INTRODUCTION

During 1986 and 1987, the National Labor Relations Board and various federal circuit courts of appeal have substantially reinterpreted the provisions of the National Labor Relations Act which apply to the construction industry. The Board redefined the basic laws on the enforceability of contracts and the representation status of unions in *John Deklewa & Sons*, while the courts addressed the permissible scope of union picketing and secondary activities in *DeBartolo* and *Boxhorn*. It is not clear yet whether these decisions will survive review. Nevertheless, the changes in application of the NLRA to the construction industry are fundamental and are likely to have a dramatic effect on the conduct of
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labor relations in construction over the near term. The immediate impact of these decisions is accentuated because lawyers who represent clients in this area of labor law tend to operate in a very contentious and adversarial atmosphere. As a result, there is a tendency, when a new case like Deklewa or DeBartolo comes out, to believe that it is either the apotheosis of all evil or the repository of all bright light in the area, depending on one's point of view. We too often fail, however, to focus on the long-term impact the decision will have on how parties deal with one another. Focusing on that impact, starting with Deklewa, is the purpose of this presentation.

I

PREHIRE AGREEMENTS AFTER JOHN DEKLEWA & SONS

As background for our discussion of John Deklewa & Sons, it should be noted that the National Labor Relations Act was amended at section 8(f) to recognize the special problems of labor relations in the construc-

4. For other recent discussion on this topic, see Axelrod, Agency Reverses View on Union Contracts in Building Industry, Legal Times, Apr. 13, 1987, at 12, col. 1.


5. The contentiousness that goes on in this area will continue if the Board has anything to do with it. Recently Board member Johanson, in an unusual public statement, indicated that our efforts toward labor/management cooperation were very close to violating the NLRA and should cease these cooperative efforts. Insofar as he is concerned, the parties need to have a care toward maintaining the adversarial relationships that exist in this field.

Either Mr. Johanson has not read the Labor Management Cooperation Act of 1978, 29 U.S.C. §§ 141, 173, 175a, 186 (1982), and the amendments to the LMRA in that Act, or the Board does not really care to read it. As evidence of the latter interpretation, I point to the fact that if you pick up a copy of the Act itself from the Department of Information at the NLRB in Washington, it does not include § 302(c)(9) which the 1978 Act added (codified at 29 U.S.C. § 186(c)(9)).

6. Section 8(f) of the NLRA provides:

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 section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographic area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

tion industry. There are also special provisions of the Act at 8(e) and 8(b)(4)\(^7\) that refer to the construction industry. The statutory provision at issue in Deklewa is section 8(f), which allows construction employers and construction unions to enter into prehire agreements before any representative complement of workers is hired at a particular work site.\(^8\)

For a number of years, the National Labor Relations Board construed that section to mean that at the beginning of such a relationship, the relationship was not given section 9(a)\(^9\) status. In other words, the union did not have status as a majority representative of the employees in the bargaining unit. However, the Board did read the legislative history to permit the conferring of section 9(a) status on the union in a second contract, such that it was the exclusive collective bargaining representative for purposes of section 8(a)(5)\(^10\) of the Act. That doctrine, called conversion, was developed most completely in the R.J. Smith case.\(^11\) That case stated that certain conduct on the part of the employer and on the part of the union, after a period of time, conferred upon the union full majority status as the exclusive collective bargaining representative of the employees in the unit, such that sections 8(a)(5) and 8(d)\(^12\) of the Act would apply.\(^13\)

In Deklewa, the Board overruled R.J. Smith in two ways. First, it announced the end of the conversion doctrine.\(^14\) Second, it overruled the holdings in R.J. Smith and in later cases, culminating in Higdon,\(^15\) which had allowed an employer to repudiate a section 8(f) agreement during the term of the agreement.\(^16\) Employers in the construction industry are no longer privileged, as of Deklewa, to repudiate a collective bargaining agreement, entered into pursuant to section 8(f), during the term of that agreement.

To understand the impact of that decision, consider what the parties have said about the case. Shortly after the case was issued, Engineering News Record, a leading industry journal, reported the following:

"It's a mind-boggling decision," says Dennis M. Bradshaw, executive director for manpower services for the Associated General Contractors. Noting that organized labor won the case 4-0, he adds, "It looks


\(8.\) 29 U.S.C. § 158(f) (text quoted supra note 5).


