

HOT topic
"Future Worker Management"
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STATEMENT OF ROBERT A. GEORGINE, PRESIDENT
BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

BEFORE THE

COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS

December 15, 1993

Mr. Chairman and Members of the Commission.

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I want to thank the Commission for the opportunity to appear here today and to discuss with you the particular problems facing employees and many employers in the building and construction industry. The basic point I want to make is that certain changes in the law are essential in order to restore the stability of labor relations in this critical industry.

The Building and Construction Trades Department of the AFL-CIO is comprised of fifteen national and international unions that in the aggregate represent a membership in excess of four million workers. We are, therefore, vitally concerned with the need to preserve stable labor relations in the construction industry, in order to serve the needs of employers, employees and the public as well.

I think it will be helpful if I describe at the outset the nature of the industry, and the particular difficulties that employers and employees in the construction industry have faced for many years.

The construction industry is one of the most vital to our nation's economy. It is responsible for building the roads, bridges, factories, offices, shops and homes, without which there would be no economy. According to the Department of Commerce, the income generated by the construction industry in 1992 was more than \$212 billion. Using a different measure, also from the Department of Commerce, the value of all structures constructed in 1992 was \$504.6 billion. Thus, this is a large and critical industry. When it flourishes, the overall economy flourishes. And when it suffers, it becomes a huge anchor on the overall economy.

And yet, in spite of the size of the industry itself, virtually all of the firms in this industry are quite small. Department of Commerce figures also show that there are more than 1,900,000 construction establishments. Of those, over 1,360,000 were single proprietorships, with no employees. And of the 536,000 firms that had employees, more than 430,000 have less than ten employees, and virtually all of them have less than twenty employees. In addition, as I will explain in a moment, the pattern of employment in the industry is one of intermittent and casual work.

There are other features of the construction industry that make it complex and give rise to special problems concerning labor

relations in the industry. For example, as I explain in more detail in a memorandum of legal issues which is an attachment to my testimony, Congress made certain changes in the law in 1959. One of them allowed certain agreements between unions and "employers" in the construction industry. In 1959 agreements were typically between a construction union and a construction employer, because all such agreements were with business entities that met the technical definition of "employer." In more recent years, there have been significant structural changes in the construction industry, and the key management entity that is responsible for a construction project, and with which a union must deal, is often no longer an "employer" in the technical sense. Construction projects are frequently overseen directly by owners or developers of property, or by construction managers who may choose to hire no employees of their own.

It is also important to understand how the structure of a typical construction project differs from one's view of employment in a manufacturing plant or a retail store. In the latter, there is a consistent identifiable employer, and a relatively stable complement of employees who work for that employer over a long period of time. The situation at a construction site is very different. Picture, if you will, a pyramid. At the top of the pyramid is the construction owner or developer for whom the building, mall, factory, etc., will be built. The owner or developer will then typically engage a general contractor,

construction manager or project manager, who will have oversight responsibilities for construction of the entire project. In the case of a general contractor, he may or may not hire employees performing work directly for him.

At the next level, through a bidding process, the general contractor or project or construction manager will hire a series of contractors to perform various portions of the work. Because the construction of a building or other work is performed in stages, different portions of the work will be done at many different times over the course of the project. For example, ground clearing, excavation and preliminary electrical work are among the first items of work, and therefore the first construction trades employed. On the other hand, plumbing, painting and interior electrical work will come much later in the process.

Moving further down the pyramid, the first tier contractors I've mentioned will do some of the work for which they've contracted themselves, but they will often subcontract other portions of the work to subcontractors. And, in turn, some of those subcontractors may even contract out a portion of their work to additional subcontractors. In short, on a single construction project there are many levels of interrelated employers, most of them working for short periods of time, and at different times during the life of the project.

For these reasons, and because construction contractors must bid for jobs, which are usually of short duration, never knowing which jobs they will obtain and which they will not, the construction industry is characterized by employees working for many different employers, at different sites and for different periods of time. The workforce, therefore, is constantly in a state of flux, changing from employer to employer, and even from geographic area to geographic area, depending on where work opportunities can be found. In the course of a year, an individual employee may work for many employers, and for none of them on a continuing basis.

II

An important feature of construction industry labor relations, because of these characteristics, is the "prehire" agreement. Employers usually enter into collective bargaining agreements covering a geographical area that coincides with the jurisdiction of a local union in the area. The agreement may run for several years and, since most building projects are of short duration, these prehire labor agreements often apply to jobs which have not been started when they are signed, and cover employees who are not yet hired.

The prehire agreement, which has long been a cornerstone of bargaining in the construction industry, is quite simple in

concept. Because of the market realities of the construction industry, the work force of each employer fluctuates according to his success in securing bids. The more success -- the larger the work force; the less success -- the fewer workers required. At the end of each project, the employer may or may not have another project at which he can offer employment to his current employees. Thus, the employees in the construction industry represent one form of the "contingent workforce" about which this Commission has already been informed. In fact, the nature and age of the construction industry make it the prototype of the contingent work problem that in more recent years has infected other industries as well.

By the same token, when an employer does succeed in a bid award, he must very quickly be able to secure skilled craft employees of all varieties, upon whose skills the employer must be able to immediately rely. The employer cannot afford to commence each new job with an on-the-job training program to develop skills. Also, the employer benefits not only from the availability of skilled workers through the hiring hall, but from the fact that the prehire agreement provides him with foreknowledge of his labor rates, which assists him in preparing his bid estimates.

