In response to the decline in construction union membership and expanding market penetration of open shop construction, construction unions have employed job targeting as a means of regaining their market share. Formal job targeting arrangements provide for an increase in membership dues to establish a fund which is used to gap the difference between the targeted wage and regular union scale. As a result, the union contractor has lower costs but workers realize the full wage scale. The experience of the International Brotherhood of Electrical Workers (IBEW) working in cooperation with the National Electrical Contractors Association (NECA) demonstrates how job targeting programs can increase construction unions' market share at the expense of open shop contractors and contribute to an increase in construction union membership. However, because job targeting unions lack the resources to target the largest projects, the effects of job targeting have primarily been on small and mid-sized jobs. While job targeting has contributed to IBEW and other construction union membership, it has not had a substantial effect.

Opponents of job targeting have attacked these arrangements on several fronts. Job targeting arrangements on federally financed construction projects have been attacked under the anti-kickback provisions of the Copeland and Davis-Bacon Acts. Targeting funds were found to act as a rebate scheme which benefits contractors, not merely as union dues. As a result, unions may target federally funded jobs but cannot assess employees working on public projects for targeting. Job targeting programs have similarly been attacked on the state level in those jurisdictions with "Little Davis-Bacon" prevailing wage statutes. Although cases are pending in state courts, to date unions have enjoyed only limited success by arguing that dues are governed by federal labor policy which preempts the state laws. Because the core values of the NLRA are not threatened by state determina-
tions of what constitutes "wages," it is likely that future litigation will reach the merits of these cases. Challenges to job targeting on private construction projects have also been brought pursuant to anti-trust laws. A NECA job targeting program was alleged to have violated the Sherman Act and constitute a conspiracy to exclude open shop contractors from the local market. Although the district court granted summary judgment to NECA, finding that the program was exempt from antitrust scrutiny under labor exemptions, the case is currently on appeal and may be reversed. Future courts should reach a determination of what job targeting programs, if any, constitute an antitrust violation. Finally, job targeting may be subject to attack under as yet untested theories, including the provisions of section 302 of the NLRA. The legal analysis of job targeting programs is at a formative stage. As future cases are tried on the merits, the law will undoubtedly be clarified.

I. CONSTRUCTION UNION DECLINE AND POLICIES TO REGAIN JOBS .......................................................... 64
   A. Innovative Policies to Attempt to Regain Union Market Share ................................................... 65

II. DEVELOPMENT AND NATURE OF JOB TARGETING .......... 66
   A. Project Agreements and Informal Job Targeting ............. 67
   B. Development of Formal Job Targeting ....................... 68
   C. Pinpointing ............................................. 70
   D. Organization of Funded Job Targeting ....................... 71
   E. Job Targeting Administration and Results in the Portland Area .................................................... 71
   F. The Extent and General Impact of Job Targeting ............ 73

III. THE LEGAL ATTACK ON JOB TARGETING .................... 76
   A. Davis-Bacon Act Litigation ................................ 77
   B. State "Little Davis-Bacon" Acts .............................. 80
   C. Antitrust Litigation ...................................... 84
   D. The Path Not Taken—NLRA Section 302 ..................... 87

IV. CONCLUSION .................................................. 89

This article examines union action to gain jobs by subsidizing unionized contractors with funds deducted from workers' pay checks. The avowed purpose is to assist these contractors to compete successfully with nonunion (open shop) contractors, thereby to win bids for unionized construction contractors and jobs for union members, and to dominate the market for such work and jobs. The development of this job-winning technique is described, cases are analyzed, and legal countermeasures used by or potentially available to contractors are examined against the background of the decline of construction unions and the minority share of construction work now being performed by unionized contractors.
I
CONSTRUCTION UNION DECLINE AND POLICIES TO REGAIN JOBS

In 1973, the AFL-CIO building and construction unions enrolled 40 percent of the construction industry labor force as members;\(^1\) by 1994, this proportion was only 18.8 percent.\(^2\) Meanwhile, the construction labor force grew by approximately 1.5 million from 1980 to 1995.\(^3\) In the first nationwide study of the market penetration of open shop construction, it was estimated that in 1975, “it appears likely that the open-shop builders are in the majority and probably control 50 to 60 percent of the total work.”\(^4\) A second nationwide study, made nine years later, concluded:

that the dollar volume of construction produced by unionized craftsmen is not likely to exceed 30 percent of the total. . . . During the years since 1970, open shop construction has increased in the sectors and regions in which it has historically dominated. At the same time, sectors and regions which traditionally have been union strongholds have been significantly penetrated by the open shop.\(^5\)

No study of this nature has been published since 1984, but based upon regular monitoring of the field, the open shop share of the construction dollar has probably stabilized at 70-80 percent of the total market.\(^6\)

---


3. Bureau of Labor Statistics, U.S. Dep't of Labor, Employed Persons by Industry and Occupation, 27 Employment and Earnings No. 7, 56, tbl. A-24 (1980) (indicating total construction employment of 6.4 million); Bureau of Labor Statistics, U.S. Dep't of Labor, Employed Persons by Industry and Occupation, 42 Employment and Earnings No. 7, 32, tbl. A-19 (1995) (indicating total construction employment of 7.9 million). Data on the construction labor force are published monthly in Employment and Earnings. This growth has been uneven and varied by sectors of the industry. Hard hit by the recession of the early 1990s, construction employment, after increasing by almost one million workers in the 1970's, lost nearly one-half of these gains by 1982 but has since recovered. 1 Employment, Hours and Earnings, United States, 1909-90 No. 5, 38 (1991). The increased employment of the 1990's, however, has been heavily in homebuilding, which is about 90 percent open shop nationally. Northrup, Open Shop, supra note 1, at 65. The urban, high-rise commercial building sector remains in a serious slump because of high vacancy rates resulting from overbuilding during the 1980s. Id. at 157. Since this latter sector is a cornerstone of construction union strength, its continued slump has contributed to union decline in recent years. Id. at 157-58, 161-63, 189.


6. These estimates are based upon regular monitoring of association, contractor, and union contacts and publications. For case studies in one area in which union construction virtually collapsed, and in another in which union control has largely been maintained, see Herbert R. Northrup, Arizona Construction Labor: A Case Study of Union Decline, 11 J. Lab. Res. 161 (1990) and Herbert R. Northrup, The Status and Future of Unionized Construction in New Jersey, 4 N.J. Building Contractor 9 (1991).
A. Innovative Policies to Attempt to Regain Union Market Share

In response to this decline, construction unions and unionized contractors have developed economic and political initiatives to bolster or protect their memberships and businesses. Many contractors have either broken with unions and now operate open shop, or have developed or purchased an open shop company and now operate "doublebreasted," i.e., they have two separate firms: one union and the other open shop. This permits them to bid on jobs regardless of the union orientation in a given sector or area.\footnote{See Herbert R. Northrup, Construction Doublebreasted Operations and Pre-Hire Agreements: Assessing the Issues, 10 J. LAB. RES. 215, 219-22 (1989) [hereinafter Northrup, Assessing the Issues]; Herbert R. Northrup, Doublebreasted Operations and the Decline of Construction Unionism, 16 J. LAB. RES. 379, 380 (1995) [hereinafter Northrup, Construction Unionism].}

Unions and contractors have also negotiated agreements removing or modifying numerous restraints to productivity and flexibility of operations, although many such restraints remain in agreements in some localities.\footnote{The Construction Labor Research Council (CLRC), the research institute for unionized contractors, has placed "terms and conditions" costs in union construction for 1993 at $2.18 per hour. It noted that although the percentage costs of contract terms and conditions declined in the 1980s, absolute costs have risen as the industry wage and fringe rate has increased. See Construction Labor Research Council, Costs of Terms and Conditions in Collective Bargaining Agreements 2 (Mar. 1994). See also Associated General Contractors Basic Trades Committee, Construction Labor Research Council, Cost Reducing Modifications to Construction Collective Bargaining Agreements (1992). A preliminary result of another CLRC study has found a marked improvement in local union restrictive practices and a reduction in jurisdictional disputes. See Study Reports Improvement in Local Labor Practices, 40 Construction Lab. Rep. (BNA) 766 (Oct. 12, 1994).}

