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Labor Law -- Pre-Hire Contracts in the Construction Industry -- Operating Engineers Local 150 v. NLRB (R.J. Smith Construction Co.)

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designated individual airport, the better course would be to allow the FAA to make the tentative decision to "un-preempt" the field. This FAA decision would be "reviewable" by Congress, which can at any time act to expressly preempt local authority.[82] Furthermore, airlines would be quick to contest any overly restrictive local law on the ground that it would conflict with existing federal policy.

Recognition of the agency role in preemption policy-making would bring the Court a long way toward the development of a realistic approach to the nature of administrative authority.[83] In a time of increasing demands on local airport proprietors to reduce environmental noise pollution, the Supreme Court would do well to defer to the FAA determination of the division between federal and state authority where Congress has not expressly spoken on preemption. Such an approach would give the Court a means of preventing needless preemption of local regulations consistent with congressional purposes, without eroding the principles enunciated in *Burbank*.

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Labor Law—Pre-Hire Contracts in the Construction Industry—*Operating Engineers Local 150 v. NLRB (R.J. Smith Construction Co.)*.[1]—Local 150 brought an unfair labor practice action against R.J. Smith (the employer) alleging a refusal to bargain in violation of section 8(a)(5) of the National Labor Relations Act (the Act).[2] The employer had unilaterally increased selected employees' wage rates during the term of its contract with Local 150 and had failed to bring wage rates up to the level agreed upon in the contract.[3] The relevant details of the bargaining relationship be-

[82] One alternative to "un-preemption" would be to permit municipal proprietors to establish the same regulations as those promulgated for each airport by the FAA. Cf. California v. Zook, 336 U.S. 725 (1949). This approach would also allow enforcement by the proprietor, although not on the selective basis the FAA has previously employed. An added advantage of giving all municipal airport proprietors the power to enforce concurrent regulations is that liability would be less likely to shift from the proprietor to the federal government, thus maintaining the local incentive to control noise. Such an approach, however, also depends on the assertion that a finding of pervasiveness does not prevent the FAA from sanctioning complementary regulation.

[83] The FAA has been making such de facto preemption decisions throughout its history. It has chosen to permit the New York Port Authority, for example, to enforce the same types of regulations recommended by the EPA. See note 52 supra.

[1] 480 F.2d 1186, 83 L.R.R.M. 2706 (D.C. Cir. 1973). The statement of facts set forth below is taken from id. at 1187-88, 83 L.R.R.M. at 2707-08.

[2] 29 U.S.C. § 158(a)(5) (1970) provides: "It shall be an unfair labor practice for an employer— . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

[3] Local 150 also alleged a violation of §§ 8(a)(1) and (3), 29 U.S.C. §§ 158(a)(1), (3) (1970), in the company's discharge of the only two union workers in the employer's fairly stable

tween Local 150 and the employer were as follows. The employer was a contractor in the building and construction industry and Local 150 represented employees in that industry. A history of bargaining between these two parties dated back to 1964.[4] In October 1968, the parties entered into two new collective bargaining agreements, for violation of which Local 150 brought its allegations of unfair labor practices. Although each of these contracts purported to recognize Local 150 as exclusive bargaining agent for R.J. Smith's employees, at no time did the union petition the National Labor Relations Board (the Board or NLRB) to hold a representation election so that it might prove its majority support and become certified to bargain in the usual manner.[5] At least one of the agreements contained union security provisions which required membership in the union after the seventh day on the job as a condition of employment.[6] Such clauses normally operate to ensure that the union achieves and maintains majority status. However, at no time since the beginning of the bargaining relationship in 1964 did Local 150 actually represent or even claim to represent a majority of the employees.

Despite its lack of Board certification or actual majority status, Local 150 claimed that the contracts were binding agreements under the "pre-hire" contract provision of section 8(f) of the Act, providing for special treatment of collective bargaining in the construction industry.[7] Under section 9 of the Act, unions in other industries must be selected as bargaining representatives by a majority of the

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complement of thirteen to fourteen workers. However, the company did not challenge this allegation and the employees were reinstated two weeks later with full back pay. They became the only employees in the unit to receive full contract wages and fringe benefits. 480 F.2d at 1188 n.1, 83 L.R.R.M. at 2707-08 n.1.

[4] The employer and Local 150 had entered into a collective bargaining agreement in 1964 which adopted the terms of a master agreement between Local 150 and an employers' association. The company never complied with the terms of this contract and, according to its president, never intended to do so. When the contract expired in Jan. 1966, chronic disagreements prevented a renewal, although there is some evidence that both parties believed that a new contract between them did exist. See 191 N.L.R.B. No. 135, at 3 (trial examiner's opinion), 77 L.R.R.M. 1493 (1971), rev'd, 480 F.2d 1186, 83 L.R.R.M. 2706 (D.C. Cir. 1973).

