The Enforceability of Construction Industry Prehire Agreements After *Higdon*

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*The Supreme Court decision in National Labor Relations Board v. Iron Workers Local 103 unsettled the traditional status of prehire collective bargaining agreements executed between trade unions and construction industry employers pursuant to section 8(f) of the National Labor Relations Act. The authors summarize the Court's decision and analyze each of the issues to which the ruling has given rise. After discussing the nature of the problem, the authors offer their suggestions as to how future NLRB and court decisions should treat these issues, and how to protect long-term collective bargaining relationships in the construction industry.*

**I**

**INTRODUCTION**

In *NLRB v. Iron Workers Local 103,*¹ the Supreme Court held that pre-hire collective bargaining agreements executed in the construction industry pursuant to section 8(f) of the National Labor Relations Act could not be enforced by a union without proof of the union’s majority status. The decision introduced a major element of uncertainty into the established pattern of collective bargaining in the construction industry.

The pattern of collective bargaining in the industry had developed pursuant to the terms of section 8(f), which provides in pertinent part:

*It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act*

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¹ 434 U.S. 335 (1978).
prior to the making of such agreement.\textsuperscript{2}

Section 8(f) was added in 1959 to accommodate unique features of the construction industry. The traditional system of recognition following the hiring of a workforce and proof of the union’s majority status would be unworkable in an industry in which employers simultaneously work a number of construction projects in various geographical areas, move from project to project in a relatively short time, and rely on unions in each area to refer employees to the job site. The construction industry is also unique in that employees tend to work for a number of employers as they move from project to project. Hence, section 8(f) was designed to inject stability into the construction industry by allowing parties to enter into agreements without an established workforce or a prior showing of majority support by the union.

\textit{NLRB v. Iron Workers Local 103}, commonly referred to as the \textit{Higdon} decision, has raised doubts about the capacity of section 8(f) to meet adequately the special needs of the construction industry. The uncertainty stemming from the ruling is compounded by serious questions left unanswered by the Court concerning the decision’s meaning and application. Three basic issues were left unresolved: first, in what relevant bargaining unit must majority status be proved, second, what constitutes sufficient evidence of majority, and third, what impact does the decision have on contractual enforcement devices such as arbitration, no-strike injunctions, and section 301 actions?

\section*{II

BACKGROUND OF THE HIGDON DECISION}

Local 103 and Higdon Construction Company had a bargaining relationship that dated back to 1968. In 1973, a new contract was signed wherein the company agreed to the terms of a multi-employer agreement. The agreement did not contain a union security clause. It was a valid, prehire agreement under section 8(f) of the National Labor Relations Act.\textsuperscript{3} Concurrent with the signing of this new agreement, Higdon Contracting Company was established as a satellite company for the express purpose of performing nonunion work. After its formation, Higdon Contracting began work on two different jobs. Local 103 instituted picketing at these sites to protest the breach of the agreement signed between Higdon Construction and the Union.

After thirty days of picketing, Higdon Contracting filed a complaint alleging that Local 103 was in violation of section 8(b)(7)(C). The Administrative Law Judge found that the two firms, Higdon Con-


\textsuperscript{3} Iron Workers Local 103 (Higdon Contracting Co.), 216 N.L.R.B. 45, 49 (1975).
tracting and Higdon Construction, were "alter egos" for each other, and that the picketing was for the express purpose of enforcing the contract rather than obtaining recognition. The NLRB reversed on the second point, ruling that since the union had not achieved majority status and the section 8(f) contract carried no presumption of majority support, the union was in violation of section 8(b)(7)(C). The Court of Appeals reversed the Board, relying on an earlier case in which it had said: "[W]e cannot conceive of such an exercise in futility on the part of Congress as to validate a contract with a union having minority status, but to permit its abrogation because of the union's minority status."

The Supreme Court reversed the Court of Appeals and affirmed the Board's decision. The Court accepted the Board's construction of the Act as "an acceptable reading of the statutory language. . . ." Under this reading of the Act, union picketing to enforce a section 8(f) agreement that an employer refuses to honor is subject to section 8(b)(7)(C) if the union has not attained majority support in the relevant unit.

Such an interpretation of the Act carries other consequences as well. Under the Board's interpretation of the statute and its legislative history, an 8(a)(5) bargaining order will not be issued upon the charge of a minority union signatory to a prehire agreement. In addition, the Court made clear that a union's minority status can also be raised as a defense in the context of a section 301 suit.

The essence of the Court's holding in Higdon is that until the union attains majority status, "the prehire agreement is voidable and does not have the same stature as a collective bargaining contract entered into with a union actually representing a majority of the employees and recognized as such by the employer." Thus, section 8(f)—

4. Id. at 46 n.7.
5. Id. at 50.
6. Id.
10. Id. at 341.
11. Id. at 343.
13. 434 U.S. at 351-52.
14. Id. at 341.
which seemingly had been intended to ensure the viability of prehire contracts in the construction industry—was reduced to simple permission to execute the contract, notwithstanding section 8(a)(2).

III

THE RELEVANT UNIT

The Court’s decision stated that the union must demonstrate majority representation in the “relevant unit”15 to enforce a section 8(f) agreement, but did not define the term. The Board’s decision noted only that the union did not have majority status with either Higdon Construction or Higdon Contracting.16 Nonetheless, the unit question stands as the most important problem raised in the Higdon decision. By neglecting to establish a definition of relevant unit, the Court left unit determination at the mercy of NLRB precedent that is inadequate to serve the construction industry.