Union wage and benefit increases have declined dramatically since 1980. In 1994, such increases averaged 2.7 percent for the first year and 3.0 percent for the second year in multi-year agreements\footnote{See Construction Labor Research Council, 1995 Construction Labor Trends and Outlook 1 (Feb. 1995); Construction Labor Research Council, Wage and Benefit Settlements in Construction 1994 1 (Dec. 1994). Wage and benefits settlements during the 1960s and 1970s can be found in annual publications of the Bureau of Labor Statistics entitled Wage and Benefits: Building Trades. This series was discontinued after 1981.} whereas they often exceeded 10 percent annually, 1965-1980.\footnote{See, e.g., Northrup, Open Shop, supra note 1, at 322 fig. VIII-1 (indicating an 11 percent increase in wage plus benefit rate in 1980).}

The construction unions, however, have determined that economic actions are insufficient to regain their market share. They have, therefore, embarked upon both political and direct action programs. Politically, construction unions have been pushing several proposed laws that would enhance their power.\footnote{A proposal by the construction unions would amend the Employee Retirement Income Security Act of 1974 (ERISA) to provide that it will not preempt state laws requiring payment of prevailing wages and benefits on public projects, regulating apprenticeship and training, or providing for contributions of multi-employer plan contributions from open shop contractors. Its purpose is to reverse court decisions which have prevented states from denying open shop contractors accreditation of training programs, enacting prevailing wage laws, and requiring contributions of open shop companies to union welfare and pension plans. See Operating Eng'rs & Participating Employers Pre-Apprentice, Apprentice, & Journeymen Affirmative Action Fund v. Weiss Bros. Constr. Co., 270 Cal. Rptr. 786 (Cal. Ct. App. 1990).}

They are also pressuring local governments to require
all-union agreements that would preclude the use of open shop contractors on major projects.¹²

The direct action union programs include "salting,"—having union members or organizers take jobs with open shop contractors in order to organize the employees and to disrupt their operations;¹³ utilizing environmental permit processes to delay or threaten to delay, the issuance of permits, and thereby induce users or financiers of construction to award contracts to unionized contractors;¹⁴ and job targeting, the subject of this article.

II
DEVELOPMENT AND NATURE OF JOB TARGETING

Job targeting can take several forms. Some such efforts have existed for many years. Earlier versions did not involve the transfer of funds from unions or job funds to the contractor; some have reduced wages for a project, or waived various contractual provisions. Current union tactics, however, provide for more sophisticated arrangements.


A. Project Agreements and Informal Job Targeting

A limited form of job targeting, project agreements, has existed for many years. Under such arrangements, a separate collective agreement is negotiated which applies only to the project at hand and which establishes project terms separate from other local contracts. Such agreements are more likely to provide less restrictive rules and conditions than to reduce the area's standard wage scale, but a lower wage scale is not unknown. In areas where construction unions are weak, project agreements often have more drastic wage concessions. Project agreements, unlike new forms of job targeting, are typically negotiated for very large projects.\(^1\)

A significant project agreement is the National Construction Stabilization Agreement between approximately ten large, unionized contractors, the Building and Construction Trades Department, AFL-CIO, and approximately twelve building trade unions. It lays down basic conditions of work which may be more advantageous to contractors than such conditions in many local agreements, but provides for the payment of locally-negotiated wages and benefits.\(^6\)

Particularly in times of recession, unions may agree to waive the contractual wage scale and work for less; they may also agree to forego contributions to benefit plans in order to save or to win jobs. Such agreements may be formal or informal, but the object is the same: to increase the competitiveness of unionized contractors. Informal arrangements, of course, are more likely to occur on small jobs involving small contractors and a small work force. During the severe recession of the early 1980s, many such arrangements were found.\(^7\) Union officials often look the other way when these arrangements violate the contract, because they keep people working and preserve the union scale. When business improves and employment expands, the informal arrangements are fought by the union and many disappear.\(^8\)

\(^{15}\) See Northrup, Open Shop, supra note 1, at 228-30. Information on project agreements is based upon Dr. Northrup's field research in the industry which has extended over many years. In the course of this work, a number of project agreements have been collected, and many others examined. In all cases, respondents to both personal and telephone interviews have demanded anonymity as a condition of cooperation.

\(^{16}\) National Construction Stabilization Agreement, Operational Procedures for the Joint Administrative Committee (November 1991) (on file with author).

\(^{17}\) See Northrup, Open Shop, supra note 1, at 348-49. During the field research for the Open Shop Construction Revisited book, Dr. Northrup examined many such arrangements. Usually no names were mentioned, but both contractors and union officials freely admitted that these arrangements existed. The union officials stated that by keeping things "informal," the union scale was more likely to be maintained for the day when business conditions improved.

\(^{18}\) Id.
B. Development of Formal Job Targeting

The current form of funded job targeting appears to have been initiated during the early 1980s. Several construction unions have utilized it. For example, the Sheet Metal Workers International Association (SMWIA), in cooperation with the Sheet Metal and Air Conditioning Contractors National Association (SMACNA), has such a program. Annual surveys by SMACNA of its chapters found that job targeting was "available to combat non-union competition" in 28.8 percent of the chapters reporting in 1991, and this increased to 57.4 percent of those reporting in 1994.

The International Brotherhood of Electrical Workers (IBEW), in cooperation with the National Electrical Contractors Association (NECA), has probably been the most active practitioner of job targeting. For this reason, and because key litigation, as discussed in Part III below, has provided considerable material for analyzing job targeting, the authors concentrate on the IBEW experience.

The IBEW's venture into job targeting apparently began in the Kansas City area, a traditionally union area in which the open shop was making some gains, and then developed in other jurisdictions. Targeting has had the full support of the national officials of IBEW and NECA as part of a "market recovery program" which they urged their local affiliates to develop. The IBEW established a "Special Products Department" to encourage organization, and this Department has been in the forefront both of "salting" and job targeting tactics.

Prior to April 1995, the IBEW national officers encouraged and supported job targeting as part of a strong organizing program aimed at securing a monopoly of the local labor markets. In April 1995, however, the IBEW president issued a new policy in which targeting was discouraged, because it was found to depress wages, particularly on government-funded
construction. The emphasis was shifted entirely to organizing, with salting as a major tactic.\(^{27}\) As discussed in Part III below, targeting has been found to be illegal on federally funded projects and caused California authorities to lower the "prevailing" wages on state funded ones.

Nevertheless, local unions continue to utilize this tactic. According to Michael Lucas, executive assistant to IBEW's president, although no more job targeting programs will be created, and the IBEW's "stated intention was to do it only as long as we had to. . . . [I]t's not the end of targeting."\(^{28}\) Moreover, local unions which have utilized targeting have not indicated that they will cease doing so, and some are clearly continuing to target. For example, local union reports issued six months or more after the issuance of the IBEW's new organizing policy described targeting actions.\(^{29}\)

NECA is a full partner in job targeting programs. In 1987, NECA announced a policy which declared that it would no longer serve open shop contractors and in effect invited such contractors to leave the organization.\(^{30}\) Henceforth, NECA stated that labor relations would be its most important function, that it would seek even closer ties with the IBEW, and that it would serve only signatory (unionized) contractors.\(^{31}\) Although the NECA chapters are supposedly independent corporations, the national organization has considerable power over them. For example, it forced the Puget Sound (Seattle) chapter to divest its open shop manpower and hiring hall recruiting program.\(^{32}\) Today, NECA chapters play a leading administrative role in job targeting, and cooperate fully with IBEW local unions for this purpose.

