

**Brannan Sand and Gravel Co. and Teamsters Construction Workers, Local Union No. 13, AFL-CIO.**<sup>1</sup> Case 27-CA-9329-3

July 20, 1988

**ORDER DENYING MOTION TO DISMISS AND REMANDING PROCEEDING**

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On September 23, 1986, Administrative Law Judge Gerald A. Wacknov issued his decision in this proceeding<sup>2</sup> finding that the Respondent violated Section 8(a)(5) and (1) by failing to bargain in good faith with the Union regarding the terms of a successor collective-bargaining agreement, by unilaterally discontinuing provisions of the expired collective-bargaining agreement, and by placing contract proposals into effect prior to an impasse in bargaining. Subsequently, the Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and an answering brief.

Thereafter, on June 23, 1987, the Respondent filed a motion to dismiss the complaint in this case based on the Board's decision in *John Deklewa & Sons, Inc.*,<sup>3</sup> which issued after the judge's decision and after the exceptions had been filed in this case.<sup>4</sup> On July 7, 1987, the General Counsel filed an opposition to the Respondent's motion.

On October 30, 1987, the Board issued a Notice to Parties of Opportunity to Submit Statements of Position. The notice invited the parties<sup>5</sup> to address the following issues raised by *Deklewa*, but not discussed or decided there:

1. May construction industry bargaining relationships that originated prior to the effective date of the 1959 amendments to the Act and that have thereafter continued without interruption be presumed to be other than Section 9 relationships under the holdings of *John Deklewa & Sons*, supra?
2. In determining the current status of a construction industry bargaining relationship

<sup>1</sup> On November 2, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

<sup>2</sup> The judge's decision also encompassed Cases 27-CA-9329-2, 27-CA-9391, and 27-CA-9527, involving the Respondent and Laborers' International Union of North America, Local No. 86. Those cases were severed from this case by Board Order of October 30, 1987.

<sup>3</sup> 282 NLRB 1375 (1987), enfid sub nom *Iron Workers Local 3 v NLRB*, 843 F.2d 770 (3d Cir 1988).

<sup>4</sup> The Board held in *Deklewa* that it would apply the new principles set forth there "to all pending cases in whatever stage." 282 NLRB 1389.

<sup>5</sup> In addition, the Board invited various other entities to submit statements of position as amici curiae.

that originated prior to the 1959 amendments, is it necessary to consider whether the relationship was lawful at the outset?

3. Would the Board be barred by Section 10(b), as construed in *Machinists Local 1424 v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411 (1960), from making a determination regarding the lawfulness of pre-1959 events?
4. What record evidence, if any, pertaining to the initial or continuing aspects of recognition is necessary to establish a Section 9 relationship when the recognition predated 1959? The parties should specifically address the record evidence in this case and raise any additional relevant evidence which might warrant a remand.

Subsequently, the Respondent, the General Counsel, the Rocky Mountain Chapter of the Associated Builders and Contractors, Inc., Associated Builders and Contractors of Wyoming, Inc., the American Federation of Labor and Congress of Industrial Organizations, the AFL-CIO's Building and Construction Trades Department, and the Associated General Contractors of America, filed briefs and statements of position.

The record reveals the following relevant facts. The Respondent is engaged in the construction industry as an asphalt paver and in the sand and gravel business. The Respondent and the Union had a collective-bargaining relationship for more than 30 years, the origins of which predated the enactment of Section 8(f) of the Act in 1959. The parties' latest contract expired on June 30, 1985,<sup>6</sup> and the Respondent gave proper notice to the Union in April that the Respondent wished to terminate the agreement. Negotiations for a new contract commenced on June 7, and the parties met on 10 occasions through October 21 without reaching an agreement.

The Respondent's contract proposals sought to delete or change substantially virtually every significant provision of the expired contract. In response to the lack of progress in negotiations, the Union began a strike on July 3. On that same date the Respondent advised the Union that it would begin hiring permanent replacements, would stop enforcing the union-security provision of the expired contract, and, because there was an impasse in bargaining, would implement its last wage offer made to the Union. The Union replied that even though there was a strike, there was no impasse, and the Union expected to continue negotiating with the Respondent.