A. Decisional Background

1. The Dee Cee Decision

In Dee Cee Floor Covering, Inc.,17 decided before the Supreme Court’s Higdon decision, the Board ostensibly laid this issue to rest by ruling that the single construction site is the appropriate unit for determining majority representation when a section 8(f) contract is at issue. In that case, a union had executed prior collective bargaining agreements with Dee Cee Floor Covering, Inc. Work performed under these agreements had been done by union workers. When that firm went out of business and was replaced by Dagin-Akrab Floor Covering, the union executed a new contract with the employer, identical to the contract with Dee Cee. Four months later, the “new” firm was awarded a contract at Ft. Riley, Kansas, which it planned to perform nonunion. Terms different than those in the contract with the union were unilaterally put into effect at the site, prompting the union to file charges alleging a section 8(a)(5) violation.

The Board held that the union lacked majority status, and denied the contract’s enforceability.18 The Board’s decision emphasized that the company did not have any employees working at the Ft. Riley project, either at the time when it signed the contract or when it unilaterally set the conditions of employment. The Board rejected the argument that the union had represented a majority of Dee Cee’s em-

15. Id.
16. 216 N.L.R.B. at 46.
18. Id. at 422.
ployees at previous sites and that the union would undoubtedly represent a majority at this site as well: "[T]he Union must demonstrate its majority at each new jobsite in order to invoke the provisions of Section 8(a)(5), of the Act." 19

The single site rule of Dee Cee has two prongs. First, unions representing workers employed by a contractor on several projects will be required to demonstrate majority status at each project rather than among the contractor's overall work complement (employer-wide). 20 Second (actually a corollary of the first), Dee Cee limits proof of majority status to existing sites.

The holding in Dee Cee is wrong because it conflicts with the Board's own unit cases in the construction industry and because its reliance on precedent was misplaced. Moreover, the decision conflicts with the statutory purposes of section 8(f) and is out of step with the realities of the construction industry. Finally, Dee Cee could lead to a confusing schism in Board representation decisions in the construction industry.

By defining the relevant unit as it did in Dee Cee, the Board radically departed from its own precedent. The Board had previously adhered to the position that the presumptively appropriate bargaining unit in the construction industry was employer-wide. 21 The Board recognized this as the prevailing practice of the industry 22 and distinguished the construction industry from others when determining unit questions. 23 Indeed, less than company-wide units 24 and site-by-site 25 units have been rejected as not appropriate in the construction industry. Of particular note is Daniel Construction Co. 26 in which the Board

19. Id. (emphasis added).
20. The General Counsel interprets Dee Cee "narrowly" and considers it applicable to only § 8(f), but not § 9(a) relationships. If a union has established majority status under § 9(a), the union becomes the representative at all sites "present and prospective without the need to reprove majority at each future site." Office of the General Counsel Memorandum 79-32, April 26, 1979 “Guidelines for Handling Section 8(f) Cases” [hereinafter cited as "General Counsel Memo"].
23. But see Arthur A. Johnson Corp., 97 N.L.R.B. 1466, 1467-68 (1952). The Board rejected the union's petition for a unit of all projects engaged in by the joint venture because "[t]he pattern of bargaining applicable to the building trades employees on the project, i.e., an area-wide master contract, is not demonstrated with respect to the technical employees . . . " (emphasis added).
26. 133 N.L.R.B. 264 (1961), enforced in relevant part, Daniel Constr. Co. v. NLRB, 341 F.2d 805 (4th Cir. 1965), cert. denied, 382 U.S. 831 (1965). The Board's holding did rely upon the well-defined geographical area of the employer's operations and the employment of a substantial number of employees on a regular and part-time basis. These two factors indicated sufficient stability to warrant an employer-wide unit despite the transitory nature of the work. See also
rejected the employer's request for single-project units. The petition granted instead a unit covering all current and future construction locations throughout a six-state area. At the time of the union's petition, sixty-eight projects were underway involving 600 workers. The strength of the Board's ruling is highlighted by its refusal to amend the unit upon presentation of evidence by the employer that Daniel Construction Company had expanded the geographic area in which it operated and had instituted several organizational changes.

The Board has recognized few situations in which the single-site unit in the construction industry was appropriate. Where security concerns were paramount, or where unions were contesting representation on one site but not another, or where the parties had no prior bargaining history and the project was to be of long duration, the Board has sanctioned single-site units. However, neither these cases nor The Irvin-McKelvy Co., the only case the Board cited for the proposition that the single site is the relevant unit for determining majority representation, provides precedent to justify the Board's position in Dee Cee.

2. IRVIN-MCKELVY CO.

In Irvin-McKelvy, District 50's three-year agreement with the employer contained a "most favored nations" clause. When District 50 subsequently negotiated a "project agreement" with an employer association, the Irvin-McKelvy Company invoked its "most favored nations" clause, urging that an agreement limited to the duration of a single project is more favorable than one for a set period of time. The company argued that operation of the favored nations clause converted its agreement into a project agreement, leaving it free to contract with

Gulick Drilling Co., 139 N.L.R.B. 1137, 1138-39 (1962). Even should the Board retreat from its extreme Dee Cee position, these distinctions may nevertheless support the denial of employer-wide unit determinations in certain cases. See Queen City R.R. Constr., Inc., 150 N.L.R.B. 1679 (1965).

27. The unit defined by the Board was:
All journeyman plumbers and pipefitters, pipefitter welders and pipefitter helpers employed by the company in its Greenville division, including but not limited to construction work in the States of North Carolina, South Carolina, Tennessee, Alabama, Georgia, and Florida, excluding all other building trades craftsmen, engineers, draftsmen, foremen (working and nonworking), general foremen, clerical employees, professional employees, watchmen, guards, and supervisors as defined in the Act.
133 N.L.R.B. at 266.