Typically, job targeting is initiated by an agreement for a "market recovery program" between the local union and the local association chapter. For example, the 1985-86 agreement between Local Union No. 48 and the Oregon-Columbia Chapter, NECA, which covers the Portland, Oregon, region, was amended in April 1985 as follows:

---

27. INTERNATIONAL OFFICE, INTERNATIONAL BHD. OF ELEC. WORKERS, I. O. Policy on Inside Construction Organizing 8-9 (April 18, 1995) [hereinafter INSIDE CONSTRUCTION ORGANIZING].


30. NATIONAL ELEC. CONTRACTORS Ass'N, LONG RANGE PLAN REPORT - GOALS AND OBJECTIVES (Mar. 2, 1987) [hereinafter NECA REPORT]. Speaking to the 1991 IBEW Convention, the president of NECA stated: "Most recently, we have committed the resources from both of our organizations [IBEW and NECA], nationally and locally, to a program to tell the buyers of construction services that their best choice is to use NECA electrical contractors who employ IBEW electricians." See 1991 PROC. 34TH CONV. IBEW, supra note 26, at 406.

31. NECA REPORT, supra note 30, at 2.

32. The Puget Sound chapter filed a charge with the National Labor Relations Board (NLRB) claiming that the national NECA and the local IBEW union violated section 8(e) of the National Labor Relations Act (NLRA). 29 U.S.C.A. 158(e) (West 1978). An administrative law judge found in the chapter's favor, but the NLRB reversed, stating it was "particularly reluctant" to enter this "unique statutory treatment." International Bhd. of Elec. Workers, Local 46 and Puget Sound Chapter, Nat'l Elec. Contractors Ass'n, 303 N.L.R.B. 48 (1991).
Where the union deems it necessary to protect the jurisdiction of the . . . [IBEW], the union will, prior to the bidding process or letting of a contract for a particular project, consider a modification of the wages as outlined in the current collective bargaining agreement. Should the union consent to a modification of the labor agreement for a particular project, the modification shall apply only to the project in question until its completion . . . .

C. Pinpointing

Many of the earlier job targeting programs were established under a procedure that has since become known as a "pinpointing" plan. It provided that unionized contractors wishing to bid on a job for which open shop contractors were also bidding, would notify the local NECA chapter, which passed the information to the local IBEW officials. If the local IBEW leadership determined that concessions would be appropriate, it notified its NECA counterpart of what reductions would be in order, and in turn, the chapter would notify the area's unionized contractors. The unionized contractors would then bid the job on the basis of a lower wage scale or other concessions granted by the union. Thus, pinpointing is essentially a project agreement which provides for less than standard union wage scales.

The idea of working for less than scale has never been very appealing to the union membership generally. This is especially true in a local union, where some members would be working at full scale and others for various lesser amounts, depending upon what the union business agents felt was necessary to assist in winning bids. Unlike a traditional major project agreement, which could employ the bulk of a local union membership over a long period, pinpointed jobs tended to be much smaller projects employing a much fewer number for shorter periods. Assignment of work to the pinpointed jobs rather than to the full scale jobs, therefore, became an internal political problem to the local union wherever it was adopted. As a

36. Id.
37. Actually, neither pinpointing nor funded job targeting as now practiced are utilized for very large jobs, because the local unions cannot raise enough funding for major construction. The significance of job targeting from a labor market viewpoint is that it is utilized mainly in smaller commercial jobs which in recent years have been heavily open shop.
38. See. e.g., Deposition of Edward Barnes, Business Agent of Local Union 48, IBEW at 111, Phoenix Electric (91-436-JE) (on file with author) [hereinafter Barnes Deposition]; Deposition of Timothy Gauthier, Secretary-Manager, Oregon-Columbia Chapter, NECA at 33, Phoenix Electric (91-436-JE) (on file with author). Both testify about the problems caused by having some union employees working for lesser amounts than others under their pinpointing plan which preceded the funding plan.
result, pinpointing soon vanished from the scene.\textsuperscript{39} It gave way to the funded job targeting plan.

\textbf{D. Organization of Funded Job Targeting}

The typical job targeting program now provides for a local agreement between the IBEW local union and the local chapter of NECA under which dues are increased, sometimes after contracts were modified and wages increased, to provide for the establishment of a fund which is used to make up the difference between the targeted wage and the regular union scale. If, for example, a 10 percent wage concession was approved by the local union for a targeted project, and the unionized contractor was awarded the job, union members would still receive the full wage scale because the 10 percent wage reduction would be made up from the targeting fund.

The unionized contractor would thus have lower costs, but the workers would not have lower wages. As the Regional Director of NECA explained: "the difference between the pinpoint program and the MRP [market recovery program for targeting] is that 'where you use pinpointing, the members of the local union receive various wage rates. With the funded job targeting program, the [union employees] all receive the same wage.'\textsuperscript{40}

Initially in several localities, the union paid the difference in wages directly to the employees working on targeted jobs.\textsuperscript{41} This made the union responsible for fringe benefits, workers' compensation, and other supplements associated with wages and benefits, plus "an enormous amount of paperwork for the union, as it had to keep track of each hour worked by each member on a targeted job and then issue checks to each as the work proceeded."\textsuperscript{42}

As a result of this experience, the procedure has been changed. Now on targeted jobs, the common approach is for the union to make a grant directly to the contractor who wins the job. All wages are thus paid directly by the contractor who has been subsidized. As discussed in Part III, this approach has generated considerable litigation which is still active.

\textbf{E. Job Targeting Administration and Results in the Portland Area}

Job targeting is financed by assessing a percentage of wages, which varies among local unions. It is usually between 2 and 5 percent; it is 3.5 percent in the Local No. 48-Portland area NECA program.\textsuperscript{43} The assess-

\textsuperscript{39} Telephone calls around the country in mid-1994 failed to find any pinpointing plans still extant.

\textsuperscript{40} Plaintiffs' Objections to Finding and Recommendations of the Magistrate, at 13, Phoenix Electric (91-436-JE) [hereinafter Plaintiffs' Objections].

\textsuperscript{41} Metzgar, supra note 22, at 53.

\textsuperscript{42} Id.

\textsuperscript{43} Barnes Deposition, supra note 38, at 112-15, 142-45.
ment is checked off by the contractor and paid to the union. The union puts the money in a special fund and has complete control over its disposition, but is likely to confer with the executive of the contractor association before determining the amount to be dispersed in a given situation.

IBEW Local No. 48 has developed a form for contractors to use when they request a grant from this fund. It provides for the project name and address, the amount of the grant requested, additional contractors involved, and the names of the prospective open shop competitor bidders. The form is then sent to the NECA Portland chapter, which must discuss it with Local 48’s business manager and then return it to the IBEW local before any funding is paid out. A decision is then made and approved by the business agent as to the amount of grant, if any. NECA is told of the IBEW action and makes the information available to all signatory contractors. If a signatory contractor wins the bid, the grant is paid directly to his company. In turn, the contractor makes weekly reports to the IBEW local concerning the man hours utilized, wages paid, and other pertinent information until the job is completed.

Job targeting is popular with unionized contractors generally, and by all reports has been successful in winning jobs for them and work for union members. In the Portland area, unionized contractors’ market share, which stood at about 90 percent in 1975, had declined to less than 50 percent by 1985. Following the introduction of job targeting, the unionized share rose to over 80 percent by 1992.