Because of the nature of the industry, labor unions play a uniquely important role in dealing with employers and representing employees. The union negotiates, not on behalf of current employees of each employer, but rather, on behalf of the area-wide pool of hiring hall applicants who are available to work for the employers who are able to secure jobs in the area. Everyone on the out-of-work list is a potential employee for any employer who has a contract with the union. The area-wide hiring hall and the prehire agreement, which is the only workable collective bargaining agreement in the construction industry, characterized the construction industry long before the Wagner Act was conceived.

Prehire agreements and area-wide hiring halls also have been responsible for many valuable benefits for construction workers and for the industry itself. For example, portable pension and welfare benefits have been created under such agreements for employees who are forced to move from job to job, and who otherwise would lack those benefits. Similarly, joint labor-management committees established under prehire agreements have been responsible for the development of apprenticeship and other training programs within the construction industry. The organized sector of the construction industry accounts for more than one-half of all apprentices in the United States, and it is the single largest source of apprenticeship programs, both in terms of the number of programs operated and the amount of dollar funding. These features of the bargaining relationship in the organized construction

industry are vitally important, since the vast majority of construction contractors are small employers who could not individually afford to provide training or to create pension or welfare plans.

III

As you can see, the construction industry is structured quite differently, and functions in a manner quite different, from most other industries. And it is because of those differences that the election procedures of the National Labor Relations Act simply do not work in the construction industry. The Wagner Act, as written in 1935, was intended to work quite well in the normal industrial setting characterized by a stable complement of employees who work for the same employer at the same plant location on a continuous basis. In that situation, there is a reasonable assumption that at the end of the election process, an identifiable employer and identifiable group of employees will remain for purposes of collective bargaining representation.

In the construction industry the presumption is the opposite. Construction workers are not attached to a particular employer, but are attached to the industry itself within a geographical area. Accordingly, the NLRA's election procedures are simply unsuitable for the construction industry. In fact, construction workers were

organized for many decades before the NLRA was enacted in 1935, and those workers gained nothing of substance from the Wagner Act.

It was because of its recognition that elections do not work in the construction industry, and that the prehire agreement is an essential ingredient of stable labor relations in that industry, that Congress in 1959 specifically authorized prehire agreements in the construction industry. Unfortunately, however, as explained in the memorandum attached to my testimony, the present state of the law with respect to such agreements is grossly inequitable and requires Congressional action if stability in construction industry labor relations is to be assured.

Because of two major developments, collective bargaining in the construction industry today is an endangered species, as it has become virtually impossible for construction workers to avail themselves of their statutorily protected rights to secure and maintain collective bargaining representation.

A) The first of these developments is the increasing use of what is called "double-breasting." Double-breasted operations were originally a creation unique to the construction industry, but they are now seen in several other industries as well. The phrase "double-breasted" refers to a union construction company that establishes or acquires a non-union construction company, both of which are commonly owned and controlled. The new subsidiary then

performs the same work as the unionized company, in the same geographical area, but on a non-union basis, thereby avoiding the commitment made by the original employer to abide by the terms and conditions in his collective bargaining agreement. The phenomenon of double-breasted has occurred largely over the last twenty years and, today, is a openly acknowledged way of evading collective bargaining obligations. In November of 1981, Thomas E. Daley, President of the Associated General Contractors of America, in an interview with the Engineering News Record, described the motivation of double-breasting as follows:

There is no union contractor I know of that by choice would go open shop for the hell of it. It's a lot easier for him to stay union as long as he can compete ... but the minute he starts to lose work and his business is threatened, he will go double breasted or open shop, that's all there is to it. He has to.

In the early 1970's the practice of double-breasting was rare. It was believed that such sham maneuvers violated the law. If it was done, it was done in the shadows to avoid detection. Since then, however, the practice has come out of the closet, and corporations publicly acknowledge their double-breasted status. For example, a 1981 survey conducted by the Engineering News Record disclosed that 77 of the 400 top construction companies in the country labeled themselves as double-breasted. Later, according to a report in the November 8, 1984, issue of Engineering News Record, 27 of 50, or 54 percent of the largest contractors by dollar volume in 1983, were operating double-breasted. In 1986, figures among

the very largest contractors illustrated even more dramatically the extent of double breasting. Of the top 25 contractors listed in an April 17, 1986, Engineering News Record story, 20 -- or 80 percent -- had double-breasted affiliates. That number has certainly increased in the years since that survey was taken. And among smaller contractors, it is even easier and more common to form double-breasted operations.

It seems self evident that the law should not permit employers to avoid collective bargaining contracts by playing corporate shell games. We of the Building Trades are sympathetic to the need of our employers to remain competitive, and I am proud of our record over the last 15-20 years in actively pursuing the elimination of non-competitive work practices at the bargaining table. In our view, however, our national labor policy requires that workers and employers must together negotiate solutions to non-competitive aspects of collective bargaining agreements, and prohibits employers from unilaterally solving such problems through a decision to become double-breasted.