[5] Section 9(c) of the Act, 29 U.S.C. § 159(c) (1970), sets out the procedure for certification. See generally Section of Labor Relations Law, American Bar Ass'n, The Developing Labor Law 153-99 (C. Morris ed. 1971) [hereinafter cited as C. Morris].

[6] 191 N.L.R.B. No. 135, at 3, 77 L.R.R.M. at 1494 (Board's opinion). See § 8(f)(2) of the Act, 29 U.S.C. § 158(f)(2) (1970), which allows construction unions to require membership after the seventh day of employment, unlike other unions which may require membership only after thirty days of employment pursuant to 29 U.S.C. § 158(a)(3) (1970).

[7] Section 8(f) of the Act, 29 U.S.C. § 158(f) (1970), provides in pertinent part:

> 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 (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 . . . .

employees before they can lawfully contract with the employer.[8] This is generally accomplished by means of a representation election. A building trades union is authorized by section 8(f) to negotiate a contract even though it has not established majority status. However, the final proviso to section 8(f)[9] provides that a representation election questioning the union's majority status may be called at any time by the employer, waiving the contract bar rules which normally immunize an agreement from such challenge for at least one year after the election which established the union's majority.[10]

Framing the issue presented by the *R.J. Smith* case in the terminology of the Act, the court posed the question as

> whether an employer may be guilty of an unfair labor practice with respect to a union with which it has executed a pre-hire contract, valid under § 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f) (1965), to the same extent that it may with respect to a union which has gained recognition and secured a contract after traditional demonstration of its majority support.[11]

With regard to this issue, the court HELD: that unless and until a representation election proves that the union represents only a minority, the employer should be held to the same bargaining standards under a pre-hire contract as would apply in bargaining with a certified union.[12] In examining the legislative history of section 8(f) the court concluded that to allow the employer to terminate unilaterally a pre-hire contract upon its own determination of the union's failure to achieve majority status would frustrate Congress' purpose in approving these special construction contracts. Such an interpretation, the court explained, would render pre-hire contracts "voidable at will."[13] Therefore, the employer was bound by his pre-hire agreement to bargain with the minority union until a representation election proved the lack of majority status. Since the employer in the instant case had not followed the statutory election procedure, the court found that it had violated section 8(a)(5) of the Act in unilaterally modifying the terms of the contract, thereby refusing to bargain with Local 150.[14]

The court's holding in *R.J. Smith* broadly defines the scope of section 8(f) and unfair labor practice liability thereunder. Its deci-

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[8] 29 U.S.C. § 159(a) (1970). See generally C. Morris, supra note 5.

[9] The final proviso to § 8(f) of the Act, 29 U.S.C. § 158(f) (1970), reads: "*Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) . . . ."

[10] See C. Morris, supra note 5, at 162-65.

[11] 480 F.2d at 1187, 83 L.R.R.M. at 2707.

[12] Id. at 1191, 83 L.R.R.M. at 2710.

[13] Id. at 1190, 83 L.R.R.M. at 2709.

[14] Id. at 1191, 83 L.R.R.M. at 2710.

sion reverses rulings by the trial examiner and the Board which had previously limited the application of section 8(f). The trial examiner limited the statute's usefulness by defining the term "pre-hire contract" to include only the initial bargaining agreement between an employer and a union, excluding contracts which form part of a continuing bargaining relationship, as were present in *R.J. Smith*.[15] Implicitly rejecting the trial examiner's limited definition of pre-hire contracts, the Board found Local 150's contract to be within the scope of section 8(f), but found that it was not enforceable in view of the union's admitted failure to achieve majority support.[16] The circuit court rejected both of these theories and recognized Local 150's pre-hire contract as binding on the employer absent a representation election proving the union's failure to achieve majority support.[17]

This note, in analyzing the court of appeals' decision, will first discuss the particular characteristics of the construction industry which led Congress to adopt section 8(f). An analysis of the trial examiner's limited definition of the statute's scope and then of the Board's theory of limiting the force of contracts under section 8(f) will follow. A discussion of the circuit court's rejection of these two theories will underline the importance of its decision in preserving the bargaining structure of the construction industry and the stability of building trades unions. Finally, an analysis of the court's decision in relation to the industry as a whole will lead to conclusions as to the role that section 8(f) plays in the structure of collective bargaining in the construction industry.

THE CONSTRUCTION INDUSTRY

The construction project differs from the stable regularly-scheduled operations of other industries in several important respects.[18] First, the individual project is immobile, tied to the construction site determined by the customer, whereas other industries may follow the available supplies of raw materials and labor. Second, construction is a highly complex industry. The variety of operations on each building site requires a varied labor force with a high proportion of skilled craftsmen.[19] The construction industry labor force, which comprises fifteen percent of the nation's skilled workers,[20] is divided into at least twenty different crafts and many more specialties.[21] Third, the industry is seasonal, the volume of

[15] 191 N.L.R.B. No. 135, at 6 (trial examiner's opinion).