Several of the largest open shop electrical contractors, including Tigard, the original lead plaintiff against NECA and the IBEW in Phoenix Electric, now on appeal to the Ninth Circuit Court of Appeals, have become signatory contractors because of a loss of work. Other Portland area

---

44. Id.
45. Id.
46. Exhibits to Plaintiff ABC’s Motion for Partial Summary Judgment at 119, Phoenix Electric (91-436-JE) (Market recovery Program Form, Plaintiffs’ Exhibit 80).
47. Barnes Deposition, supra note 38, at 144; Exhibits to Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment on Labor Exemption Issue at 50, Phoenix Electric (91-436-JE) (Market Recovery Program Local Union #48 Letter) [hereinafter Exhibits on Labor Exemption Issue].
49. Id.
50. Id. at 145; Exhibits on Labor Exemption Issue, supra note 47, at 50-51.
52. These are Local 48’s data based upon compilations that it regularly ran and were produced in the Phoenix Electric case. See, e.g., Plaintiffs’ Exhibit A at 5, 92, 70-72, and 142-47; E at 175-76, 205-18; and J at 335-45, i. 376.
53. Id.
54. 861 F. Supp. 1498. The original case, when filed, listed Tigard Electric as the first named plaintiff.
55. Phoenix Electric, 861 F. Supp. 1498, appeal docketed, No. 94-35522 (9th Cir.).
open shop contractors testified that they did not bid on a number of jobs or lost many others because of the targeting program.56

The secretary of the IBEW has declared that:
Local 48 and the Portland NECA Chapter provide an excellent example of what can be accomplished by cooperation. The spirit of cooperation there has allowed the IBEW and NECA to recapture and dominate the electrical industry. . . . [T]here is no end to what could be achieved if IBEW locals and NECA chapters nationwide showed the same spirit of cooperation.57

F. The Extent and General Impact of Job Targeting

In other parts of the country, there is considerable evidence that job targeting has increased the unionized sector's share of work in the electrical contracting industry. As early as 1992, the then president of the Associated Builders and Contractors (ABC), the largest open shop contractors association (which includes a substantial membership of electrical contractors), and which is, of course, very opposed to job targeting, stated that the effect of job targeting programs are being felt by non-union builders across the country: "It's rampant, it's spreading, and it is no longer the tool of one or two unions. We are receiving reports that virtually every [building trades] union is engaged in a kickback scheme."58 The Associated General Contractors (AGC), whose membership is about equally divided between unionized and open shop contractors, has likewise adopted a policy opposing job targeting.59

Job targeting among the IBEW local unions and NECA local chapters is regularly reported in the monthly IBEW JOURNAL and in labor relations and business reports. The WALL STREET JOURNAL carried an article showing the success of the IBEW and other union plans.60 The Daily Labor Report (BNA) has noted the inclusion of targeting arrangements in new contracts.61 Cockshaw reported after a telephone survey that the IBEW "is now winning jobs in . . . such 'merit shop' (open shop) bastions as Oklahoma, Mississippi, Georgia and Maine."62 Local Union No. 569, San Diego, announced that its program "had funded 43 jobs, generating more

56. See generally Affidavit of James A. Hite, Phoenix Electric (91-436-JE); Affidavit of Steven D. Deacon, Phoenix Electric (91-436-JE); Deposition of William Wallace Mehrens, Phoenix Electric (91-436-JE); Deposition of Frank Vandeventer, Phoenix Electric (91-436-JE); Deposition of David Myers, Phoenix Electric (91-436-JE).
57. Focus on Cooperation, IBEW 1, Jan.-Feb. 1989, at 8.
62. Cockshaw, supra note 51, at 1.
than 127,223 journeyman... man-hours." Similar successes have been reported by local unions in Madison, Wisconsin, San Jose, California, and Minneapolis, Minnesota, among others. For Detroit, the IBEW JOURNAL carried a picture of the business agent of Local Union No. 58 presenting its first targeting check to a contractor. Even very large electrical contractors like Shambaugh & Son, Inc., located in Fort Wayne, Indiana, report that "union job-targeting programs allowing the relaxation of some work rules and partial wage subsidies help the firm compete." It is apparent from these reports that the utilization of job targeting has been widespread and often successful.

Where job targeting exists, it can be advantageous to unionized contractors and unions even if the subsidized unionized contractors fail to win jobs. Thus IBEW Local No. 1253, Augusta, Maine, reported:

The open shops are paying close attention to these [targeted] jobs being lost, most notably in the Bangor area, and are lowering their bids and profit margins frantically to win their share of bids. Even when we are unsuccessful in winning a targeted job, there is a payoff in the fact that the nonunion takes the job at bare-bones prices.

As already noted, evidence was presented in the Phoenix Electric case that job targeting has resulted in fewer bids by open shop contractors and that where such bids are absent, and targeting is not utilized, bid prices tend to be substantially higher than where any open shop electrical contractor bids. Additionally, as already noted, several open shop contractors have been forced to sign union agreements to remain in business, and others have gone out of business.

A minus for the job targeting union is that it may have a divisive effect on a local in which "travelers" (union members from a different local union) are referred for jobs because of full employment of the home union members. This occurred in IBEW Local Union 357, Nevada, in which 12 travelers refused to pay a 2 percent targeting assessment on the grounds that the assessment was illegal, and were sued by the local. The Court of

---

70. Plaintiffs' Objections, supra note 40, at 6-7.
71. Id. at 7-8.
72. International Bhd. of Elec. Workers v. Brock, 68 F.3d 1194, 1196 (9th Cir. 1995). The nature of the Davis-Bacon Act provides for the setting of "prevailing wages" on government funded jobs. In Building & Constr. Trades Dep't v. Reich, 40 F.3d 1275 (D.C. Cir. 1994), job targeting for Davis-Bacon covered jobs was declared illegal. See infra Part III.
Appeals for the Ninth Circuit found for the travelers because they were working on jobs covered by the Davis-Bacon prevailing wage law.\textsuperscript{73}

The impact on IBEW membership overall is difficult to ascertain. Formerly, NECA produced the best yearly data nationwide and by state concerning the union/nonunion division of work in a single craft. In 1972, the first year in which the NECA data were published, 37 percent of the 33,189 inside electrical employers and 55 percent of the 327,411 employees in this trade were governed by IBEW contracts.\textsuperscript{74} By 1989, the last year for which these data were published, only 15 percent of the 58,644 employers and 29 percent of the 542,597 employees were so situated.\textsuperscript{75}

No such data have been published since the 1989 data were released.\textsuperscript{76} The IBEW secretary reported to the 1991 convention that membership had declined from a little over 1 million to approximately 900,000 between 1986 and 1991, but these data include IBEW membership in manufacturing, utilities, and railroads, as well as in construction.\textsuperscript{77} In mid-1994, the IBEW secretary announced that the union’s “Construction Branch membership numbers are beginning to improve. Losses of... membership have slowed, almost to a stop.”\textsuperscript{78} During the period 1991-1993, nearly all AFL-CIO unions, including construction unions, suffered membership losses according to the per capita payments to the AFL-CIO.\textsuperscript{79}

These data are somewhat contradicted by a new survey for 1989-1992 made by NECA.\textsuperscript{80} This report revises the methodology of the previous annual reports, eliminates all white-collar occupations from its survey, and thereby raises its alleged market share for employers from 15 percent to 36 percent in 1989, which declined to 34 percent in 1992; and for employees, from 29 percent to 38 percent in 1989, which grew to 50 percent in 1992.\textsuperscript{81} It appears likely also from the data and the observations just quoted from publications and officials that much of homebuilding and small commercial work, which is overwhelmingly done open shop, is not included in these

\textsuperscript{73} Brock, 1995 WL 613624, at *32.

\textsuperscript{74} IBEW and Other Inside Electrical Employers and Employees United States, 1972 - 1989, in NECA CHArTER ALERT (National Elec. Contractors Ass’n, Bethesda, Md.) June 12, 1991.

\textsuperscript{75} Id.

\textsuperscript{76} Why NECA ceased publishing this data is not known, but the suspicion of the authors is that the continued decline was embarrassing to the IBEW, as well as to NECA, and that its market recovery programs have not been successful enough to stem the tide. See infra notes 77-78 for evidence to that effect.


\textsuperscript{78} Building a Better Life for the IBEW Family, IBEW J., July 1994, at 2.