B) In addition to the geometric growth of the sham device of double-breasting, the last quarter century has seen a tremendous growth in the non-union sector of the construction industry. Between 1968 and 1992, one author has reported that the percentage of construction work performed by non-union firms nationwide increased from approximately 20% to 60%. See Stephen F. Befort,

Labor Law and the Double-Breasted Employer, 1987 Wisc. L. Rev. 67, n.3. In some trades, the percentage of work now done on a non-union basis is even higher. It is easy to recognize that this trend works to the disadvantage of fair contractors who choose to abide by their collective bargaining agreements, and the employees who wish to receive the benefits provided by those agreements.

What may not be so readily apparent is the damage that results to society from the increasing amount of work done non-union. I have already noted how collective bargaining agreements are responsible for portable pension and welfare plans that protect millions of organized construction workers. That is a benefit that cannot be matched in the non-union sector, and is frequently lacking completely. With the emphasis in today's headlines on the lack of adequate health care in this country, the danger presented by increasing numbers of construction workers with no or inadequate protection from health and welfare plans is obvious.

I have also mentioned the apprenticeship and training programs provided under collective bargaining agreements. Today, the fifteen national building trades unions and their contractors spend more than \$300 million on training programs, at both the national and local levels. At present, more than 180,000 apprentices each year participate in these training programs. Many other craft workers and foremen undergo additional training to upgrade their skills. In spite of recent rhetoric from some non-union contractor

organizations, the simple fact is that training programs are virtually non-existent in the non-union sector or, where they do exist, don't come close to providing the level of instruction and training provided under collectively-bargained programs. Given the predictions of a severe shortage of skilled workers for the rest of this decade and into the next century, the present journeyman and apprenticeship programs provided by the organized construction industry provide the best hope of meeting the manpower needs of the industry in the years ahead. Workers benefit, the industry benefits and society benefits from the role that the organized construction industry has played -- and will continue to play -- in the training of skilled workers.

Let me mention another area where the growth of the non-union construction sector has serious consequences for employees and for society. The present condition of occupational safety and health in the construction industry is a scandal. According to government figures, each year an average of more than 2,100 deaths and 250,000 serious injuries occur in construction workplaces. Moreover, this situation has become progressively worse during the last twenty years. In 1970, construction workers constituted 4% of the total workforce and accounted for 15% of the total fatalities. Today, construction workers constitute 5.5% of the workforce but account for 25% of the fatalities.

Once again, it is the building trades unions and their contractors that have worked jointly to sponsor comprehensive safety and health programs in order to protect the lives of workers and to reduce the enormous losses that result from accidents. Unlike the non-union sector, these safety programs have been instrumental in preventing accidents and have resulted in savings to the industry of approximately 10% of the total cost of construction projects.

The greatest single safeguard against accidents is worker training, and the record is clear that it is the organized sector that provides superior safety training to workers. According to one study, published in the November 1990 Journal of Occupational Medicine, entitled "Safety Performance Among Union and Nonunion Workers in the Construction Industry," the superior training given to union workers results in safer job sites. The study found clear evidence that union workers had received more safety training, and had a better safety record, than their non-union counterparts.

IV

The sum of the plight faced by building trades workers and their unions is this: Construction unions provide a number of significant benefits, through the collective bargaining process, for the employees they represent. It goes without saying that these benefits increase the labor costs of unionized construction

contractors, and places them at a competitive disadvantage vis-a-vis non-union contractors. That problem is magnified by the fact that construction is an industry that new companies can easily enter. As I mentioned at the beginning of my testimony, the overwhelming majority of construction companies -- 73 percent -- consist only of their owner.