32. 194 N.L.R.B. 52 (1971).
33. Such a clause provides that if the union offers another contractor a term more favorable than any contained in his contract, the employer is also entitled to the same favorable term.
other unions on subsequent projects. When the company did so, District 50 charged it with violation of sections 8(a)(2) and 8(a)(5). The Board agreed with the company's argument that the favored nations clause converted the agreement, and held that the employer was free to make section 8(f) prehire agreements covering subsequent projects with other unions.\textsuperscript{34}

\textit{Irvin-McKelvy} did not state that the relevant unit is always the single site. The holding is based on idiosyncrasies of contract language and interpretation, namely, the "most favored nations" provision.\textsuperscript{35} After the company insisted on the more favorable provision, District 50's contract applied \textit{by its own terms} only to individual sites.

A close reading of the Administrative Law Judge's decision in \textit{Dee Cee} reveals the possibility that the contract in dispute between the union and Dagin-Akrab (the successor firm) was intended by its own terms to apply only to the Ft. Riley job.\textsuperscript{36} \textit{Dee Cee} may be distinguished on the same ground as \textit{Irvin-McKelvy}; that the single site unit was contractually, not statutorily, compelled.

The Board's decision also ignored the distinctive characteristics of the construction industry that motivated Congressional passage of section 8(f). Employment in the construction industry is distinguished by the "occasional nature of the employment relation," the fact that an employee frequently works for several different employers in a year's time, and the generally short duration of the job.\textsuperscript{37} Because of these various features, it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to \textit{jobs which have not been started and may not even be contemplated}. . . . One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral.\textsuperscript{38}

\textbf{B. \textit{Dee Cee} Should Be Overruled}

All of these factors, as highlighted in hearing after hearing\textsuperscript{39}

\begin{footnotesize}
\textsuperscript{34} 194 N.L.R.B. at 53.
\textsuperscript{35} \textit{Accord}, General Counsel Memo, \textit{supra} note 20, at 24-5.
\textsuperscript{36} 232 N.L.R.B. at 7.
\textsuperscript{37} S. REP. No. 187, 86th Cong., 1st Sess. 28 (1959).
\textsuperscript{38} \textit{Id.} (emphasis added).
\end{footnotesize}
before final passage of section 8(f), indicate the inappropriateness of the Board's ruling in *Dee Cee*. Because of the industry's dynamic nature, Congress provided a way to introduce certainty in employer calculations and stability in labor-management relations. *Dee Cee* partly removes these by weakening section 8(f).

If *Dee Cee*’s single site rule becomes settled law, unit definitions in the construction industry could vary depending on whether the question arises during section 8(f) litigation or a section 9 representation proceeding. The Board’s General Counsel appears to be urging an unreasonable distinction between section 8(f) and section 9 units. In his brief to the Court of Appeals in *South Prairie Construction Co. v. Operating Engineers, Local 627*, the General Counsel has argued that one must distinguish representation proceedings from other situations. In representation cases, employees “still retain the right to choose or reject the bargaining representative.” In other contexts, he argues, representation is imposed. The General Counsel has expressed a concern identical to that contained in accretion cases: “to ensure that such (unit) descriptions are not implemented or extended so as to conflict with employee interests and rights.” The Supreme Court’s decision in *Higdon* hinted at this same concern in its reference to *Connell Construction Co. v. Plumbers Local 100*. Although addressing section 8(b)(7), the Court seized the occasion to again speak of “top-down organizing.”

In addition to the foregoing difficulties, the rule in *Dee Cee* presents several practical problems as well. *Dee Cee* precludes extending proof of union majority status to projects not yet underway (i.e.

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40. Cases previously cited for the proposition that the appropriate unit in the construction industry is employer-wide were all decided in the context of a representation proceeding. *Dee Cee* did not concern itself with a petition for certification.

41. 425 U.S. 800 (1976). The court held that the two employers, South Prairie and Kiewit, were single employers. The Court also ruled that the court of appeals erred in deciding that the employees of both firms constituted a single appropriate unit because the Board had not yet passed on the issue. Upon remand, the Board found two appropriate units, one union and one non-union. Peter Kiewit Sons’ Co. & S. Prairie Constr. Co., 231 N.L.R.B. 76 (1977) aff’d, Operating Engineers Local 627 v. NLRB, 595 F.2d 844 (D.C. Cir. 1979).

42. Brief for National Labor Relations Board at 17, Operating Engineers Local 627 v. NLRB, No. 77-2031 (D.C. Cir.).

43. NLRB v. Security-Columbian Banknote Co., 541 F.2d 135 (3rd Cir. 1976); Retail Clerks Local 919 v. NLRB, 416 F.2d 1118 (D.C. Cir. 1969); Industrial Workers Local 620 v. NLRB, 372 F.2d 707 (6th Cir. 1967). If the logic of these accretion cases is allowed to be carried over into the construction industry, there will be no escaping a single-site unit.

44. Brief for NLRB, *supra* note 38, at 17.

45. 434 U.S. at 346.


47. 434 U.S. at 346.
where employees have not yet been hired). Therefore, the rule allows employers, as in Dee Cee, to unilaterally change the terms and conditions of an agreement on new projects. The duration of a contract now depends on the duration of a specific project, creating an inherent element of instability in all bargaining relationships. A loophole is also provided to employers who wish to avoid existing contractual commitments; they can now manipulate their workforces or hiring practices to diminish the number of union employees at a new site. Dee Cee's command that proof of representative status be site-by-site gives employers this option.