\textsuperscript{81} Id.
revised surveys. Unfortunately, no pre-targeting comparisons can be made because of the incompatibility of the former and present surveys.

Any idea that job targeting or other programs had made a major impact on IBEW's control of the market was shattered by President J.J. Barry in his policy statement of April 18, 1995, in which he declared that the national union's support of job targeting would cease.\(^8\) He also noted that the IBEW market share stood at 30 percent.\(^83\) Moreover, AFL-CIO statistics on paid membership of affiliates, issued in October 1995, showed that the IBEW had lost 31,000 members between 1993 and 1995.\(^84\)

Job targeting and salting, of which the IBEW is also a major practitioner, have no doubt affected membership trends, but it should be emphasized that job targeting affects only the small and mid-sized jobs. The job targeting local unions do not have the funds to target multimillion dollar projects and, therefore job targeting does not affect large numbers of workers.\(^85\) On the other hand, job targeting has been effective mainly in the commercial sector of construction in which the open shop has made the greatest gains.\(^86\) There is no question that this has impacted the nonunion sector adversely. President Barry, however, noted that "the commercial/retail construction market . . . is presently dominated by the merit [open] shop."\(^87\)

Meanwhile, membership in all construction trades is being hurt by the continued depression in high-rise center city office buildings, a major source of union jobs historically.\(^88\) It would be fair to conclude, therefore, that job targeting has had a positive impact on IBEW and other construction union membership, but the extent of any gains is unlikely to have been substantial.

### III

**The Legal Attack on Job Targeting**

As one might expect, opponents of job targeting have mounted a number of legal attacks on the system. These challenges have been pursued in three distinct situations: (a) on federally-subsidized projects subject to the Davis-Bacon Act; (b) on projects governed by state "Little Davis-Bacon" laws; and (c) on purely private construction projects. Cases in these

\(^{82}\) See *Inside Construction Organizing*, supra note 27, at 8-9.

\(^{83}\) Id. at 4.

\(^{84}\) *AFL-CIO Statistics on Paid Membership of Union Affiliates Prepared for Federation's 21st Constitutional Convention*, Daily Lab. Rep. (BNA) No. 197, at E-4 (Oct. 12, 1995). The extent to which these IBEW membership losses were in industries other than construction is not known.

\(^{85}\) See supra note 37.

\(^{86}\) See *Northrup, Open Shop*, supra note 1, at 65-96.

\(^{87}\) *Inside Construction Organizing*, supra note 27, at 10.

\(^{88}\) See *Northrup, Open Shop*, supra note 1, at 188.
three groups are discussed below, followed by as-yet untried avenues of litigation which may be tested in the future.

A. Davis-Bacon Act Litigation

The Davis-Bacon Act of 1931 fixed wage rates and a variety of related terms of employment on federally financed construction projects. The original Act predated the New Deal and was based on laws adopted by a number of state legislatures before the Depression. The political impetus behind the original Act is somewhat unclear. Like many local labor laws, before and since, it may have been aimed at protecting local construction labor forces against competition from minorities and other low-wage outsiders. Consistent with the caution of the Hoover years, however, the original 1931 Act was relatively limited and toothless.

After the election of Franklin Roosevelt in 1932, the federal government sought to aggressively counter wage deflation. The New Deal economic response to the Depression was based on the precept that, in times of recession, the government should use deficit spending to put cash into the hands of consumers. Consumers would then purchase goods, thus increasing demand, raising prices and stimulating production, which would in turn generate more wage income. To this end, the federal government embarked on a number of public works and welfare programs. These included a wave of public construction projects designed to put more cash into the pockets of construction workers.

Clearly, this program would not be effective if contractors were able to require employees to kick back their wages to the employer. To avoid this, as well as to remedy an obvious injustice, Congress in 1934 passed the Copeland Anti-Kickback Act (Copeland). Copeland is a criminal provision which prohibits a federal contractor from requiring employees to kick back wages. The Davis-Bacon amendments of the following year took the principle a step farther and put the Act in its modern form. Copeland combated deflation by prohibiting evasion of federal wage supports. Davis-Bacon now acts by specifying, in advance, the wage level that would be supported. Under Davis-Bacon, contractors are required to pay the “pre-

---

91. Id. at 28.
94. Id.
95. See 49 Stat. 1011 (1935).
vailing wage” in a given locality.98 The rationale here may have been that, since part of the ultimate objective was to raise incomes, the price paid for labor on public works should not inadvertently lower the local wage scale by bidding it down below existing market levels.

In addition to fixing the price of labor, Davis-Bacon also broadened the protections provided by the Copeland Act, by requiring the payment of specified wages “without subsequent deduction or rebate on any account.”99 This is clearly much more expansive language than Copeland, which addresses only reductions by “force, intimidation or threat.”100 The Department of Labor’s regulations accurately reflect this expansiveness.101 The regulations prohibit all deductions which could benefit the contractor in any way102 and specifically permit deductions only for regular union initiation fees and dues, exclusive of fines and special assessments.103

In 1988, the ABC challenged job targeting under the anti-kickback provisions of the Copeland and Davis-Bacon Acts by way of a request for a ruling from the Administrator of the Wage and Hour Division of the Department of Labor.104 ABC charged that the funds collected by the union and paid to contractors for use in the job targeting program were kickbacks which violated the Copeland Act.105 The Administrator rejected this argument, but did find that the union deductions from Davis-Bacon wages violated the prevailing wage requirements of the Act,106 as well as the requirements of the Department of Labor’s regulations accompanying Davis-Bacon.107

The union appealed the ruling to the Wage Appeal Board,108 arguing that the job targeting deductions were permissible under 29 C.F.R. section 3.5(i) as union dues. The Board, however, upheld the decision of the Administrator, finding the deductions more akin to special assessments specifically prohibited by the regulations than to dues allowed by section 3.5(i).109 Further, although no court had directly addressed the question under Davis-Bacon, the Board considered and applied the Supreme Court’s understand-

98. Id. Not surprisingly, the “prevailing” wage, as determined by the Department of Labor, frequently turned out to be the union scale, especially prior to the reforms made in Davis-Bacon administration during the 1980s.
100. 18 U.S.C.A. § 874.
102. 29 C.F.R. § 3.6(a) (1994).
103. 29 C.F.R. § 3.5. (1994).
104. A discussion of the background of this action can be found in the Court of Appeals opinion, Building & Constr. Trades Dep’t v. Reich, 40 F.3d 1275, 1277-79 (D.C. Cir. 1994). See also International Bhd. of Elec. Workers v. Brock, 1995 WL 613624 (9th Cir. Oct. 20, 1995).
105. Reich, 40 F.3d at 1277-78.
109. Id.
ing of "union dues" as explained in *Communications Workers of America v. Beck.*

The union then sought review in federal district court, and, most recently, to the District of Columbia Court of Appeals. The battle lines have remained relatively static, and the Department's position has been affirmed against attacks from both the unions and ABC at each step. Thus, as matters currently stand, the unions may target federally funded jobs. They may not, however, assess employees working on public projects for targeting.

More recently, the Ninth Circuit has endorsed the same view in *International Brotherhood of Electrical Workers, Local 357 v. Brock.* The court held broadly that a subsequent deduction or rebate, even if paid directly or "voluntarily" by the employee to the targeting fund, is impermissible under the Davis-Bacon Act. Like the D.C. Circuit, the Ninth Circuit also held that these payments cannot be characterized as union dues. A precise definition of "union dues" is lacking in both opinions; however, both Circuits appear to believe that union dues are assessments which are regular, uniform, and used for traditional union services and administration, i.e. the same line drawn by the Supreme Court in *Beck.*

Although this resolution may appear to be only a minor impediment to job targeting, it may have considerable practical significance because it creates difficult political problems for the unions. First, targeting is structured precisely to prevent any wage differential between targeted and scale jobs. By prohibiting targeting deductions on Davis-Bacon projects, the Court of Appeals decisions reimpose a wage differential which cannot be eliminated. Second, the "prevailing" wage, as determined by the Department, is often a very close approximation to the union scale. Precisely because of open shop competition, actual wage and benefit packages in the private sector are frequently below scale, in practice if not in theory. Thus, union members working on Davis-Bacon jobs may already receive a higher rate than many members working on private sector projects. The privately employed members are sure to be somewhat skeptical of a proposal that they give up part

110. 487 U.S. 735 (1988). In *Beck,* the Court held that dues allowable under section 8(a)(3) of the NLRA, 29 U.S.C.A. § 158(a) (West 1978), were limited to assessments used to "perform . . . the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues," (quoting Ellis v. Railway Clerks, 466 U.S. 435, 448 (1984)), such as collective bargaining, contract administration, and grievance adjustment.


