers’ Int’l Ass’n v. McElroy’s, Inc.*, No. 5:05-cv-04086-RDR-KGS (D. Kan. Nov. 4, 2005), 2005 WL 3623192 (McElroy’s argued: “In effect, the three-year agreement signed by the parties is actually a six-year agreement [under] this approach because there is absolutely nothing the employer can do to effectively repudiate the agreement upon its expiration. All a union must do to extend the term of the agreement by an additional three years is contrive some non-existent ‘controversy of dispute,’ and the NJAB will step in and intervene on its behalf.”).

The Court also rejected McElroy's argument that "absent *active* negotiation, the *Deklewa* rule allows a party unilaterally to terminate the agreement on its expiration date."⁸⁰ In the Court's view, such an argument would only be valid if the agreement did not impose an obligation to negotiate.⁸¹ The Court stated that McElroy's could not avoid its obligations under the agreement to "negotiate a renewal agreement or to have one imposed upon them if one party timely gives notice of a desire to renew the agreement" by refusing to engage in negotiations.⁸² This inaction, in the Court's opinion, would result in "deadlocked" negotiations and invoke the right of the other party to submit the matter to the NJAB.⁸³ Here, the Court deferred to the logic and reasoning of the district court's opinion where the district court had stated, "In our opinion, a failure of one side to participate in negotiations for a renewed agreement leads to a 'failure of the parties to negotiate a renewal.'"⁸⁴ The district court, in finding that a deadlock occurred when one side refuses to negotiate, stated that a contrary construction of the term "deadlocked" in the agreement would "obviate the duty of the parties to negotiate which was a duty they accepted when they signed the original agreement."⁸⁵

The Court found that the provisions of the agreement had imposed a duty on "each party to negotiate and, in the absence of a [negotiated] agreement, obligate[d] them to accept the decision of the NJAB."⁸⁶ Applying the terms of the agreement to the facts, the Court found that since Union had timely served McElroy's with notice of an intent to reopen and McElroy's had "deadlocked" negotiations by refusing to participate, the case had been properly submitted to arbitration pursuant to Article X, Section 8 of the agreement.⁸⁷ The Court of Appeals for the Tenth Circuit affirmed the order of the district court granting Union's motion to confirm the arbitration award directing the parties to enter into a renewal agreement.⁸⁸

V. COMMENT

A. The Instant Court Employed a Conclusory Analysis and Failed to Address Relevant Issues

In *McElroy's*, the Court of Appeals for the Tenth Circuit had an opportunity to clarify how the principles of the *Deklewa* decision and the policy behind § 8(f)

80. *McElroy's Inc.*, 500 F.3d at 1099.

81. *Id.*

82. *Id.* (citing *Beach Air Conditioning & Heating, Inc. v. Sheet Metal Workers Int'l Ass'n, Local Union No. 102*, 55 F.3d 474, 477 (9th Cir. 1995) (rejecting the argument that "you can't fail [to negotiate a renewal contract] if you don't try" because it ignores the party's "duty to negotiate in the first place")). The Court clarifies in footnote 3 that the absence of notice by Union as required expressly in the agreement, the employer would not have an obligation to negotiate for a renewal of the agreement. *Id.* at 1099 n.3.

83. *Id.* at 1099.

84. *McElroy's Inc.*, 2006 WL 1044465, at *5.

85. *Id.* (citing *Beach Air Conditioning*, 55 F.3d at 477; *Sheet Metal Workers Int'l Ass'n v. Architectural Metal Works, Inc.*, 259 F.3d 418, 428-29 (6th Cir. 2001); *M.R.S. Enters., Inc. v. Sheet Metal Workers' Int'l Ass'n*, 2006 WL 931572 at *5 (D.D.C. 2006)).

86. *McElroy's Inc.*, 500 F.3d at 1098.

87. *Id.* at 1099.

88. *Id.*; *McElroy's Inc.*, 2006 WL 1044465, at *6.

pre-hire agreements should be interpreted and applied to situations where a party's statutory rights come into conflict with contractual provisions. Moreover, the court had an opportunity to address a novel question for its circuit of how an interest arbitration clause should be applied to a contract that did not allow for any means of repudiation upon the expiration of the agreement. The Court's failure to provide independent answers to these issues, or to even address them, leaves many questions open as to how there will be uniformity among the circuits as to the application of the *Deklewa* decision to agreements governed under § 8(f) of the NLRA and whether current inconsistencies are producing results contrary to what § 8(f) was designed to create.