\(13.\) R.J. Smith, 191 N.L.R.B. at 695 n.5.

\(14.\) Deklewa, 124 L.R.R.M. (BNA) at 1187.


\(16.\) Deklewa, 124 L.R.R.M. (BNA) at 1197.
like they won the battle but lost the war.” Bradshaw claims that the decision will put building trades on the same footing as unions in any other industry. The decision “has got to [cover] 98% of the agreements in this industry,” he says. One union leader in Texas acknowledges, “That will do us in.” Others at AGC lament the loss of repudiation, however.

Former NLRB [General Counsel] Peter Nash, a labor law attorney, sees the case as “significant,” but does not think, as some open-shop contractors believe, that it may doom future union contracts. “I don’t think it means we’ll see termination of union contracts,” he says. “Employees will just come out of the hiring hall where they are union members and establish a majority position.” Nash believes that they can easily do so and does not think that the prohibition against strike activity will hinder unions because it won’t apply to ones with majority status.17

At issue in Deklewa was the repudiation of a collective bargaining agreement in mid-term by John Deklewa & Sons after it faced a jurisdictional dispute between the Laborers on the one hand and the Ironworkers on another, with respect to rebar and wire work on a highway job.18 The Board held in Deklewa that repudiation during the term of the agreement was prohibited.19 The decision is retroactive in the sense that any case pending at any stage of the proceeding is bound by the Deklewa case.20 An employer’s repudiation in reliance on R.J. Smith is improper reliance.21

A. New Rules Governing Section 8(f) Agreements

Deklewa established new rules for application of collective bargaining contracts in the construction industry: “(1) A collective bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanism of Section 8(a)(5) and Section 8(b)(3),22 (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e),23 (3) in processing such petitions, the appropriate unit normally will be the single employer’s employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no prescription of majority status, and either party may

18. Deklewa, 124 L.R.R.M. (BNA) at 1186-87. John Deklewa & Sons joined a multiemployer association in 1980 and executed the association’s 8(f) agreement with the Iron Workers Union for the 1982-85 term. In 1983, with proper notice, Deklewa withdrew from the association and repudiated the union agreement. Deklewa had no union ironworkers in its employ at the time of repudiation, nor had it hired any union ironworkers in the previous six months.
19. Id. at 1197.
20. Id. at 1198.
21. Id. at 1198 n.61.
repudiate the 8(f) bargaining relationship."\textsuperscript{24}

Under the first rule,\textsuperscript{25} a primary issue of concern to unions is whether or not, under section 8(a)(5), the employer has any obligations outside the obligation during the term of the agreement to comply with the agreement. For example, does an employer have a duty to supply information during the term of the contract or to bargain about subjects not covered by the contract, absent a zipper clause? Neither these nor any other issues that may arise during the term of the agreement are clearly answered by the Board. The implication is that outside of the strict obligation to comply with the agreement, there is no other obligation.\textsuperscript{26}

In discussion of the fourth Deklewa rule, the Board took one step further and said in dicta that at the termination of the agreement the union will not be permitted to strike or to picket for another section 8(f) agreement.\textsuperscript{27} Elsewhere in the decision the Board stated unequivocally that the union will not be permitted to strike or to picket.\textsuperscript{28}

Even the General Counsel blanched at this last assertion.\textsuperscript{29} There is no statutory authorization for that dicta. Certainly, the union is not prohibited under section 8(b)(7)(C),\textsuperscript{30} the section of the Act that deals with recognition, from picketing for a reasonable period of time not to exceed 30 days. Footnote 7 of the NLRB General Counsel's

\textsuperscript{24} Deklewa, 124 L.R.R.M. (BNA) at 1187.
\textsuperscript{25} Id. at 1196.
\textsuperscript{26} The NLRB General Counsel has instructed all regional offices that cases involving issues of § 8(a)(5)-(b)(3) employer obligations, other than compliance, during the term of an 8(f) contract should be submitted to its Advice Division. Collyer, NLRB GENERAL COUNSEL'S MEMORANDUM GC87-2, Guideline Memorandum Concerning John Deklewa & Sons, 282 N.L.R.B. No. 184, n.2 (1987).
\textsuperscript{27} Deklewa, 124 L.R.R.M. (BNA) at 1195.
\textsuperscript{28} Id. at 1197. The Board did not proscribe picketing to enforce an 8(f) agreement during its term, or to compel compliance with rights that accrued during its term. However, the Board invited further consideration of the issue, stating:

If the Board is directly presented in a future case with the issue of whether a union's picketing to compel compliance with a now enforceable 8(f) agreement violates 8(b)(7), we will decide whether there are any policy considerations apart from the rejected R.J. Smith rationale warranting an exception to the general rule that unions may picket to enforce compliance with collective bargaining obligations.