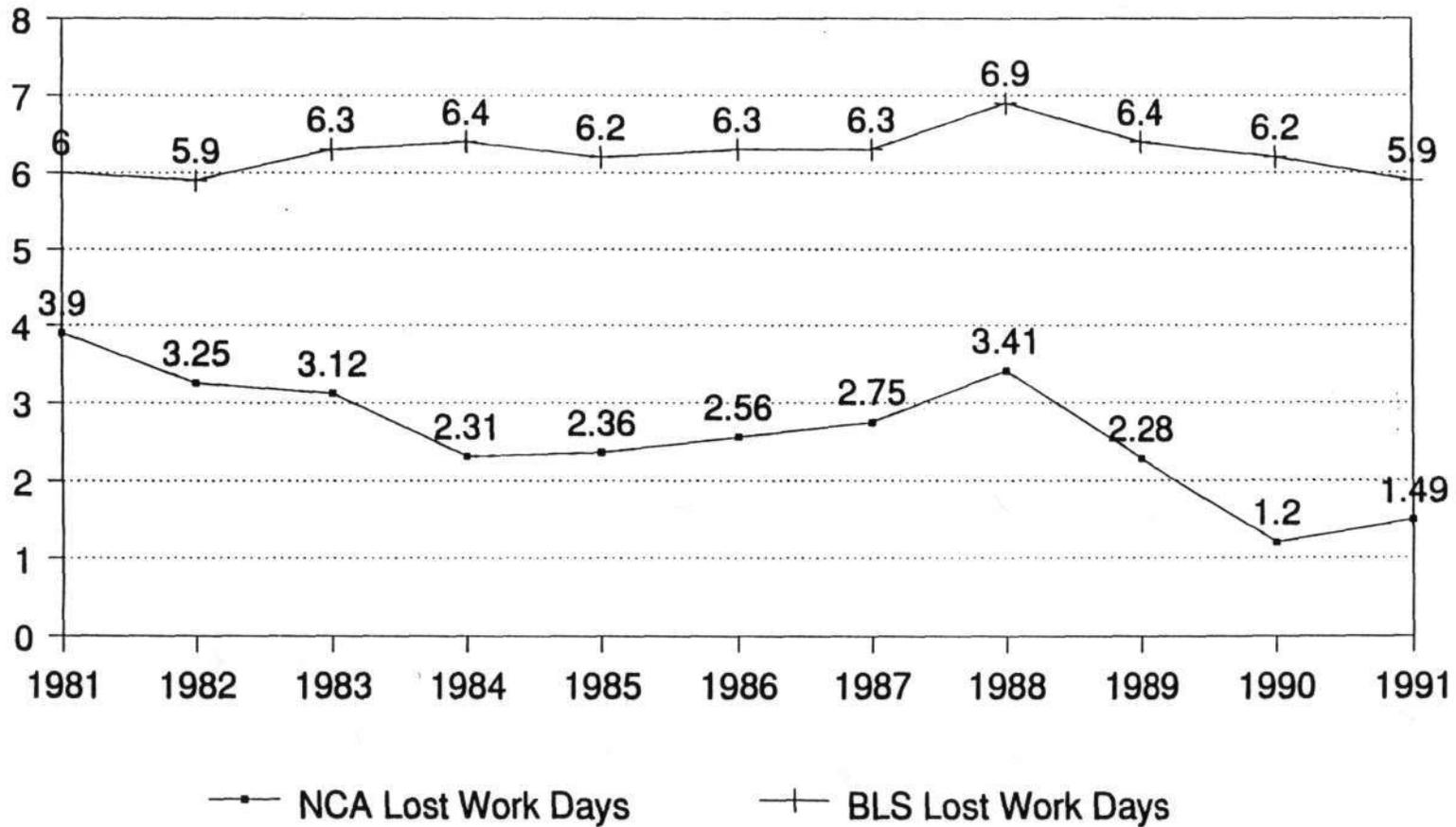
The problems that arise from the nature of the industry itself are then compounded by developments in the law. Since 1973, the law has allowed -- even encouraged -- union companies to operate on a non-union basis by becoming double-breasted. The law also allows a union company to stop recognizing the union and to become totally non-union as soon as its collective bargaining agreement expires. Finally, the law ties our hands in attempting to respond to these actions. We cannot exert pressure on property owners, general contractors or construction managers, because they are considered untouchable "neutrals" under the secondary boycott section of the law -- even though, as I indicated earlier -- all of the business operations on a construction site are closely interrelated. And, even the non-union breast of a unionized company is considered a "neutral" under the law.

The bottom line is that building trades unions and the employees they represent face a number of problems that are directly related to the current inequitable state of our federal labor law. The result of these problems is that the system of

collective bargaining in the construction industry, which has been the basis of stability and productivity in that industry for a century, has been seriously undermined and is at grave risk. Fundamental legislative changes are necessary in order to redress this situation, and I have described those changes in some detail in the memorandum attached to my testimony.

Thank you.

National Constructors Association 11 Year Trend - Lost Work Day Cases



1981-1991

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ADDENDUM TO
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I

Because of the nature of the construction industry, and the particular difficulties that employers and employees in the construction industry have faced for many years, Congress sought a legislative solution for those problems in 1959, in order to accommodate the terms of the National Labor Relations Act (NLRA) to the nature of this industry. Unfortunately, the 1959 Congressional effort has been largely undermined in the intervening years.

In my testimony before the Commission, I noted the unusual nature of the construction industry, which is characterized by many small employers, with jobs of short duration, and a casual workforce seeking employment from many different employers at different times and locations. It is, essentially, an employment pattern of seasonality and intermittence.^{1/} My testimony also

^{1/} In 1959, Congress recognized this pattern of employment in the construction industry, and used it as a basis for the construction industry amendments to the Act that are discussed later in this paper. See S. Rep. No. 187, 86th Cong., 1st Sess., at 27, 28 (1959), 1 LMRDA Leg. Hist. 423-24.

noted the significance of the "prehire" agreement and the use of area-wide hiring halls as essential ingredients in serving the needs of employers and employees in this industry.

II

In order to understand the predicament that construction workers find themselves in today, one must review the history of the National Labor Relations Act. The Wagner Act was the first federal statute to establish what has become an immutable principle of American law -- the right of workers to form unions and bargain collectively. But one need not be a scholar in American history to know that collective bargaining and union organization did not begin in this country with enactment of the Wagner Act. Unions had been a part of the fabric of our society long before 1935.

But in 1935, Congress was faced with a national crisis in labor relations to which it was compelled to respond. That crisis was created by the great industrial union organizing campaigns in the largest and most anti-union industries in this country. The great tide of industrial organizing had, for the first time, brought employers in the steel, auto, rubber and other major industries to the realization that federal labor legislation might be in their own best interest in the face of sit-down strikes, mass picketing, product boycotts and a myriad of other organizing

techniques. Congress responded to this unrest with the Wagner Act which, as you know, in Section 7 promises that:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection....

The Act, as written in 1935, was structured with these major industries in mind. It was intended to work quite well in the normal industrial setting characterized by a stable complement of employees who work for the same employer at the same plant location on a continuous basis. In the construction industry, however, as noted in my testimony, the situation is very different. Construction workers are not attached to a particular employer, but are in fact attached to the industry itself, centered around the union hiring hall, within a geographical area. Accordingly, it was determined early in the history of the NLRA that the normal representation election procedures simply do not work in the construction industry.