The court in the instant decision adhered too strictly to the four corners of the agreement and did not consider relevant issues that could be raised by examining the agreement and interest arbitration clause in a broader context. Specifically, the Court should have examined more closely the background of § 8(f) agreements and the possible effects of the Court's interpretation of the agreement and the interest arbitration clause. The Court should have incorporated into its analysis how *Deklewa* stands for the proposition that parties to a § 8(f) relationship cannot be coerced into bargaining for a new contract but also adamantly maintains that parties to such relationships should be bound to their agreements.⁸⁹ The Court seems to have encompassed the latter in their decision but did not address the applicability of the policy concerns that may be behind the former to the instant case. While the opinion supplies a brief overview of *Deklewa's* history and progeny as well as citations to cases from other jurisdictions, the Court's analysis fails to examine the significance interest arbitration clauses have on pre-hire agreements and the building and construction industry. Courts should consider whether interest arbitration clauses, when providing for a renewal agreement to be negotiated or imposed upon a party, function to negate the principles set forth by *Deklewa* by allowing for unilateral conversion to § 9(a) agreement? Moreover, does an automatic extension of the pre-hire agreement provide the union with more time to obtain majority support and convert what was supposed to be a pre-hire agreement into an exclusive collective bargaining agreement that is contrary to both of the parties' original intentions? These are just some rational inferences of how to apply the policy concerns for pre-hire agreements that were raised by the NLRB in *Deklewa*.⁹⁰

The conflicts that arise in disputes where interest arbitration clauses are imposed contractually to § 8(f) agreements are strikingly similar to the disputes that arise when parties argue over whether their agreement is governed by § 9(a) or § 8(f). This is due to the distinction between the obligation to bargain upon the expiration of a 9(a) agreement and the absence of such a duty upon the expiration of an 8(f) agreement. In such disputes, unions in the construction industry have

89. See Harold J. Datz, *Alternative Dispute Resolution—Interest Arbitration and the National Labor Relations Act*, 6 LAB. LAW. 127, 131 (1990) (stating “[I]n section 8(f) situations, there is a conflict of principles.”). In the footnotes of the article it was noted that Mr. Datz was Associate General Counsel, Office of the General Counsel, NLRB, but that the article does not necessarily reflect the views of the NLRB or its General Counsel. *Id.* at 127 n.a.

90. John Deklewa & Sons, Inc., 282 N.L.R.B. 1375, 1387 (1987). “Unlike a full 9(a) [exclusive] representative, the 8(f) union enjoys no presumption of majority status on the contract's expiration and cannot picket or strike to compel renewal of an expired agreement or require bargaining for a successor agreement.” *Id.*

argued that they entered into bargaining relationships pursuant to 9(a) so as to impose a duty to bargain upon the employers following the expiration of their collective bargaining agreements. Conversely, employers in the construction industry have contended that they entered into bargaining relationships pursuant to 8(f) and therefore may unilaterally repudiate the agreement upon its expiration without being subjected to a § 8(a)(5) unfair labor practice charge.⁹¹ Still, the court in the instant decision failed to address these interesting parallels leaving future parties to enter into pre-hire agreements based on logical, but possibly erroneous perceptions of their rights. Moreover, how future courts will apply interest arbitration clauses to various factual circumstances when they create relationships far more restrictive than statutory § 8(f) agreements and whether that situation can be distinguished from the trend in some recent courts of becoming more lenient in allowing unions to convert their § 8(f) agreements into § 9(a) majority bargaining status is also left unanswered.⁹² Notably, the Tenth Circuit Court of Appeals has been suggested to have “crafted” the approach for § 8(f) unions to “convert [their] status to that of a majority bargaining representative under § 9(a) through contract language alone.”⁹³

B. The Issue of Whether Interest Arbitration Clauses in Pre-hire Agreements as Applied in the Instant Decision are Consistent With the Principles of Collective Bargaining Needs to Be Explicitly Addressed

The open-endedness left by the Court’s decision raises questions on whether interest arbitration clauses and other mechanisms, when contractually altering the parties’ otherwise statutory obligations and rights, are effecting genuine collective bargaining or whether they function as tools for parties who can take advantage of the inconsistencies in this area of law to gain disproportionate bargaining power over their labor agreements.