\textsuperscript{29} Collyer, supra note 26, at n.7 (citations omitted), states:

The Board's proscription on picketing presumably refers to Section 8(b)(7). Thus, the Board has implicitly rejected the possible argument that the picketing is lawful because it is not for initial recognition. Section 8(b)(7) does not however forbid strikes, and, in Curtis Bros., 362 U.S. 274 the Supreme Court held that pressure to secure minority recognition is not unlawful under Section 8(b)(1)(A). Cases presenting strike issues should be submitted to Advice.

The memo after Deklewa says as much. The Board cannot mean what it is apparently saying.

The comment that the union cannot strike at the expiration of the agreement is at least an arguable issue, if it applies only to striking with respect to a new 8(f) agreement. But the broad statement that the union has no right to strike at the expiration of an 8(f') agreement is arrant nonsense. Certainly, at the expiration of the agreement, the employer can unilaterally change terms and conditions of employment, having no obligation to maintain the status quo at the expiration of the agreement. But there is no statutory authority to say that the employees are obliged to continue to work for those lesser terms and conditions, or that the employees are obliged under section 8(b)(7) not to picket for unfair labor practices that the employer may have committed. Even the contention that the union cannot picket to secure recognition may be challenged.

The second Deklewa rule provides: "Such agreements will not bar the processing of a valid petition filed pursuant to Section 9(c) and 9(e)." The union may file an RC petition during the term of the agreement or at the expiration of the agreement, and during the term of the agreement the employer is privileged to file an RM petition. The employer, according to the third Deklewa rule, is privileged to file an RM petition with respect to a single employer unit, even if the employer is party to a multiemployer unit. The practical question that parties face is whether or not the employer may waive his right to file an RM petition during the term of the agreement. The answer from the regional offices is that the employer can waive his right to file an RM petition by contracting away that right with the union, thus permitting some confidence in the stability of agreements.

B. Philosophical Premises Underlying Deklewa

At this point, it is important to raise certain philosophical questions. What was the Board attempting to do in this case? Deklewa is extraordinary because the Board is, in effect, announcing at length that it was

31. Collyer, supra note 26, at n.7 (quoted supra note 29).
32. Deklewa, 124 L.R.R.M. (BNA) at 1187.
33. Id. at 1194-95.
34. Id. at 1194 n.42.
35. Id.
36. I believe that unions should move in the direction of long-term agreements. There is no reason under Deklewa for a union to restrict itself to a three-year agreement, in lieu of a five- or seven-year agreement or whatever, because the contract bar rules no longer apply. Unions should also consider favoring agreements with partial reopeners and limited periods for employers to withdraw from multiemployer agreements. See, e.g., R.K. Burner Sheet Metal, Inc. v. Local 206, Sheet Metal Workers, No. 86-2111-R(btm), slip op. at 21-22 (S.D. Cal. July 1, 1987) (upholding provision of expiring agreement which required interest arbitration if parties did not agree on terms of new agreement). Further, unions should claim § 9(a) status for all pre-1959 relationships. NLRB General Counsel's Quarterly Report, 33 Daily Lab. Rep. (BNA) No. 216, at E-1 (Nov. 10, 1987).
unable to administer the *R.J. Smith* conversion doctrine—that the Board had been following the wrong policy for the last dozen or so years.