<sup>6</sup> All subsequent dates are in 1985 unless stated otherwise.

By letter dated July 9, the Respondent advised the Union that it intended to implement for returning strikers and replacement employees its proposals pertaining to subcontracting, hours of work, and overtime, and that all employees would be covered under the Respondent's health and welfare and deferred compensation plan. The Respondent presented its final proposal at the bargaining session on July 19, and on July 23 the Respondent notified the Union that the various proposals had been implemented. The Union was still on strike at the time of the hearing in this case.

Analyzing the evidence pursuant to principles evolved under Sections 9(a), 8(d), and 8(a)(5) of the Act, without reference to Section 8(f)'s provisions for construction industry collective-bargaining relationships, the judge found that throughout the negotiations the Respondent insisted on proposals which it knew would not be accepted by the Union, and which ensured the futility of bargaining. Accordingly, the judge concluded that the Respondent failed to bargain in good faith, unlawfully made unilateral changes in employees' terms and conditions of employment, and that the employees' strike was an unfair labor practice strike.

#### Positions of the Parties

The General Counsel contends that the Board should presume irrebuttably that construction industry bargaining relationships which started before the effective date of the 1959 amendments to the Act and which have continued without interruption are governed by Section 9(a) of the Act, and therefore the Respondent was obligated to bargain in good faith with the Union over the terms of a successor contract. The General Counsel adds that because the relationship in question here predates the enactment of Section 8(f), it was at its inception either a lawful 9(a) relationship or an unlawful relationship under Section 8(a)(2) of the Act. The General Counsel submits that the Board should conclude that the Respondent recognized the Union under Section 9(a) as the majority representative of the unit employees because the law presumes that parties act lawfully. Further, the General Counsel argues that Congress intended that Section 8(f) would operate prospectively only, and therefore relationships established before Section 8(f)'s enactment cannot be regarded as relationships protected by Section 8(f). Alternatively, the General Counsel asserts that, even if Section 8(f) had retroactive effect, that retroactivity was necessary to shelter nonmajority bargaining relationships only for the 6 months preceding Section 8(f)'s enactment because of Section 10(b). Accordingly, the General Counsel argues that the legality

of the relationship at issue here stems from Section 9 and is shielded by Section 10(b). In any event, the General Counsel contends that Section 10(b) of the Act bars the Respondent from asserting that the relationship was an unlawful 8(a)(2) agreement at its inception.

In agreement with the General Counsel, the AFL-CIO and its Building and Construction Trades Department urge that collective-bargaining relationships in the construction industry which have existed continuously since before the enactment of Section 8(f) should be treated in the same manner as relationships in industries not covered by Section 8(f). Accordingly, the AFL-CIO argues that because Section 9(a) is applicable to the parties' relationship, there was a presumption of majority support on the expiration of the last collective-bargaining agreement, which is rebuttable by showing relevant circumstances existing at that time, but not by inquiry into events concerning the legality of the inception of the relationship.

The Respondent contends that under *Deklewa*, supra, construction industry bargaining relationships which originated prior to the enactment of Section 8(f) and which have continued uninterrupted may not be presumed to be 9(a) relationships, and that to establish a 9(a) relationship here the General Counsel must show that the Union was certified as a result of a Board election or at least that voluntary recognition was based on a card check. In this regard, the Respondent asserts that there is available evidence which demonstrates that its relationship with the Union was a voluntary prehire agreement as contemplated by Section 8(f). Further, the Respondent argues that in determining the current status of a construction industry bargaining relationship that began prior to the 1959 amendments, it is unnecessary to consider whether the relationship was lawful at the outset because, by Section 8(f), Congress intended to legalize all such relationships. Thus, the Respondent submits that Section 10(b) is not applicable here. In any event, the Respondent contends that it is not necessary to determine the status of pre-1959 construction industry bargaining relationships in this case because the Respondent did not agree to a contract containing a union-security clause or a recognition clause until 1966.