These obvious problems with Dee Cee suggest that a properly framed case may convince the Board to revise its prior decision. Intimations of such an alteration in the rule have been made. In Haberman Construction Co. Members Penello and Murphy advanced separate suggestions which would curtail and revamp the Dee Cee rule. Member Penello viewed Dee Cee as requiring, where the employer hires on a project-by-project basis, that majority status be determined only for those projects underway. On its face, Penello's position recognizes an employer-wide unit extending only to current projects, making the agreement unenforceable as to future projects. Member Murphy suggested that a union which could demonstrate that it would have a majority on the next project is entitled to retain its majority status as to that future project, thereby ensuring the contract's enforceability. This is a further step in the direction of an employer-wide unit wherein the contract is enforceable as to all current and future sites once the union attains majority status.

Recognition of the practical and legal problems afflicting the Dee Cee rule fully support the suggestions of Penello and Murphy. However, to fully answer all the questions raised by the holding in Dee Cee and protect the established practices of the industry, Dee Cee should be overruled in its entirety and a rule permitting an employer-wide unit encompassing all current and future projects adopted.

48. The requirement that employees be actually hired before a union can claim majority status raises the problem posed in Whitaker Paper Co., 149 N.L.R.B. 737 (1964). Upon the expiration of the contract there, the union struck over economic issues. The company replaced 100 percent of the workers with permanent employees. The Board rejected the employer's argument that the union's picketing became unlawful after 30 days under § 8(b)(7)(C) because all the union employees had been replaced and the union had failed to file a valid petition under § 9(c). But see Lawrence Typographical Local 570, 158 N.L.R.B. 1332 (1966) in which the Union lost a Board-supervised election. Presumably, Higdon has not vitiated the Board's reasoning in this case.


IV

ESTABLISHING MAJORITY STATUS

In sections A-H which follow, various methods are discussed by which unions may convert a voidable section 8(f) contract into a fully enforceable contract in the shortest possible time. Section G notes that, in fact, a number of construction contracts are governed by section 9(a) and one suggestion is made by which that status may be preserved.

A. Certification

The building trades unions' general unfamiliarity with the Board's representation process may soon change. Precontract certification is the ultimate defense to allegations that one is not a majority representative. In fact, certification relieves the union altogether of section 8(f) concerns by granting the union an irrebuttable presumption of majority status during the first year of certification\(^5\) and a rebuttable presumption thereafter.\(^6\) A representative that is informally recognized by the employer is granted a rebuttable presumption of majority status after a year, but no presumption during the first year.\(^7\) Because a section 8(f) contract lacks such a presumption, the union will presumably have the burden of coming forward with evidence of its majority status when questioned. When a construction industry employer appears to violate section 8(a)(5) but claims the relationship is governed by section 8(f), the General Counsel believes that the party claiming the violation would have the burden of showing majority status.

At that point, the respondent has the burden of claiming and proving that the present contract or earlier contract between the parties was an 8(f) contract, i.e., it was entered into at a time when the union did not represent a majority of the employer's employees. If the respondent proves prima facie that there was a prior 8(f) contract, the burden would shift back to the other party to establish either that there was not a prior 8(f) contract . . . or, more likely that the 8(f) relationship was transformed into a section 9 relationship, i.e., that at some relevant time the union attained either actual majority or a presumption of majority status during the history of the parties' bargaining relationship.\(^8\)

In *Michigan Drywall Corp.*,\(^9\) the employer attempted to use an alter ego firm to circumvent parts of an existing collective bargaining

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\(^6\) See e.g. Tahoe Nugget, Inc., 227 N.L.R.B. 357 (1976); Barrington Plaza & Tragniew, 185 N.L.R.B. 962 enforcement denied on other grounds 470 F.2d 669 (9th Cir. 1972).

\(^7\) NLRB v. San Clemente Publications Corp., 408 F.2d 367 (9th Cir. 1969).

\(^8\) General Counsel Memo, supra note 20, at 18.

agreement. Unlike the situation in *Higdon*, the union was certified and consequently the employer was found in violation of section 8(a)(5).

The potency of precontract certification is compromised by a series of disadvantages in the construction industry which suggest that certification will continue to be of limited importance. Certification is often a long and complicated procedure. Many construction projects can be all but completed before the Board's procedures have run their course. This same reason convinced Congress in 1959 to allow section 8(f) contracts.\(^5\)

Certification remains unlikely even in those cases where it is practical, for example long-running projects. First, because of the exigencies of the construction process, labor supply must be assured before commencement of a project. In addition, the election process cannot be instituted until employees have been hired. Thus, a section 8(f) contract will still be necessary as an initial matter. Second, on such larger projects where the employer and union have entered into a section 8(f) contract, the possibility is remote that one party will abrogate when many jobs and dollars are at stake. Finally, unless the rule in *Dee Cee* is altered, the incentive to seek certification of large employers or multi-employer associations will be considerably lessened because certification will be of limited scope and utility.