[16] Id. at 6, 77 L.R.R.M. at 1496 (Board's opinion).

[17] 480 F.2d at 1191, 83 L.R.R.M. at 2710.

[18] See W. Haber & H. Levinson, Labor Relations and Productivity in the Building Trades 10-11 (1956).

[19] Dunlop, The Industrial Relations System in Construction, in The Structure of Collective Bargaining 258 (A. Weber ed. 1961).

[20] D. Mills, Industrial Relations and Manpower in Construction 4 (1972).

[21] Id. at 14.

business varying greatly because of climatic conditions. Fourth, the possibility of greater economic gain has encouraged specialization by contracting firms. The specialized contractor must be ready and able to expand or contract operations or move to another geographical area as the market conditions change. These distinguishing features have greatly affected employment conditions in the industry. Skilled workers' jobs are usually of short duration. Employment is migratory, moving from one construction site to the next. Many workers change employers as often as they change jobs.[22] The union's role in this highly flexible industry is crucial:

> The craft union supports the specialization of production by performing functions which stabilize the industry. The union enforces standards of work and compensation, participates in the formal training of men, refers men to work at the contractor's request, and, in general, maintains a level of stability in the labor market as a whole which is adequate to allow the direct employment relationship (between individual employer and employee) to be extremely unstable.[23]

Thus the building trades union has become, in effect, an employment agency, contracting with the employer before a job has begun and then providing skilled workers when and where the contractor needs them, as well as negotiating standard wages and working conditions for the employees' benefit.[24]

It was along these lines that collective bargaining in the construction industry was organized in the nineteenth century. By the year 1900, the basic crafts were each organized nationally and enjoyed "a degree of power and stability hitherto unknown in American industry."[25] Dominant throughout the industry was the "closed shop" in which the employer was required to hire only members of the union with which he chose to bargain.[26] Prior to 1947, the National Labor Relations Board had refused to assume jurisdiction over the construction industry, recognizing that building trades unions had already developed their own particular bargaining structure which adequately provided workers the opportunity to organize and be heard without Board supervision.[27] However, when the Taft-Hartley Act was passed in 1947, adding regulations against union unfair labor practices to the pre-existing provisions of the

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[22] Comment, The Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L.J. 673, 677 (1951).

[23] Mills, The Construction Industry, 21 Lab. L.J. 498, 504 (1970).

[24] Fleming, Title VII: The Taft-Hartley Amendments, 54 Nw. U.L. Rev. 666, 703 (1960).

[25] W. Haber & H. Levinson, supra note 18, at 30.

[26] Id. at 62.

[27] See Johns-Manville Corp., 61 N.L.R.B. 1, 16 L.R.R.M. 77 (1945); Brown & Root, Inc., 51 N.L.R.B. 820, 12 L.R.R.M. 278 (1943).

National Labor Relations Act which regulated only employer practices, the Board resigned itself to accept jurisdiction over the construction industry,[28] which was now expected to comply with the provisions of the National Labor Relations Act. Under the Taft-Hartley Act, the construction industry's use of the closed shop was outlawed[29] and the unions were expected to comply, just as any other union, with the statutory procedures of Board-supervised election and certification as set forth in section 9 of the Act.[30]

The construction industry, however, could not adapt so quickly to the rules which were applied to collective bargaining in other industries. Representation elections presented one of the more serious difficulties. The contractor could no longer insure himself a ready supply of labor at set wage rates *before* bidding for and beginning a project, since an election among a representative number of employees had to precede any recognition of the union as exclusive bargaining agent. In addition, because of the brief duration of jobs and the continual variation in the size and composition of the working crew on most construction sites, the administrative task of holding meaningful elections even after a project was begun involved tremendous expense and in the end was given up as impracticable. By 1950, NLRB General Counsel Robert Denham, several major employer associations and the Building and Construction Trades Department of the American Federation of Labor had all requested that the Board recognize the impossibility of holding elections on many job sites and exempt the industry in some way from this requirement. However, the Board did not change its policy, thus forcing the industry to carry on as best it could in constant violation of the Act.

In 1959, Congress decided to alleviate the situation by amending the Act. Senator Javits explained on the floor of the Senate: "We cannot apply the Taft-Hartley law to the building and construction field. We all know the law is not being applied in that field and we might as well recognize the fact in the law."[31] Section 8(f) was adopted to adjust the law to the realities and needs of the industry.

