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Whose Choice?: The Future of Construction (and Maybe All) Labor Law

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Whose Choice?: The Future of Construction (and Maybe All) Labor Law

Cover Page Footnote

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WHOSE CHOICE? THE FUTURE OF CONSTRUCTION (AND MAYBE ALL) LABOR LAW

Michael J. Hayes⁺

I. THE BOARD’S 2020 CONSTRUCTION UNION PROOF RULE AND THE CURRENT UNIONIZED CONSTRUCTION INDUSTRY.....	111
A. <i>The Current National Labor Relations Board’s 2020 Construction Union Proof Rule on Employee Representation in the Construction Industry</i>	111
B. <i>The Current Unionized Construction Industry</i>	120
II. CONSTRUCTION LABOR LAW HISTORY—AND POSSIBLE FUTURE	123
A. <i>The History</i>	123
B. <i>The Possible Future</i>	129
III. CONSTRUCTION LABOR LAW: THE FUTURE OF ALL LABOR LAW?.....	144
IV. CONCLUSION.....	148

On April 1, 2020, the National Labor Relations Board (Board) issued a rule affecting construction industry employers and unions. The rule provides that even when an employer has signed a written contract with the union, agreeing that a majority of its employees want the union to represent them, that the employer (or its employees) can challenge the union’s status as a representative unless the union can prove it had majority support when the employer agreed it did.¹ In considering this rule, one should take into account that in the construction industry, employers can choose their source of workers in a way that makes it more or less likely that those workers will choose to be represented by a union, especially after being influenced by their employer. Nonetheless, the Board asserted that its new rule was intended to protect the choice of employees. As this Article will explain, it is more likely that *construction employers’* choices will be more often served by the new rule, which hereinafter will be referenced as the “Construction Union Proof Rule.”

Construction industry employers can choose a union as its source of workers even prior to hiring any employees, which is legally permissible for that industry only because of section 8(f) of the Labor Management Relations Act (LMRA).² In 1959 Congress passed that provision on a bipartisan vote, and Republican President Dwight Eisenhower signed it into law,³ because the politicians knew that many contractors in the construction industry preferred to hire employees

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1. See 29 C.F.R. § 103.22 (2020).

2. See Labor Management Relations (Taft-Hartley) Act § 8(f), 29 U.S.C. § 158(f).

3. See THE DEVELOPING LABOR LAW ch. 4, §§ VI.A.4, VI.B (Am. Bar Ass’n, 7th ed. 2019).

for projects from hiring halls administered by unions.⁴ Such hiring from union hiring halls can be “exclusive” or “nonexclusive” depending on a contractor’s or other employer’s agreement with the union.⁵ For either type of hiring hall, unions cannot discriminate against employees who are not members of the union in referring employees for hiring.⁶ In addition, under the express terms of Section 8(f), an employer’s agreement with a union to hire employees referred from the union hall cannot be raised as a ground to “bar” a representation election sought by employees on whether that union, or any union, will represent them in dealings with their employer.⁷

The rule issued on April 1, 2020 by the current Board changes the requirements for a construction union to (at least securely) maintain its status as a majority representative of a contractor’s employees.⁸ Under this Construction Union Proof Rule, no matter what language a contractor agreed to with a union regarding its recognition of that union as the “majority representative” of that contractor’s employees, neither that agreement nor the union’s relationship with that contractor would bar a petition for an election on whether that union would remain the employees’ representative.⁹

This Construction Union Proof Rule could be only the “tip of an iceberg” in which the Board, through subsequent decisions, could hugely transform union representation of employees in the construction industry.¹⁰ The transformation is in the form of rules that could give construction contractors nearly limitless authority and ability to decide when their employees would, and would not, be represented by a union (or at least to vote on such representation) and to time those decisions to the contractor’s maximum advantage. The rules would do nearly nothing to benefit any construction employees ever represented by a union, even though, as explained in Part I of this Article, the Board repeatedly claims in its Construction Union Proof Rule that its purpose is to serve “employee choice” regarding union representation. The Board’s Construction Union Proof Rule, and any rules it adopts afterwards through its decisions, are likely to be upheld by many federal courts, which also could add or instead adopt

4. See H.R. REP. NO. 86-741, at 19–20 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2441–43.

5. See LEE MODJESKA ET AL., *FEDERAL LABOR LAW: NLRB PRACTICE* § 7:13 (Aug. 2020 ed.).

6. *Id.*

7. Labor Management Relations (Taft-Hartley) Act § 8(f).

8. See Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed. Reg. 18366-01 (Apr. 1, 2020)(codified at 29 C.F.R. § 103.22) [hereinafter Construction Union Proof Rule].

9. *Id.* Any agreement between a contractor and a union would not bar a petition for a representation election for any longer than three years. See THE DEVELOPING LABOR LAW, *supra* note 3, at ch. 10, §§ II.E, II.E.2.

10. See *infra* Section I.B.

new rules to govern representation of construction industry employees.¹¹ In addition, the Board and federal courts could rely on these newly created legal rules to change labor law throughout the U.S. economy because, as this Article discusses, many features of employer-worker relationships and working environments are, in many parts of the twenty-first century American economy, becoming more like the twentieth and twenty-first century construction industry.¹²

Part I of this Article discusses the new employee representation rule the Board adopted on April 1, 2020, and the labor law precedents the Board did and did not rely on in fashioning the rule. Part I goes on to describe and explain relevant aspects of the current U.S. unionized construction industry. Throughout Part I, this Article discusses how the Board's Proof Rule would mostly augment contractor opportunities to choose whether their employees will be represented by a union. Part II of this Article begins with a discussion of the history of U.S. labor law in the construction industry. This overview is followed by a discussion of how the Board's Proof Rule, and possible subsequent decisions, would depart from long-established and congressionally-intended labor law rules for the construction industry and—by increasing opportunities for contractors to exercise *their* choices—likely harm employee representation in that industry. Part III, as mentioned above, explains how many aspects of the relationship between employers and workers in broad sectors of the U.S. economy are becoming more similar to the construction industry, making the Board's likely changes to construction industry labor law relevant to labor law for many other millions of employees.

I. THE BOARD'S 2020 CONSTRUCTION UNION PROOF RULE AND THE CURRENT UNIONIZED CONSTRUCTION INDUSTRY

A. *The Current National Labor Relations Board's 2020 Construction Union Proof Rule on Employee Representation in the Construction Industry*

The current effort began in September 2018 when the Board invited filing of amicus briefs in the then-pending *Loshaw Thermal Technology* decision.¹³ In that decision, Administrative Law Judge (ALJ) Eric M. Fine relied on the Board's 2001 ruling in *Staunton Fuel & Material, Inc.*,¹⁴ and two 2000 decisions by the Tenth Circuit Court of Appeals,¹⁵ in holding that collective bargaining

11. See, e.g., *IBEW Local Unions 605 & 985 v. NLRB*, 973 F.3d 451, 457 (5th Cir. 2020) and *Casino Pauma v. NLRB*, 888 F.3d 1066, 1075 (9th Cir. 2018), for recent examples of federal appeals court decisions applying deferential standards of review to NLRB decisions.

12. See *infra* Section III.

13. Notice and Invitation to File Briefs at 2, *Loshaw Thermal Tech., LLC*, No. 05-CA-158650 (N.L.R.B. Sept. 11, 2018) [hereinafter *Invitation*].

14. *Staunton Fuel & Material, Inc.*, 335 N.L.R.B. 717 (2001).

15. *NLRB v. Triple C Maint., Inc.*, 219 F.3d 1147, 1155 (10th Cir. 2000); *NLRB v. Okla. Installation Co.*, 219 F.3d 1160, 1164 (10th Cir. 2000).

agreement language can be sufficient to prove a construction industry union's majority status.¹⁶ ALJ Fine had also found that the employer's challenge to the union's majority status was time-barred, applying the Board's rule from its 1993 *Casale Industries*¹⁷ decision that such a challenge must occur within six months of granting such recognition.¹⁸

In its invitation for briefs in *Loshaw Thermal Technology*, the Board explained that the employer was asking the Board to overrule *Staunton Fuel* and to reconsider *Casale Industries*.¹⁹ The Board apparently decided it would, because the first questions the Board listed that it wanted briefs to address were, "Should the Board adhere to, modify, or overrule *Staunton Fuel*?"²⁰ and, if that decision were overruled, "what standard should the Board adopt in its stead?"²¹ Further questions the Board raised included "what should constitute sufficient evidence" to prove majority status and whether contract language should be considered pertinent to that issue.²² The Board also asked that briefs address, regardless of its decision to overrule *Staunton Fuel* or not, whether the Board should revise its *Casale Industries* rule that "contract language alone would continue to be sufficient to establish 9(a) status whenever that status goes unchallenged for 6 months after 9(a) recognition is granted."²³

The Board suspended this invitation for briefs a month later, after the union party in *Loshaw Thermal Technology* notified the agency that it was withdrawing its unfair labor practice charge in the case.²⁴ Two months later, the Board rescinded its invitation for briefs on voluntary recognition in the construction industry.²⁵ A labor journalist reporting on this development wrote that this "leaves in place key precedents with enormous practical consequences for businesses and unions—at least for now" but that "[t]he board could and likely will revisit the issue, if it gets another case with a similar set of circumstances and issues."²⁶

As it turned out, the Board did not wait for such a case. Instead, on August 12, 2019, the Board issued and published in the Federal Register a Notice of

16. See *Loshaw Thermal Tech., LLC*, No. 05-CA-158650, 2016 NLRB LEXIS 493, at *21–22, *24–26 (N.L.R.B. July 7, 2016).

17. *Casale Indus., Inc.*, 311 N.L.R.B. 951, 953 (1993).

18. *Loshaw*, 2016 NLRB LEXIS 496, at *19–20.

19. Invitation, *supra* note 13, at 1.

20. *Id.* at 2.

21. *Id.*

22. *Id.*

23. *Id.*

24. Robert Iafolla, *NLRB Halts Public Input on Construction Industry Bargaining*, BLOOMBERG LAW NEWS (Oct. 16, 2018, 12:06 PM), <https://news.bloomberglaw.com/daily-labor-report/nlrh-halts-public-input-on-construction-industry-bargaining>.

25. Hassan A. Kanu, *NLRB Drops Construction Industry Bargaining-Policy Review*, BLOOMBERG LAW NEWS (Dec. 14, 2018, 1:09 PM), <https://news.bloomberglaw.com/daily-labor-report/nlrh-drops-construction-industry-bargaining-policy-review>.

26. *Id.*

Proposed Rulemaking on, among other things, “Proof of Majority Support in Construction Industry Collective-Bargaining Relationships.”²⁷ The Board proposed “to overrule *Staunton Fuel*” and to promulgate a rule that “contract language alone cannot create a 9(a) bargaining relationship in the construction industry,” which the Board referred to as “the D.C. Circuit’s position.”²⁸ The Board further proposed that, in addition to contract language in which an employer recognized the union’s majority status, the Board would require “extrinsic proof of contemporaneous majority support”²⁹ Unlike in its 2018 invitation for briefs, the Board did not mention the *Casale Industries* time limit rule in its 2019 Notice of Proposed Rulemaking. The Board initially requested comments within 60 days, with an additional 14 days for reply comments, but twice extended the deadline for comments so that they were due and submitted by January 2020.³⁰

As noted earlier, the Board issued its final rule on April 1, 2020. In explaining the labor history leading to its proposal, the Board, in both its proposed rule and final rule, began with the 1959 amendments, which, as will be explained below, is a questionable place to begin.³¹ The Board correctly stated that Congress enacted Section 8(f) of the Act in 1959, which allows “employer[s] engaged primarily in the building and construction industry to make an agreement covering [its] employees engaged” in that industry with a union that does not represent a majority of those employees or even before that employer has hired any employees.³² In addition, as the Board also said, an agreement made lawful only by Section 8(f) does not bar any NLRB-administered representation elections provided for by the National Labor Relations Act (NLRA).³³

The Board next summarized the “conversion doctrine” that was applied from 1971 until 1987, describing it as a union obtaining majority status “by means other than a Board election or a majority-based voluntary recognition.”³⁴ The Board then almost immediately quoted the Board’s criticisms of the conversion doctrine when it overruled it in 1987 in *John Deklewa & Sons, Inc.*³⁵ The Board next discussed what *Deklewa* said about how a construction union could now

27. See Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 84 Fed. Reg. 39930, 39930 (proposed Aug. 12, 2019) (to be codified at 29 C.F.R. pt. 103)) [hereinafter Proposed Rule].

28. *Id.* at 39938.

29. *Id.*

30. See Construction Union Proof Rule, *supra* note 8.

31. See *infra* Section II.

32. Labor-Management Relations (Taft-Hartley) Act § 8(f), 29 U.S.C. § 158(f); Construction Union Proof Rule, *supra* note 8, at 18366.

33. § 8(f); Construction Union Proof Rule, *supra* note 8, at 18400. The reference in Section 8(f) to “a petition filed pursuant to section 9(c) or 9(e)” covers all NLRB-administered representation elections. See *The Developing Labor Law*, *supra* note 3, at ch. 10, §10.I.

34. Construction Union Proof Rule, *supra* note 8, at 18368.

35. *Id.* at 18368 (quoting *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375, 1378 (1987), *enforced sub nom.* *Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988)).

obtain a Section 9(a) relationship with an employer. The Board observed that in *Deklewa* the Board had stated that “the party asserting the existence of a [Section] 9(a) relationship [is required to] prov[e] it.”³⁶ The Board then acknowledged that the *Deklewa* Board had stated that construction unions could still seek Section 9(a) recognition from employers with which they had Section 8(f) relationships and had specifically held that a construction union, “could achieve 9(a) status through ‘voluntary recognition accorded . . . by the employer of a stable workforce where that recognition is based on a clear showing of majority support among the [union] employees, e.g., a valid card majority.’”³⁷

In the final Construction Union Proof Rule’s discussion of some of the first Board decisions applying *Deklewa*, the Board in effect quoted prior decisions as stating that to prove majority support, the union “would have to show its ‘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 employees’”³⁸ However, the Board failed to mention that it did not consider how the union sought or obtained voluntary recognition in any of the cited decisions. In the *American Thoro-Clean, Ltd.* decision, the Board, reviewing a pre-*Deklewa* Administrative Law Judge decision, held that the employer was bound to a succession of Section 8(f) agreements, and the Board therefore agreed with the judge’s decision that the employer violated Section 8(a)(5) by failing to comply with the most recent Section 8(f) agreement.³⁹ In *Brannan Sand & Gravel Co.*, the Board considered and rejected, in disagreement with the then-General Counsel, the union’s argument that if its relationship with the employer began prior to the enactment of Section 8(f), that was sufficient to presume that the union had majority Section 9(a) status.⁴⁰

36. *Id.* at 18368 (quoting *Deklewa*, 282 N.L.R.B. at 1385 n.41 (“In light of the legislative history and the traditional prevailing practice in the construction industry, we will require the party asserting the existence of a 9(a) relationship to prove it.”)).