Because of these unique characteristics, the NLRB refused to assert jurisdiction over the construction industry from 1935 to 1947. Elections were not conducted in the industry, and prehire agreements, although technically a violation of the Wagner Act because they are signed before the employer has a representative complement of employees, continued as the norm. In its deliberations on the Taft-Hartley Act in 1947, Congress showed no

special concern over the Board's treatment of elections and prehire agreements in the construction industry. Congress did, however, exhibit a concern over secondary boycotts in all industries, and dealt with them by enacting Section 8(b)(4). Accordingly, after the passage of Taft-Hartley, the Board felt compelled to assert jurisdiction over the construction industry for all purposes, including representation elections.

In 1948, the NLRB carried out a pilot program of construction industry elections under the union shop authorization provisions of the Act. The result was that, even with the full cooperation of the unions and employers involved, the election costs were so staggering that the General Counsel ultimately recommended that the Board ignore the statute with respect to elections in this industry.

Commencing in 1951, and in several sessions of Congress thereafter, bills to amend the Taft-Hartley Act to deal with unique aspects of the construction industry were introduced. These modifications were ultimately enacted in 1959 as part of Title VII of the Landrum-Griffin Act, also known as the Labor-Management Reporting and Disclosure Act ("LMRDA").

Unfortunately, however, in spite of Congressional efforts in 1959, collective bargaining in the construction industry today is an "endangered species" because it is virtually impossible for

workers in our industry to avail themselves of their statutorily protected right to secure and maintain collective bargaining representation. In the last 20 years, interpretations of the law have ignored the special characteristics of the construction industry and defeated Congress' desire to facilitate collective bargaining in that industry.

III

In order to permit the continuation of the prevailing practices in the construction industry, and to accommodate the terms of the NLRA to conditions in the construction industry, Congress in 1959 enacted two provisions specifically tailored to the nature of labor relations in this industry. Unfortunately, much of that Congressional effort has since been undone.

A) The first of the sections was 8(f), which for the first time authorized prehire agreements in the construction industry. Thus, the mechanism that had so well served the interest of both workers and employers in the construction industry was at last formally protected by the law. Section 8(f), however, while authorizing prehire agreements, preserved employee free choice. It provided that, while prehire agreements did not violate the Act, such agreements could not serve as a bar to an election petition filed pursuant to Section 9 of the Act. This is a specific safeguard to allow employees to seek a Board election and to reject

any prehire bargaining representative with which they are dissatisfied.

We believe that this is a uniquely appropriate accommodation for our industry. Workers are assured that their unions can negotiate agreements on their behalf which will establish the wages and conditions available to them if the market conditions provide employment. They are also assured that, through those agreements, employers can be required to seek workers through the hiring hall and, accordingly, workers need register with only one source of employment instead of wandering from project to project, day in and day out, seeking work opportunities. In addition, a number of specific and valuable benefits for construction workers have been provided through the use of prehire agreements. These include portable pension and welfare benefits for employees who continuously move from job to job; apprenticeship and other training programs that produce the highly skilled craft employees needed in this industry; and safety and health programs designed to reduce worksite dangers of accidents and exposure to harmful substances. I have described the nature and value of these benefits in more detail in my testimony before the Commission.

The prehire system of collective bargaining, validated by Congress, served the industry well until the early 1970's, when the Labor Board issued a series of decisions which undermined the viability of prehire agreements. In R. J. Smith Construction Co.,

191 NLRB 693 (1971), the Board held that employers who enter into prehire agreements were free to terminate those agreements at any time, unless and until the union could establish that it represented a majority of the employer's employees.

In 1987, the Board modified that approach and announced new rules governing the operation of prehire agreements in the construction industry. John Deklewa and Sons, 282 NLRB 1375 (1987). Under the new rule, although employers cannot terminate a prehire agreement during its term, they are free to repudiate their bargaining relationship immediately upon the expiration of the agreement. Or, if the employer wishes, it can begin bargaining for a new contract, but then withdraw from the bargaining and end its relationship with the union if the employer is unhappy with the progress of the negotiations. These latter parts of the Deklewa rule are contrary to the law in all other industries, and contrary to the effect which Congress intended to give to prehire agreements through its enactment of Section 8(f) in 1959. You do not have to be a legal scholar to know that a rule that lets one party simply walk away from his bargaining relationship is wrong by any standard. Moreover, the result of the rule is that Section 8(f) agreements have an inferior status to Section 9(a) agreements in other industries. Yet, in reviewing the history of Section 8(f), a Senate Report in 1987 noted expressly that,

Congress [in 1959] intended for Section 8(f) of the LMRDA to accord pre-hire agreements in the construction industry the

same status and to have the same force and effect under the Act as Section 9(a) agreements [in all other industries.]. [S. Rep. No. 100-314, 100th Cong., 2nd Sess., at 8.]

The present state of the law under Section 8(f) is, therefore, inequitable and indefensible, as well as contrary to what Congress intended in 1959. Stability in labor relations cannot be returned to this industry without corrective Congressional action.