While cases such as the instant decision might raise some concern about the loss of bargaining power by parties who enter into pre-hire agreements with no avenue but interest arbitration at the agreement’s expiration, such concerns are arguably misplaced from a general labor law perspective. In the context of federal labor law it has been said, “Parties to a collective bargaining agreement are conclusively presumed to have equal bargaining power, and union agents have no duty to explain to employers the terms, conditions, or consequences of a collective

91. Caufield, *supra* note 34, at 418-19. The author notes that “[t]his assumes that the employer no longer wishes to continue its bargaining relationship, because the 8(f)/9(a) dichotomy does not impact the relationship otherwise.” *Id.* at 419 n.37.

92. *See generally id.* This article makes that argument that while the NLRB has not overruled *Deklewa* nor reverted to the Conversion Doctrine, multiple recent decisions have set forth principles and elements that clearly reestablish the Conversion Doctrine and “set a roadmap for unions to follow in order to convert their 8(f) status to majority status pursuant to 9(a).” *Id.* at 414.

93. *Id.* at 413. In footnote 110 of the article, the author states:

Tenth Circuit Senior Judge Monroe G. McKay sat by designation in the Third Circuit and authored *Sheet Metal Workers’ Int’l Ass’n v. Herre Bros.*, 201 F.3d 231 (3d Cir. 1999). Months later, and back on his home ‘court,’ Judge McKay authored *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160 (10th Cir. 2000), and *NLRB v. Triple C Maint.*, 219 F.3d 1147 (10th Cir. 2000). All three cases are pivotal to the roadmap used to ultimately revert to the Conversion Doctrine.

Id. at 439 n.10

bargaining agreement.”⁹⁴ This argument maintains that as various sized employers should be entitled to the enforcement of their collective bargaining agreements with various sized unions, unions should be extended the same entitlement. Furthermore, interest arbitration is a contractual, not a statutory, obligation. An interest arbitration clause, as a non-mandatory subject of bargaining, is not a provision over which a union could insist. Consequently, any stability in federal labor law would cease to exist if courts began selectively rewriting or refusing to enforce labor contracts in an effort to redistribute the parties’ balance of power. The possibility that individual contract terms might have different meanings under state and federal law would inevitably disrupt both the negotiation and administration of labor agreements.⁹⁵

While there is validity to concerns for uniformity in construing the terms of bargaining agreements, such concerns should not be at the expense of the principles of genuine collective bargaining. Courts should have concern for the effect that contractual provisions like interest arbitration clauses, especially in agreements with language and terms used commonly throughout an industry, may have on the bargaining power of the involved parties. It is clear that not all parties to recent pre-hire agreements have an understanding of the way courts will apply § 8(f) when the pre-hire agreement has been altered contractually from its statutory model. A consistent number of disputes continue to arise with largely the same issues in the context of pre-hire agreements arguably from the inconsistencies courts display in interpreting § 8(f) to different factual and contractual circumstances, including the effect of interest arbitration clauses.⁹⁶

It is arguable that this inconsistency has led to knowledgeable parties contracting for terms that exploit the lack of court interpretations to their benefit and will continue unless the issue is addressed explicitly for future contracting parties. Despite the common understanding that one is bound to what he contracts for, when one is entering into an agreement that he believes to be governed by § 8(f) rather than § 9(a), it is not illogical for that party to believe that they are not subject to the same duty imposed on parties to a 9(a) agreement to bargain in good faith following expiration of the agreement. Courts, including the Tenth Circuit in the instant case, have shown that unions can enter into an agreement with the understanding that the agreement is governed by § 8(f) while also contracting, perhaps to the other party’s unawareness, for extensions that ensure that once the union has submitted an intent to negotiate for a renewal agreement, binds the other party to negotiate or accept terms under interest arbitration. Whether this is an

94. *Employee Painters’ Trust v. J & B Finishes*, 77 F.3d 1188, 1192 (9th Cir. 1996).

95. *See Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962). “[I]n enacting §301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.” *Id.* at 104.