37. *Id.* (quoting *Deklewa*, 282 N.L.R.B. at 1387 n.53).

38. *Id.* (quoting *Brannan Sand & Gravel Co.*, 289 N.L.R.B. 977, 979–80 (1988)).

39. *Am. Thoro-Clean, Ltd.*, 283 N.L.R.B. 1107, 1108–09 (1987).

40. *Brannan Sand*, 289 N.L.R.B. 977, 978–80 (1988). The Board, in explaining its ruling, did at one point state that “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” *Id.* at 980. The Board based this reasoning on employee choice when it added that a pre-1959 relationship “does not take into account employees’ representational desires and does not further the fundamental statutory interest in employee free choice.” *Id.* However, the Board found it necessary to add at the start of the next paragraph that “the presumption urged in this case has no basis in fact.” *Id.* The court likely made that statement because in that case the union did not request voluntary recognition, and, after the contractor unilaterally repudiated its relationship with the union, it went on strike. See *id.* at 977–78. The strike and the contractor’s use of temporary replacements might have, in turn, led to the contractor’s claim that it had “oral and documentary evidence which it assert[ed] w[ould] demonstrate that the General Counsel c[ould not] prove that the Union ha[d] 9(a) status[.]” a fact the Board did rely on in its holding. *Id.* at 983. Given this reasoning in *Brannan Sand*, the decision provides little or no support for finding that, prior to

In the final Construction Union Proof Rule, the Board next turned to the precedent it overruled—the 2001 *Staunton Fuel* decision—which set the law on this issue of majority status until the Board issued its new rule on April 1, 2020.⁴¹ As the final Construction Union Proof Rule stated, the Board in *Staunton Fuel* held that language in an agreement between the employer and the union could establish the union’s Section 9(a) majority status.⁴² The required *Staunton Fuel* conditions are that the contract language:

[U]nequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer’s recognition was based on the union’s having shown, or having offered to show, evidence of its majority support.⁴³

The proposed rule acknowledged that this test was borrowed from two then-recent decisions by the United States Court of Appeals for the Tenth Circuit,⁴⁴ and that the Board had found that this test “properly balances Section 9(a)’s emphasis on employee choice with Section 8(f)’s recognition of the practical realities of the construction industry” and allowed employers and unions to form “9(a) bargaining relationships easily and unmistakably where they seek to do so.”⁴⁵

The Board, when identifying the reasons it wanted to change this rule, relied heavily on the United States Court of Appeals for the District of Columbia Circuit’s 2018 decision in *Colorado Fire Sprinkler, Inc. v. NLRB*.⁴⁶ In that decision, the court vacated a Board order in which the Board had held, based on its *Staunton Fuel* decision, that “clear and unequivocal contract language can establish a 9(a) relationship in the construction industry” and that the employer’s “evidence fail[ed] to show that the Union lacked majority support in the unit at the time the Respondent agreed to that contractual language.”⁴⁷ The Board acknowledged that, in *Colorado Fire Sprinkler*, the D.C. Circuit had held that the purpose of Section 8(f) was to “provide employees in the inconstant and fluid construction and building industries some opportunity for collective

Staunton Fuel, the Board had already resolved what evidence of majority support was required for a union to prove Section 9(a) status.

41. See Construction Union Proof Rule, *supra* note 8, at 18369, 18389 (discussing *Staunton Fuel & Material, Inc.*, 335 N.L.R.B. 717 (2001)).

42. *Id.* (citing *Staunton Fuel*, 335 N.L.R.B. at 719–20).

43. Proposed Rule, *supra* note 27, at 39936 (quoting *Staunton Fuel*, 335 N.L.R.B. at 720).

44. *Id.* at 39935–36 (citing *NLRB v. Triple C Maint., Inc.*, 219 F.3d 1147 (10th Cir. 2000); *NLRB v. Okla. Installation Co.*, 219 F.3d 1160 (10th Cir. 2000)).

45. *Id.* at 39936 (quoting *Staunton Fuel*, 335 N.L.R.B. at 719–20).

46. Construction Union Proof Rule, *supra* note 8, at 18369 (citing *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031 (D.C. Cir. 2018)).

47. *Colo. Fire Sprinkler*, 891 F.3d at 1041; *Colo. Fire Sprinkler, Inc.*, 364 N.L.R.B. No. 55, 2016 NLRB LEXIS 543, at *3–4, *4 n.4 (July 22, 2016) (citing *Staunton Fuel*, 335 N.L.R.B. 717).

representation[.]”⁴⁸ but the Board emphasized that in that decision, the D.C. Circuit stated that “[b]ecause the statutory objective is to ensure that only unions chosen by a majority of employees enjoy Section 9(a)’s enhanced protections, the Board must faithfully police the presumption of Section 8(f) status and the strict burden of proof to overcome it.”⁴⁹ However, perhaps tellingly, the Board did not mention that in the decision the D.C. Circuit also stated that “what matters is that the affirmative evidence of majority support exists in the record.”⁵⁰

The Board also relied on and quoted at length the D.C. Circuit’s 2003 decision in *Nova Plumbing, Inc. v. NLRB*.⁵¹ In that decision the court refused to enforce a Board order requiring the employer to “continue bargaining” with a union when the Board’s decision was based “solely on a contract provision suggesting that the company and the union intended a 9(a) relationship despite strong record evidence that the union may not have enjoyed majority support as required by section 9(a)”⁵² The Board pointed out that the *Nova Plumbing* decision relied on the U.S. Supreme Court’s 1961 decision in *International Ladies’ Garment Workers’ Union v. NLRB*⁵³ and quoted the D.C. Circuit’s statement that “[a]n agreement between an employer and union is void and unenforceable, *Garment Workers* holds, if it purports to recognize a union that actually lacks majority support as the employees’ exclusive representative.”⁵⁴ The Board further quoted the D.C. Circuit’s finding that “the Board’s test allowed employers and unions to ‘collud[e] at the expense of employees and rival unions’”⁵⁵ This concern for employer-union “collusion,” especially to prevent representation elections, will be discussed again below.⁵⁶

However, other important language in the D.C. Circuit’s *Nova Plumbing* decision was not quoted or referenced by the Board. For example, the Board failed to mention that the D.C. Circuit in *Nova Plumbing* took pains to make clear that it did “not mean to suggest that contract language and intent are irrelevant[.]” and instead held that these “are perfectly legitimate *factors* that the Board may consider in determining whether the *Deklewa* presumption has been

48. Construction Union Proof Rule, *supra* note 8, at 18369 (quoting *Colo. Fire Sprinkler*, 891 F.3d at 1038–39).

49. *Colo. Fire Sprinkler*, 891 F.3d at 1039; Construction Union Proof Rule, *supra* note 8, at 18369 (quoting *Colo. Fire Sprinkler* 891 F.3d at 1039).

50. See *Colo. Fire Sprinkler*, 891 F.3d at 1039.

51. Construction Union Proof Rule, *supra* note 8, at 18369 (quoting *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 536–37 (D.C. Cir. 2003)).

52. *Nova Plumbing*, 330 F.3d at 533.

53. Construction Union Proof Rule, *supra* note 8, at 18369 (citing *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731 (1961)).

54. *Nova Plumbing*, 330 F.3d at 537; Construction Union Proof Rule, *supra* note 8, at 18369 (quoting *Nova Plumbing*, 330 F.3d at 537).

55. Construction Union Proof Rule, *supra* note 8, at 18369 (quoting *Nova Plumbing*, 330 F.3d at 537) (alteration in original).

56. See *infra* notes 82–83, 162 and accompanying text.

overcome.”⁵⁷ The D.C. Circuit next stated that contract language and the parties’ intent “cannot be dispositive, *at least where, as here, the record contains strong indications that the parties had only a section 8(f) relationship.*”⁵⁸

The D.C. Circuit in *Nova Plumbing* went on to discuss multiple key facts it relied on in its decision, which the Board did not reference at all. One example was that “the [collective bargaining agreement] itself—which is apparently the sole basis for [the union’s] claim to section 9(a) status—states that Nova’s recognition of the union rests on ‘independently verified[,]’ [by a Certified Public Accounting Firm,⁵⁹] proof that the union represents a majority of unit employees.”⁶⁰ The court then observed that the “the record contains no evidence of independent verification of employee support[,]” and next stated that “the Board and union have failed to demonstrate majority representation under the very boilerplate language on which they rely to overcome the *Deklewa* presumption.”⁶¹ The D.C. Circuit continued to rely on this lack of compliance with contract language in stating that if the Board wanted to rely on contract language to prove majority status, “it must take such language seriously when a recognition clause indicates that there is a concrete basis upon which to assess employee support. Otherwise, unions and employers would be free to agree to such self-serving language with no threat of challenge.”⁶² The D.C. Circuit’s reliance on lack of evidence of compliance with recognition agreement language is consistent with an argument discussed below—that it is fair and reasonable to bind parties to the language to which they have agreed.⁶³

In *Nova Plumbing*, the D.C. Circuit also relied on the union and NLRB’s failure to present any authorization cards of any employees to show support of the union, and the union representative’s testimony that he recalled only three employees who had signed such cards.⁶⁴ The D.C. Circuit contrasted this lack of authorization cards with record evidence indicating that the union was not supported by *Nova Plumbing*’s employees.⁶⁵ In sum, much more underlaid the D.C. Circuit’s decision in *Nova Plumbing* than the Board referenced in its Construction Union Proof Rule.

57. *Nova Plumbing*, 330 F.3d at 537. The Board did not quote this language even though the AFL-CIO quoted it in its Comment, urging the Board not to proceed with its proposal. See American Federation of Labor & Congress of Industrial Organizations (AFL-CIO), Comment Letter on Proposed Rule on Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective Bargaining Relationships 41–42 (Jan. 9, 2020), <https://www.regulations.gov/document?D=NLRB-2019-0001-0138>.

58. *Id.* (emphasis added).

59. *See id.* at 535.

60. *Id.* at 538.

61. *Id.* at 537–38.

62. *Id.* at 538.

63. *See infra* Section II.B.

64. *Nova Plumbing*, 330 F.3d at 537–38.

65. *Id.*

It is worth noting here, and it will be discussed more fully below,⁶⁶ that in the two D.C. Circuit decisions discussed by the Board in its proposal (*Colorado Fire Sprinkler*⁶⁷ and *Nova Plumbing*⁶⁸), the rhetoric referred to the “choice” and rights of employees, but the actions at issue were not those of employees but those of contractors. The term “contractors,” rather than “employers” is used because, at the times relevant actions occur, the contractor sometimes has no employees,⁶⁹ or the employees for whom the decision expresses concern (e.g. those working for an employer when it chooses whether to renew an agreement) are often not the employees who will be working for the contractor if its challenged decision is upheld, as when a contractor stops using employees referred by a union and instead uses employees from another source or hired “off the street.”⁷⁰ In fact, it consistently has been (and likely will continue to be) the contractor’s choice that is really at issue, and—when that choice is upheld by the Board or a court—the contractor, not the employees, always gets to choose the desired outcome.⁷¹

The D.C. Circuit itself discussed the role of the contractor, and why it should be limited, in its 2006 decision in *M & M Backhoe Service, Inc. v. NLRB*.⁷² The Board did not mention that D.C. Circuit decision in its 2019 proposed rule; and in responding to comments in its 2020 final rule, the Board only referenced the decision as stating that a union with a Section 8(f) contract could obtain Section 9(a) majority status by winning an election or by “demand[ing] recognition from the employer by providing proof of majority support’ and finding a 9(a) relationship based on signed authorization cards.”⁷³ In the final Construction Union Proof Rule, the Board did not mention that, in *M & M Backhoe*, the D.C. Circuit did not hold that “providing [the] proof of majority support” meant the union actually showing the employer the proof of such support, because the central issue in *M & M Backhoe* was whether the employer actually had to

66. See *infra* Section II.B.

67. *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031 (D.C. Cir. 2018).

68. *Nova Plumbing*, 330 F.3d at 531.

69. E.g., *Colo. Fire Sprinkler*, 891 F.3d at 1036 (involving a contractor who made agreement with the union at a time when it had no employees).

70. See, e.g., *Staunton Fuel & Material, Inc.*, 335 N.L.R.B. 717, 727–20 (2001) and *McKenzie Engineering Co.*, 326 NLRB 473, 488–89 (1998), for a discussion of how employers hired new employees directly, rather than using employees referred through the union’s hiring hall, after withdrawing union recognition.

71. See, e.g., *Staunton Fuel*, 335 N.L.R.B. at 720–21 (holding that an employer directly hiring employees, instead of accepting them from the union hiring hall, had lawfully withdrawn recognition from the union); *Yellowstone Plumbing, Inc.*, 286 NLRB 993, 994, 997, 1013–14(1987)(upholding withdrawal of union recognition by employer that subsequently hired employees directly instead of through the union hiring hall).

72. *M & M Backhoe Serv., Inc. v. NLRB*, 469 F.3d 1047, 1050–51 (D.C. Cir. 2006).