**B. Union Security Clause**

Because of the impracticality of certification, union security clauses may well prove to be the best "contract insurance" available to a union. Although the union's contract with Higdon did not have a union security clause, the Court in *Higdon* purportedly affirmed the Board's rule that a union security clause, once enforced, entitles the union to a rebuttable presumption of majority support.\(^7\) The Board has held that, in some situations, at least a rebuttable presumption of majority will arise from a section 8(f) contract. This might occur, for example, when a union security agreement is present in the section 8(f) contract and has been enforced.\(^8\) However, the Court paraphrased Board law in the following language: "One-time majority status, coupled with a union security clause that has been enforced, gives rise to a rebuttable presumption of continued majority status, in the Board's view."\(^9\) The Court's language contains an added requirement not

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57. The General Counsel emphasized that the union security clause must have been enforced in order to provide evidence of majority support. General Counsel Memo, supra note 20, at 19.
59. 434 U.S. at 351 n.12 (emphasis added).
found in any Board cases, namely, that a union security clause—even though enforced—will not entitle a union to a presumption of majority support unless one-time majority support is also demonstrated. The Court’s language could be read as an inadvertent misstatement of pre-existing law. An alternate interpretation is that the Court merely repeated itself because, according to Board law an enforced union security clause indicates “one-time majority support.” In either event, the language should not be read as a revision of existing law.

The Board has expressed willingness to give a union security clause evidentiary value if the clause has been enforced:

8(f) contracts do not carry, even with union security provisions, a presumption of majority status until such time as employees for particular projects have been hired. . . . [m]ore precisely, until the provision of the union security clause has taken effect at a project (usually 7 days).

An indication of how an enforced union security clause might have cured the problem encountered by Local 103 in Higdon is illustrated in Davis Industries, Inc. The case on its face is nearly identical to Higdon. The contractor signed a prehire project agreement with the union. The employer breached the agreement when it walked away from the job. An alter-ego company assumed the same subcontracting contract, but rejected the union agreement.

Davis and Higdon are distinguishable because the Davis agreement contained a union security clause. Thus, shortly after the job began all the employees belonged to the union. Upon enforcement of the union security clause, according to the ALJ, the “pre-hire arrangement . . . blossomed into a full, traditional collective-bargaining relationship which the Davis Industries was no longer privileged to ignore for the duration of the pipeline job without running afoul of the Act.”

The company’s breach of the contract, through its alter-ego, was found to be a violation of section 8(a)(5).

C. Authorization Cards

Should a union security clause be unobtainable, the most practical and reliable method of demonstrating representative status is the collection of authorization cards. Securing authorization cards from a majority of the employees should guarantee enforceability of the

60. Except Bricklayers Local 3, 162 N.L.R.B. 476, 478 (1967), enforced on other grounds, 408 F.2d 469 (9th Cir. 1968).
61. Ironworkers Local 103, 216 N.L.R.B. at 46 and n.5. The requirement that a union security clause be enforced through the actual hiring of employees also raises a problem with projects which are not yet underway. To be consistent with its position on union security clauses, the Board would have to limit majority determination to those sites where employees have been hired. This, of course, leaves us with the Dee Cee holding.
63. Id. at 952.
union's section 8(f) contract. The strength of such a practice is indicated in the Board decision in *Fenix & Scisson, Inc.* The Congress of Independent Unions (CIU) signed a project agreement with the employer and collected applications for membership from seven of eight employees on the job. The job was halted by vandalism. The employer later withdrew recognition from the CIU and signed contracts with other unions. Concluding that "the CIU would have continued to be the duly designed representative under [the contract] if that project had been permitted to run its normal course," a violation of section 8(a)(5) was found.

The decision in *Fenix & Scisson* suggests the advantages of collecting cards at the onset of a job. In fact, the potency of such a procedure is indicated by the Board's dismissal of the employer's argument that the cards were not from a representative complement. The decision clearly rejects any requirement that the cards collected constitute a majority of peak employment at some point in time subsequent to their collection.

**D. Union Membership or Payment of Union Dues**

In *Precision Striping, Inc.*, the Board found the employer who sought to repudiate his contract on the strength of *Higdon* to be in violation of section 8(a)(5) of the Act. The decision relied on the fact that four of the five employees were union members in good standing. It therefore follows that the Union, possessing majority support from Respondent's employees at that time, was their collective-bargaining representative as defined in Section 9(a) of the Act, and was entitled to the irrebuttable presumption of majority status flowing from a valid labor agreement in such circumstances.

The General Counsel has stated that "actual union membership of a majority of union employees can be utilized as proof of support." When the union's majority status has been challenged in other contexts, the Board has looked at the number of employees who paid dues during a recent period of time or who became formal members of

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64. 207 N.L.R.B. 752 (1973).
65. *Id.* at 759.
66. The Administrative Law Judge did note in this regard that because the contract contained a union security clause which the CIU intended to enforce, the union would have continued as the majority representative, irrespective of fluctuations in employment. However, the decision also suggests the inappropriateness of the representative complement rule in the construction industry where employment is not stable and involves a transient work force. *Id.* at 759. This reasoning would support use of a card majority collected prior to peak employment as proof of the union's representative status at some later time.
68. *Id.* at 4.
the union.\textsuperscript{70} Proof of majority by either method would establish the union's representative status.\textsuperscript{71}

Caution must be exercised because the converse is not necessarily true: a failure to prove that union members or dues paying employees constitute a majority of unit employees does not indicate that the union lacks majority support. The Board has acknowledged that there is no necessary correlation between union membership and the number of union supporters. "Many employees are content neither to join the union nor to give it financial support but to enjoy the benefits of its representation."\textsuperscript{72}

The difficulty inherent in the situation in which less than a majority of the employees is paying dues or belongs to a union is partly attributable to vagueness in the definition of majority status. In \textit{Celanese Corporation of America},\textsuperscript{73} the Board took it to mean that a majority of employees in the unit wish to have the union as their representative for collective bargaining purposes. Thus, the Board has been able to find in \textit{United Aircraft Corp.}\textsuperscript{74} that "the employees were at least tacitly in agreement . . . that the locals should continue bargaining for them . . . ," particularly "in view of the direct effect which the representation activities had upon the employees' working conditions . . . ." This argument is obviously of greatest force where there is no obligation to join the union and many employees are simply free riders obtaining the union benefits for no cost. The argument that a union has faithfully executed its responsibilities of representation under a contract on behalf of all employees may have some weight in these intermediate situations and should provide one justification for using the fact of a long bargaining history as evidence of majority support, as will be discussed below.