96. *Compare Beach Air Conditioning & Heating, Inc. v. Sheet Metal Workers*, 55 F.3d 474, 476 (9th Cir. 1995) (construing standard sheet metal industry “interest arbitration” and “contract extension” verbiage to contractually bind each assenting employer, following the union serving timely notice to reopen negotiations, to re-negotiate a new agreement or have one imposed by arbitration board), *with Indus. Turnaround Corp. v. NLRB*, 115 F.3d 248, 255 (4th Cir. 1997) (stating that an employer’s notification of repudiation need not comply with the termination provision of the agreement when the agreement is a § 8(f) pre-hire agreement).

example of genuine bargaining principles is unclear.⁹⁷ On one hand the statutory rights and obligations seem to stand in sharp contrast to those of the agreements with these contractual provisions so the effect of the statutory exceptions granted to bargaining agreements in the construction industry seem to have been ignored or overruled. On the other hand, equal bargaining power is a long-standing presumption in the collective bargaining context and thus public policy arguments are a hard sell.⁹⁸ Consequently, the fact that a drafting party may have realized the benefit of interest arbitration clauses and other contractual mechanisms in pre-hire agreements before the signing parties have either realized how to use such clauses to their benefit or contract out of them remains an unanswered public policy argument. While there is some merit to either argument, as further illustrated by the instant decision, there has not been a court that has engaged discussion over all of the potential consequences of such clauses to different factual situations and how employers, unions, and the industry as a whole will be affected in the future.⁹⁹

In examining the instant decision and other decisions in this area of law, it is clear that in the context of bargained-for agreements in the building and construction industry courts are prone to uphold interest arbitration clauses and the awards granted under them. In the future, however, hopefully courts will make it clear to both employers and unions their rights in negotiating and repudiating § 8(f) pre-hire agreements when interest arbitration clauses are involved. While the statutory and contractual distinctions may seem clear from an outsider perspective, it is clear from the instant decision and similar cases that many parties do not comprehend how severely some of these contractual provisions like interest arbitration clauses can affect their otherwise statutory rights. Given the variances in how the circuits interpret parties' rights and obligations under § 8(f) pre-hire agreements even in cases concerning purely statutory rights, how the building and construction will achieve uniformity amongst the circuits for construing and interpreting agreements varied by interest arbitration clauses when the circuits lack a consistent position on the principles and policies underlying § 8(f) agreements remains to be answered.

VI. CONCLUSION

Given the inconsistencies displayed by the circuits in their application of the *Deklewa* decision and its progeny, hopefully the Supreme Court will at some point clarify the issues about contractual and statutory conflict that arises in § 8(f) pre-hire agreements. Until then, when entering into a pre-hire agreement with an

97. See Loewenberg, *supra* note 47, at 134 (stating that the use of interest arbitration "would be relatively rare if parties had full understanding of each other's positions and needs and negotiated according to the integrative bargaining model.").

98. See *Employee Painters' Trust*, 77 F.3d at 1192. This decision states that there is a conclusive presumption that parties to a collective bargaining agreement have equal bargaining power so that unions have no duty to employers to explain contract terms. *Id.* Consequently, an employer who signs an agreement drafted by a union only to later argue that terms should be construed against the union when it becomes dissatisfied would not have a strong argument.

99. See Loewenberg, *supra* note 47, at 135 ("The future of interest arbitration depends on the vitality of collective bargaining, the structure of bargaining, the role of interest arbitration in the labor relations system, and the willingness of society to limit the use of economic power as a determinant of bargaining outcomes.").

employer, it is likely that more and more unions in the construction and building industry will draft interest arbitration clauses to reinforce the interpretation of the agreement that is most favorable to their bargaining position. These provisions have been interpreted by courts such as the Tenth Circuit as acceptable to supercede the statutory bargaining rights and obligations provided to parties in § 8(f) relationships largely without any public policy consideration or thoughtful analysis of the effect the terms may have on the bargaining relationships of the parties before it or in the future.

Courts have been clear that the area of labor law has a presumption of equality of bargaining power that is not easy to rebut. Despite the exception to general collective bargaining rules granted to § 8(f) pre-hire agreements, whether the courts or the Supreme Court would ever interpret the law as providing special rules of fairness for such relationships when the parties have contracted for special terms may be doubtful but is nonetheless unanswered. Unfortunately the Tenth Circuit did not provide any meaningful analysis on the issue and thus inconsistencies in courts' application of this gray area of law to factual circumstances involving interest arbitration clauses will remain.

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