73. Construction Union Proof Rule, *supra* note 8, at 18389 (quoting *M & M Backhoe*, 469 F.3d at 1050).

review the union's proof of support for the union to obtain majority status.⁷⁴ In *M & M Backhoe* the D.C. Circuit said no, holding that “[a]n employer who recognizes a union after the union offers to provide evidence of its majority status cannot revoke that recognition solely because the employer never took the union up on its offer—provided that the union actually had majority support.”⁷⁵ Significantly, the D.C. Circuit next stated, based on the U.S. Supreme Court's decision in *NLRB v. Gissel Packing*⁷⁶—which the Board also relied on in its proposed rule—that “[t]o rule otherwise would be to allow the employer to frustrate the employees' section 7 rights by turning its back to the union's evidence.”⁷⁷

In *M & M Backhoe*, the D.C. Circuit distinguished its prior ruling in *Nova Plumbing* (a decision the Board strongly relied on to support its rule) on the ground that, in *Nova Plumbing*, there was no evidence in the record that the union (ever) actually had majority support.⁷⁸ In contrast, the record in *M & M Backhoe* showed, and the Board had found, that “a majority of employees voluntarily signed union authorization cards signifying their support” of the union.⁷⁹ The D.C. Circuit therefore concluded that “[u]nder this [employer-limiting] standard, [the union] properly converted its relationship with M & M to one governed by section 9(a), and M & M [could not] disclaim the conversion after the fact.”⁸⁰ Notably, the D.C. Circuit in *M & M Backhoe* also did not impose any requirement of “contemporaneity” on the evidence of majority support, unlike the Board's final Construction Union Proof Rule requirement of a “contemporaneous” showing of support, with no explanation of what that means. The problems caused by this undefined “contemporaneous” requirement are discussed below.⁸¹

M & M Backhoe is one of numerous case examples where a court or other legal decisionmaker did not emphasize, as the Board did in its proposed and final rule, that a union and contractor might “collude” to limit employee choice on representation,⁸² but instead stressed how a contractor might disregard the

74. See *M & M Backhoe*, 469 F.3d at 1050–51.

75. *Id.* at 1051.

76. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

77. *M & M Backhoe*, 469 F.3d at 1051 (citing *Gissel Packing*, 395 U.S. at 596–98); see also Proposed Rule, *supra* note 27, at 39938 (quoting *Gissel Packing*, 395 U.S. at 602).

78. *M & M Backhoe*, 469 F.3d at 1050.

79. *Id.*

80. *Id.* at 1051.

81. See *infra* Section II.B.

82. The Board did not mention any such examples of collusion in its proposed rule. See generally Proposed Rule, *supra* note 27. Given that the Board itself stated in its final rule that only “minor, non-substantive changes” were made between its proposed and final rule, one might question how important actual evidence of real-world collusion was to the Board. See Construction Union Proof Rule, *supra* note 8, at 18370. In fairness to the Board, however, it did respond to commenters' points about “collusion” by referencing past Board decisions in which the employer and union agreed that the union “represented a majority of its employees” prior to the employer

preference of its employees for union representation to serve instead its own “choice”—the recent real-world examples of which are demonstrated by the facts of *M & M Backhoe* and many other cases and contractor actions.⁸³

B. The Current Unionized Construction Industry

The unionized construction industry, since its beginning in the nineteenth century, has been characterized by training through apprenticeship programs and the use of so-called “hiring halls” to refer construction employees to jobs with multiple contractors with union agreements.⁸⁴ Every employee referred by the union is also represented by it and works under an agreement between the union and a contractor that has chosen to obtain its construction workforce from the union.⁸⁵ As is discussed more fully below in the section on labor law history, Congress recognized (and it is still true) that employment by one or more construction employees by a specific contractor is often seasonal, short and intermittent.⁸⁶ As a result, it is not unusual for a unionized construction employee to work for many different contractors within the construction “season,” with the union effectively providing employment even though the union is never that employee’s “employer.”⁸⁷ Additionally, construction workers often do not work every day, even when working for the same employer, depending on factors such as the weather, the availability of key materials, and what work must be done on a project on each day.⁸⁸ Consequently, special labor

having hired any employees, which the Board referenced in the final rule as “parties [who] falsified majority support.” *Id.* at 18390; *NLRB v. Triple C Maint., Inc.*, 219 F.3d 1147, 1154 (10th Cir. 2000). This Article discusses the inappropriateness of the Board’s reference to these agreements as containing language in which majority support was “falsified” or as being relevant to “collusion.” *See infra* note 213.

83. *See infra* Section II.A.

84. *See* NATIONAL LAWYERS GUILD, EMPLOYEE AND UNION MEMBER GUIDE TO LABOR LAW § 5:35 (2020).

85. *See* THE DEVELOPING LABOR LAW, *supra* note 3, at ch. 13 § VII, ch. 26 §§ II.G, V (discussing the role of construction unions in referring employees); *Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988) (noting that “[construction] workers can obtain jobs only through union referrals” and explaining the obligations that creates for construction unions).

86. *See infra* Section II.A (discussing legislative history of 1959 amendments to the Labor Management Relations Act).

87. *See* NATIONAL LAWYERS GUILD, *supra* note 84, § 5:35.

88. *See id.* at § 5:1; Lonnie Golden, *Irregular Work Scheduling and Its Consequences*, ECON. POL’Y INST. BRIEFING PAPER NO. 394 1 (Apr. 9, 2015) <https://files.epi.org/pdf/82524.pdf>; Jeffrey Hilgert, *The Future of Workplace Health and Safety as a Fundamental Human Right*, 34 COMPAR. LAB. L. & POL’Y J. 715, 726 (2013); Xiuwen Dong, *Long Workhours, Work Scheduling and Work-Related Injuries Among Construction Workers in the United States*, 31 SCANDINAVIAN J. WORK ENV’T HEALTH 329, 329, 331–32 (2005); *see also* J.E. Brown Elec., Inc., 315 NLRB 620, 621–24 (1994) (discussion in majority and concurring opinions of construction employees’ typical work schedules).

law rules have had to be created for “employee choice,” through representation election or otherwise, in the construction industry.⁸⁹

In the U.S. construction industry—both unionized and non-unionized—for every project sought by an ultimate customer or client, construction on projects of significant scope and dollar amount will almost always be overseen by one or more general contractor(s) and/or construction manager(s).⁹⁰ This overseer will hire one or more subcontractors for each construction trade they oversee, and sometimes all the subcontractors for all the trades that will work on the project.⁹¹ Consequently, unless the ultimate user of the project specifies otherwise, it is often the general contractor and/or construction manager who decides, for each trade or type of work on the project, whether the subcontractors will be contractors who obtain their employees from one or more unions, contractors whose employees are not represented by a union, or a mix of both.⁹² Sometimes the ultimate user, or someone else with control over a project, will in fact specify whether they want some or all of a project to be built with employees working under agreement(s) between one or more unions and one or more contractors.⁹³ Such agreements are often called Project Labor Agreements.⁹⁴

In the unionized construction industry many contractors decide, because of the nature of the industry, to join or assign bargaining authority to multiemployer associations that negotiate agreements with unions.⁹⁵ Through these associations, or other arrangements between construction unions and multiple contractors, millions of construction employees, retirees, and their family members are provided benefits (e.g. pension/retirement, health) through

89. See, e.g., THE DEVELOPING LABOR LAW, *supra* note 3, at ch. 31 § II.G.2 (stating that because of “intermittent employment” of construction employees, special rules exist for eligibility to vote in representation elections); P.J. Dick Contracting, Inc., 290 N.L.R.B. 150, 151 (1988) (discussing how unit in the construction industry can be based on the definition in the collective bargaining agreement).

90. See Jason O’Leary, *What’s the Difference? A General Contractor vs. A Construction Manager*, SURETY BONDS DIRECT (Oct. 9, 2019), <https://www.suretybondsdirect.com/educate/general-contractor-vs-construction-manager>.

91. See *id.*

92. See A. SAMER EZELDIN & AHMED M. ALHADY, CONSTRUCTION SITE COORDINATION AND MANAGEMENT GUIDE § 4.8 (titled “Subcontracting” and discussing how the general contractor hires subcontractors)(2018); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 658–60 (1982)(discussing widespread use of subcontracting in the construction industry); *Chi. Reg’l Council of Carpenters Pension Fund v. Schal Bovis, Inc.*, 826 F.3d 397, 406–07 (7th Cir. 2016) (discussing how construction contractors can choose between one of two different unions as a source of the employees who will perform work).

93. See Jared Bernstein, *Project Labor Agreements: A Better Deal for All*, WHITE HOUSE BLOG (Apr. 12, 2010, 4:16 PM), <https://obamawhitehouse.archives.gov/blog/2010/04/12/project-labor-agreements-a-better-deal-all>.

94. See, e.g., *id.*; see generally John T. Dunlop, *Project Labor Agreements*, (Harv. U. Joint Ctr. for Hous. Stud., Working Paper No. W02-7, 2002) (giving a historical overview of the use of project labor agreements).

95. See NATIONAL LAWYERS GUILD, *supra* note 84, § 5:1; THE DEVELOPING LABOR LAW, *supra* note 3, at ch. 11 § III.D.1.

multiemployer benefit plans.⁹⁶ Multiemployer bargaining in the construction industry has, for the most part, been stable for more than fifty years,⁹⁷ but defining units for the purposes of the NLRB conducting elections has led to many challenging issues and inconsistent decisions in cases when a contractor has relied on a multiemployer association for bargaining.⁹⁸ The Board also uses a unique formula for construction industry elections to determine voter eligibility, which it reaffirmed in its 1992 *Steiny & Co.* decision by finding that the formula should be applied to all elections in the construction industry.⁹⁹ In its final Construction Union Proof Rule, the Board reserved these and other issues,¹⁰⁰ but it probably will have to decide them much more frequently because of the sub-rules it included in the final Construction Union Proof Rule it issued.¹⁰¹

Unions and unionized contractors jointly spend an estimated \$1.3 billion a year on apprenticeship training for hundreds of thousands of persons at 1,600 training facilities across the country.¹⁰² With regard to the “employee choice” the Board seeks to serve, many construction employees in many skilled trades

96. See *What Is a Multiemployer Plan?*, INT’L FOUND. OF EMP. BENEFIT PLANS, <https://www.ifebp.org/news/featuredtopics/multiemployer/Pages/default.aspx> (last visited Nov. 24, 2020); see also Sean Forbes, *Construction Multiemployer Pension Plans Doing Well*, BLOOMBERG LAW (Aug. 24, 2017, 5:58 PM), <https://news.bloomberglaw.com/employee-benefits/construction-multiemployer-pension-plans-doing-well>.

97. See, e.g., *Chel LaCort*, 315 N.L.R.B. 1036, 1036–37 (1994) (declining to change the rules for withdrawing from multiemployer bargaining that were first established in *Retail Associates*, 120 N.L.R.B. 388 (1958)).

98. See NATIONAL LAWYERS GUILD, *supra* note 84, § 5:6 (summarizing “NLRB elections,” “appropriate bargaining unit[s],” and “when employer and union are parties to prehire agreement[s]”); THE DEVELOPING LABOR LAW, *supra* note 3, at ch. 11 § III.B.3 (“The building and construction industry has posed special problems of unit determination because of the fluctuating nature of the workforce and the constant changes in job sites.”); *Cleveland Constr. v. NLRB*, 44 F.3d 1010, 1012 (D.C. Cir. 1995) (vacating the Board’s decision in favor of a multi-site bargaining unit).

99. See *Steiny & Co.*, 308 N.L.R.B. 1323, 1328 (1992); NATIONAL LAWYERS GUILD, *supra* note 84, § 5:8.

100. See *Construction Union Proof Rule*, *supra* note 8, at 18391, 18393 (reserving on multiple issues, including what evidence will be sufficient to prove majority support).

101. The “subrules” include the requirements of “positive evidence” of an “unequivocal demand” for recognition as the majority representative, of “unequivocal acceptance” by the employer of such status, and of that acceptance being “based on a contemporaneous showing of support from a majority of employees in an appropriate unit.” See 29 C.F.R. § 103.22. Another “subrule” the Board said it adopted partially overruled the Board’s decision in *Casale Indus. Inc.*, 311 N.L.R.B. 951, 953 (1993), in which the Board had decided that the majority status of a construction union could be challenged only within six months of when it had been granted. The Board overruled that decision to the extent it would prevent an election petition from being filed after the six-month period expired. See *Construction Union Proof Rule*, *supra* note 8, at 18391.

102. North America’s Building Trades Unions, Comment Letter on Proposed Rule on Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations 1, 20 (Sept. 5, 2019), <https://nabtu.org/wp-content/uploads/2019/08/NABTU-IRAP-Comments-RIN-1205-AB85.pdf>.

make their choice to work union or non-union when they first participate in one of these apprenticeship programs. It remains to be seen what incentive unions, and contractors with union-represented employees, would have to make such investments if, now that the Board has adopted its Construction Union Proof Rule, employers were to petition for elections or withdraw recognition based on that rule and the Board's language in adopting it.

There also remains a question of what incentives unions would have to spend on apprenticeship training if unions were to train workers and refer them to contractors. If non-union contractors were to hire such apprentices, they'd likely ensure those employees would comprise less than a majority of that employer's construction employees, to support that employer's claims the union lacks majority status, which that employer might try to make real by dragging out an unfair labor practice or representation proceeding, or both. Presidential candidates from both major political parties say they want to provide skilled construction labor to repair and update the U.S.'s infrastructure.¹⁰³ If non-union contractors and non-union contractor associations believe they can meet their workforce needs by hiring skilled trades workers who were trained by unions, as they are now doing,¹⁰⁴ they might want to pause and consider how long they can continue to do that.

In light of all these issues, the Board has decided to enter a thicket. As it declined to resolve any of these of these issues in its final Construction Union Proof Rule, the Board might be ill-equipped to deal with them if and when they do arise.

II. CONSTRUCTION LABOR LAW HISTORY—AND POSSIBLE FUTURE

A. *The History*

Interestingly, given that the Board in its proposed and final rule exalted its own secret ballot elections as the means for construction unions to obtain majority status, the original NLRA did not even apply those representation proceedings to the construction industry.¹⁰⁵ That changed after the 1947 amendments, when the legislative history indicated that Congress intended the construction industry to be covered by the law and the NLRB obliged.¹⁰⁶ This

103. See Mike Kopp, *To Beat the COVID-19 Recession, Invest in Roads, Bridges, Broadband and More*, THE GAZETTE (Sept. 20, 2020), https://gazette.com/opinion/perspective-to-beat-the-covid-19-recession-invest-in-roads-bridges-broadband-and-more/article_db2bdec6-f77e-11ea-bf9d-97778f52301e.html.