The Rocky Mountain Chapter of the Associated Builders and Contractors, Inc., the Associated Builders and Contractors of Wyoming, Inc., and the Associated General Contractors of America contend that both *Deklewa* and the legislative history of Section 8(f) demonstrate that there is no logical or factual basis for presuming that a bargaining relationship initiated in the construction industry

before 1959 is or was a 9(a) relationship. Instead, these amici argue that the Board must presume that an agreement between a construction industry employer and a union is an 8(f) agreement and that this presumption is rebuttable only by evidence of Board certification or recognition by the employer concurrent with a showing that the union has majority support.

#### Discussion and Conclusions

After careful consideration of the parties' and amici's arguments, we conclude that all construction industry bargaining relationships, including those which began prior to the enactment of Section 8(f), cannot be presumed to be 9(a) relationships; that the lawfulness of the origination of the relationship is irrelevant to determining the current nature of the relationship; and that Section 10(b) as construed in *Machinists Local 424 v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411 (1960), does not preclude finding that a construction industry bargaining relationship, whatever its age, is not a 9(a) relationship. We also hold that we will find full 9(a) status with respect to all construction industry bargaining relationships only if the signatory union has been certified following a Board election or has been recognized on the basis of an affirmative showing of majority support. (See discussion, *infra*, at 980). Applying these principles to the facts of this case, we conclude that the case must be remanded for further consideration and for the parties to have an opportunity to introduce relevant evidence.

In *Deklewa*,<sup>7</sup> *supra*, the Board overruled the "conversion doctrine," under which a bargaining relationship which began as an 8(f) relationship could be found to have "converted" into a full 9(a) relationship by means other than a Board election or voluntary recognition based on a simultaneous showing of majority support.<sup>8</sup> The Board in *Deklewa* also emphasized that "[i]n light of the legislative history and the traditional prevailing practice in the construction industry" the burden of proving 9(a) status in construction industry cases is

on the party asserting the existence of a 9(a) relationship. *Deklewa*, *supra* at 1385 fn. 41.<sup>9</sup> This allocation of the burden of proof reflects the Board's recognition that, in enacting Section 8(f), Congress found that entering into prehire agreements was the prevalent practice in the construction industry.<sup>10</sup> As fully set forth in *Deklewa*, a review of the legislative history demonstrates that prior to the 1959 amendments

it had become established practice in the construction industry for employers to recognize and enter into collective-bargaining agreements with a construction industry union for periods ranging from 1 to 3 years even before any employees had been hired.

S. Rep., 1 Leg. Hist. 423. *Deklewa*, *supra* at 1380. This practice had become so widespread and routine that Congress deemed it necessary to add Section 8(f) to the Act because the Board's application of Section 8(a)(2) to the industry was resulting in "substantial instability in the industry by the invalidation of established industry practices . . . ." *Deklewa*, *supra* at 1380.

Several Board decisions since *Deklewa* have clarified the means by which a party can prove 9(a) status in the construction industry. In *American Thoro-Clean, Ltd.*, 283 NLRB 1107, 1108-1109 (1987), the Board stated:

In doing away with the conversion doctrine as applied to collective-bargaining agreements permitted under Section 8(f), we held in *Deklewa* that in light of the legislative history of Section 8(f), and the prevailing practice in

<sup>9</sup> This latter point is not necessarily a change in the law. See *Stine Scovil Construction Co.*, 269 NLRB 465 (1984), in which the Board refused to find that a construction industry employer's admitted failure to abide by a collective-bargaining agreement violated Sec. 8(a)(5) because the General Counsel failed to allege or submit proof that the union had 9(a) status or that the contract was not an 8(f) contract. *Carmichael Construction Corp.*, 258 NLRB 226 fn. 1 (1981), *enfd.* 728 F.2d 1137 (8th Cir. 1984), cited by the AFL-CIO and its Building and Construction Trades Department, is not to the contrary. There, the Board, in affirming a judge's conclusion that the respondent employers violated Sec. 8(a)(5), relied on the respondents' admissions that the union had majority status. Similarly, *Bay Area Sealers*, 251 NLRB 89 (1980), modified on other grounds 665 F.2d 970 (9th Cir. 1982), also cited by the AFL-CIO, is consistent with placing the burden of proving 9(a) status on the party asserting it. There, the Board affirmed a judge's finding that, although the respondent employer proved that it was engaged primarily in the construction industry, the General Counsel successfully satisfied its *prima facie* burden of establishing that the union was the 9(a) representative of unit employees at the time the parties' collective-bargaining agreement was executed.