\textbf{E. Union Referrals}

The union in \textit{Higdon} had referred workers to one of the non-union sites.\textsuperscript{75} This fact was never entered as evidence of the union's majority status. Had the argument been made, \textit{Higdon} might have been decided differently. The Board has used the fact that a company employed union referrals as evidence of the union's majority.\textsuperscript{76} In \textit{Ruttman Con-}

\begin{itemize}
\item \textsuperscript{70} Terrell Machine Co., 173 N.L.R.B. 1480 (1969); United Aircraft Corp., 168 N.L.R.B. 480 (1967); NLRB v. Gulfmont Hotel Co., 362 F.2d 588 (5th Cir. 1966).
\item \textsuperscript{71} Bay Counties Dist. Council of Carpenters, 154 N.L.R.B. 1598, 1605: "At the time Disney's employees were all members of one or another carpenters' local."
\item \textsuperscript{72} Terrell Machine Co., 173 N.L.R.B. 1480, 1481 (1969).
\item \textsuperscript{73} 95 N.L.R.B. 664, 671-72 (1951).
\item \textsuperscript{74} 168 N.L.R.B. 480, 486 (1967).
\item \textsuperscript{75} 216 N.L.R.B. 45.
\item \textsuperscript{76} 191 N.L.R.B. 701 (1971).
\end{itemize}


The Board stated that a “prehire agreement is but a preliminary step that contemplates further action for the development of a full bargaining relationship . . . [including] the hiring of employees who are usually referred by the union or unions with whom there is a prehire agreement.” More recently, the General Counsel has reaffirmed that a company’s use of a union’s hiring hall “over a period of years” is weighty proof of the union’s representative status.

F. Bargaining History

The Higdon decision embraced prior Board decisions that a section 8(f) contract standing alone will be given no presumption of majority support. Nevertheless, the question remains whether the existence of a continuing and longstanding bargaining relationship may support such a finding.

In Dallas Building & Construction Trades Council, the Board concluded that successive approvals of a prehire agreement removed the contract from the context of section 8(f) and its proviso: it does not follow that successive renewals of such agreements would be subject to the second proviso to section 8(f). The Association’s contracts with local labor organizations here were not initial agreements, but the latest fruits of continuing bargaining relationships dating as far back as 1948.

In Bricklayers & Masons Local 3, the Board spelled out why successive contracts were not to be treated as naked section 8(f) agreements, lacking any presumption:

Thus, the entire legislative history of section 8(f) is couched in terms of “pre-hire agreements,” a reference which can have no meaning in the situation where, as here, the parties are continuing an existing bargaining relationship under which employees have previously been hired.

This same argument has reiterated by the ALJ in the recent case of Haberman Construction Co., although the Board affirmed the ALJ’s decision on other grounds.

The difficulty with this analysis is that in Higdon itself, Local 103 had already signed several agreements with Higdon Construction. The specific argument was made to the court that a violation of section

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77. Id. at 702. Accord Haberman Construction Co., 236 N.L.R.B. at 4.
78. Division of Advice Memorandum, NLRB, Case No. 17-CP-190, March 27, 1978.
80. 164 N.L.R.B. 938 (1967).
81. Id. at 943.
83. 126 N.L.R.B. at 478.
84. 236 N.L.R.B. No. 7 (1978).
85. The General Counsel has indicated that bargaining history must be coupled with other
8(b)(7)(C) could not be found because the union was not seeking initial acceptance. Consequently, the argument went, the picketing could not be termed recognition. The Court rejected this reasoning. In distinguishing *Sullivan Electric Co.*, wherein picketing to enforce a valid agreement that might require additional bargaining was found not to violate section 8(b)(7)(C), the Court said: "[T]he *Sullivan Electric* rule does not protect picketing to enforce a contract entered into pursuant to § 8(f) where the union is not and has never been the chosen representative of a majority of the employees in a relevant unit."88

*Higdon* invalidated the syllogism that a union cannot violate sections 8(b)(7)(C) by picketing to enforce a section 8(f) agreement because the agreement itself constitutes recognition. However, the Court's rejection of this argument did not go to use of the parties' bargaining history as evidence of a union's majority status. For this reason, *Dallas Building & Construction Trades Council* and *Bricklayers & Masons International Local 3* retain some vitality. Successive contracts under which employees have been hired do not remove the case from section 8(f) analysis but they do provide evidence of majority support.89

### G. Use of Recognition Clause

In many situations where the employer and union have had previous agreements, or where the employer already has hired workers prior to executing a contract, the union may represent a majority of the workers at the contract's signing. Such a contract is not a section 8(f), prehire agreement but instead one sanctioned by section 9(a):

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of

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88. 434 U.S. at 343-44.
89. The NLRB's Division of Advice has recommended that a Regional Office drop a § 8(b)(7)(C) case where it was alleged that the union was not a majority representative. The Division relied in part on the fact that the parties had enjoyed a 20-year collective bargaining relationship and that "in view of the longstanding bargaining relationship . . . the Union has probably long since become the 9(a) representative." Division of Advice Memorandum, NLRB, Case No. 17-CP-190, March 27, 1978.
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The difference between a section 8(f) contract and one signed with a section 9(a) representative is that the union signatory to a section 8(f) contract "did not and could not demonstrate majority status" at the time of signing. Of key importance is the fact that a section 9(a) contract affords the union a rebuttable presumption of majority thereby placing the burden of proof on the employer. A section 8(f) contract on its face carries no such presumption.