104. See Danny L. Caliendo, *Building Trades Members, Their Skills & Contractors are Being Transferred by Design to the Non-Union*, LAB. RISING (Apr. 21, 2019), <http://laborrising.com/2019/04/building-trades-members-their-skills-contractors-are-being-transferred-by-design-to-the-non-union/>.

105. See S. REP. NO. 85-1684, at 27–30, 72 (1958).

106. Benjamin Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1121 (1960) (citing Plumbing Contractors Ass'n, 93 N.L.R.B. 1081 (1951)).

Article does not contend that NLRB elections should never occur in the construction industry, at least *when the currently requisite percentage of employees request an election or a union demands from an employer recognition as a majority representative*.¹⁰⁷

The experience with NLRB elections in the construction industry from 1947 to 1959 was problematic. In 1951, the President of the AFL Building and Construction Trades Department testified before Congress that “the entire industry is being plunged into a completely chaotic relationship due primarily to the [NLRA] election procedures”¹⁰⁸ The subject of his testimony was a bill to exempt the construction industry from the election provisions of the NLRA, and that bill was also supported by the Associated General Contractors of America, the National Electrical Contractors Association, and the Tile Contractors Association of America.¹⁰⁹ However, that bill was not reported out of committee because of opposition from the CIO, the International Association of Machinists (IAM), and the United Mine Workers (UMW).¹¹⁰ It might be worth noting that this testimony occurred prior to the 1955 merger of the AFL-CIO.¹¹¹

The 1959 Congress, whose intent the Board claimed to be effectuating in its 2020 final Construction Union Proof Rule,¹¹² recognized the difficulty with applying NLRB election procedures in the construction industry. The Senate Labor and Public Welfare Committee Report on the bill (S. 1555) that eventually added Section 8(f) and other amendments to the LMRA stated that, because construction was not covered from 1935–1947, “[c]oncepts evoked by the Board therefore developed without reference to the construction industry” and that the later “application of the [A]ct to the construction industry has given rise to serious problems”¹¹³ After citing multiple hearings in which those problems had been identified, the Report referred to the issues of NLRA application to construction as “urgent problems.”¹¹⁴ This Report also stated that construction

107. *But see* Montgomery Ward & Co., 137 N.L.R.B. 346, 347 (1962) (finding employer is bound to its contractual commitment to not file an election petition even if the collective bargaining agreement, because of its duration, would not bar an employee petition).

108. Benjamin Aaron, *Amending the Taft-Hartley Act: A Decade of Frustration*, 11 INDUS. & LAB. RELS. REV. 327, 332 (1958) (quoting *Hearings Before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare*, 82d Cong. 39 (1951) (statement of Richard Gray)).

109. *Id.*

110. The late institute director, Benjamin Aaron, explained that the CIO wanted the bill to do more for maritime union hiring halls, and the IAM and the UMW were concerned about how the proposed bill would affect their representation of employees in the construction industry. *Id.* at 332–33.

111. See Charlotte Garden, *Union Made: Labor’s Litigation for Social Change*, 88 TUL. L. REV. 193, 206 (2013).

112. See *supra* notes 31–33 and accompanying text.

113. S. REP. NO. 86-187, at 27 (1959), as reprinted in 1959 U.S.C.C.A.N. 2317, 2344.

114. *Id.* at 28, as reprinted in 1959 U.S.C.C.A.N. at 2344.

is “markedly different from manufacturing and other types of enterprise[.]” specifically because “[a]n individual employee typically works for many employers and for none of them continuously” and “[j]obs are frequently of short duration, depending upon various stages of construction.”¹¹⁵ The Report further concluded that “[r]epresentation elections in a large segment of the industry are not feasible to demonstrate such majority status due to the short periods of actual employment”¹¹⁶

In this Report, the 1959 Senate committee made another observation that is relevant to the Board’s 2020 Construction Union Proof Rule. The Report stated that in the construction industry

the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired.¹¹⁷

In 2020 and the foreseeable future, construction craft unions continue to provide the skilled workers construction contractors need. This fact is a major reason why contractors make agreements with such unions—and, when both the contractor and union understand that the union will refer the contractor’s workers, they agree that the union is the majority representative of those workers. The union and the contractor’s employees rely on this commitment from the contractor, and the Board should not make it easy for a contractor to disavow the voluntary recognition at the heart of this commitment.

Given this history and congressional intent, it is not surprising that, only seven years later, the Board adopted the position in *Bricklayers & Masons International Union Local No. 3* that when a construction union and contractor renew an agreement, that renewed agreement is not based on Section 8(f) and is therefore effectively equivalent to any Section 9(a) agreement, including being subject to Section 8(a)(5) and 8(b)(3).¹¹⁸ As will be discussed in the next paragraph, a few years later, in 1971, the Board expanded the kinds of facts beyond renewal of a prior agreement that a construction union could use to prove it had become a majority representative of a contractor’s employees. In its final Construction Union Proof Rule, the Board did discuss some of the 1971 Board

115. *Id.* at 27, as reprinted in 1959 U.S.C.C.A.N. at 2344.

116. *Id.* at 55, as reprinted in 1959 U.S.C.C.A.N. at 2373.

117. *Id.* at 28, as reprinted in 1959 U.S.C.C.A.N. at 2345.

118. *Bricklayers & Masons Int’l Union Local No. 3*, 162 N.L.R.B. 476, 478–79, *enforced*, 405 F.2d 469 (9th Cir. 1968) (upholding the Board’s ruling that a union committed an unfair labor practice when, while renewing an agreement, it insisted on a non-mandatory subject). This and similar decisions were overruled more than 20 years later in *Brannan Sand & Gravel Co.* See *Brannan Sand & Gravel Co.*, 289 N.L.R.B. 977, 980 n.12 (1988).

decisions,¹¹⁹ but never mentioned the 1966 *Bricklayers & Masons International Union Local No. 3* precedent holding that a renewal of a prior contractor-union agreement can establish a union's majority status. That oversight could be significant if the current Board were to decide whether a contractor could withdraw recognition from a union even after an initial agreement is renewed or replaced by a succeeding one. The current Board will do exactly that if they continue to agree with the same dissenting Board members they relied on in issuing their final Construction Union Proof Rule.¹²⁰

As noted earlier,¹²¹ the final Construction Union Proof Rule discussed how the Board's 1987 *Deklewa* decision overruled a so-called "conversion doctrine," which the *Deklewa* Board and the 2020 Board both traced to the Board's 1971 decisions in *R. J. Smith Construction Co.*¹²² and *Ruttmann Construction Co.*¹²³ The Board's 1987 *Deklewa* decision was the first time it used the phrase "conversion doctrine."¹²⁴ That 1987 Board, and the Board proposing the rule in 2019, both rightly stated that, in these 1971 decisions, the Board regarded a union-contractor Section 8(f) agreement as "a preliminary step that contemplates further action for the development of a full bargaining relationship."¹²⁵ In 1971 and until *Deklewa*, the Board did not require that "further action" to include the union obtaining voluntary recognition or an NLRB election win.¹²⁶ In the 1971 *Ruttman* decision, the Board stated that a union's continued representation of employees, so that the contractor remained bound to bargain with it, could be legally validated by "the hiring of employees who are usually referred by the union."¹²⁷ Also in that year, the Board added that majority status could be

119. See Construction Union Proof Rule, *supra* note 8, at 18368 (citing *Ruttmann Construction*, 191 N.L.R.B. 701 (1971); *R.J. Smith Construction Co.*, 191 N.L.R.B. 693 (1971)).

120. See, e.g., *Colo. Fire Sprinkler, Inc.*, 364 N.L.R.B. No. 55, 2016 NLRB LEXIS 543, at *18 (July 22, 2016) (Member Miscimarra, dissenting); *King's Fire Prot., Inc.*, 362 N.L.R.B. 1056, 1059–60 (2015) (Member Miscimarra, dissenting in part) (dissenting in both decisions from the Board majority's ruling that the contractor had unlawfully repudiated its relationship with the union upon expiration of a successor agreement); Construction Union Proof Rule, *supra* note 8, at 18389–90 (citing Member Miscimarra's dissenting opinions).

121. See *supra* Section I.A.

122. *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693, 694–95 (1971), *vacated on other grounds sub nom. Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973).

123. *Ruttmann Constr. Co.*, 191 N.L.R.B. 701, 706–08 (1971). See also Construction Union Proof Rule, *supra* note 8, at 18368; *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375, 1377 (1987), *enforced sub nom. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.).

124. *Deklewa*, 282 N.L.R.B. at 1377. This Article's author searched Board and NLRB Administrative Law decisions prior to the date of the *Deklewa* decision (February 20, 1987) and found no uses of the phrase "conversion doctrine."

125. *Id.* at 1378 (quoting *Ruttmann*, 191 N.L.R.B. at 702); Proposed Rule, *supra* note 27, at 39935 (quoting *Ruttmann*, 191 N.L.R.B. at 702). The Board did make the same statement in its final rule. See Construction Union Proof Rule, *supra* note 8.

126. *Deklewa*, 282 N.L.R.B. at 1377–78.

127. *Ruttmann*, 191 N.L.R.B. at 702.

proven by the fact that a contractor's employees were union members bound by a union-security clause.¹²⁸

As this Article discussed previously,¹²⁹ the Board in its 2019 proposed rule and 2020 final rule relied on significant changes in the law governing construction employer recognition of unions that were made in the Board's 1987 *Deklewa* decision.¹³⁰ Though the Board did not discuss it in either the 2019 Proposed Rule or 2020 final Construction Union Proof Rule, the *Deklewa* majority also rejected the rule under *R.J. Smith* that a contractor could unilaterally repudiate at any time any Section 8(f) relationship with a union that did not convert to majority status,¹³¹ a rule the *Deklewa* Board called "simply wrong."¹³² The Board in *Deklewa* found that such a rule was "not a necessary predicate for advancement of the employee free choice principles" and then compared it to the Section 9(a) rules that prevail outside the construction industry.¹³³ The *Deklewa* Board pointed out that, with regard to non-construction agreements, "the Board effectuates employee free choice by limiting the election bar effect of a contract to 3 years, *but the irrebuttable presumption of a union's majority status and the enforceability of the contract exist and continue for the contract's full term.*"¹³⁴

In *Deklewa*, the Board did not fully apply this "irrebuttable presumption of majority status" to Section 8(f) relationships, as the Board held that such relationships would never bar election petitions.¹³⁵ In practical terms, at least for careful construction employee unions, these would be election petitions filed by employees, as an employer cannot file an election petition unless a union requests recognition as a majority representative.¹³⁶ The *Deklewa* Board described the appropriate "characterization" of the Section 8(f) "election"

128. Irvin, 194 N.L.R.B. 52, 53 (1971), *enforced in part, denied in part* 475 F.2d 1265 (3d Cir. 1973).

129. *See supra* Section I.A.

130. *See Deklewa*, 282 N.L.R.B. at 1377–78.

131. R.J. Smith Constr. Co., 191 N.L.R.B. 693, 694–95, 695 n.5 (1971), *vacated on other grounds sub nom.* Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186 (D.C. Cir. 1973); *Deklewa*, 282 N.L.R.B. at 1382 (quoting *R.J. Smith*, 191 N.L.R.B. at 694).

132. *Deklewa*, 282 N.L.R.B. at 1382.

133. *Id.*

134. *Id.* (emphasis added).

135. *Id.* at 1377, 1379.

136. *See* National Labor Relations Act of 1935 § 9(c)(1)(B), 29 U.S.C. § 159(c)(1)(B) ("Whenever a petition shall have been filed . . . by an employer, alleging that one or more individuals . . . have presented to him a claim to be recognized as the representative defined in subsection [9](a) . . .") (emphasis added); PSM Steel Constr., Inc., 309 N.L.R.B. 1302, 1304 (1992) (finding that a union seeking an employer to sign a § 8(f) agreement does not support an employer's petition for an election). The Board in *Deklewa* did say that an employer filing an "RM" election "need only demonstrate that it is signatory to an 8(f) agreement to satisfy the 'objective considerations' requirement." *Deklewa*, 282 N.L.R.B. at 1385 n.42. However, that does not change the fact that, under the statutory language, an employer can file a petition only when a union claims to be the 9(a) majority representative.

proviso as “it[s] operat[ion] as an ‘escape hatch’ for employees subject to unwanted representation imposed before they were hired.”¹³⁷ In the same paragraph, the *Deklewa* Board added its view that “Congress specified that an 8(f) agreement may not act as a bar to, inter alia, decertification or rival union petitions.”¹³⁸ The Board reinforced this in another part of the decision when it stated, “an 8(f) union is not a stranger to the employees. Rather, it is usually the initial employment referral source for most of the employees the employer hires. In any event, if the *employees subsequently decide to reject* that representative, the contract will not stand in their way.”¹³⁹ Thus, the Board in *Deklewa* provided much stronger indication that “employee choice” was to be carried out by employees, and not by unilateral contractor action, than it did of how a union could obtain Section 9(a) status.

The Board in *Deklewa* arguably did not apply these insights about the meaning and intent of Section 8(f) when it held that, while a contractor could no longer unilaterally repudiate a Section 8(f) relationship with a union during the term of an agreement, it could do so after the agreement expired.¹⁴⁰ The *Deklewa* Board did so even though it recognized that “an employer’s decision to repudiate may be based on the employer’s own economic considerations, without reference to or concern for the employees’ desire to continue the status quo.”¹⁴¹ The Board immediately followed this recognition by stating—again referring to employee-sought elections—that “[e]ven if the employer has a legitimate question as to its employees’ representational desires, Congress has expressly provided an electoral mechanism for testing them.”¹⁴² In *Deklewa*, the Board’s only rationale for allowing a contractor, at contract expiration, to end a relationship with a union that its employees might want was that otherwise the union “could lawfully seek to compel the employer, through strikes or picketing” to agree to a successor contract,¹⁴³ which the Board found would be contrary to congressional intent expressed in legislative history.¹⁴⁴ That reasoning hardly seems the most straightforward way to establish rules that meet congressional intent to avoid “compelled” Section 8(f) agreements while also serving actual “employee choice” in the construction industry. A contractor’s unilateral repudiation of a relationship with a union serves only itself and does nothing for employee choice except that it often undermines the choice of employees then working for the contractor. That aspect of *Deklewa* furthers only contractor

137. *Deklewa*, 282 N.L.R.B. at 1381.