<sup>10</sup> *Deklewa* did not modify longstanding precedent holding that the threshold burden of resolving any ambiguity concerning whether an employer is primarily in the building and construction industry falls on the party seeking to avail itself of 8(f)'s statutory exception. See *Carpet Local 1247 (Indio Paint)*, 156 NLRB 951 fn. 1 (1966). Here, it is undisputed that the Respondent is an employer engaged primarily in the building and construction industry.

<sup>7</sup> *Deklewa* set forth the following principles: (1) a collective-bargaining agreement permitted by Sec. 8(f) shall be enforceable through the mechanisms of Sec. 8(a)(5) and Sec. 8(b)(3); (2) such agreement will not bar the processing of valid petitions filed pursuant to Sec. 9(c) and 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) on the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

<sup>8</sup> Accordingly, the Board overruled in relevant part *R. J. Smith Construction Co.*, 191 NLRB 693 (1971), *enfd.* denied sub nom. *Operating Engineers Local 150 v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973). Under the conversion theory, a 9(a) relationship could be established by showing, for example, that during a relevant period unit employees were referred from an exclusive hiring hall, that a majority of unit employees were members of the signatory union, or that the 8(f) contract contained an enforced union-security clause.

the construction industry, the party to an 8(f) relationship which asserts the existence of a collective-bargaining relationship under Section 9(a) of the Act would have the burden of affirmatively proving the existence of such a relationship, through either (1) a Board-conducted representation election or (2) a union's express demand for, and an employer's voluntary grant of, recognition to the union as bargaining representative, based on a showing of support for the union among a majority of the employees in an appropriate unit. [Citation omitted.]

Further in *Precision Striping*, 284 NLRB 1110 (1987), the Board pointed out that an employer-conducted poll prior to the initial recognition may, in proper circumstances, establish a Section 9 bargaining relationship in the construction industry.<sup>11</sup>

Notwithstanding the emphasis in *Deklewa* and its progeny on traditional means of proving 9(a) status, the General Counsel and the AFL-CIO and its Building and Construction Trades Department contend that there should be another way to establish 9(a) status in the construction industry, i.e., by showing that the collective-bargaining relationship began before the enactment of Section 8(f). We note initially that this theory has no support in Board precedent. Of course, the theory would have been equally arguable under the rule of *R. J. Smith* as an alternative to the now-abandoned conversion doctrine,<sup>12</sup> or at any time subsequent to Section 8(f)'s enactment, but our review of precedent failed to reveal any indication that it was so argued.<sup>13</sup>

More importantly, reliance on the mere fact that a collective-bargaining relationship predates Section 8(f) to establish 9(a) status differs fundamentally from reliance on a Board election or recognition based on a contemporaneous showing of majority support for the union because it does not take into account employees' representational desires and does not further the fundamental statutory interest in employee free choice. In this respect, such a pre-

<sup>11</sup> See also *W. L. Miller Co.*, 284 NLRB 1180 (1987), and *Kephart Plumbing*, 285 NLRB 612 (1987).

<sup>12</sup> In this regard, we note that *R. J. Smith*, supra, implicitly overruled the proposition, set forth in *Bricklayers Local 3 (Eastern Washington Builders)*, 162 NLRB 476 (1966), enfd. 405 F.2d 469 (9th Cir. 1968), that Sec. 8(f) applies only to the situation where parties are entering into an initial contract, and not to succeeding contracts. *Deklewa* did not disturb that aspect of *R. J. Smith* and, in holding that successor construction industry bargaining agreements are presumed to be 8(f) contracts, we expressly overrule *Bricklayers*. We also overrule *Williams Enterprises*, 212 NLRB 880 (1974), enfd. mem. 519 F.2d 1401 (4th Cir. 1975), and *Dallas Building Trades Council (Dallas County Construction Employers' Assn.)*, 164 NLRB 938 (1967), enfd. 396 F.2d 677 (D.C. Cir. 1968) on this point.