THE SCOPE OF SECTION 8(f): THE DEFINITION OF A PRE-HIRE CONTRACT

Section 8(f) allows an employer and a labor union in the construction industry to make a collective bargaining agreement even though "the majority status of such labor organization has not been

[28] See Plumbing Contractors Ass'n, 93 N.L.R.B. 1081, 1084 n.12, 27 L.R.R.M. 1514, 1516 n.12 (1951); Wadsworth Bldg. Co., 81 N.L.R.B. 802, 23 L.R.R.M. 1403 (1949).

[29] Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (1970), outlaws the closed shop and substitutes a limited form of union security known as the "union shop," in which an employee may be required to join the recognized union after the thirtieth day of his employment.

[30] 29 U.S.C. § 159 (1970).

[31] 105 Cong. Rec. 6395 (1959).

established under the provisions of section 159 of this title prior to the making of such agreement . . . ."[32] Although the statute itself does not make use of the expression "pre-hire contract," the term was used in the congressional debate which preceded the passage of section 8(f)[33] and has since been regularly used to refer to contracts made pursuant to that statute. However, the term was never clearly defined by the legislators and has therefore been the subject of some confusion.

The court in *R.J. Smith,* adhering strictly to the wording of the statute, defined pre-hire agreements as "collective bargaining contracts entered into before the union's majority status had been certified under § 9 of the Act.[34] Previously, however, the Board had provided a more limited definition of the term. In *Bricklayers Local 3,*[35] the Board restricted the application of section 8(f) to pre-hire contracts defined as the *initial* attempt by an employer and a union in the construction industry to establish a bargaining relationship. Those contracts which are products of a "continuing bargaining relationship," despite the fact that they were made without prior certification of the union's majority status, were not pre-hire in nature, according to the Board, and were therefore beyond the scope of section 8(f).[36]

In *Bricklayers,* a building trades union which had previously made exclusive bargaining agreements with the employer, although it had never been certified to represent the employees pursuant to a representation election, was negotiating for contract renewal. The union insisted on the inclusion of a certain clause to which the employer objected, causing a bargaining impasse. The Board found that the union had caused this impasse over a "non-mandatory subject of bargaining," a practice which normally subjects the union to unfair labor practice liability under section 8(b)(3) of the Act.[37] The union contended that it had no bargaining duties under the Act because it was negotiating a "voluntary" pre-hire contract and was exempted from normal bargaining duties by section 8(f).[38] As will be

[32] 29 U.S.C. § 158(f) (1970).

[33] See notes 38, 42 and 43 infra.

[34] 480 F.2d at 1188, 83 L.R.R.M. at 2707.

[35] 162 N.L.R.B. 476, 64 L.R.R.M. 1085 (1966).

[36] The Board explained:

> [T]he bargaining between AGC [the employer association] and the Union presents the situation of a continuing bargaining relationship; a situation quite different from that which Congress had in mind when enacting Section 8(f)(1), to wit, an initial attempt by a union and an employer in the construction industry to commence such a relationship.

Id. at 478, 64 L.R.R.M. at 1086.

[37] 29 U.S.C. § 158(b)(3) (1973).

[38] During the Senate debates over § 8(f), Sen. John F. Kennedy, indicating that he wished to establish the legislative history on this question, stated:

> It was not the intention of the Committee to require by Section 604(a) [section 8(f)] 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

discussed below,[39] the Board had already had some difficulty defining the relation between pre-hire contracts and various bargaining rights and duties defined in other sections of the Act. Avoiding this troublesome issue, the Board in *Bricklayers* simply found that the contract in question was not a pre-hire contract at all, since it did not represent an initial attempt to establish a bargaining relationship, and held that the union, being subject to normal bargaining obligations, had committed an unfair labor practice in causing the bargaining impasse.

The Board's limitation of the scope of pre-hire contracts in *Bricklayers* is based on its understanding of the legislative history of section 8(f). It explained that "the entire legislative history of Section 8(f)(1) is couched in terms of 'prehire agreements,' a reference which can have no meaning in the situation where, as here, the parties are continuing an existing bargaining relationship under which employees have previously been hired."[40] But the Board's definition of the term pre-hire contract upon closer examination proves contrary to the actual congressional intent. A comparison of the terms of section 8(f) with an alternate proposal advocated by the executive branch in 1959 but rejected in favor of section 8(f) shows that Congress did not intend to limit the scope of section 8(f) as the Board in *Bricklayers* suggested. The administration proposal provided that pre-hire contracts were permissible only between unions and employers who could show previous history of a bargaining relationship between them,[41] *i.e.*, exactly the type of contract which the Board in *Bricklayers* declared to be beyond the scope of section 8(f). Proponents of this bill thought that only unions who had represented the employees before and thus were more likely to be their preferred representatives should be exempt from the election requirements normally applicable before a contract is signed. The rejection of the history-of-bargaining safeguard indicates that Congress meant by section 8(f) to extend the new contractual privileges to newcomer unions and avoid awarding preferential treatment to well-established unions.[42] It did not intend to exclude the older

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otherwise coerce an employer to sign a prehire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary prehire agreements.