113. *See supra* notes 104-112 and accompanying text.

114. 68 F.3d 1194 (9th Cir. 1995).

115. *Id.*

116. *See supra* note 98.
of their wages to subsidize a group which is already receiving a higher rate and which does not itself contribute to the subsidy fund.

B. State "Little Davis-Bacon" Acts

Thirty-three states have enacted "Little Davis-Bacon" prevailing wage statutes which have not been repealed. Unlike the federal scheme, the various state statutes seem to be based less on a coherent economic program than on a vague desire to assist the construction industry and, more particularly, unionized construction workers. Nevertheless, the state statutes typically faithfully parrot the language of the Davis-Bacon Act, including its anti-kickback language. As a result, job targeting programs have been attacked on a state level, using arguments similar to those made by ABC in the federal proceedings: that contributions by unions to contractors are improper and that contributions from union employees on state projects should be considered rebates, or at least not counted toward the contractor’s prevailing wage obligation. As on the federal level, virtually all of the actual dispute has been on the latter point.

Most of the litigation to date has been under the Ohio and California statutes which, for present purposes, closely approximate Davis-Bacon. Presently, there are a number of cases pending in the Ohio courts which deal with these issues. Two cases have reached the intermediate appellate courts, both of which have been decided adversely to the open shop contractor. The Ohio Supreme Court has refused to hear the case. The attorneys will be filing a petition for certiorari in the Supreme Court.

In Ohio, the unions have argued that the purpose, manner of collection, and disbursement of dues is a matter governed by federal labor policy and that the state “Little Davis-Bacon Acts” are preempted to that extent. It has not always been clear exactly what type of federal labor preemption is intended. However, the Ohio courts now appear to have settled on the Garmon preemption as the principal rationale, although the parties’ briefs

117. Nine states repealed such laws in recent years. See Northrup, The “Helper” Controversy, supra note 11, at 433 n.10.
are full of references to numerous other theories of preemption and exemption.\textsuperscript{126}

In truth, it is not easy to see why preemption is even an issue in this litigation. The state is not attempting to regulate dues check-off. It is not calling into question the underlying collective bargaining agreements. It is not adjudicating a dispute properly before the National Labor Relations Board (NLRB) or interfering in the zone left by Congress to the free play of economic forces. The state is simply attempting to define what counts as payment of prevailing wages for purposes of its own competitive bidding statutes. This is surely a process which is both innocuous and necessary. The line must be drawn somewhere for the guidance of contractors. Given the purposes of these statutes, the line certainly must be drawn so as to avoid counting kickbacks by employees. The only question is whether a 2 percent pay deduction for the industry fund falls on one side of the line or the other. There are many cogent arguments on both sides, but no real issue of federal labor policy. The union parties remain free to deduct as much as they will, just as the non-union contractor remains free to receive kickbacks. Neither, however, should expect credit toward payment of the prevailing wage under the present Ohio statute.\textsuperscript{127}

In California, the arguments have been similar. The ABC attacked targeting in an administrative proceeding before the California Department of Industrial Relations (CDIR), complaining of the IBEW-NECA program.\textsuperscript{128} In California, this plan is funded by union dues, a portion of which is allocated to a targeting trust fund. The Director of the CDIR eventually determined that he could not distinguish between “good dues” and “bad dues” without trespassing on federal labor preemption, apparently of the \textit{Garmon} variety, although other types are also suggested.\textsuperscript{129} Thus, CDIR could not enforce the anti-kickback provisions of the applicable California statute.\textsuperscript{130} On the other hand, CDIR agreed with ABC that wages paid back to contractors, by whatever route, could not be included in the wage base for the purpose of calculating the prevailing wage.\textsuperscript{131} Accordingly, CDIR is reevaluating its prevailing wage determinations with a view to reducing the wage base by the amount of the targeting contribution.\textsuperscript{132} A


\textsuperscript{127} \textit{Ohio Rev. Code Ann.} §§ 4115.07, 4115.10 (Baldwin 1995).


\textsuperscript{129} \textit{Id.} at 3-4.

\textsuperscript{130} \textit{Id.} at 5-6 (discussing \textit{Cal. Lab. Code} § 1773).

\textsuperscript{131} \textit{Id.} at 6-8.

\textsuperscript{132} \textit{Id.} at 8-9.
union attempt to obtain judicial reversal has recently been preliminarily rejected.133

Again, the federal issue is illusory. States routinely characterize union dues for other purposes and have faced no insurmountable federal obstacle in doing so. For example, states decide issues such as: are union dues taxable to the employee, deductible by the employer, or neither for state income tax purposes?134 Are such payments part of the wage base for state job training grant purposes? Part of income for public assistance means tests? Counted toward the average per capita wage for computing county revenue sharing grants? The answers may be very different, depending on the state and the purpose of the underlying legislation. However, in no case will the federal Cerberus awaken. It slumbers on, content that the states are simply going about their business and drawing necessary lines. The situation is no different in the case of job targeting.

Although federal preemption is ultimately a red herring, the arguments should be visited briefly. Garmon preempts state regulation of activities which are arguably protected or prohibited by sections 7 and 8 of the NLRA.135 This type of preemption is designed to protect the jurisdiction of the NLRB.136 Although it is possible to argue that nearly anything involving a union is arguably protected by section 7 or section 8 of the NLRA, it does not really seem that the state statutes in question have any connection with the core values of the NLRA. State court actions under the state acts would seem to have even less true significance for the jurisdiction of the Board. At least since Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters,137 Garmon has not been applied mechanically or to matters of strong local interest, and preemption depends on the similarity of the state law dispute to the hypothetical NLRB charge.138 Furthermore, dues check-off is governed by section 302 of the Labor Management Relations Act (LMRA),139 which is not within the NLRB’s enforcement jurisdiction.

The unions counter by citation to a string of cases, most of which involve attempted state regulation of dues check-off by direct legislation.140

134. Perhaps the more interesting question is whether targeting payments are ordinary business income.
138. Id. at 197.
These cases are read for the proposition that a dues check-off under section 302 is within the NLRB’s competence and that state regulation is preempted. While there is nothing wrong with the unions’ scholarship, the problems are historical and conceptual. Essentially all of the unions’ authority was written before Garmon was reigned in by Sears, before International Ass’n of Machinists v. Wisconsin Employment Relations Comm’n announced a more carefully crafted and separate preemption doctrine for matters intentionally left unregulated, and before the relationship between federally protected collectively bargained rights and independent state law rights had been ironed out. The courts of twenty years ago had little to work with but Garmon’s broad formula and a general idea that collective bargaining agreements could not be dictated by the state. Since that time, the importance of state interests has become better appreciated. Thus, for example, state employment standards legislation—such as Little Davis-Bacon legislation—is now held to be beyond the envelope of federal labor preemption. Further, it is now better understood that the right to bargain collectively does not grant parties to a collective bargaining agreement a general license to enter into contracts that are illegal under state law. It is therefore at least doubtful that Garmon would be applied in the same fashion to these facts today. The Machinists analysis would be more appropriate and would almost certainly lead to a finding that the incidental and indirect effect of state prevailing wage legislation was not a forbidden intrusion by states on an area intentionally left free of regulation.