B. Unfortunately, the damage that the NLRB has done to collective bargaining in the construction industry goes beyond its misinterpretation of Section 8(f) and the use of the prehire agreement. The NLRB has provided a reluctant construction employer with another device to avoid its collective bargaining obligations and to deny workers the benefits of union representation. The Board has done so by allowing employers to establish what are called "double-breasted" operations. Double-breasted operations were originally a phenomenon unique to the construction industry. They are now used in several other industries as well. Although we cannot identify who coined the term "double-breasted" to identify these types of construction operations, it refers to a union construction company and a non-union construction company, both of which are commonly owned and controlled.

Until the early 1970's the term "double-breasted" was virtually unheard of. Today, it has become an easy way for employers to avoid their obligation to abide by collective bargaining agreements. The beginning of the tremendous growth of

double-breasted operations coincides with, and is in large part attributable to, the NLRB's 1973 decision in a case known as Peter Kiewit Sons' Company, 206 NLRB 562. In that case, Kiewit was bound to a collective bargaining agreement with the Operating Engineers in the State of Oklahoma for the performance of highway construction work. The contract had been in effect for years. In 1972, Kiewit brought a separate corporate subsidiary known as South Prairie Construction Company into the State of Oklahoma for the purpose of bidding on highway construction work for the first time on a non-union basis. South Prairie immediately began to secure such work and refused to recognize and abide by the Operating Engineers' collective bargaining agreement. Kiewit, in the meantime, withdrew from bidding for highway construction work in the State.

Kiewit made no attempt to disguise its purpose. It had decided that it would be more profitable to ignore, than to comply with, its commitment to perform highway construction work in Oklahoma under its collective bargaining agreement. Accordingly, Kiewit shifted the work previously performed by employees of its union company over to the employees of its non-union company. Again, it does not take a legal scholar to recognize that a system which permits an employer to evade his written agreement by merely setting up a new company to perform the same work, in the same area, on a non-union basis, is just plain wrong. That was not what Congress had in mind in 1935 when it guaranteed workers the right

to bargain collectively, or in 1959 when it attempted to facilitate collective bargaining in the construction industry.

Nevertheless, the NLRB found that the Act permitted Kiewit to evade his bargaining agreement, primarily because Kiewit and South Prairie each "independently" controlled its own labor relations policies. The United States Court of Appeals for the D.C. Circuit, however, rejected that conclusion. It found that common control of labor relations was not necessarily the critical factor and emphasized the importance of seeing whether there was an "arms-length" relationship between the two employers. Operating Engineers Local 627 v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975). Although the Supreme Court upheld that part of the D. C. Circuit's decision, it sent the case back to the Board to determine whether, even if Kiewit and South Prairie constituted a single entity, the employees of each company constituted separate bargaining units. South Prairie Construction Co. v. Operating Engineers Local 627, 425 U. S. 800 (1976). Not surprisingly, in its second opinion, the Board decided that even though the two companies constituted a single entity, they were separate bargaining units, and thus it reached the same conclusion it had originally reached, i.e., the Operating Engineers' agreement did not apply. Peter Kiewit Sons, Inc., 231 NLRB 76 (1977).

The Kiewit case is the landmark case on double-breasting. It is the road map for employers seeking to escape their collective

bargaining obligations by establishing non-union operations. In fact, Professor Steven G. Allen, a professor at North Carolina State University and a well-respected student of the construction industry, concluded earlier this year that the Kiewit decision is significantly responsible for the decline in union density in the construction industry. Allen, Unit Costs, Legal Shocks, and Unionization in Construction, April 1993 (paper scheduled for inclusion in a 1994 research publication of the Industrial Relations Research Association). The 1973 Kiewit decision contained a statement which at the time was incorrect, but which has become a self-fulfilling prophecy:

It is not uncommon in the construction industry for the same interests to have two separate organizations; one to handle contracts performed under union conditions, and the other under non-union conditions.

206 NLRB at 562.

By 1987, the House of Representatives recognized the need to outlaw this destructive practice, and passed the Building and Construction Industry Labor Law Amendments of 1987, which was designed to insure that employers in the construction industry abide by their collective bargaining agreements, and to preclude such employers from avoiding those contractual obligations by utilizing non-union related business entities to perform the same work which is covered by their collective bargaining agreements. In early 1988, the bill was cleared by the Senate Committee on Labor and Human Resources but, because of the pressures of the

presidential election in 1988, the bill did not reach the Senate floor. Later versions of the bill have been introduced but have not moved through either House. Nevertheless, the problems addressed by the bill remain critical.

In the same 1987 Senate Report, cited above, the Committee on Labor and Human Resources said that, in

the 'double breasting' line of cases, the Board has drawn a blueprint for construction industry employers who wish to evade the obligations stated in collective bargaining agreements by establishing so-called 'double-breasted' companies. The Committee has received copies of contractor "how to" manuals that outlined the steps contractors could take to operate double breasted in a common geographical area and avoid any criminal or Labor Board prosecution ... There is no real cessation or diminution of the employers' activity in the industry, merely the termination of the right of employees to participate in that activity under the terms of a collective bargaining agreement. The Board has placed its imprimatur on this double-breasting device, and the result has been to spawn an even greater use of this technique. [S. Rep. No. 100-314, 100th Cong., 2nd Sess., at 16.]