104 Cong. Rec. 11,308 (1958).

The union contended that since Sen. Kennedy's explanation of the voluntary nature of pre-hire contracts excluded the use of what is otherwise lawful coercion by a union to force an employer to enter into a pre-hire contract, it also precluded the employer from invoking normal bargaining duties under the Act and allowed a union to cause a bargaining impasse during contract renewal negotiations. 162 N.L.R.B. at 477, 64 L.R.R.M. at 1086.

[39] See text at notes 50-70 infra.

[40] 162 N.L.R.B. at 478, 64 L.R.R.M. at 1086.

[41] For discussion of the administration's proposal, see 105 Cong. Rec. 1284 (1959) (statement by the Labor Dep't); id. at 1732 (remarks of Sec'y of Labor Mitchell); id. at 6398 (remarks of Sen. Lauche); id. at 6414 (remarks of Sens. Dirksen and Saltonstall); id. at 6415 (remarks of Sen. Lauche); id. at 6431 (remarks of Sen. Goldwater).

[42] Id. at 14,205 (Rep. Rayburn's Labor Bill speech).

unions which were considered "safer" candidates for pre-hire contracting.

It is true that congressmen in discussing the proposed draft of section 8(f) generally used the term pre-hire contract in a context which often referred specifically to the frequent need of contractors to make a contract for labor supplies before a project had begun and thus before a representation election could be held.[43] However, the Board in *Bricklayers* seemed to assume that this situation occurs only when an employer bargains with the union for the first time, whereas in fact this is not necessarily the case. A union which develops a stable bargaining relationship with a contractor over a period of years may still face employment conditions dictating an extremely flexible labor force. Employment may remain short in duration with workers still jumping from one job site to the next as the need for their particular skills arises. In this situation, both the contractor and the employee continue to rely on the union to serve as an employment agency, negotiating wages and hours before the projects begin and, throughout the period of the contract, referring skilled workers to the various construction sites as needed.[44] Representation elections might still present the same administrative difficulties as were encountered in the unsuccessful attempts to hold such elections in the construction industry before the passage of section 8(f).[45] A union which develops a continuing bargaining relationship with an employer and is thus in a stable position itself continues to make pre-hire agreements in order to deal with the continuing employment instability.[46]

The trial examiner in *R.J. Smith* adopted the *Bricklayers* definition of pre-hire contracts and found that Local 150's contract, as part of a continuing bargaining relationship, was not pre-hire in

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[43] The Report of the Senate Committee on Labor and Public Welfare explains the purposes of its pre-hire agreement provision as follows:

> In the building and construction industry it is customary for 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. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired. One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral.

S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959), reprinted in 1 Nat'l Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 424 (1959) [hereinafter cited as Legislative History].

[44] See text at notes 18-26 supra.

[45] See text at note 29 supra.

[46] See D. Mills, supra note 20, at 15.

nature.[47] The trial examiner then held that since Local 150 could not show majority support, the employer was free of any duty to bargain which would have applied to it under a contract with a certified union.[48] But the Board in *Bricklayers* had limited the definition of pre-hire contracts in the context of a very different factual situation and with opposite results. The Board considered that the continuing bargaining relationship in *Bricklayers* qualified the union as the "recognized bargaining agent of the employees"[49] and without questioning the union's majority status held it to bargaining duties normally applicable to certified unions under the Act. Thus the trial examiner's decision in *R.J. Smith* allowed an employer to unilaterally renounce its contract and the bargaining relationship it had developed with Local 150, whereas the *Bricklayers* case on which the decision was based had upheld a contract made without union certification or any other formal showing of majority status and, in fact, had fostered the continuing bargaining relationship carried on outside the regulatory scheme of recognition set forth in the Act. As we have seen, the legislative history of section 8(f) and the realities of the construction industry do not support the limited definition of the pre-hire contract upon which both of these decisions are based. However, their contradictory results serve to raise the issue of the binding force of pre-hire contracts and their effect on the bargaining duties of employers and unions in the construction industry. This is the very issue upon which the Board and the court of appeals disagreed in *R.J. Smith.*

THE BINDING FORCE OF PRE-HIRE CONTRACTS

The District of Columbia Circuit in *R.J. Smith* upheld the validity of a pre-hire contract whether or not the union could show actual majority support and found that the employer had committed an unfair labor practice in unilaterally modifying the contract. The court's decision, which is expressly applicable to all unfair labor practices committed under pre-hire contracts in every circumstance,[50] upholds the binding force of pre-hire contracts and promotes stability in bargaining relationships as they presently exist in the construction industry. However, the court agreed with the Board[51] that the majority status of a union under a pre-hire agreement is not "*fully* as immune from challenge during the contract term as is the majority status of a union which has gained recognition and secured a contract after traditional demonstration of its majority support."[52] Section 8(f) states in its final proviso that a