Conceptually, the older Garmon cases cited by the unions are simply inapposite. The states of Ohio and California have no interest in regulating union dues, check-off, or collective bargaining. They are simply attempting to determine what should count as “wages” for their own purposes. In any case, if the area truly is preempted, then there is no bar even to naked kickbacks—a proposition unlikely to receive much credence in

141. Machinists, 427 U.S. 132, 147 (1976) (“[T]he crucial inquiry regarding pre-emption is . . . whether ‘the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act’s processes.’

142. See, e.g., Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405 (1988) (“[I]f the resolution of a state law claim depends upon the meaning of a collective bargaining agreement, the application of state law . . . is pre-empted and federal labor law principles must be employed to resolve the dispute.”).

143. Metropolitan Life Ins. v. Massachusetts, 471 U.S. 724, 755 (1985). The same is apparently not true of ERISA. Perhaps the rule could be better stated with respect to the underlying values which Machinists and ERISA preemption seek to protect. Both preserve a free fire zone of deliberately unregulated conduct. It is certainly conceivable that a minimum labor standards law could intrude significantly enough into traditional self-help activities that it would be preempted (e.g. a law requiring time-and-a-half for striker replacements). However, an anti-kickback law of the Davis-Bacon type does not significantly threaten the right to economic self-help. See also Challenger Caribbean Corp. v. Union General de Trabajadores de Puerto Rico, 903 F.2d 857, 867 (1st Cir. 1990) (holding section 301 preemption does not apply).


145. See supra note 140.
any court. Surely the state is entitled to protect its prevailing wage scheme from outright fraud.

The matter may also be looked at in another way. One difficulty, particularly with the CDIR's approach, is that it focuses on the wrong end of the process. CDIR has no need to pass on the legality of dues collection. How the money is acquired is immaterial. The point is that wages, however collected, are rebated to contractors in defiance of the state act. If this is unlawful under the California code, it is not immunized by collecting the targeted funds as union dues, as ERISA welfare fund payments, or as charitable contributions. Thus the federal issue is not germane to the state statute and should not impede enforcement. Particularly when, as here, the state is announcing the terms under which its own money will be spent on its own projects, the federal courts are unlikely to find federal labor preemption of any kind.

In summary, litigation under the "Little Davis Bacon Acts" is at an early stage. At the present time, the most heavily litigated issue appears to be federal preemption. Although the unions are enjoying some degree of success on this issue, it remains to be seen what the eventual consensus will be. Federal labor preemption doctrines, as currently understood, do not appear to preempt an action under the state prevailing wage laws.

C. Antitrust Litigation

Since unions and unionized contractors must agree to any job targeting scheme, it is not surprising that the only substantial challenge to job targeting of private construction projects has been brought under the antitrust laws. The Phoenix Electric action was brought against a NECA job targeting program in Portland, Oregon. Although nominally a local matter, the suit has been a direct face-off between national NECA and national ABC. ABC argued that the NECA targeting program violated the Sherman Act and constituted a conspiracy to exclude open shop electrical contractors from the Portland construction market. NECA argued that the program was exempt from antitrust scrutiny under the labor exemptions. The court agreed with NECA and granted summary judgment for the defendants. The matter is presently on appeal to the Ninth Circuit.

146. Cf., Employee Staffing Services v. Aubry, 20 F.3d 1038, 1041-42 (9th Cir. 1994), in which the Director of CDIR took a somewhat different view of federal preemption. In the federal action, CDIR successfully maintained that running workers compensation funds through an ERISA trust did not result in preemption of California's workers' compensation law. Id. By the same token, any attempt to sterilize kickbacks by collecting them initially as "dues" should be ineffective.
149. The NECA program has been described at supra notes 43-57 and accompanying text.
151. Id. at 1507-08.
152. Id. at 1503.
In order to evaluate the Phoenix Electric decision, it is necessary to outline the scope of labor's immunity from the antitrust laws. Labor organizations are usually exempted from the operation of the antitrust laws by both a statutory and a non-statutory exemption. The statutory exemption operates to shield a union from liability for its own actions, "[s]o long as a union acts in its self-interest and does not combine with non-labor groups." Thus, the union loses protection when it conspires with employers and suppliers to create a closed market or when it conspires with one set of employers to destroy another. The Ninth Circuit, in its decision USS-POSCO Indus. v. Contra Costa Bldg. & Constr. Trades Council (POSCO), noted that the statutory labor exemption has two prongs: the union must not conspire with a non-labor entity and it must pursue a legitimate goal. Drawing heavily on a seminal law review article by Durie and Lemley, the Ninth Circuit held that a union forfeits its statutory exemption not only when it conspires, but also when it does not act in its "legitimate" self-interest. "Whether the interest in question is legitimate depends on whether the ends to be achieved are among the traditional objectives of labor organizations."

In addition to statutory immunity, a union's anti-competitive actions may also be immune from antitrust scrutiny under a non-statutory exemption. The primary purpose of the non-statutory exemption is to protect restraints incidental to collective bargaining agreements and other arrangements concerning "legitimate subjects of collective bargaining." Many courts have agreed that a restraint should normally meet three criteria before this exemption will be applied: (a) the restraint must primarily affect only the parties to the agreement; (b) it must concern a mandatory subject

153. Phoenix Electric, 861 F. Supp. 1498, appeal docketed, No. 94-35522 (9th Cir.).
158. 31 F.3d 800 (9th Cir. 1994).
159. Id. at 807-08.
161. The word "legitimate" does not appear in the original formula announced in United States v. Hutcheson, 312 U.S. 219, 232 (1941). The qualifier, however, was introduced in H.A. Artists & Associates, Inc., v. Actors' Equity Ass'n, 451 U.S. 704, 721 (1981), and appears to have become part of the lexicon.
162. POSCO, 31 F.3d at 807-08.
163. Id. at 808.
of bargaining; and (c) it must be the product of bona fide arm's-length bargaining.\textsuperscript{165}

In \textit{Phoenix Electric}, the district court found that the defendants enjoyed both types of labor immunity.\textsuperscript{166} With regard to statutory immunity, it found that the unions were attempting to maximize work for their members and were therefore acting in their "legitimate self-interest."\textsuperscript{167} Such a global and imprecise view of "legitimate self-interest" is inconsistent with the specific inquiry suggested by \textit{POSCO}. In rare cases, a particular union local is dominated by employer or criminal interests and ceases to function as a union. Absent such pathological cases (which can be dealt with by other law) a union regularly acts to maximize work. The question asked by \textit{POSCO} is whether the union's \textit{legitimate} self-interest includes the boycott in question, not whether the defendant is acting as a union.\textsuperscript{168} Furthermore, the characterization of the union's actions is meaningless with respect to the employer defendants. Indeed, the statutory exemption is available only to labor organizations.\textsuperscript{169}

The \textit{Phoenix Electric} court also found that the second prong of the statutory exemption was met.\textsuperscript{170} It held that the job targeting program merely acted as a wage concession to union employers.\textsuperscript{171} It was not the type of "combination" between unions and employers that ought to fall outside the exemption.\textsuperscript{172} If it were, the court argued, any collective bargaining agreement would take a union out of the statutory exemption.