138. *Id.* at 1382.

139. *Id.* at 1387 n.52 (emphasis added) (citation omitted).

140. *See id.* at 1377–79, 1382–83.

141. *Id.* at 1382.

142. *Id.*

143. *Id.* at 1384.

144. *Id.* at 1384–85, 1385 n.39 (“The Conference Report on the 1959 amendments . . . states that ‘[n]othing in [Section 8(f)] is intended . . . to authorize the use of force, coercion, strikes, or picketing to compel any person to enter into such [8(f)] agreements.’”) (alterations in original).

choice, including with respect to the source of its entire workforce, and the Board's final Construction Union Proof Rule would only increase contractor opportunities to make that unilateral choice.

In its 2020 final Construction Union Proof Rule, the Board has overruled its prior 2001 decision in *Staunton Fuel*.¹⁴⁵ The Board in *Staunton Fuel* found that, after *Deklewa*, the way in which a union could obtain majority status was still unresolved.¹⁴⁶ After concluding—probably correctly—that the Board had not yet decided what kind of evidence a construction union could use to prove Section 9(a) majority status, the Board considered the issue. It discussed its language from *Pierson Electric, Inc.*, and other past decisions, which was also quoted in the 2019 Proposed Rule: “a construction union can overcome the presumption of 8(f) status by showing that it made an unequivocal demand for, and that the employer unequivocally granted, majority recognition based on a showing of majority support in the unit.”¹⁴⁷ The Board then adopted the standard—applied for almost twenty years during two Republican and one Democratic presidential administrations—that it ultimately overruled in 2020.¹⁴⁸

B. The Possible Future

In considering the possible future regarding employee representation in the construction industry, it is valuable to take account of how central the choices of the contractor, not its employees, are in the process. When one or more construction employees choose to be represented by a union, that union does not yet represent them, at least with regard to any specific employer/contractor. If, however, the contractor that employs them chooses to make an agreement with a construction union, that union will become their representative. The contractor also chooses whether it will recognize the construction union as its employees' majority representative or make a Section 8(f) agreement with the union that does not require majority support. If the contractor chooses the latter, then its employees could petition for an NLRB election that would determine if the union remains their representative. But if the employees don't do that—and they rarely do—then it will again be the contractor that decides for its employees when the Section 8(f) contract expires. At that time, the contractor could choose to repudiate its relationship with the union so that its employees no longer have

145. Proposed Rule, *supra* note 27, at 39938–39 (discussing *Staunton Fuel & Material, Inc.*, 335 N.L.R.B. 717 (2001)); Construction Union Proof Rule, *supra* note 8, at 18368–69, 18393 (indicating Board's adoption of this feature of its proposed rule).

146. *Staunton Fuel*, 335 N.L.R.B. at 718–19.

147. *Id.* (citing *W. Pipeline, Inc.*, 328 N.L.R.B. 925 (1999); *James Julian, Inc.*, 310 N.L.R.B. 1247 (1993); *Pierson Elec., Inc.*, 307 N.L.R.B. 1494 (1992)); *see also* Proposed Rule, *supra* note 27, at 39935 n.30 (quoting *Pierson Elec.*, 307 N.L.R.B. at 1495). The Board in its final rule did not quote or cite *Pierson Electric* or any of these decisions. *See* Construction Union Proof Rule, *supra* note 8.

148. *See* Construction Union Proof Rule, *supra* note 8, at 18366, 18370.

any representation and, in many cases, will no longer be employed by that contractor.

When the contractor makes the choice about its employees' union representation, the contractor is also usually choosing who its employees will be and where they will come from. As mentioned in the Introduction, the contractor chooses the source of its employees in the construction industry.

The Board's Construction Union Proof Rule is aimed at contractor-construction union agreements with particular language that, for nearly twenty years, has been found to establish a Section 9(a) relationship between the two, which the contractor cannot repudiate when the term of that contract ends. The Board's Construction Union Proof Rule would restore that choice of repudiation to the contractor, which could simultaneously make a choice about what workers it will employ and how and from where they will be hired. In return, employees who have indicated their support of the union as a representative (and often will be union members referred by the union) would get a rarely exercised opportunity to petition immediately for an election on whether to keep the contract terms they have been working under, and to keep union representation, instead of having to wait nearly the duration of a contract, or nearly up to three years, to petition for such an election. If lost by the union, that election would again create "choices" for the contractor: what terms its employees will work under, and what employees it will hire and retain. Those choices create risks for construction employees. The Board's Construction Union Proof Rule merely makes available for them a chance to get an election that risks their employment terms and jobs. One cannot help but wonder what "choice" actual construction employees would make if the Board's rule were offered to them in an "up or down" vote.

Given that the Board, in its invitation for briefs in *Loshaw Thermal Technology*, stated that the respondent contractor wanted the Board to "revisit" its 1993 *Casale Industries* rule on the limitations period for a contractor to withdraw recognition from union, and the Board's final rule overruled *Casale Industries*,¹⁴⁹ it seems reasonable to infer that the Board plans to make that choice available to contractors as well. If the Board did so, that would mean that if a contractor renewed or made any agreement with a union, no matter what that agreement said, the contractor could try to later claim that it had only a Section 8(f) relationship with the union and was not obligated to bargain with the union or treat that union as the representative of its employees (whomever they might turn out to be) after the 8(f) agreement expires. The contractor could make that claim even if the union had in fact shown the contractor that a majority of its employees wanted the union to represent them, because the burden would be on the union to prove that. Will signatures of a majority of employees on authorization cards be sufficient to prove that? What if the employer disputes the authenticity of such signatures—what standard will be used in that instance?

149. See *id.* at 18391.

It is unknown what standards the Board or courts will apply to such issues in the future, and the Board gave no indication in its 2020 Construction Union Proof Rule.

The D.C. Circuit decisions the Board relied on in its rule demonstrate what might happen. In both *Nova Plumbing* and *Colorado Fire Sprinkler*, the D.C. Circuit allowed the contractors to withdraw recognition from the union.¹⁵⁰ In the latter decision, the court allowed this result even though it recognized that Colorado Fire Sprinkler, beginning in 1994 and continuing until it withdrew its relationship with the union in 2013, hired its sprinkler fitters “primarily through the [u]nion’s apprenticeship program”¹⁵¹ The union’s referral of apprentices certainly ended when Colorado Fire Sprinkler ended their relationship. The “choices” of the “employees” whom the union otherwise would have referred were certainly not served by the court’s decision.

It is less clear whether employee choice was served or not in *Nova Plumbing*, given that, as discussed in Section II.B, there was evidence that, at the time of its withdrawal of recognition, a majority of Nova Plumbing’s employees did not support the union as a representative.¹⁵² With those facts, *Nova Plumbing* can perhaps be regarded as an instance of “bad facts making bad law,” at least to the extent it led to the Board’s final Construction Union Proof Rule. In any event, although both *Nova Plumbing* and *Colorado Fire Sprinkler* discuss employee choice, they also can be regarded as decisions that were based on the fact that the union did not comply with the terms of the agreement on which it based its claim of Section 9(a) status. In *Nova Plumbing*, as discussed in Section I.A, the agreement said the union would have its majority status verified by a Certified Public Accounting Firm, and that never happened.¹⁵³ “Verification” was also an issue for the union in *Colorado Fire Sprinkler*, as the form agreements it relied on stated that the contractor “freely and unequivocally acknowledge[d] that it ha[d] verified the Union’s status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the National Labor Relations Act.”¹⁵⁴ The D.C. Circuit called the language in which the contractor acknowledged the union’s majority status “demonstrably false in at least one prior iteration”¹⁵⁵ (apparently when the contractor was party to the agreement it had no employees, from 1991 until sometime in 1994) and the court found “at no point in the administrative record did the Union even explain, let alone proffer, what evidence it claimed to have collected” of its majority status.¹⁵⁶ There was no

150. See *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1041 (D.C. Cir. 2018); *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 533, 539 (D.C. Cir. 2003).

151. *Colo. Fire Sprinkler*, 891 F.3d at 1036.

152. *Nova Plumbing*, 330 F.3d at 536–37.

153. *Id.* at 535.

154. *Colo. Fire Sprinkler, Inc.*, 364 N.L.R.B. No. 55, 2016 NLRB LEXIS 543, at *47 (July 22, 2016).

155. *Colo. Fire Sprinkler*, 891 F.3d at 1040.

156. *Id.* at 1041.

evidence in the record that the employer saw and verified evidence of the union's majority status.¹⁵⁷

It was this lack of evidence demonstrating union majority status that the D.C. Circuit found to be key in *Colorado Fire Sprinkler*. The union probably could have shown the employer that it had majority support at any point in their relationship after 1994, but apparently did not, as the court stated that “[t]he record is bereft of evidence either confirming or controverting majority support. In the Company’s twenty-year history, there were no petitions, authorization cards, or votes confirming or denying the Union’s majority status. No anecdotal evidence was offered either.”¹⁵⁸ The court made it clear that this lack of evidence was crucial by stating, “what matters is that the affirmative evidence of majority support exists in the record.”¹⁵⁹ Therefore, the D.C. Circuit’s view, based on its most recent precedent on this issue, is that *Staunton Fuel* contract language plus evidence (such as authorization cards) that the union was in fact supported by a majority of the contractor’s employees, is sufficient to prove Section 9(a) status and prevent the employer from withdrawing from its relationship with the union.¹⁶⁰ It can only be hoped that the current Board will not demand more from unions than this standard does.

In *Colorado Fire Sprinkler*, the court said that “[t]he unusual Section 8(f) exception is meant not to cede all employee choice to the employer or union,” but the court’s ruling gave the choice entirely to the contractor.¹⁶¹ None of that contractor’s employees, whether apprentices referred by the union or other employees, played any part in what the contractor chose to do. One rationale the court gave for this holding was to avoid “collusion” between the contractor and the union to preclude petitions from rival unions or to get rid of the union.¹⁶² The court did not mention that, in cases where it allows the contractor to walk away or otherwise withdraw recognition, as it did *Colorado Fire Sprinkler*, the court rewards one of the colluders. A contractor must always go along with such collusion or it does not happen. In fact—as this Article has argued consistently—the contractor gets its “choice” at all times. When it wants an agreement for a source of labor (as Colorado Fitter Sprinkler did when it was founded and had no sprinkler fitters), the contractor makes an agreement with a union. When the contractor, for any reason—Colorado Sprinkler Fitter claimed it was due to increased competition—wants to end its relationship with a union, it can make that choice too. Neither the D.C. Circuit, nor anyone else, has ever explained how allowing a colluder to get its way at all times will reduce the incentive for collusion.

157. *Id.* at 1040.

158. *Id.* As noted earlier, the court found that the contractor hired primarily union apprentices as sprinkler fitters from 1994–2013. *See id.* at 1036.

159. *Id.* at 1039.

160. *Id.* at 1039–40.

161. *Id.* at 1038.

162. *Id.* at 1039, 1041.

One long-recognized limit on when contractors can renege on an agreement with a union, based on challenging the union's majority status and claiming that the presumption of a Section 8(f) relationship applies, is the 1993 *Casale Industries* rule that such a challenge will not be allowed more than six months after the contractor has recognized the union as a Section 9(a) majority representative.¹⁶³ At least for the purposes of representation cases, the Board overruled *Casale Industries*, and the way in which the Board did so is worth considering. As this Article discussed previously, the Board's 2018 invitation for briefs in the unfair labor practice/withdrawal of recognition case, *Loshaw Thermal Technology*, asked whether the Board should reconsider *Casale Industries* and "revise" its rule from that decision.¹⁶⁴ However, as was also stated earlier in this Article, the Board did not mention *Casale Industries* in its August 2019 proposed election protection rule.¹⁶⁵ Then, ostensibly in response to a commenter who asked the Board to retain the *Casale Industries* time limit on challenging majority support,¹⁶⁶ the Board's final Construction Union Proof Rule declared that it "overrule[d] *Casale* to the extent that it is inconsistent with the instant rule."¹⁶⁷ The Board thus ignored the "notice" part of "notice-and-comment rulemaking," which alone could serve as a ground for invalidating this part of its final rule.¹⁶⁸ After all, in response to the commenters the Board could simply have stopped after stating, as it did at the outset of discussing *Casale Industries*, "we decline to adopt a Section 10(b) 6-month limitation on challenging a construction-industry union's majority status by filing a petition . . ."¹⁶⁹ That would have been consistent with the Board's treatment of many other issues raised by commenters, which the Board explained it would address in future cases, as necessary.¹⁷⁰ It was also unusual that the Board made this

163. See *Casale Indus., Inc.*, 311 N.L.R.B. 951, 953 (1993).

164. See *supra* Section I.A.

165. See *supra* Section I.A.

166. See, e.g., Robert D. Kurnick on behalf of North America's Building Trades Unions, Comment Letter on Proposed Rule on Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective Bargaining Relationships 19–21 (Jan. 9, 2020), <https://www.regulations.gov/document?D=NLRB-2019-0001-0107> (discussing consistent application of Section 10(b) six-month limitations period in construction industry cases).

167. Construction Union Proof Rule, *supra* note 8, at 18391.

168. See, e.g., *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985) ("If the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.") (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir.1983)). The U.S. Supreme Court has never upheld an agency's rule on the ground that the rule adopted is a "logical outgrowth" of the rule proposed. See Jack M. Beermann, *Rethinking Notice*, 39 ADMIN. & REGUL. L. NEWS 12, 13 (2014) (mentioning that "in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007), the Court cited the 'logical outgrowth' test with apparent approval," but failed to mention that in that case the agency withdrew the proposed rule).