The Board's response to that conclusion is an attempt to deregulate, a goal which is consistent with a broad range of deregulatory activity that has occurred in the Reagan administration. The Board has sought to deregulate by making the contract enforceable during its term, but eliminating any possibility of litigation over recognition at the expiration of the contract. However, the Board has not effectively accomplished that purpose. It may be that the unions in the construction industry will file RC petitions with respect to the single employers who are party to multiemployer agreements. Indeed, a union would be well advised to seek to convert an 8(f) arrangement into a 9(a) relationship. Wherever its employees are on the job sites, the union should convert before the contracts expire. Construction unions may choose—and certainly the Board should have been able to predict this—to file what may amount to in excess of 100,000 RC petitions across the United States. Typically, the Board handles only a very few thousand petitions in any one year.

Perhaps the Board was being extremely cynical about the matter, believing that the unions would either get voluntary recognition or wither away, but certainly would not come back to the Board and file these thousands of petitions. Perhaps the Board really believes it has effectively deregulated. Of course, there is no assurance that it has. It may be that, indeed, the unions will file hundreds of thousands of petitions. And if you take the Board at its word that job-site by job-site petitions may be required, the numbers are in fact that high.

Even if the unions seek voluntary recognition from employers during the term of the contract, deregulation is an unlikely result. If they engage in active organizational activity, in an industry which is not used to the ordinary processes under section 9(a), it seems that any administrator could have contemplated vast numbers of unfair labor practices committed during the course of those organizational activities, which could lead to an enormous work load for the Board. So in that sense as well, the Board has not deregulated.

In fact, in one respect the Board did seek actively to regulate the unions without any support under the statute. Even the NLRB General Counsel, as noted above, blanched at endorsing the Board's proposition that unions had no right to picket at the expiration of these 8(f) agreements. As a result, an asymmetrical kind of deregulation exists. In the process, the *Deklewa* decision left open a long list of issues critical to the future of labor relations in the construction industry, among them:

1. Whether the duty to supply information, the duty to bargain about

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subjects not covered by the contract, and other rights commonly extended to collective bargaining agreements will be attached to 8(f) agreements if not expressly conferred?

2. Whether RM petitions will be entertained which seek to withdraw a single employer from a multiemployer unit during an 8(f) agreement?

3. What risks an employer faces if it repudiates an 8(f) agreement after a union loses an election but before all post-election proceedings are complete?

4. To what extent the Board will go to proscribe recognitional picketing and strikes upon expiration of 8(f) agreements?

5. Whether the Board will permit picketing to enforce 8(f) agreements during their term, or upon expiration of term with respect to accrued rights?

6. Whether the Board will treat consecutive 8(f) agreements between an employer and a union as a valid basis for claiming majority status as 9(a) relationships?

7. Whether the Board will liberalize application of eligibility criteria for elections and develop election rules “to facilitate employee free choice” and compensate for the added “dislocation” caused by this decision to an already transient industry?

The most basic open question after Deklewa, however, is whether the Board is rapidly making itself completely irrelevant with respect to an entire industry.

It is interesting to note that almost simultaneously with the issuance of this case by the Board, Robert Flanagan, associate professor of economics at the Graduate School of Business at Stanford, published a book with the Brookings Institute on the floodgates of litigation in labor/management relations, the problems (generally of an economic nature), and the solutions.38 In it, he recommended that the Board selectively deregulate in the area of labor/management relations. He suggested that the Board recede in the election area, relying on some of the research that had been done by Julius Getman.39 He also made the astonishing proposition that the Board perhaps could not deregulate in the area of bargaining rights, but that Congress itself ought to consider doing away with the duty to bargain under the National Labor Relations Act.40 Professor Flanagan speculated that the Board might not make use of the analyses that were being done because under section 4(c) of the

Act it is prohibited from retaining economists. Nevertheless, he also commented that it was clear that the Board could not act in the area of bargaining rights proper, because that was a congressional matter and was statutorily mandated.

One does not know whether those views were available to the Board prior to the book’s publication date. The idea of deregulating in the area of the duty to bargain has been debated in the academic community for some time. It appears that, in the construction industry, the Board has taken that idea and partially deregulated by doing away with the bargaining obligation that exists or that was thought to exist under the R.J. Smith case, and by adding substantial regulation at the other end by denying or purporting to deny unions the right to picket and strike at the expiration of those contracts (though the latter dicta will probably have no influence as an improper ruling, even according the Board’s own General Counsel).

II
DEVELOPMENTS ON INFORMATIONAL CAMPAIGNS

An interesting parallel to Deklewa is the seminal DeBartolo case. It is a watershed case which raises issues of the first amendment, of section 8(b)(4), and questions of the effectiveness of leafletting and other forms of publicity in the construction industry.