<sup>13</sup> See, e.g., *Operating Engineers Local 542 (R. S. Noonan)*, 142 NLRB 1132 (1963), enfd. 331 F.2d 99 (3d Cir. 1964), cert. denied 379 U.S. 889 (1964); *Ellis Tacke Co.*, 229 NLRB 1296, 1299-1300 (1977).

sumption shares some of the same shortcomings that led the Board to abandon the conversion theory in *Deklewa*. Indeed, the conversion doctrine at least required proof that at some point after the parties entered into an 8(f) relationship, the union actually achieved majority support in a permanent and stable employee work force. The theory advanced here would eliminate the need for any such showing based on an irrebuttable presumption arising from the mere fact of a continuous bargaining relationship entered into before the enactment of Section 8(f).

Furthermore, the presumption urged in this case has no basis in fact. The Board recently stated in *Buckley Broadcasting Corp.*, 284 NLRB 1339 (1987), that

[a]s an evidentiary matter, presumptions should arise when it is believed that proof of one fact renders the inference of the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until it is affirmatively disproved. [Fn. omitted.]

*Buckley*, supra.<sup>14</sup> Applying this principle here, we find no basis for such a presumption because the fact of a construction industry bargaining relationship in existence prior to the enactment of Section 8(f) does not support an inference that the parties must have initiated their relationship under Section 9(a). As previously indicated here and in *Deklewa*'s review of the legislative history, the facts overwhelmingly support a contrary presumption. In particular, Congress stated:

In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements for future employment is not entirely consistent with the Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired . . . .<sup>15</sup> [Emphasis supplied.]

<sup>14</sup> While presumptions must as an initial matter have some basis in fact, they normally have a policy as well as a factual basis. See *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).

<sup>15</sup> S. Rep. No. 187, 1 Leg. Hist. 424

We also find no merit in the General Counsel's effort to use Section 10(b) to support an irrebuttable presumption of initial 9(a) status or otherwise bar a determination that any construction industry relationship predating Section 8(f) was a nonmajority prehire agreement at its inception. Relying on earlier precedent,<sup>16</sup> she asserts that the policies which the Supreme Court understood in *Bryan Mfg.* to underlie Section 10(b) as an affirmative defense could in this case preclude a defense based on evidence of unlawful minority union recognition predating the 6-month limitations period. *Bryan*, which was decided shortly after Section 8(f)'s enactment, involved the straightforward question of whether respondents employer and union could invoke Section 10(b) against alleged violations of Sections 8(a)(2) and 8(b)(1)(A) where the bargaining agreement was executed more than 6 months from the date of the charge. In holding that Section 10(b) was a viable bar to the complaint, the Court stated (362 U.S. at 419):

Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that Sec. 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events, "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused," H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40 [fn. omitted] and of course to stabilize existing bargaining relationships.

However, the logic of *Bryan* cannot be extended to support the General Counsel's argument here. In *R. J. Smith*, supra, the Board rejected this precise contention. In holding that the policies behind Section 10(b) did not support an irrebuttable presumption favorable to the General Counsel and did not foreclose inquiry into events that preceded the 6-month limitations period and that might have a bearing on the current status of the bargaining relationship, the Board contrasted construction prehire agreements with collective-bargaining agreements in other industries (191 NLRB at 694-695):

We find, further, that there is no merit in the exception based on *Local Lodge No. 1424 International Association of Machinists (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960), that Respondent was precluded by Section 10(b) from asserting that the October 1968 contract was executed at a time when the Union did not enjoy majority support. It is true that, in the normal case, an employer-respondent in an 8(a)(5) case may not go behind the 10(b) period to show that a contract, apparently regular and continuing on its face, was executed at a time when the union was not the majority representative. The reason for this rule is that a contract, regular on its face, carries with it an irrebuttable presumption—absent, perhaps, unusual circumstances—of continuing majority status of the union. Thus, since the contract standing alone carries with it a continued requirement of union recognition, to go behind the 10(b) period to show that when the contract was executed the union failed to represent a majority runs directly counter to the teachings of *Bryan*.