The decided advantage of a section 9(a) contract is threatened when an employer attempts to abrogate the agreement one or two years after its signing. The NLRB will first "go behind the section 10(b) period [six-month limitation] to see what kind of contract is involved in a particular case . . . ." Yet, proof of whether the union had a majority at the contract's signing may be difficult years later. One possible solution may be to request the employer to acknowledge in a contract provision the union's majority status in the relevant employer-wide unit and to recognize the union as the exclusive bargaining representative on the basis of that status.

An employer signatory to such a provision should be estopped from challenging the union's majority at a later date on the basis of a good faith doubt. If the NLRB or the courts reject this estoppel argument, the clause should nevertheless place on the employer the burden of disproving the union's majority.

Recognition pursuant to section 9(a), along with the certification argument discussed above, offers construction unions two non-section 8(f) routes for safeguarding their collective bargaining agreements. The key obstacle may simply be evidentiary proof.

H. Multi-Unit Bargaining and Section 8(f)

The General Counsel has stated that when a construction industry

94. The General Counsel has stated:
[B]y entering into a fixed term 8(f) contract that extends exclusive recognition and that is multi-site in scope, absent specific contractual language to the contrary, . . . an employer has in effect committed itself to a full Section 9(a) bargaining relationship with the union at all sites, present and prospective, upon a demonstrable showing of majority among a representative complement of its employees. This obviates the need to retest majority status at each future project, and thereby promotes peace and stability in the construction industry.

General Counsel Memo, supra note 20, at 25.
employer joins an existing multi-employer association, the employer's present and future workforce is merged into the multi-employer unit. If the single employer had a section 8(f) relationship with the union, it too is merged into any pre-existing section 9(a) relationship between the union and the association. The union's majority status is based on examination of the multi-employer unit, rather than site-by-site or member-by-member.

V. Enforcement

Higdon denied enforcement of a section 8(f) contract negotiated with a minority union by way of recognition picketing or a section 8(a)(5) proceeding. The Court's decision also bars a section 301 contract enforcement action. Distinguishing its decision in Retail Clerks Locals 128 & 633 v. Lion Dry Goods, Inc., which held that section 301 conferred jurisdiction on the federal courts to entertain suits between an employer and a minority union, the Court said:

It would not be inconsistent with Lion Dry Goods for a court to hold that the union's majority standing is subject to litigation in a § 301 suit to enforce a § 8(f) contract, just as it is in a § 8(a)(5) proceeding, and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable.

In all three contexts, section 8(a)(5), 8(b)(7)(C), and 301, the procedural setting features a union attempting to enforce a contract and the employer raising the union's minority status as a defense. Is the same defense available to the unions? Can a union signatory to a section 8(f) contract unilaterally disregard a term of its own collective bargaining contract and raise its own minority status as a defense to a section 8(b)(3) complaint or a section 301 action? Language in the Higdon decision strongly indicates that the contract is not enforceable by either party: "Absent these qualifications (majority standing) the collective bargaining relationship had never matured." The Court neither qualified nor restricted this language. Unequivocally, a "non-majority contract" is not enforceable by either party. Rather, until the union attains majority status, "the pre-hire agreement is voidable and does not have the same stature as a collective bargaining contract entered into with a union actually representing a majority of the employees...

If the contract is unenforceable by either party and can be abrogated unilaterally, there would be substantial conflict with other princi-
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...pleas of federal law. Generally, the result conflicts with the federal policy of promoting stability in labor management relations. As the legislative history of section 301 indicates, it was Congress’ purpose in enacting that section: “. . . to encourage the making of agreements and to promote industrial peace through faithful performance by the parties . . .”

More specifically, the ruling raises questions about the application of the federal policy favoring arbitration to section 8(f) contracts. Because arbitration can only encompass matters governed by the contract, no party can be compelled to arbitrate a claim to which it has not agreed. Consequently, a court cannot compel arbitration where the contract itself is unenforceable. Thus, Higdon may be translated into a rule that a court may not compel arbitration under a section 8(f) contract absent majority status.

One legitimate limitation on this rule might be that an employer may not be permitted to contest the enforceability of one clause while enjoying the fruits of all others. Such a restriction would be consistent with the federal labor policy favoring arbitration because it would hinder selective refusals to arbitrate unless the party was willing to suffer the consequences of losing all protection afforded by the agreement.

The potential blow struck by Higdon to arbitration under section 8(f) contracts may also be softened by restricting Higdon’s applicability to arbitrable “causes of action” arising subsequent to the employer’s claims of unenforceability. Actions having arisen prior to the contract’s repudiation would remain enforceable in the courts. This argument would be premised on the Higdon Court’s own language that the contract is voidable, not void. While abrogation would be valid prospectively, existing commitments which had been met with ample consideration would not be erased, retroactively.