Not surprisingly, the court cites no authority for this proposition.\textsuperscript{173} The entire justification for the nonstatutory exemption lies in the fact that the statutory exemption does in fact fail whenever a union engages in collective bargaining. A collective bargaining agreement is, by its very nature, a combination between a labor and a non-labor entity. It may be otherwise exempt. It may not be an unreasonable restraint, but a combination it remains. There is no justification for getting courts into the business of separating "good" and "bad" collective bargaining agreements under the antitrust acts. This is precisely the kind of judicial interference with federal labor policy that the exemptions were designed to prevent.

\begin{footnotes}
\textsuperscript{166} 861 F. Supp. at 1502.
\textsuperscript{167} \textit{Id.} at 1509.
\textsuperscript{168} 31 F.3d at 808-09.
\textsuperscript{169} \textit{In re Detroit Auto Dealers}, 955 F.2d at 464-65.
\textsuperscript{170} 861 F. Supp. at 1509.
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.}
\end{footnotes}
Finally, the *Phoenix Electric* court found that the NECA targeting scheme was protected by the nonstatutory exemption.\(^\text{174}\) Application of the nonstatutory exemption is a closer call. The court faithfully parroted the three standard criteria for exemption,\(^\text{175}\) but applied them in a nonstandard manner. Briefly, the court found that the restraint primarily affected the parties to the contract, because any contractor was free to sign up with the union.\(^\text{176}\) This conclusion cannot stand, because the question is the effect on non-parties, not the ease with which persons can become parties. The court also concluded that the restraint concerned a mandatory subject of bargaining, because wages are a mandatory subject.\(^\text{177}\) This may well be correct with respect to selective wage reductions, but cannot be true as to wage subsidies or rebates that are not mandatory subjects of bargaining.

What the court actually seems to have done is to conclude that the restraint was not unreasonable under the circumstances. In this, the court could well be correct. To say that a practice is not exempt from antitrust scrutiny is not to say that it is an antitrust violation. The *Phoenix Electric* plaintiffs would face a formidable burden to prove unreasonableness even if there were no exemption. However, it does appear that the better course would have been to permit the parties to try the case on its merits, rather than attempt to dispose of it by way of summary judgment.

Interestingly, the magistrate judge who initially granted the motion appears to have recognized this problem. The magistrate’s recommendation includes a substantial discussion of the reasonableness of the restraint.\(^\text{178}\) Unfortunately, this discussion reveals a number of fact issues for trial, and, in any case, this portion of the magistrate’s recommendation was rejected by the District Judge.\(^\text{179}\)

**D. The Path Not Taken—NLRA Section 302**\(^\text{180}\)

The NLRA section 302, as amended, prohibits payments of money or other things of value by any employer to a labor organization,\(^\text{181}\) as well as the solicitation of any such payment.\(^\text{182}\) A violation of the general prohibition is a felony, or is enjoinable in a private civil action, unless the payment falls within certain enumerated exceptions.\(^\text{183}\) For example, section 302(c) permits payments for medical or pension benefits, provided that the pay-
ments are made to a trust fund. The trust must meet various requirements, notably including joint administration by an equal number of union and employer representatives. The fund must also be held in trust solely for the benefit of its beneficiaries, in accordance with a written agreement, and be audited annually. Payroll deduction for union dues or payments to benefit trusts are permitted. Section 302, however, requires written employee authorization for all deductions from paychecks.

The restrictions written into section 302(c) resulted from the World War II and post-war strikes led by John L. Lewis, the late president of the United Mine Workers (UMW), and the initial, history-making welfare funds that he won in 1946 after negotiations with the then Secretary of the Interior, Julius Krug, who was administering the coal mines after the federal government seized them to end a series of strikes.

The Lewis-Krug agreement provided miners with a welfare and retirement fund jointly supervised by the union and the government [as the "owner" of the seized mines] . . . financed by a five-cent royalty on every ton of coal mined. A second medical and health fund was established, to be administered by the union and financed by the companies depositing moneys previously deducted from the miners' wages for company run medical and health programs . . .

The second, union-administered fund, combined with the antipathy for Lewis and the coal strikes, aroused the concern of Congress. Section 302 was the compromise result between those who would outlaw such arrangements or leave them to free, non-required collective bargaining and those who would not regulate them.

It is quite possible that the usual job targeting scheme of the wage subsidy or rebate type violates section 302(c). Usually such funds are collected from employers, either as assessments or as "dues" deducted from the paychecks of employees. If union employers are directly paying the union to run a wage subsidy fund, this practice may well violate section 302, unless the fund complies with the structural requirements of section 302(c), including keeping the funds in a jointly trusteed trust. In fact, even in the unlikely event that the union could comply with the structural requirements of section 302(c), the fund would not serve any of the recog-

185. Id. Pub. L. No. 91-86 (1969), added employee scholarship and child care centers to the list of permissible fringe benefits that could be legally provided under the section restrictions, but excepted such benefits from required bargaining status. Pub. L. No. 93-95 (1973), added legal services to the permissible list, with limitations on the use of such services.
186. 29 U.S.C.A. § 186(c)(5).
188. Id.
190. Id.
191. Id. at 472.
192. Id.
nized purposes for which such a trust may be used. Further, such a fund, by
definition, assists the contractors. Accordingly, it could not be said to serve
the "sole and exclusive benefit of the employees."193

If, on the other hand, the payments are made by union employees as
"dues," then the analysis is different. A wage checkoff is permitted only for
union dues.194 A union cannot avoid compliance with section 302 by
recharacterizing a payment as dues.195 Thus, it is at least unclear whether a
job targeting fund can comply with section 302 under any possible fact
pattern.196

Federal courts may enjoin payments to labor organizations if the pay-
ments violate section 302.197 However, an attempt by an open shop con-
tractor to enjoin the checkoff of "dues" paid by the employees of another
contractor entails some significant standing problems. It is at least certain
to raise judicial eyebrows. A more productive approach may be to take
advantage of the fact that section 302 violations are also RICO "predicate
acts."198 Civil RICO actions are not without their own difficulties. How-
ever, since section 302 is an enumerated predicate act, labor preemption
will not be among these difficulties.

IV

CONCLUSION

As pointed out in the introduction, construction labor unions have
steadily lost ground to the open shop. Conventional organizing techniques
have proven ineffective to overcome market forces. Job targeting is one of
several novel strategies developed by the unions to overcome economic re-
alities. It has been relatively effective in regaining some lost ground, partic-
ularly for small and medium-sized construction.

The legal analysis of job targeting is at a very early stage. The con-
tractors have had some success with respect to public projects under the
Davis-Bacon Act. However, the unions have won most of the early rounds
with respect to state-funded and privately financed projects. In these latter
cases, there is a serious question whether the labor organizations can con-

193. 29 U.S.C.A. § 186(c)(5). The CDIR decision, supra note 128, seems to assume that the union
"trust fund" used in the California scheme, complies with section 302. This simply cannot be the case.
The CDIR decision itself notes that the funds are (a) allocated to contractors, and (b) in the sole discre-
tion of the union. Accordingly, it appears to a legal certainty that the fund is neither jointly administered
nor used for the exclusive benefit of employees.
195. See Master Insulators of St. Louis v. Local No. 1, 925 F.2d 1118, 1124 (8th Cir. 1991). See
also Building & Constr. Trades Dep't v. Reich, 815 F. Supp. 484, 491 (D.D.C. 1993) (affirming the
Secretary of Labor's determination that "dues" do not extend to job creation schemes under the Davis-
Bacon Act).
continue to hold the legal high ground. Specifically, the federal labor preemp-
tion and labor exemption issues require at least a more thorough exposition.
None of the conventional labor preemption doctrines seem to be a good fit,
nor do either of labor's antitrust immunities. In addition, targeting may be
subject to attack under other theories, such as NLRA section 302.

At the very least, it would be beneficial to have a few of these test
cases tried on the merits, so that the factual background necessary for accu-
rate application of these various defenses could be more fully explored.
The current crop of decisional law is long on principle, but rather short on
critical factual detail. Quite possibly, some targeting techniques, for exam-
ple, project agreements which reduce costs for a particular job, are members
of the rare family of successful and beneficial labor-management coopera-
tive efforts. Equally likely, other techniques (direct contractor subsidies, for
example) are malignant growths that virtually invite corruption and abuse.
Legal theory cannot distinguish between the two genera without a more
serious factual inquiry by the judiciary. It is hoped that this study will en-
courage more judicial decisions on the merits.