[47] 191 N.L.R.B. No. 135, at 6 (trial examiner's opinion).
[48] Id. at 7 (trial examiner's opinion).
[49] 162 N.L.R.B. at 478, 64 L.R.R.M. at 1087.
[50] 480 F.2d at 1191, 83 L.R.R.M. at 2710.
[51] Id. at 1190, 83 L.R.R.M. at 2709.
[52] 191 N.L.R.B. No. 135, at 4, 5, 77 L.R.R.M. at 1494 (emphasis added).

representation election may be called at any time, suspending the usual year-long grace period which other unions enjoy under normal contract bar rules found in sections 9(c) and (e) of the Act.[53] The Board in *R.J. Smith* had viewed the provision as permitting a challenge of the union's status at any time and allowed the employer to do so as a defense to Local 150's charges of refusal to bargain. Reversing the Board's decision, the court of appeals explained that the election proviso is the sole safeguard against minority unions who might otherwise use a pre-hire contract to establish themselves as bargaining representatives without ever being able to gain majority support.[54] In the absence of such an election, the court held that the employer was not entitled to repudiate Local 150's contract nor to defend itself by challenging the union's majority status in court. An analysis of these two conflicting interpretations of section 8(f)'s election proviso is a useful preliminary means of resolving the question of unfair labor practice liability under a pre-hire contract.

The Board in *R.J. Smith* read very broad implications into the representation election proviso, asserting that it

> supplies an unmistakable guide to Congress' desire to immunize from liability only the preliminary contractual steps which precede an employer's acquisition of a work force on a project in that it expressly permits the testing of the signatory union's majority status *at any time* after employees have been hired and an election might, therefore, be conducted.[55]

The Board assumed that since the union's majority status may be challenged at any time, it may also be challenged in any manner, and held that the employer was entitled to challenge the union's status during the litigation of a charge of refusal to bargain. It asserted that the effect of section 8(f) is only to exempt the parties from unfair labor practice liability in making a pre-hire contract and not to give force to the contract regardless of the union's failure to achieve majority status.[56]

The Board, however, offers no substantiation that its interpretation of this "unmistakable guide" accurately reflects the congressional intent. Throughout the congressional debates, the final proviso to section 8(f) is referred to as a safeguard of employee freedom of choice in the selection of a bargaining representative.[57] The emphasis is on protection of the *employee* and not the employer, who is the party invoking its protection in *R.J. Smith*. But granting that the election proviso must include protection of the employer as well, what need does the employer have for such protection if he can

[53] 29 U.S.C. §§ 159(c), (e) (1970).

[54] 480 F.2d at 1191, 83 L.R.R.M. at 2710.

[55] 191 N.L.R.B. No. 135, at 6, 77 L.R.R.M. at 1495 (emphasis in original).

[56] Id. at 6-7, 77 L.R.R.M. at 1496.

[57] See, e.g., 105 Cong. Rec. 15,542 (1959) (Rep. Rayburn's Labor Bill speech).

successfully challenge a union's majority by the simpler method of ignoring the contract or unilaterally modifying its terms? If Congress had intended to leave pre-hire contracts vulnerable to attack in any form, one would expect it to make such a significant change in the status quo explicitly. It is unlikely that Congress would leave this important limitation to be implied from an election proviso. It is also significant that throughout the congressional debates the election proviso is the only procedure ever mentioned whereby employees or their employer might be safeguarded against unwarranted imposition of minority union control under section 8(f).

There is, however, some precedential support for the Board's holding. In *NLRB v. AAA Electric, Inc.*,[58] an employer fired all of his employees for valid economic reasons and then, refusing to accept union referrals as provided for in its agreement with the union, hired non-union replacements and repudiated all obligations under the union contract. The Sixth Circuit's decision denying enforcement of the contract was influenced by the deliberate slowdown which the union workers had caused and the union's complete lack of support once the union members were all validly terminated.[59] The court held that a section 8(f) agreement does not constitute "recognition of the Union as the bargaining agent for the employees,"[60] and that there is "nothing to indicate that this section was to be an alternate method of recognizing the majority status of the Union involved."[61]

In *NLRB v. Irvin*[62] the Third Circuit, although expressly refusing to reject the reasoning of *AAA Electric*,[63] found a situation in which that reasoning should not apply. This case involved an employer's repudiation of a pre-hire contract under which the union

[58] 472 F.2d 444, 82 L.R.R.M. 2326 (6th Cir. 1973).

[59] The court was so influenced by the evidence of lack of good faith on the part of the union workers and the validity of their termination that it stated:

> It should be noted that even if the § 8(f) agreement were to be construed as a recognition of the Union, the valid economic termination of all of the employees nevertheless would result in the loss of the recognition. There is no duty to bargain with a Union representing employees who were validly discharged.