Such is not the case with an 8(f) agreement. As previously described, an 8(f) agreement, because of its prehire nature, need not be made with a majority union to be legal. For this reason, there is no basis, either in logic or in policy, to extend to the union which is party to such a contract an irrebuttable presumption of majority status. Indeed, we conclude that any such presumption would be irreconcilable with the final proviso to Section 8(f). It is, of course, necessary sometimes to go behind the 10(b) period to see what kind of contract is involved in a particular case—just as it might be necessary to take an employer's operations for an entire year, including 6 months behind the 10(b) period—to see whether it is engaged in commerce and within the Board's jurisdictional standards. However, once that is accomplished and it is determined the particular contract under scrutiny is validated by Section 8(f) rather than by Section 9(c)(e) [sic]—one to which no irrebuttable presumption of majority can be attached—that is the end of the pre-10(b) inquiry. No actual "defense" in such a situation is predicated on pre-10(b) events.

There is nothing in the foregoing analysis quoted from *R. J. Smith* which suggests that the analysis is any less applicable to bargaining relationships originating in prehire agreements which antedate the enactment of Section 8(f) than it is to 8(f) relationships inaugurated by postenactment agree-

<sup>16</sup> See, e.g., *Barrington Plaza & Tragniew*, 185 NLRB 962 (1970), enf. denied on other grounds 470 F.2d 669 (9th Cir. 1972).

ments. The General Counsel nevertheless attempts to avoid *R. J. Smith's* rejection of Section 10(b)'s relevance by suggesting that Congress intended only to give Section 8(f) prospective application to contractual relationships inaugurated after its effective date. From this watershed date, parties initiating construction prehire bargaining relationships can invoke Section 8(f) to immunize themselves from attack without resort to Section 10(b). But conversely, in the General Counsel's view, pre-1959 prehire agreements would have remained vulnerable to attack under Sections 8(a)(2) and 8(b)(1)(A) through the present time were it not for Section 10(b). In essence, with respect to pre-1959 relationships, the argument seems to be grounded in parity: Given the bar erected *defensively* by Section 10(b) against 8(a)(2) and 8(b)(1)(A) charges, the Board should likewise invoke Section 10(b) *offensively* to give the General Counsel the benefit of a presumption that the relationship is based on the union's majority status.

We think that this argument is wholly unpersuasive for two reasons. First, we have been shown nothing in the legislative history to suggest that Congress intended to create a dichotomy between pre-1959 prehire agreements, which supposedly remain potentially vulnerable, and post-1959 agreements, which do not. Congress declared that the Board's invalidation of prehire agreements in the construction industry had "given rise to serious problems" and that Section 8(f) "endeavors to resolve certain most urgent problems . . ." <sup>17</sup> It would be incongruous to conclude that notwithstanding the strong desire of Congress to promote labor relations stability by protecting widespread and established bargaining practices, Congress left a number of these practices open to challenge.

Secondly, to the extent that the then-existing law of Section 10(b) may have shaped the thinking of the 86th Congress, it would not support the major premise of the General Counsel's parity argument. Prior to the Supreme Court's 1960 decision in *Bryan*, the Board had embraced a "continuing violation" theory with regard to collective-bargaining agreements entered into with minority unions. Accordingly, at the time Section 8(f) was enacted, Section 10(b) was not available defensively to insulate the agreements from prosecution. In short, prehire agreements remained unlawful regardless of the limitations period. <sup>18</sup> Thus, as a matter of logic, without Section 10(b) to protect construction prehire agreements, there is no reason that the 86th Congress would have expected the Board to apply

the policies underlying Section 10(b) so as to preclude an employer from proving that a union did not enjoy majority support when establishing a collective-bargaining relationship more than 6 months earlier. <sup>19</sup>

We conclude that Congress gave Section 8(a)(2) immunity to all nonmajority bargaining relationships in the construction industry, not just those established after or within 6 months of the enactment of Section 8(f). We further conclude that the rationale of *R. J. Smith* regarding Section 10(b) remains valid, notwithstanding our criticism and rejection of other aspects of that opinion in *Deklewa*. Nothing in *Bryan* precludes inquiry into the establishment of construction industry bargaining relationships outside the 10(b) period. Going back to the beginning of the parties' relationship here simply seeks to determine the majority or nonmajority based nature of the current relationship and does not involve a determination that any conduct was unlawful, either within or outside the 10(b) period.