169. Construction Union Proof Rule, *supra* note 8, at 18391.

170. *Id.* at 18393. Nor could the Board's decision to overrule *Casale* be justified by the Board wanting to protect the "employee choice" for a petition in which the 6-month time period had

major change to a labor law rule, a rule eight years older than the one in *Staunton Fuel*, in its response to comments, and did not mention it in its “Summary of Changes to the Proposed Rule,” where it did bother to mention “minor, non-substantive changes” to this part of its rule.¹⁷¹ Why did the Board take this approach to the *Casale Industries* rule?

Perhaps because, for the *Casale Industries* time limit, the Board had in mind a goal other than responding to commenters. After the sentence stating that it “overruled” *Casale*, the Board added, “[s]pecifically, we overrule *Casale*’s holding that the Board will not entertain a claim that majority status was lacking at the time of recognition where a construction-industry employer extends 9(a) recognition to a union and 6 months elapse without a petition.”¹⁷² The reference to “not entertain[ing] a claim” six months after recognition certainly indicated application to unfair labor practice cases.¹⁷³ Next, perhaps recalling the limited scope of its final Construction Union Proof Rule, the Board did note, but only “[a]s an initial matter,” that “Section 10(b) applies only to unfair labor practices and that this aspect of the rule addresses only representation proceedings—*i.e.*, whether an election petition is barred because a construction-industry employer and union formed a 9(a) rather than an 8(f) collective-bargaining relationship.”¹⁷⁴

After that, the Board returned to its likely goal regarding the *Casale* time limit rule—which does involve unfair labor practice cases—and discussed two federal courts of appeals decisions and past Board members’ opinions that questioned or refused to apply the six month time limit to contractor withdrawals of recognition of a union in unfair labor practice cases.¹⁷⁵ Thus, the Board could hardly have been more obvious in signaling its intentions for future unfair labor

elapsed, because the Board, in its final rule, announced that it would apply “only prospectively” and “only to construction-industry bargaining relationships entered into on or after the date the rule goes into effect.” *Id.* at 18390.

171. *Id.* at 18370.

172. *Id.* at 18391.

173. *See id.*

174. *Id.* Near the end of the part of the Board’s final rule in which it responded to comments calling for a 6-month time limit, the Board returned to discussing election petitions. *Id.* The Board first found that *Casale* should not be applied to election petitions because “employees and rival unions will likely presume that a construction-industry employer and union entered an 8(f) collective-bargaining agreement” and therefore would not file a petition within a 6-month period. *Id.* What employees and “rival unions” would presume is obviously a matter of pure speculation. More could be said about what employees and rival unions in the construction industry would likely presume, and why, but that is beyond the scope of this Article. In this part of its rule, the Board’s other reason for rejecting the *Casale* 6-month limit was another invocation of the “employee choice” rationale, which it has claimed as the basis for everything in the rule since it proposed overruling *Staunton Fuel*. *Id.* Much of this Article is devoted to explaining why that is almost certainly a false claim and that it is unlikely that they will file a petition challenging the union’s status within 6 months of recognition.

175. *Id.* (citing *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 539 (D.C. Cir. 2003); *Am. Automatic Sprinkler Sys. v. NLRB*, 163 F.3d 209, 218 n.6 (4th Cir. 1998)).

practice cases when a construction contractor withdraws recognition from a union more than six months after that same contractor recognized the union as a majority representative. This intention regarding “contractor choice” is all the more clear when one takes into account the Board’s 2018 *Loshaw Technology* invitation for briefs, in which the Board, in a contractor withdrawal of recognition case, requested views on whether it should “revisit” the *Casale Industries* time limit rule.¹⁷⁶

For many reasons, the Board should not follow through with this previewed plan. First, as was discussed earlier regarding “collusion,”¹⁷⁷ the Board will most likely allow withdrawal of recognition in a case involving one of the “colluders”—the contractor that previously recognized the union as a majority representative—as was true in the *Loshaw Thermal Technology* case.¹⁷⁸ Presuming that this contractor will also stop obtaining its employees from union referrals, it would be unbelievable if the Board claimed that “employee choice” is served when a contractor that illegally recognized a union as a majority representative of its employees later relied on its mistaken and unlawful recognition to terminate its relationship with that union. Any and all Board decisions allowing such withdrawals of recognition by construction contractors would plainly serve the “choices” of those contractors much more directly and fully than any employee’s choice on representation.

Second, in *Casale Industries* the Board simply decided that, in the construction industry, it would apply the same rule as the Supreme Court had affirmed for all other covered industries: that a claim that an employer granted unlawful recognition to a union as a majority representative must be brought within the six-month period for filing a charge of an unfair labor practice.¹⁷⁹ The Board in *Casale* rightly added that “[a] contrary rule would mean that longstanding relationships would be vulnerable to attack, and stability in labor relations would be undermined.”¹⁸⁰ The point about stable labor relations is important: promoting such “labor relations stability,” along with “employee [] choice,” was identified by the *Deklewa* Board as one of the two “fundamental statutory objectives” and “overarching objectives” of the NLRA.¹⁸¹ Yet the Board in its final Construction Union Proof Rule, while repeatedly invoking “employee choice” as the reason underlying the rule, only mentioned labor relations stability in a conclusory assertion that it “will restore the proper balance of interests—employee free choice on one hand, labor relations stability on the

176. See Invitation, *supra* note 13, at 1.

177. See *supra* Section II.B.

178. See *Loshaw Thermal Tech., LLC*, No. 05-CA-158650, 2016 NLRB LEXIS 493, at *24–26 (N.L.R.B. July 7, 2016).

179. *Casale Indus., Inc.*, 311 N.L.R.B. 951, 953 (1993) (citing *Int’l Ass’n of Machinists v. NLRB (Bryan Mfg.)*, 362 U.S. 411 (1960)).

180. *Id.* (citing *Bryan Mfg.*, 362 U.S. at 429).

181. *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375, 1380, 1382 (1987).

other—intended by Congress and safeguarded in *Deklewa*.”¹⁸² The only serious consideration of labor relations stability was by the dissenting board member when the Board proposed the rule.¹⁸³

There are other reasons why the *Casale Industries* rule should be retained to limit any claims, by a contractor or anyone else, that a union did not and does not have majority status. As the Supreme Court recognized in *International Ass’n of Machinists v. NLRB (Bryan Manufacturing)*, Congress itself said enacting the Section 10(b) six month limit was to ensure litigation did not occur “after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.”¹⁸⁴ Especially given that local union officers must be elected every three years,¹⁸⁵—and, for some contractors, there is also turnover in personnel—the risks Congress recognized are definitely present when an employer waits for more than six months, or even years, prior to breaking its relationship with a union and claiming it lacks majority status. The *Deklewa* Board also recognized this issue and raised it as a ground for rejecting the “conversion doctrine” that required determining if a union had majority support in the past:

[T]he Board [must] “look back” any number of years into a relationship characterized by sporadic and shifting employment patterns to determine whether the union, at any time, enjoyed majority support. This determination must be made in adversarial litigation based on such factors as union membership rolls, the presence of an enforced union-security clause, exclusive hiring hall referrals, or union fringe benefit contribution records. The documentary evidence of such factors is often incomplete, contradictory, or unavailable. In those situations, the crucial determination may be made on the basis of individual recollections as to employees’ representational wishes years previously.¹⁸⁶

As mentioned previously, the Board referenced two federal appellate court decisions, permitting employer withdrawals of recognition, to support its overruling of *Casale Industries*.¹⁸⁷ The first of those two decisions was by the U.S. Court of Appeals for the Fourth Circuit, in *American Automatic Sprinkler Systems, Inc. v. NLRB*.¹⁸⁸ In footnote six of that decision, the court discussed the Board’s contention that the contractor’s withdrawal of recognition was

182. See Construction Union Proof Rule, *supra* note 8, at 13839.

183. Proposed Rule, *supra* note 27, at 39940 (Member McFerran, dissenting).

184. *Int’l Ass’n of Machinists v. NLRB (Bryan Mfg.)*, 362 U.S. 411, 419 (1960) (citing H.R. REP. NO. 80-245, at 40 (1947)).

185. Labor-Management Reporting & Disclosure Act of 1959 §401(b), 29 U.S.C. § 481(b).

186. *Deklewa*, 282 N.L.R.B. at 1383. See also *Overstreet ex rel. NLRB v. Tucson Ready Mix, Inc.*, 11 F. Supp. 2d 1139, 1147 (D. Ariz. 1998) (applying a six-month limit to a successor employer defense to withdrawing recognition).

187. See *supra* note 175 and accompanying text.

188. *Am. Automatic Sprinkler Sys. v. NLRB*, 163 F.3d 209 (4th Cir. 1998).

untimely under *Casale* and rejected it for the rather conclusory reason that “the basis for applying a 10(b) limitations period in the nonconstruction industry workplace, where minority recognition is unlawful, does not hold in the construction industry, where there is no statutory prohibition on minority recognition.”¹⁸⁹

Interestingly, in the next sentence, the Fourth Circuit observed that “in the nonconstruction industries, a *defense* of invalid voluntary recognition is tantamount to a *charge* of unlawful conduct under the NLRA provisions prohibiting employers and nonmajority unions from entering into collective-bargaining agreements.”¹⁹⁰ The Fourth Circuit proceeded on the mistaken premise that a contractor’s recognition of a minority union is not unlawful, overlooking that it violates Section 8(a)(2) if and when a contractor agrees that a union is the “majority” or “Section 9(a)” representative of a union, as is true in any case where the *Staunton Fuel* standard is relevant.¹⁹¹ Thus when a contractor agrees a union is a majority representative of its employees, as American Automatic Sprinkler Systems did,¹⁹² it violates Section 8(a)(2) if the union does not actually represent a majority, as American Automatic Sprinkler Systems later claimed the union did not.¹⁹³ Moreover, the U.S. Supreme Court established in *Garment Workers*¹⁹⁴—a decision the Board relied on multiple times in its final Construction Union Proof Rule¹⁹⁵—that there is no scienter requirement in Section 8(a)(2), so it does not matter whether the employer knew the union lacked majority support.¹⁹⁶ Therefore, the Fourth Circuit should have found that the Section 10(b) period began to run when American Automatic Sprinkler Systems agreed that the union was a majority representative, which would have been consistent with the rule in *Bryan Manufacturing* and other non-

189. *Id.* at 218 n.6 (quoting Triple A Fire Prot., Inc., 312 N.L.R.B. 1088, 1089 n.3 (1993) (Member Devaney, concurring)).

190. *Id.*

191. See *Marin Chatmar, Inc.*, 188 N.L.R.B. 68, 70 (1971) (finding that an executed agreement to recognize a union as representing a majority of employees was an 8(a)(2) violation because the union did not yet represent a majority when the agreement was executed); *Butler Knitting Mills, Inc.*, 127 N.L.R.B. 68, 81 (1960); *Marcus Trucking Co.*, 126 N.L.R.B. 1080, 1109 (1960) (finding an 8(a)(2) violation where employer treated Teamsters union as majority representative in interactions with employees prior to that union attaining majority support), *enforced* 286 F.2d 583 (2d Cir. 1961). An employer accepting in a collective bargaining agreement with a union that the union is a majority (or §9(a)) representative of employees might be especially significant as it relates to preventing interference with employee rights because any employee represented by a union has the right to review that union’s collective bargaining agreements with an employer. See 29 U.S.C. § 414.

192. *Am. Automatic Sprinkler*, 163 F.3d at 212.

193. See *id.* at 214.

194. *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731 (1961).

195. See Construction Union Proof Rule, *supra* note 8, at 18369, 18389, 18391–92.

196. *Garment Workers*, 366 U.S. at 739.

construction cases.¹⁹⁷ In failing to do so, the Fourth Circuit disregarded its own insight that nothing “suggest[s] . . . Congress intended in any way to *disadvantage* construction industry employees in their attempts to organize or bargain collectively.”¹⁹⁸ The Board also mentioned this insight in its final Construction Union Proof Rule, citing *Deklewa*, but seems to have disregarded it in overruling *Casale*.¹⁹⁹

The other federal appeals court decision that the Board relied on in overruling *Casale* was the D.C. Circuit’s decision in *Nova Plumbing*.²⁰⁰ However, the discussion of *Casale* in that decision was clearly dicta, as the court expressly stated, “we need not resolve this [*Casale* time limit] issue, for the Board did not rely on section 10(b) and ‘we cannot sustain agency action on grounds other than those adopted by the agency in the administrative proceedings.’”²⁰¹ It should nonetheless be noted that both the Board, in its final Construction Union Proof Rule, and the D.C. Circuit, in *Nova Plumbing*, referenced the Board’s pre-*Casale* decision, *Brannan Sand & Gravel Co.*,²⁰² to support the possible proposition that the Section 10(b) limit should not apply to the question of whether the contractor-union relationship had been established under Section 8(f) or Section 9(a).²⁰³ In its final Construction Union Proof Rule, the Board quoted the same language from *Brannan* that the D.C. Circuit did, but continued the quote by noting that *Brannan* stated that the nature of the relationship “does not involve a determination that any conduct was unlawful.”²⁰⁴ However, as explained immediately before, if a contractor prevailed in a withdrawal of recognition case in which the union claimed the contractor had recognized the union as a majority representative, that usually *would* prove that the contractor had acted unlawfully under Section 8(a)(2) in granting such recognition.²⁰⁵ In its final Construction Union Proof Rule, the Board instead treated the claim that a contractor

197. See Construction Union Proof Rule, *supra* note 8, at 18391 (discussing Int’l Ass’n of Machinists v. NLRB (*Bryan Mfg.*), 362 U.S. 411 (1960)).

198. *Am. Automatic Sprinkler*, 163 F.3d at 218.

199. See Construction Union Proof Rule, *supra* note 8, at 18368. The Board relied on its 1987 *Deklewa* decision in stating “nothing . . . [was] meant to suggest that unions have less favored status with respect to construction[-]industry employers” specifically regarding that “a union could achieve 9(a) status through ‘voluntary recognition’” *Id.* (quoting *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375, 1387 n.53 (1987)) (alterations in original).

200. *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003).