Today, double-breasting is an openly acknowledged way of evading collective bargaining obligations. In my testimony, I have cited a number of statistics from employer sources that reveal dramatically the growth of double-breasting in recent years. I also stated my belief, which seems to me a truism, that employers should not be allowed to avoid their responsibilities under collective bargaining agreements, and to deprive employees of the benefits provided by those agreements, by playing corporate shell games. Accordingly, when a union contractor forms a subsidiary to perform the same work, in the same geographical area, but on a non-

union basis, the law must provide that the union company violates the NLRA by refusing to apply the agreement to both operations. The huge loophole presently provided by the law on double-breasting is in immediate need of a Congressional remedy if labor stability is to be returned in the construction industry, and if employee free choice is not to be so easily defeated by the sham device of double-breasting.

Although some unions have attempted to combat the double-breasting device by negotiating contractual provisions that prohibit the practice, or seek to compel application of the collective bargaining agreement to the newly established non-union shop, those efforts have been thwarted on the grounds that such causes are considered unlawful "hot cargo" agreements under Section 8(e) of the Act. That is a subject that requires some explanation, and the subject which we now address.

C) To understand the second part of the special treatment that Congress accorded the construction industry in 1959, we must review briefly the "secondary boycott" provisions of the National Labor Relations Act. Prior to 1959, Section 8(b)(4) was the only secondary boycott section of the Act.

What became Section 8(e) was, to a large extent, a Congressional response to two Supreme Court decisions: Local 1976, Carpenters v. NLRB (Sand Door), 357 U.S. 93 (1958), and NLRB v.

Denver Building and Construction Trades Council, 341 U.S. 675 (1951). In Sand Door the Court held that Section 8(b)(4) did not permit a union to coerce an employer's compliance with an agreement not to handle non-union or struck goods, but it also held that the Act did permit an employer and a union to enter into a hot cargo agreement and voluntarily to comply with it. 357 U.S. at 108. In Denver Building Trades the Court held that a general contractor and its subcontractor working on a jobsite were separate entities under Section 8(b)(4) and that a union violated that section by picketing and conducting a strike designed to compel the general contractor to cease doing business with a subcontractor on the same job.

Thus, when Congress convened in 1959, unions in the construction industry could not picket, strike or otherwise coerce one employer in the construction industry in order to influence another employer, even if the two employers were a general contractor and its subcontractor working on the same jobsite. But, a voluntary agreement between a union and an employer in that industry could not be deemed unlawful because of its secondary objectives or effects. Throughout the legislative history of the LMRDA there are discussions about the efforts to overrule both of those decisions. Ultimately, Congress did not overrule Denver Building Trades so as to permit economic activity directed against secondary employers in the construction industry. Congress did overrule Sand Door and prohibit voluntary agreements with secondary objectives, but it created an exemption from that prohibition for

the construction industry as a partial substitute for the attempt to overrule the Denver Building Trades decision.

The new prohibition took the form of Section 8(e), which prohibits secondary "hot cargo" agreements generally and was designed to eliminate the loophole created by the Sand Door decision. In enacting Section 8(e), however, Congress recognized that a specific exception had to be made for the construction industry from its prohibition of "hot cargo" agreements. The construction industry proviso to Section 8(e) expressly allows agreements between unions and employers in the construction industry that relate to the contracting of work at construction sites, even if those agreements are deemed "secondary" and would otherwise fall within the ban of Section 8(e).

This explicit protection given to typical construction industry contracting and subcontracting agreements has been largely diminished in two respects, however. First, in 1959, it was adequate to authorize agreements between a labor organization and an "employer" in the construction industry, because all such agreements were with business entities that met the technical definition of "employer." With structural changes in the construction industry in recent years, however, the key management entity that is responsible for a construction project, and with whom a union often must deal, is no longer necessarily an "employer" in the construction industry. Frequently, construction

projects are now overseen by owners or developers directly, or by construction managers.

This problem can be corrected a very simple change in the construction industry proviso, to permit agreements between a labor organization in the construction industry and "an employer, owner, developer, construction manager or other business entity," that relates to the contracting of work at a construction site. Such an amendment to the 8(e) proviso would do no more than recognize the changes in business forms and operations that have occurred in the last thirty-four years, while still preserving the intent that underlies the proviso.

Second, the Labor Board has given a very narrow interpretation to union efforts which are designed to preserve the work of the employees they represent. These work preservation efforts are deserving of greater support through a more liberal interpretation of the law. This point requires some elaboration.

As mentioned earlier, the proviso to Section 8(e) comes into play only if an agreement in the construction industry is first found to be "secondary" and therefore within the scope of the main prohibition in Section 8(e). On the other hand, if an agreement is deemed to be for the purpose of preserving the work of employees represented by the union and is therefore considered "primary," it is entirely outside the scope of 8(e). National Woodwork

Manufacturers Association v. NLRB, 386 U.S. 612 (1967). Many so-called "hot cargo" agreements in the construction industry are in fact intended to preserve the work of employees covered by those agreements, and should be considered primary.

In two related decisions of the U.S. Supreme Court, in 1980 and 1985, that Court announced a broad standard for what constitutes primary "work preservation" agreements. See ILA I and II, NLRB v. International Longshoremen's Association, 447 U.S. 490 (1980), and 473 U.S. 61 (1985). Specifically, the Supreme Court noted in ILA II that a union's effort to preserve jobs in the face of a perceived threat to those jobs is primary, even if that effort has secondary effects. A desire "to preserve work in the face of a threat to jobs" is a "clear[ly] primary objective." 373 U.S. at 79.