In 1980, in DeBartolo, the Board found that leafletting by a construction union at a shopping center that was directed at the owner of the shopping center and all of the shops in the shopping center was protected by the publicity proviso of section 8(b)(4) of the Act. It was one of the broadest such decisions under the publicity proviso, since it went beyond the owner in the construction industry and the direct contractor to all of the owners on the particular site at which the dispute occurred.

The case was reviewed by the Fourth Circuit, and the Board’s decision was sustained. The case was ultimately remanded to the Board by the Supreme Court. A new Board later found that the conduct was

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41. Id. at 112-13; 29 U.S.C. § 154(a) (1982).
42. R. FLANAGAN, supra note 38, at 112-13.
43. Collyer, supra note 26, at n.7 (quoted supra note 29).
44. Florida Gulf Coast Bldg. Trades v. NLRB (DeBartolo Corp.), 806 F.2d 1070 (11th Cir. 1986), cert. granted, 107 S. Ct. 3182 (1987) (prior history supra note 2). DeBartolo is not a bargaining issue case.
46. Id. The publicity proviso permits “publicity, other than picketing” to truthfully advise the public that “a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer.”
prohibited and was not protected by the publicity proviso.\textsuperscript{50} It was then reviewed by the Eleventh Circuit Court of Appeals.\textsuperscript{51}

The Eleventh Circuit Court of Appeals, the last decision in the matter, found that the Board could not have meant that this conduct was a violation of section 8(b)(4). It was peaceful, truthful, noncoercive publicity, and not picketing; therefore, it was protected under the National Labor Relations Act. If it was not protected, serious first amendment questions were raised.\textsuperscript{52}

\textit{DeBartolo} is a very significant decision because it would permit unions to carry their appeals beyond the direct owner and the direct employer in a construction dispute to financially interested parties—for example, banks and other lenders. In other words, it would take off most of the restrictions that currently exist under interpretations of the publicity proviso to section 8(b)(4).

A different conclusion, in part, was reached in the \textit{Boxhorn's Gun Club v. Local 494},\textsuperscript{53} a Seventh Circuit case in which picketing as well as leafletting was involved. On reconsideration, the Seventh Circuit receded from a broad prohibition of the noncoercive publicity that was engaged in by the union in that particular case.\textsuperscript{54} But, inasmuch as picketing was involved, the Seventh Circuit did not find that it was necessary to reach the issues that were reached in the \textit{DeBartolo} case.\textsuperscript{55}

If \textit{DeBartolo} continues to be the law,\textsuperscript{56} one can expect a substantial growth in the use of publicity, leafletting and other forms of publicity in the construction industry. It is interesting that the Board in \textit{DeBartolo} again sought to regulate conduct that was nonpicketing, truthful, and noncoercive under section 8(b)(4) of the Act, a serious attempt to regulate conduct in the construction industry.

\textbf{CONCLUSION}

In summary, both \textit{Boxhorn} and \textit{DeBartolo} are examples of the Board attempting to regulate an aspect of conduct in the construction industry. At the same time, the Eleventh Circuit is moving toward deregulation in the publicity area, and the Board in \textit{Deklewa} is moving toward deregulation in the area of recognitional rights at the expiration of the agreement.

It should be expected that many unions will move toward certifica-
tion during the term of collective bargaining agreements and at the expiration of collective bargaining agreements. Unions probably will not strike at the expiration of agreements. Rather, they will file RC petitions if they expect the employer to repudiate, because if they later strike, the strikers as well as the employees who are hired as strike replacements will be in the voting unit.

The Board itself says that it will attempt to develop procedures whereby construction unions can fairly participate in election procedures, like the Daniel Construction case,\textsuperscript{57} which allows for an expanded eligibility rule in the construction industry, in order to accommodate the needs of this itinerant industry. But if, in fact, the construction unions do seek to use the processes of the Act, the Board will not be equipped to handle the situation and will not deal with it. The parties will recede from utilization of the Board as a neutral agency for the resolution of disputes in labor/management affairs and the Board will take one more sure step in the direction of irrelevancy.

\textsuperscript{57} 133 N.L.R.B. 264 (1963).