201. *Id.* at 539 (quoting *MacMillan Publ’g Co. v. NLRB*, 194 F.3d 165, 168 (D.C. Cir.1999)).

202. *Brannan Sand & Gravel Co.*, 289 N.L.R.B. 977, 982 (1988). See *supra* notes 38–40 and accompanying text.

203. In *Nova Plumbing*, the D.C. Circuit’s dicta included a parenthetical quoting *Brannan Sand & Gravel*’s statement that “[g]oing back to the beginning of the parties’ relationship here simply seeks to determine the majority or nonmajority based nature of the current relationship” *Nova Plumbing*, 330 F.3d at 539 (quoting *Brannan*, 289 N.L.R.B. at 982). The Board’s discussion of *Brannan* in its final rule is discussed in text. See *infra* notes 204–207 and accompanying text.

204. Construction Union Proof Rule, *supra* note 8, at 18391 (quoting *Brannan*, 289 N.L.R.B. at 982).

205. *Id.*

unlawfully repudiated a Section 9(a) relationship as the only possible illegality at issue when a contractor withdraws recognition from a union.²⁰⁶ As a result, the Board declared that “*Casale* begs the question by assuming the very 9(a) status that ought to be the object of inquiry.”²⁰⁷

The *Casale* rule and decision actually do no such thing, while what the Board did in its final Construction Union Proof Rule was to “split hairs” to make an argument that is based on how a withdrawal of recognition case is characterized. The U.S. Supreme Court, in *Bryan Manufacturing*, rejected a similar argument. The NLRB General Counsel in that case tried to argue that a union-security clause was unlawful because, more than six months prior to the filing of charges (ten months and twelve months, to be exact), the employer and union had made an agreement when the union did not represent a majority of the employer’s employees.²⁰⁸ As in a contractor withdrawal of recognition case, the central issue in this unfair labor practice case was whether the union represented a majority of an employer’s employees at the time it was recognized as a majority representative.²⁰⁹ Contrary to the Board’s suggestion in its final Construction Union Proof Rule, the Supreme Court did not decide that it was permissible to “look back” before the Section 10(b) period to determine if the union was a minority union, so that its union security clause was unlawful within the Section 10(b) period.²¹⁰ The Supreme Court instead held that the Section 10(b) time-bar precluded examining the union’s majority status.²¹¹ Thus, the Board in *Casale Industries* was not “begging any questions,” but was adopting a rule consistent with *Bryan Manufacturing* and Section 10(b)’s purposes of preventing litigation—on a case’s central issue of whether a union recognized by an

206. *Id.*

207. *Id.*

208. Int’l Ass’n of Machinists (*Bryan Mfg.*) v. NLRB, 362 U.S. 411, 414–15 (1960).

209. *Id.* at 412–14.

210. See Construction Union Proof Rule, *supra* note 8, at 18391.

211. *Bryan Mfg.*, 362 U.S. at 416–17. The Supreme Court also did note in *Bryan Manufacturing* that “earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events.” *Id.* at 416 (citing *Axelson Mfg. Co.*, 88 N.L.R.B. 761, 766 (1950)). The Court’s citation to *Axelson Manufacturing*, 88 N.L.R.B. 761 (1950), strongly indicates that such evidence can be used when it supports that conduct within the Section 10(b) period was an unfair labor practice by, for example, clarifying a party’s intent during the Section 10(b) period. See, e.g., *Shumate v. NLRB*, 452 F.2d 717, 719 (4th Cir. 1971) (finding that pre-Section 10(b) actions of charged party union “illuminate[d]” its motives in actions taken against members/employees); see also 11 EMPLOYMENT COORDINATOR LABOR RELATIONS § 42:261, Westlaw (database updated April 2020) (stating that in NLRB unfair labor practice proceedings evidence from prior to the §10(b) period is admissible “if the evidence concerns the object sought to be achieved by the respondent’s activity, events considered did not take place at a time so remote that there is a risk that the evidence has lost its probative value, and there has been no intervening change of circumstances which might undermine the NLRB’s inference that the objective manifested by the antecedent conduct continues unchanged”).

employer was supported by a majority of employees at the time of recognition—based on stale and questionable evidence.²¹²

If the current Board ignores the points made above, and overrules *Casale* in an unfair labor practice case involving withdrawal of recognition, it would increase the opportunities for contractor choice enormously. The contractor would have an unlimited time within which to withdraw from its relationship with a union. It could also “time” that withdrawal to rely on union-provided labor as long as needed, and it could choose to break its relationship with the union at any time it chose for any reason that served its interests or even its whim. In *Colorado Fire Sprinkler*, for example, the contractor made an agreement with the union in 1991, shortly after its founding, when it needed sprinkler fitters.²¹³ The contractor kept relying on union labor for nearly ten years, and then repudiated its relationship with the union when it decided to save costs, purportedly because of “increased competition,” which any contractor could claim.²¹⁴ As mentioned earlier, none of this contractor’s actions were based on “employee choice” or preference.²¹⁵ The current Board’s decision to overrule *Casale* in representation—and the likelihood that it will do the same in unfair labor practice cases if given the opportunity to do so—creates “contractor choice on steroids,” and also makes even more clear that it is the choice of the contractor in which the Board is truly interested.

212. See discussion of *Bryan Manufacturing*’s reliance on Section 10(b) purposes *supra* note 211.

213. *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1036 (D.C. Cir. 2018). The contractor initially entered into a form agreement, prior to hiring any sprinkler fitters, that stated that the union was the representative of its sprinkler fitters and that the contractor “acknowledge[d] and confirm[ed]” this was so. *Id.* The Board, responding to commentators in its 2020 final rule, stated that this language in the pre-hire agreement in *Colorado Fire Sprinkler*, and the same or similar language in other pre-hire agreements when the contractor did not yet have any employees, “falsified majority support” and is an example of employer-union “collusion.” Construction Union Proof Rule, *supra* note 8, at 18390. See also discussion *supra* note 82 (discussing this part of the Board’s final rule). Those characterizations are unfair. Both “falsify” and “collude” imply an effort to deceive one or more persons, but that was not true of any of the agreements cited by the Board. The contractor who agreed to recognition language certainly knew it did not have any employees, and the union obviously knew also. The recognition clause in each case was intended to define the representational status of the contractor’s employees after the union referred them, from a hiring hall or otherwise. The union would require that as a condition of making the agreement with the contractor, which the contractor was free to accept or decline. The union was similarly free to make an agreement with a contractor under Section 8(f) without a recognition clause if it chose. Nor were any employees deceived, as long as the contractor abided by the agreement and hired employees referred by the union. Thus, as soon as the contractor hired any employees, the agreement would be completely truthful and accurate. Perhaps “future recognition” language would be more facially accurate, but it is not yet clear that the current Board will accept that either. See discussion *infra* note 225 and accompanying text.

214. *Colo. Fire Sprinkler*, 891 F.3d at 1036–37. The Board in *Colorado Fire Sprinkler* had decided that it was unnecessary to consider or rely on *Casale Industries*, and perhaps for that reason the D.C. Circuit did not mention *Casale*. See generally *id.*; *Colo. Fire Sprinkler, Inc.*, 364 N.L.R.B. No. 55, 2016 NLRB. LEXIS 543, at *4 (July 22, 2016).

215. See *supra* Section II.B.

The Board's overruling of *Casale* likely marks a key step in realizing the current Board's plans for construction labor law, as earlier indicated by its invitation for briefs in *Loshaw Thermal Technology*²¹⁶ and its Construction Union Proof Rule.²¹⁷ The Board apparently wants to enable all contractors in union agreements in which the contractor has agreed the union represents a majority of its employees, or that the union has offered to show it represents such a majority, to choose to flout what that contractor has agreed to and to disregard the commitments it contractually made to the union and its union-represented employees. The Board apparently wants such contractors to be able to ignore contractual commitments with impunity as no other parties to contracts can, including employers who declare bankruptcy.²¹⁸

It remains to be seen whether the Board will further expand the choices available to contractors by overlooking or distinguishing the precedent of the D.C. Circuit in *M & M Backhoe*, in turn based on a U.S. Supreme Court ruling in *Gissel Packing*, that if the contractor has agreed to recognize the union because the union has offered to show its majority support, the contractor cannot withdraw recognition from the union just because it "never took the union up on its offer."²¹⁹ Also unknown is whether the Board will try to distinguish its more than fifty years of precedent holding that, in the construction industry, if the contractor has reviewed the union's proof of majority support and agreed that the union has majority status, the contractor cannot later repudiate its relationship with that union.²²⁰ It cannot be predicted whether or not the Board will disagree even with the D.C. Circuit court decisions it relied on in overruling *Stanton Fuel*, and hold that even evidence in the record that the union did have majority support at a relevant time is insufficient to prevent a contractor from withdrawing recognition from the union.²²¹

In its Construction Union Proof Rule, the Board included language about a "contemporaneous showing of support from a majority of employees in an appropriate unit" as being required to block a representation petition,²²² but it rejected a commenters' proposal that this same requirement should apply to all

216. See *supra* text accompanying note 13 (discussing Board's invitation for briefs in that case).

217. See *supra* notes 163–171 and accompanying text (discussing the Board's Proposed Rule).

218. See 11 U.S.C. § 1113 (establishing the process an employer in bankruptcy must follow to reject a collective bargaining agreement).

219. *M & M Backhoe Serv. v. NLRB*, 469 F.3d 1047, 1051 (D.C. Cir. 2006). See *supra* text accompanying note 77 (discussing *M & M Backhoe* and its reliance on *Gissel Packing*).

220. See, e.g., *Island Constr. Co.*, 135 N.L.R.B. 13, 14–16 (1962); see also *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375, 1387 n.53 (citing *Island Constr. Co.* with approval); *Pierson Elec., Inc.*, 307 N.L.R.B. 1494, 1494 (1992) (applying this rule in a construction industry case decided by a Board that was unanimously appointed by Republican presidents).

221. See *supra* text accompanying notes 150–155 (discussing the D.C. Circuit's application of this standard in *Nova Plumbing* and *Colorado Fire Sprinkler*).

222. Construction Union Proof Rule, *supra* note 8, at 18366 (emphasis added).

industries.²²³ The Board therefore cannot apply this “contemporaneous showing” requirement to unfair labor practice cases involving withdrawal of recognition because that would involve disregarding the congressional intent that unions and employees in the construction industry not be disadvantaged with regard to voluntary recognition.²²⁴ The Board, therefore, should continue to abide by its more than twenty years of precedent establishing that agreements with language requiring “future recognition” of a union’s majority status, even if that agreement was initially made under Section 8(f), bar that contractor from repudiating its relationship with a union that later obtained majority employee support.²²⁵ Surely a non-construction union could make such an agreement with an employer and demand it be enforced once it can show the employer that it has such majority support.

The same commenter who requested that the Board extend “contemporaneous showing” to all industries also requested that the Board “specify that 9(a) recognition can only occur if an employer employs a substantial and representative complement of employees[,]”²²⁶ to which the Board responded that “the final rule does not disturb established precedent on this point.”²²⁷ If the Board was honest about that, it would mean, for example, that it would, in the future, permit voluntarily recognized election of multiemployer units²²⁸ or other units that are not based on a “substantial and representative complement of employees.”²²⁹ It is questionable whether that standard is even workable for many construction industry employers because, as discussed in prior sections, construction work is intermittent and many construction employees (and their employers) do not work every day.²³⁰ Construction unions nonetheless must be permitted to seek and obtain voluntary recognition from such construction employers because there is nothing in the Labor Management Relations Act that authorizes withholding employees’ representational rights on the ground that

223. *Id.* at 18392.

224. *See, e.g.*, *Am. Automatic Sprinkler Sys. v. NLRB*, 163 F.3d 209, 218 (4th Cir. 1998) (“[W]e . . . discern nothing in either the text or legislative history of the 1959 amendments or, for that matter, the statutory framework of the Act, to suggest that employees in the construction industry should in any way be disfavored in their ability to secure union representation . . .”); *see also* *NLRB v. Triple A Fire Prot., Inc.*, 136 F.3d 727, 737 (11th Cir. 1998).

225. *See, e.g.*, *VFL Tech. Corp.*, 329 N.L.R.B. 458, 459–60 (1999).

226. *Construction Union Proof Rule*, *supra* note 8 at 18392–93, 18392 n.237 (citing the Comment of the Center on National Labor Law Policy).

227. *Id.* at 18392–93.

228. *See* *Bldg. Contractors Ass’n*, 364 N.L.R.B. No. 74, 2016 NLRB LEXIS 592, at *1–3, (Aug. 16, 2016); *J.D. Consulting, LLC*, 345 N.L.R.B. 1298, 1300 (2005); *Hayman Elec., Inc.*, 314 N.L.R.B. 879, 879 n.2 (1994).

229. *See, e.g.*, *Dist. Council of Painters No. 8 of the Brotherhood of Painters*, 326 N.L.R.B. 1074, 1078–79 (1998); *G.T. Einstein Elec., Inc.*, 321 N.L.R.B. 816, 819 (1996); *S. Interiors, Inc.*, 319 N.L.R.B. 379, 380 (1995), *enforced* 107 F.3d 12 (6th Cir. 1997).

230. *See supra* Section I.B.

their employer never has a “substantial and representative complement of employees.”

For the same reasons regarding the nature of the construction industry, and because the Board has never defined the meaning of “contemporaneous showing,” that term will have to be given a different meaning than that in Black’s Law Dictionary, which is “occurring . . . at the same time.”²³¹ What “same time” would be used to match the employees who signed cards indicating they wanted the union to represent them with those working for the employer reviewing those cards—would the employees have to be working for that employer on that day? That result would be inconsistent with the nature of construction work because, again, construction employees do not work every day. So, will contemporaneous be defined as the employees working during a week, a payroll period, or a month? Or will there be some other measure to determine if there is a majority? It remains to be seen what guidance, if any, the Board will provide on the meaning of “contemporaneous showing” of majority support.