82 L.R.R.M. at 2329. This section of the court's opinion was only summarized in the version reported in the bound volume of F.2d. Therefore, citations to it are made only to the L.R.R.M. version.

The administrative and judicial interpretations of § 8(f) are sparse in number and contradictory in result. The Sixth Circuit in *AAA Electric* cites Davenport Insulation Co., 184 N.L.R.B. No. 114, 74 L.R.R.M. 1726 (1970), to support its interpretation, overlooking Oilfield Maintenance Co., 142 N.L.R.B. 1384, 53 L.R.R.M. 1235 (1963), which draws the opposite conclusion about the binding force of § 8(f) contracts. In view of the sparse and contradictory legal support for its holding regarding § 8(f), it is unfortunate that the Sixth Circuit did not pursue further its reasoning that there is no duty to bargain with a union representing employees validly discharged, which it offered only as alternate grounds for its decision.

[60] 82 L.R.R.M. at 2329.

[61] Id.

[62] 475 F.2d 1265, 82 L.R.R.M. 3015 (3d Cir. 1973).

[63] Id. at 1271 n.4, 82 L.R.R.M. at 3019 n.4.

had in fact achieved majority support by operation of a union security clause requiring workers to join the union within seven days after beginning employment. The court recognized that in this situation the employer should not be able to use section 8(f) as an excuse for violating his contractual obligations and held that the pre-hire contract had binding force. The court explained that

> at least where the union's role has by operation of such clauses been brought home to the employees quite directly, [*i.e.*, they have been required to join the union as a condition of employment within seven days of the job's commencement] and they have refrained from seeking a representation election, an employer is not free to repudiate his § 8(f) contract during its term.[64]

However, acknowledging the fear of the *AAA Electric* court of irresponsibly imposed minority union representation, the court specifically limited its holding to contracts with enforced union security clauses under which the union necessarily enjoys actual majority support,[65] overlooking the problem of pre-hire contracts incorporating union security clauses which are not enforced for undisclosed reasons, as in *R.J. Smith*. Thus the *Irvin* court did not consider the pre-hire contract, even if it included a union security clause, to be "an alternative method of recognizing the majority status of the Union . . . ."[66] But recognizing the effect of an *enforced* union security provision, the court held that under these circumstances the union enjoys a presumption of majority representation rebuttable during the contract term only by way of a representation election.[67]

At first glance, the *Irvin* court's willingness to uphold a pre-hire contract in which a union security clause has in fact insured the union majority support, but its unwillingness to extend this holding to cover all pre-hire contracts regardless of the union's majority status, seems to be consistent with Congress' assumption that most unions would in fact achieve that status. The report of the Senate Committee on Labor and Public Welfare, which studied the bill, noted: "If the employer relies upon this pool of skilled craftsmen,

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[64] Id. at 1271, 82 L.R.R.M. at 3019.

[65] Id.

[66] 82 L.R.R.M. at 2329.

[67] 475 F.2d at 1271, 82 L.R.R.M. at 3019. In the case of Dallas Bldg. & Constr. Trades Council v. NLRB, 396 F.2d 677, 68 L.R.R.M. 2019 (D.C. Cir. 1968), the court in effect applied such a presumption of majority representation when a council of unions attempted to force an employer to bargain with it concerning agreements to limit subcontracting even though the employees were already represented by a union under a § 8(f) contract. The court found a violation of § 8(b)(7)(a) of the Act, 29 U.S.C. § 158(b)(7)(a) (1970), which, in the court's words, "prohibits the picketing of an employer for the purpose of compelling recognition of a labor organization where another union is already lawfully recognized and when *representation issues are in a state of statutory repose*." 396 F.2d at 678, 68 L.R.R.M. at 2020 (emphasis added).

members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired."[68] It is not suggested that Congress sought by means of section 8(f) to amend the basic concept that a union is expected to represent a majority of the employees in a unit. Congress, in fact, made specific provision for safeguarding the principle of majority representation in the election proviso,[69] the *sole* safeguard of this principle which Congress saw fit to adopt as part of section 8(f).

In addition to the arguments set forth above which interpret the election proviso as the only procedure envisioned by Congress to challenge a union's majority status under a pre-hire contract, the dangers inherent in permitting the employer to modify or rescind a pre-hire contract by unilateral action should be recognized. The assumption that such action allowed on the employer's own determination of the union's failure to achieve majority status would affect only those unions which could be ousted by election anyway underestimates the adverse effect on union stability that such a decision might have. The court in *R.J. Smith* recognized the dangers involved:

> [U]nder the Board's interpretation, an employer, unhappy with a pre-hire agreement, can avoid it by discouraging union membership through flagrant unfair labor practices, thereby insuring that the union never attains a majority. This case illustrates that danger. Credible testimony established that the company never intended to comply with its labor agreements; it refused to negotiate with the union; it gave selective pay increases; it fired its only two union employees; and it refused to honor the contracts' hiring hall and union security clauses.[70]

A representation election, on the other hand, which is administered by impartial Board officials and in which an employer is bound by rules of impartiality set forth in the Act,[71] would go further toward insuring a determination of the representation question by the employees without undue pressure by the employer.