Any reliance on *Barrington Plaza & Tragniew*, 185 NLRB 962 (1970), enf. denied on other grounds 470 F.2d 669 (9th Cir. 1972), and similar nonconstruction cases such as *Forbidden City Restaurant*, 265 NLRB 409 (1982), enf. denied 736 F.2d 1295 (9th Cir. 1984), and *Jim Kelly's Tahoe Nugget*, 227 NLRB 357 (1976), enf. 584 F.2d 293 (9th Cir. 1978), cert. denied 442 U.S. 921 (1979), is therefore misplaced. In those decisions the Board held that an employer may not defend against a refusal-to-bargain charge by asserting that the initial recognition, occurring outside the 10(b) period, was unlawful. None of those cases involved a construction industry employer, and the legal princi-

<sup>19</sup> That the Supreme Court subsequently rejected the "continuing violation" theory in *Bryan* does not alter the significance which we assign to the pre-*Bryan* view of Sec. 10(b). As the Court has stated, in interpreting a statute in the legal context in which it was enacted, what counts sometimes is not what the correct state of the law (as in the case when the Supreme Court authoritatively construes it) may be, but what the Congress itself perceived the state of the law to be at the time of enactment. *Brown v. GSA*, 425 U.S. 820, 828 (1976); *Cannon v. University of Chicago*, 441 U.S. 677, 711 (1979); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378 (1982). Although we acknowledge that the Court in *Bryan* relied upon the clear intent of the 80th Congress in 1947 for its interpretation of Sec. 10(b), this does not mean that the 86th Congress must have acted with the view of its predecessor, rather than with the then current Board view in mind.

Moreover, if Congress believed that Sec. 10(b) immunized all but those minority-based contracts executed in the 6 months preceding the enactment of Sec. 8(f), it presumably would have expressly provided retroactive immunity to those otherwise vulnerable contracts lest its enactment have failed to address the very problem Congress perceived. For instance, Congress did expressly legalize through Sec. 8(f) other specific construction industry contractual practices whose maintenance and enforcement would have been subject to an unfair labor practice charge even if the *Bryan* interpretation of the 10(b) limitations period had applied. E.g., Sec. 8(f)(2) legalized a shorter posthirng waiting period prior to the imposition of membership requirements under a union-security agreement in the construction industry.

<sup>17</sup> S. Rep., 1 Leg. Hist. 423-424; H. Rep., 1 Leg. Hist. 777.

<sup>18</sup> E.g., *Guy F. Atkinson Co.*, 90 NLRB 143 (1950), enf. denied on other grounds 195 F.2d 114 (9th Cir. 1952).

ples set forth in them are inapplicable in a construction industry context because Section 8(f) is an exception to the 8(a)(2) ban on recognizing and reaching agreement with a nonmajority union.

Finally, we concede that the evidentiary problems in ascertaining how longstanding relationships began may occasionally be significant. Nevertheless such determinations clearly will not involve as many factual variables as were necessary to be litigated under the conversion doctrine. In any event, whatever evidentiary problems may exist do not persuade us, in light of the factors fully analyzed in *Deklewa*, that there is sufficient reason to substitute a presumption that bargaining relationships beginning before the enactment of Section 8(f) were based on the union's majority status, or that it is not proper to require the party asserting the 9(a) relationship to prove it by the means set forth in *Deklewa* and its progeny. In this regard, we note that here the Respondent indicates the availability of oral and documentary evidence which it asserts

will demonstrate that the General Counsel cannot prove that the Union has 9(a) status.

In view of the above, we shall remand this case to the administrative law judge for further consideration in light of *Deklewa*, including, if necessary, reopening the record to obtain more evidence on the collective-bargaining representative status of the Union.

Accordingly, IT IS ORDERED that the motion to dismiss is denied and this proceeding is remanded to the administrative law judge for further action consistent with the above.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a Supplemental Decision containing such resolutions, findings, conclusions, and recommendations as found necessary consistent with this remand. Following service of the Supplemental Decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.