Over the years, however, construction industry contracting and subcontracting agreements, whose purpose is "to preserve work in the face of a threat to jobs," have routinely been viewed as secondary. One such example is an agreement that prohibits or restricts the use of double-breasted operations by contractors in signed agreement with the union. Although the use of double-breasted shops poses a clear and present danger to the work force represented by the union, the Board, using an unrealistic and restrictive concept of "work preservation," almost automatically views such agreements as secondary, and then examines the question

of whether the agreement is nevertheless saved by the 8(e) proviso.

Thus, eight years after the Supreme Court's decision in ILA II, the law governing the validity of "work preservation" agreements in the construction industry remains more restrictive than the standard announced in that case by the Supreme Court. We believe, therefore, that an amendment to Section 8(e) is needed to protect legitimate work preservation efforts by incorporating into the statute the ILA standard for such efforts. Moreover, for the reasons explained earlier, the work preservation object of those efforts must be viewed in the context of the area labor pool served by the labor organization and its hiring hall, rather than by a strict bargaining unit test that is utilized in other industries but is unworkable in this industry.

IV

There is an additional problem that weakens the rights of employees in the construction industry. That problem results directly from the erroneous decision of the United States Supreme Court in NLRB v. Denver Building and Construction Trades Council, 341 U.S. 675 (1951). In that 1951 case, a 6-3 majority of the Supreme Court held that a general contractor and its subcontractors working on the same job site were separate entities under Section 8(b)(4), and that a union that had a dispute with one subcontractor violated that section by picketing to compel the general contractor

to cease doing business with that subcontractor. That decision ignored the realities of the construction industry and, in particular, the close working relationship and interdependence among all contractors and subcontractors on a single construction site. It also ignored a fundamental fact of construction, namely, that what is critical to construction workers is the award of jobs to unionized contractors, and that this process is controlled by owners, developers, general contractors and construction managers. This essential aspect of the construction industry reveals that, in fact, all work on a construction site is part of the same process, and that none of these entities is uninvolved in the process or a so-called "neutral" under Section 8(b)4. It is because of that reality that the Denver Building Trades decision should be reversed. And it is because of the same reality that the 8(e) proviso was necessary in 1959, and, as explained above, needs amendment today in order to close the loophole for those who control the job flow but do not meet the definition of "employer."

Legislative efforts were made throughout the 1950s to overrule the Denver Building Trades decision. Even President Eisenhower's 1959 message to Congress, in which he recommended the labor reform legislation that ultimately became the LMRDA, urged the enactment of provisions that would permit secondary activity in certain circumstances in the construction industry. Bills were introduced in both Houses in 1959 that would have overruled the Denver

Building Trades decision, but what ultimately emerged was the compromise that added the construction industry proviso to Section 8(e).

In 1961 the Supreme Court decided that, in the industrial sector, picketing could be conducted at a common work site using what was called a "related work" test. Electrical Workers (IUE) Local 761 v. NLRB, 366 U.S. 667 (1961). The Labor Board later ruled, however, that the General Electric rule announced by the Supreme Court for other industries did not apply to disputes with general contractors in the construction industry. Markwell & Hartz, Inc., 155 NLRB 319 (1965), enforced, 387 F.2d 79 (5th Cir. 1967), cert. denied, 391 U.S. 914 (1968).

The result of these decisions is a glaring disparity between economic rights of employees in the construction industry on the one hand, and in all other industries on the other. Subsequent legislative efforts were made to reverse the Denver Building Trades decision, and Congress ultimately accomplished that purpose in 1975 by enacting a new law to protect the economic rights of labor in the construction industry, H.R. 5900, 94th Cong., 1st Sess. (1975). After twenty-four years of trying, both Houses of Congress agreed to amend Section 8(b)(4) to permit picketing at the common site of a construction project, and expressly overruled the Denver Building Trades decision. A second part of that bill provided for a national dispute resolution procedure that could be invoked in

certain local bargaining situations in the construction industry. The objective of this portion of the bill was to provide a more orderly and efficient system of bargaining in the industry. In spite of both private and public assurances that he would sign such a bill if enacted by the Congress, President Ford vetoed it.

As a result of President Ford's veto, Congress' will in accommodating the Act to the needs of the construction industry was once again thwarted. Now, eighteen years later, the disparity in economic rights between employees in the construction industry and those in other industries is greater than ever. In short, a wrong was committed in 1951, Congress has since recognized the need to right that wrong, but that corrective action has never been finalized. That action must be taken if employees in the construction industry are to be able to exercise the same rights as their fellow employees in other sectors of the economy.

V

The Building and Construction Trades Department fully supports the efforts of the AFL-CIO to achieve a meaningful version of labor law reform, one that will effectively guarantee employee rights and assure a more effective workplace. As AFL-CIO President Kirkland has eloquently stated here, in many ways the protections of the

Wagner Act in 1935 have been rendered ineffective, and there is an urgent need of a major overhaul.

Within the building and construction industry, workers and their unions are met with an additional set of industry-specific problems that are directly related to the current state of the inequity of our federal labor law. These problems include the blatant use of double-breasting; the right of an employer to walk away from the union and the employees it represents once the contract expires; and unrealistic restrictions on the right of unions to respond to such actions. These problems have resulted in serious damage to labor relations in the construction industry today. Moreover, these current conditions dramatically reveal how Congressional efforts to bring order and stability to labor relations in this vital industry have been thwarted. Accordingly, any changes in our basic labor laws must include provisions that will effectively remedy these conditions.