THE ROLE OF SECTION 8(f) IN COLLECTIVE BARGAINING IN THE CONSTRUCTION INDUSTRY

In effect, the court's decision in *R.J. Smith* creates a presumption of majority status of a union party to a pre-hire contract and holds union and employer to normal bargaining duties unless the presumption is rebutted by means of a representation election. Al-

[68] 1 Legislative History, supra note 43, at 424.
[69] See text at note 57 supra.
[70] 480 F.2d at 1190, 83 L.R.R.M. at 2709.
[71] 29 U.S.C. § 159 (1970).

though the court warned "that § 8(f) does not wholly obviate the union's need ultimately to achieve majority status,"[72] its holding implies that the union is not necessarily expected during the term of its contract to prove that majority status in an election and to become certified by the Board as exclusive bargaining agent.[73]

A building trades union should and will gain majority support as the workers whom it refers to the employer are hired and begin to work. But nothing in section 8(f) nor its legislative history indicates that the union is expected later to petition for an election to certify its status and ensure the enforcement of its contract. In fact, although this procedure has been open to the industry under the Act since 1947, very few building trades unions have made use of it.[74] Employers have generally acquiesced in this practice in part, perhaps, because this has been the pattern of bargaining in the industry since the nineteenth century, but also because they, along with the employees, depend upon the stability of the union for job referrals.[75] Employers have countered the unions' strength by organizing employers' associations to match the unions' forceful position at the bargaining table,[76] but not by attacking union contracts.

Section 8(f) has, then, been used in the construction industry as the principal method of recognizing a union as bargaining representative, avoiding representation elections and Board certification. The industry, it must be admitted, needs strong unions to stabilize employment conditions, but it may be questioned whether it should be allowed to define its own particular bargaining structure and ignore entirely procedures which other industries are required to follow under the Act.

Congress did not intend that section 8(f) should give the construction industry free rein to preserve and develop its own bargaining structure without reference to the principles of collective bargaining as set forth in the Act. Certainly it would be unwise to divorce the construction industry from the mainstream of collective bargaining in American industry. For the many construction workers who work periodically on non-construction jobs,[77] operating between two distinct bargaining structures would unduly complicate

[72] 480 F.2d at 1190, 83 L.R.R.M. at 2709.

[73] It is possible that in some instances short-term construction workers, unable to petition for and participate in an election during their brief employment, may be saddled with a union which is not representative of the majority of workers. Although this situation would occur only rarely, given the union's role in job referral, it is a possible threat to the majority representation principle and may justify some changes in the industry's bargaining structure. But see text at note 79 infra.

[74] See D. Mills, Industrial Relations and Manpower in Construction 30 n.10 (1972); Dunlop, The Industrial Relations System in Construction, in The Structure of Collective Bargaining 261 (A. Weber ed. 1961).

[75] W. Haber & H. Levinson, Labor Relations and Productivity in the Building Trades 62-63 (1956).

[76] D. Mills, supra note 74, at 34.

[77] See id. at 3-4.

the employment situation. The court's decision in *R.J. Smith* enables the industry to remain within the regulation and spirit of the Act while still achieving stability in its bargaining structure. The principle of majority representation is not sacrificed for this stability. The election proviso establishes a safeguard against minority control, as certification does in other industries, while section 8(f) itself provides statutory authority for the procedure of post-recognition elections.

The structure of collective bargaining in the construction industry is not without its faults. The problem of rapidly rising labor costs and extensive work stoppages in the 1960's was perhaps exacerbated or caused in part by the construction unions.[78] There are also serious racial discrimination problems in the industry to which the unions have contributed by their overt discriminatory policies in referral and training.[79] Shortcomings such as these call for action by the legislature or by the courts. Perhaps even structural changes in the system of collective bargaining will be called for. However, to limit the scope of section 8(f) as the trial examiner did in *R.J. Smith* or to cut short the binding force of pre-hire contracts as the Board did might undermine the stability of the union's role on which both employer and employees depend. Considering the flexible and unstable nature of employment in the industry, the court in *R.J. Smith,* viewing only the particular facts of one dispute which could have been resolved by the statutory election procedure, chose wisely to protect the union's role in fostering bargaining stability. Any major change in the union's position in the structure of collective bargaining in the construction industry should be made by Congress and should be preceded by a careful evaluation of the particular problems encountered in that industry.

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[78] Id. at 25-27.
[79] Id. at 154-58.