In any of the above-discussed situations, and more, the Board’s broad permission for contractor choice would enable contractor gamesmanship, in which the contractor would break its relationship with the union at an opportune time and then contest, and thus make an issue in the case, whether the union had majority support when it said it did, whether the union’s evidence of majority support actually proves such support, and/or whether the contractor actually saw that evidence of support as the agreement might arguably require. Furthermore, in all such cases—especially those in which the contractor prevails—the contractor would be doing this when, in the past, this contractor, according to its own contentions, likely committed the illegal act of recognizing as a majority representative a union not supported by a majority of employees. This result would thus reward an employer who committed one wrong by green-lighting the employer’s commission of a second wrong.

If the Board’s Construction Union Proof Rule overruling *Staunton Fuel* is challenged, either directly or in any case where a union invokes an agreement to challenge an employee petition or—more likely—an employer’s repudiation of its relationship with the union, the court should recognize, as past Boards and federal courts of appeal have, that the Board’s decision in *Staunton Fuel* “properly balances Section 9(a)’s emphasis on employee choice with Section 8(f)’s recognition of the practical realities of the construction industry.”²³² It therefore also balances the two “fundamental statutory objectives” the Board identified in *Deklewa*: “employee free choice *and* labor relations stability.”²³³ As Professor Alexia Kulwicz of the University of Wisconsin stated, commenting on the rule when it was proposed, the *Staunton Fuel* standard should be kept—not only because it binds parties to their contractual obligations, but also because

231. *Contemporaneous*, BLACK’S LAW DICTIONARY (11th ed. 2019).

232. *Staunton Fuel & Material, Inc.*, 335 N.L.R.B. 717, 719 (2001).

233. *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375, 1380 (1987) (emphasis added).

it is consistent with such contractual labor law realities as that at the time the contractor recognizes the union a majority of its employees do support the union as their representative and that if this were not true any employee (or really anyone else besides the contractor) could challenge as an unfair labor practice the contractor's recognizing the union as a majority representative.²³⁴ In sum, the Board's *Staunton Fuel* precedent is a reasonable compromise of multiple current labor law rules, and multiple objectives of American labor law, that the current Board is obligated to serve.

Nonetheless, the *Staunton Fuel* standard will no longer be applied by the Board in representation cases at any level of the agency. The Board now should avoid worsening the situation by also abandoning *Staunton Fuel* for unfair labor practice cases based on withdrawals of recognition by contractors. For all the reasons discussed earlier in this Article, contractors are not the appropriate parties to protect "employee choice," which the Board said was its purpose in issuing its final Construction Union Proof Rule.²³⁵ If the Board were to require, when a contractor terminates its relationship with the union, that the union prove such absurd things as evidence of majority support that is "contemporaneous" with when the employer agreed it existed, or that the employer actually reviewed the evidence of majority support, the Board would not only be departing from both Board and federal court precedent, it would be demonstrating that it was "contractor choice," and not "employee choice," that it really cared about all along.

III. CONSTRUCTION LABOR LAW: THE FUTURE OF ALL LABOR LAW?

As discussed in the Introduction, what the Board does with its recent overruling of the *Staunton Fuel* standard and in the decisions it has signaled it

234. See Alexia Kulwicz, Comment Letter on Proposed Rule: Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships (Jan. 10, 2020), <https://www.regulations.gov/document?D=NLRB-2019-0001-0127>; see also Patty Murray, Comment Letter on Proposed Rule: Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships (Jan. 9, 2020), <https://www.regulations.gov/document?D=NLRB-2019-0001-0151>; North America's Building Trades Unions, Comment Letter on Proposed Rule: Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships (Jan. 9, 2020), <https://www.regulations.gov/document?D=NLRB-2019-0001-0107>; James T. Springfield, Comment Letter on Proposed Rule: Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships (Aug. 20, 2019), <https://www.regulations.gov/document?D=NLRB-2019-0001-0007>; Road Sprinkler Fitters Local Union No. 669, Comment Letter on Proposed Rule: Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships (Jan. 23, 2020), <https://www.regulations.gov/document?D=NLRB-2019-0001-0156>. The Board's response to these comments was that, during the pendency of the unfair labor practice case, the agreement would still block any petitions for representation elections. Construction Union Proof Rule, *supra* note 8, at 18391.

235. See *supra* notes 31–33 and accompanying text.

intends to make next—and what the federal courts do in reviewing these actions—could affect many legal rules outside the construction industry. As was also stated in the Introduction, that is because in the twenty-first century United States, in many parts of the American economy—and therefore in millions of worker-employer relationships and millions of workplaces—the relationship between workers and their employers, and how the working environment operates, is becoming more similar to how the construction industry operated for most of the twentieth century. This section of the Article will discuss ways in which this is true, or might soon be true in the future.

One of the first ways in which this became true was the growth in “contingent” and “alternative arrangement” employment in which temporary employees, seasonal employees, independent contractors, and other workers found themselves—as construction workers long have—not working in any one location for very long, and moving from employer to employer, or project to project. In May 2017, the U.S. Bureau of Labor Statistics found that there were there were 16.5 million workers, or nearly 14% of the total U.S. workforce, employed in contingent employment or alternative work arrangements.²³⁶ By the end of 2018, around 16.8 million workers were employed in temporary and contract staffing employment.²³⁷ So-called “temporary help services” alone (also known as “gig employment”) employ more than 2.5 million workers, with projections that the number “will grow to more than 3.2 million jobs by 2025.”²³⁸

Labor and employment scholars have long recognized that temporary and contract staffing firms, and other firms referring workers to employers or other “end-users,” operate much like union hiring halls in the construction industry. Professors Harris Freeman and George Gonos referred to such firms as “labor market intermediaries” or “LMIs,” and discussed how they were the functional equivalents of union hiring halls but were far less regulated by law.²³⁹ In the book *Studies of Labor Market Intermediation*, professor and labor economist David H. Autor also compared staffing and other worker referral firms to union

236. See U.S. BUREAU OF LAB. STAT., CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS (2017), <https://www.bls.gov/news.release/conemp.nr0.htm>.

237. E. Mazareanu, *Annual Temporary and Contract Staffing Employment in the U.S. 2000–2018*, STATISTA (Oct. 8, 2019), <https://www.statista.com/statistics/220682/us-total-annual-temporary-employment/>.

238. See *Temporary Employment in the U.S. to Grow Faster Than All Jobs Through 2025, According to New Job Forecast from TrueBlue and Emsi*, BUSINESS WIRE (Nov. 1, 2019, 5:00 AM), <https://www.businesswire.com/news/home/20191101005170/en/Temporary-Employment-U.S.-Grow-Faster-Jobs-2025>.

239. Harris Freeman & George Gonos, *The Commercial Temp Agency, the Union Hiring Hall, and the Contingent Workforce*, in JUSTICE ON THE JOB: PERSPECTIVES ON THE EROSION OF COLLECTIVE BARGAINING IN THE UNITED STATES 275, 275, 280 (Richard N. Block et al. eds., 2006). See also John Thompson, Comment, *Grappling with Gilmer: Pre-Hire Arbitration Agreements in the Day Labor Industry*, 35 BERKELEY J. EMP. & LAB. L. 241, 250–54 (2014).

hiring halls.²⁴⁰ The Board has already changed its rules on labor market intermediaries three times this century,²⁴¹ and the current Board members announced in October 2019 they are “open” to changing it again.²⁴² It cannot be predicted whether and how the current Board might itself compare intermediaries to union hiring halls, and base a change in legal rules on staffing firms and similar intermediaries on its Construction Union Proof Rule regarding *Staunton Fuel* and subsequent related precedents.

The construction industry, as this Article discussed earlier, has long had many layers between the owner and other “end user” and the employees actually performing the construction work: the end user retaining a construction manager and/or general contractor to oversee the project, that overseer hiring subcontractors, and the subcontractors in turn hiring construction workers (or obtaining them from a union hiring hall or referral firm).²⁴³ This kind of separation of employees from the entity that is really utilizing their work was called “fissuring” by then-Professor David Weil in his landmark 2014 book *The Fissured Workplace*,²⁴⁴ and the term has been adopted by others in describing how millions of employees are separated by layers of contractors from the entity that benefits from their work.²⁴⁵ Now-Dean David Weil, in a follow-up to his book in December, 2019, explained how “fissuring” is commonly done in the twenty-first century U.S. economy:

[O]ver time, outsourcing spread to activities such as janitorial and facilities maintenance and security. Later, it went deeper, spreading into employment activities that could be regarded as core to the company’s core competency. For example, the use of staffing agencies for distribution centers began as a response to meet fluctuating staffing needs driven by the cycle of retail demand. Over time, however, retailers and their third-party managers began to rely on it increasingly to staff ongoing activities and later home delivery.

240. David H. Autor, *Introduction* to STUDIES OF LABOR MARKET INTERMEDIATION 13–14 (David H. Autor ed., 2009).

241. See *M. B. Sturgis, Inc.*, 331 N.L.R.B. 1298, 1298 (2000) (overruling *Greenhoot Inc.*, 205 N.L.R.B. 250 (1973)), *overruled by* H.S. Care L.L.C., 343 N.L.R.B. 659 (2004), in turn *overruled by* *Miller & Anderson, Inc.*, 364 N.L.R.B. No. 39, 2016 NLRB LEXIS 498, at *6 (July 11, 2016).

242. *Stericycle of P.R., Inc.*, No. 12-RC-238280, 2019 NLRB LEXIS 588, at *2 n.1 (Oct. 31, 2019).

243. See *supra* Section I.B.

244. DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 7 (2014).

245. See e.g., Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, CLEAN SLATE FOR WORKER POWER 2–3, 38–39, 103–04, https://assets.website-files.com/5ddc262b91f2a95f326520bd/5e28fba29270594b053fe537_CleanSlate_Report_FORW EB.pdf (last visited Nov. 25, 2020); 1 GUIDE TO EMPLOYMENT LAW AND REGULATION § 10.12, Westlaw (database updated Sept. 2020); Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 L. & CONTEMP. PROBS. 45, 46 (2019).

Similarly, hotel properties turned to staffing agencies for room cleaning, restaurants for kitchen crews, and even law firms for basic legal tasks.

Once an activity like janitorial services, loading dock labor, or housekeeping is shed, the secondary businesses doing that work are affected, often shifting those activities to still other businesses. A common practice in janitorial work, for instance, is for companies in the hotel or grocery industries to outsource that work to cleaning companies. Those companies, in turn, often hire smaller businesses to provide workers for specific facilities or shifts.²⁴⁶

Such arrangements would not be unfamiliar to anyone studying, or representing employees in, the construction industry. Professor Sharon Block and Benjamin Sachs, and other contributors to the 2020 Clean Slate report, recommend “sectoral collective bargaining” by industry, rather than “enterprise bargaining” by individual employer to address obstacles to “employee choice” and “employee voice” in the latter.²⁴⁷ Construction unions have already adopted this approach with multiemployer bargaining with employer associations or by other means and bargaining some or all terms with “end-users” in Project Labor Agreements that cover employees of multiple enterprises.²⁴⁸ The current Board has made clear its interest in enhancing individual contractor choice as to whether employees will be represented,²⁴⁹ which would increase the problems for employees identified in the Clean Slate report, and undo the efforts construction unions have made to remove and mitigate such problems. The Board’s actions require attention because, whatever rationale(s) the Board gives for its new rules and that federal courts reviewing those might give for upholding them, those rationales will also likely be used against any efforts to move bargaining to a different level than “enterprise”/individual employer bargaining.

The 2020 Clean Slate report also calls for worker organizations to provide benefits that construction unions have long provided to construction workers, such as portable health benefits not tied to a specific employer²⁵⁰ and worker- and worker-organization controlled hiring halls to provide employees to employers and industries. The current Board has shown apparent disregard for how construction union hiring halls actually work and similarly given no consideration to portable benefits in the industry, thus, in the name of “employee choice” (but with the actual goal of giving choice to contractors), neglecting the true interests of unionized construction employees. Whatever justifications this Board and its defenders give for taking the steps the Board has proposed and

246. David Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, 5 RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCI. 147, 148 (2019).

247. Block & Sachs, *supra* note 245, at 37–40.

248. *See supra* notes 90–97 and accompanying text.

249. *See supra* notes 176–177 and accompanying text.

250. *See* Block & Sachs, *supra* note 245, at 8, 98, 100–01; *compare supra* notes 90–97 and accompanying text.

inquired about are likely to be raised to defeat hiring halls and portable benefits in any and all other industries.

In sum, the current struggle over construction labor law in the present is highly probable to have implications for, and offer lessons for, debates over all labor law in the future.

IV. CONCLUSION

For reasons discussed throughout this Article, the Board should not further overrule or revise the *Staunton Fuel* standard that binds a construction contractor to its recognition of a union as the majority representative of its employees. That standard is a valid and sensible compromise that takes into proper account the realities of the entire construction industry, and the unionized construction industry. If the Board is not willing to do that for union representation election cases, the Board should at the least adhere to rules that it and federal courts have recognized in the past, such as that the union can prove its majority status through any evidence that is in the case record, or that a contractor cannot renege on its agreement with a union that its review and confirmation of evidence of a union's majority support makes that union a majority representative, or that after accepting a union's proof of majority support a contractor cannot later dispute that the union has a Section 9(a) relationship with that contractor.

Finally, the Board should not revise any of the rules just mentioned to allow a contractor employer to withdraw recognition from and end its relationship with a union. In addition, the Board should not revise its *Casale Industries* rule that a contractor cannot challenge a union's majority status, by filing an unfair labor practice charge or otherwise, after the six-month Section 10(b) period has expired. Changing this rule or any of the rules discussed in this Conclusion, would not serve "employee choice" as the Board stated in its proposed rule, but only the choice of contractors who can usually choose how to hire their employees and minimize the likelihood that their employees will (at least immediately) be represented by a union. In fact, contractors will be able to make and retain their choice on union representation for a long time because, especially after other changes in union representation law made by the Board from 2018 through the present, the contractor will be able to delay a representation election for months or even years. Therefore, as this author recently suggested about the key legal rules for labor arbitration,²⁵¹ the legal rules for construction labor law are something the Board should simply leave alone.

251. See Michael Hayes, *Hey, We Were Here First!: Union Arbitration and the Federal Arbitration Act*, 70 SYRACUSE L. REV. 991 (2020). That article did not discuss NLRB deferral to arbitration procedures.