The case of enforcing an award already submitted by the parties and decided by the arbitrator is on a firmer footing. First, in an enforcement action following voluntary submission, the question is no longer whether the parties agreed to submit the issue to arbitration (because they have), but whether the decision draws its essence from the

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104. 434 U.S. at 341.
contract language and shows no manifest infidelity to existing law. Second, to allow a party to raise Higdon post-arbitration would disturb traditional equitable concepts—e.g., estoppel or waiver. A court should be unwilling to permit such behavior, despite Higdon’s “voidable” language.

When a party raises the issue of the contract’s enforceability under Higdon, the preliminary question will be whether the issue is properly for the court or the arbitrator. Generally, the issue of substantive arbitrability (whether there is anything to arbitrate), is a question for the arbitrator. In one case where the equitable defense of fraud in the inducement of the contract was raised and the relevant arbitration clause was of a very broad nature, the Supreme Court upheld referral to the arbitrator on the specific issue of the contract’s validity. Whether the question of majority support may likewise be referred to an arbitrator under an expansive arbitration clause is an open issue and most likely to be resolved in future litigation.

Higdon also raises questions concerning the reasoning employed by courts in issuing Boys Markets injunctions. A union is assumed to have given an implied promise not to strike, even where no explicit one is granted, in return for the specific performance of the obligation to arbitrate. However, the contract must be in effect to afford such a remedy and if it has expired, no underlying promises exist on which to base the injunction.

An unenforceable contract with a minority union appears to be indistinguishable from the case where the contract itself has expired. If, as previously suggested, it is ultimately held that arbitration may not be compelled in a section 8(f) context, the underpinning for the presumed no-strike promise disappears. Because a Higdon contract may be voidable, not void, a union seeking to escape a no-strike clause may wish to abrogate first through notification to the employer before striking.

Two additional areas in which the Higdon decision can be ex-
pected to pose problems are those of the duty of fair representation and fringe benefit collection cases. The judicially developed doctrine of the duty of fair representation has been read into the statutory language conferring exclusive representation on a bargaining representative. In other cases, the duty is likened more to a section 301 action, where, for example, the union has not properly fulfilled its contractual obligation under an arbitration clause. Under either theory, there would not appear to be a duty of fair representation within the context of an unenforceable section 8(f) contract. The union in such a case is not an exclusive representative under section 9(a), and no enforceable promise to arbitrate exists. Nevertheless, because the union has held itself out as the employees' representative, and Higdon dealt only with the relation between the union and employer, a court could expand the doctrine and find a violation of the duty of fair representation.

Action by trustees to collect delinquent contributions to pension or health and welfare funds (or actions to collect back wages) may also be upset by Higdon. Again, such an action is governed by the Court’s holding that in a section 301 suit a union’s majority status can be litigated. Yet, if the employer seeks to invoke Higdon in such a case, the trustees may well argue that the past-due contributions are owed for the time prior to the employer’s abrogation of the contract. The identical argument discussed above in the case of prior arbitrable “causes of action,” would apply.

Given Higdon, the specter exists of either party refusing to honor its bargain. An employer unhappy with the prospects of a wage reopener can threaten to disregard the agreement. A union may regret a bargaining concession and wish to back out of the contract.

Because of longstanding bargaining relationships or an unwillingness to risk the potential costs, it is probable that in the majority of cases unilateral abrogation will not be invoked. Nevertheless, the threat exists. A party seeking to enforce a contractual obligation such as arbitration must now consider the possibility of being met with an abandonment of the entire contract. A new element of brinksmanship has been injected into labor-management affairs where the union has not yet demonstrated majority status and where the bargaining relation

115. In the recently decided case of Carpenters v. Blake Constr. Co., Nos. 77-219-N & 77-534-N, slip op. at 8 (E.D. Va. Sept. 21, 1978), involving a claim for damages for the breach of an international agreement, Judge Hoffman referred to the Higdon case. Noting that the case creates some doubt as to the enforceability of prehire agreements, he distinguished Higdon as involving “the question of whether picketing was an unlawful labor practice.” Thus, Higdon was found “not determinative on the facts of this case.”
has not matured to the point where neither party would seriously consider, for whatever reasons, the possibility of abrogation.

VI

Conclusion

The potential denial of enforcement to a majority of its collective bargaining agreements as a result of the Higdon decision was a major shock to the construction industry. However, analysis of the decision reveals that it need not be a harbinger of contractual turmoil in the building industry.

Several important opportunities exist for limiting the decision's impact. Most significant is defining the relevant unit for the purposes of majority determination to be employer-wide and to include future as well as current sites. Similarly, disallowing Higdon challenges after a cause of action has accrued and denying challenges to only part of a contract will narrow the Court's holding. Finally, unions may safeguard their contractual rights through certification, union security clauses, collecting authorization cards, demonstrating actual union membership or payment of dues, evidence of the operation of a union hiring hall, proof of a longstanding bargaining relationship, and possibly by including in their contracts a majority representation clause.

Higdon struck the building trades unions at the worst possible time. The unions already had their hands full combatting the growing dual-shop and nonunion sector by means of section 8(a)(5) charges and contract enforcement actions. The Supreme Court's ruling opened up new avenues for employers seeking to escape their collective bargaining relationships. It is the view here, however, that future applications of Higdon will not be as severe as originally anticipated. The large urban multi-employer bargaining units that are the cornerstone of the construction industry are not likely to be tested as a practical matter. On the legal front, most courts and the NLRB will be moved to restrict Higdon's application by traditional notions of the sanctity of contract and an awareness that what is at stake is the stability of collective bargaining in an entire industry, which Congress was expressly seeking to protect in the 1959 amendments to the Labor Management Relations Act.