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SUBCONTRACTING AGREEMENTS
IN THE CONSTRUCTION INDUSTRY:
WOELKE & ROMERO “FRAMES” CONNELL*

Jan Stiglitz**

INTRODUCTION

In order to further their efforts to organize and to represent employees in the construction industry, unions have sought to include clauses in collective bargaining agreements which require that the terms of the agreements be imposed on any subcontractor who is retained by a construction employer to do unit work. These so-called subcontracting clauses are a very effective tool for the preservation and even acquisition of work for union members.

Section 8(e) of the National Labor Relations Act1 generally prohibits agreements which require an employer to refrain from doing business with another employer.2 But a proviso to §8(e), (known as the construc-
tion industry proviso), precludes its applicaton to agreements between employers and employees in the construction industry relating to work performed at a construction site.

In *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, the Supreme Court had occasion to construe the construction industry proviso and to review the legality of a subcontracting clause that had been challenged as a violation of §§ 1 and 2 of the Sherman Antitrust Act. The Supreme Court held that the clause in question, while within the express terms of the construction industry proviso to §8(e), was not to be sheltered by this proviso. As a result, the subcontracting clause was held subject to scrutiny under the antitrust laws.

Because the union in *Connell* did not represent any of Connell’s employees (nor did they seek to represent any of Connell’s employees), a question remained as to the extent to which *Connell* applied in the traditional employer-employee context. In *Woelke & Romero Framing, Inc. v. National Labor Relations Board*, the Supreme Court answered that question and unanimously held that broad subcontracting clauses negotiated in the context of a collective bargaining relationship were sheltered by the construction industry proviso to §8(e).

The Supreme Court’s ability to achieve unanimity in such a controversial area of labor law is surprising. Equally surprising is the result. The decision in *Wolke & Romero* is a departure from recent Supreme Court decisions which have frustrated the interests of unions in the construction industry. This article will examine the Court’s decision in *Wolke & Romero*; what it holds and what it portends for labor relations in the construction industry.

5. “We conclude that §8(e) does not allow this type of agreement.” 421 U.S. at 626.
6. Id. at 635.
7. Id. at 619.
10. Id. at 648.
11. *Connell* itself is an example of a decision which has troubled unions in construction by raising the specter of antitrust liability. Other significant decisions that have gone against union interests in construction include: NLRB v. Local 103, Iron Workers, 434 U.S. 335 (1978), known as *Higdon*, which limits the extent to which employers in construction are bound by prehire agreements. For additional background on *Higdon* and discussion of its implications see Barr & Jacobson, *The Enforceability of Construction Industry Prehire Agreements After Higdon*, 3 INDUS. REL. L. J. 517 (1979); King & LaVoute, *Current Trends in Construction Industry Labor Relations—The Double-Breasted Contractor and the Prehire Contract*, 29 SYRACUSE L. REV. 901 (1978); Comment, *The NLRA’s Forbidden Fruit: Valid But Unen-
The article will also examine several questions which were raised, if not directly answered by this decision: can unions picket and use coercive tactics to obtain subcontracting clauses;\textsuperscript{12} can unions picket and use coercive tactics to enforce subcontracting clauses;\textsuperscript{13} are subcontracting agreements sheltered by the construction industry proviso when included in §8(f) prehire contracts.\textsuperscript{14}

Since the decision in \textit{Woelke} deals with an interpretation of the scope of the \textit{Connell} decision, Part One of the article will be a review of \textit{Connell}. Part Two will then concern itself with the specific labor disputes that led to the Supreme Court's opinion in \textit{Woelke}. This will include a review of the Board and 9th Circuit opinions in \textit{Woelke} as well a review of \textit{Donald Schriner, Inc. v. NLRB}\textsuperscript{15}, a D.C. Circuit court decision that involved one of the original companion cases to \textit{Woelke}. Part Three will be an analysis of the opinion in \textit{Woelke}. Part Four will deal with some of the questions that remain open after \textit{Woelke}.

\textbf{PART I}

\textit{Connell}

In 1970, Plumbers and Steamfitters Local 100 was attempting to organize the mechanical and plumbing contractors in the Dallas area.\textsuperscript{16}
Since these contractors usually were retained as subcontractors on projects let to general contracting firms, the union decided to secure union work by mounting a campaign against the general contractors.\textsuperscript{17} The strategy was simple and effective. The union reasoned that if most or all of the general contractors were obligated to subcontract with union mechanical and plumbing firms, it would gain jobs for its members. Either all of the work would go to firms with whom it already had labor agreements, or the recalcitrant firms would sign agreements with the union to enable them to acquire work.

The success of the strategy depended on Local 100's ability to exert pressure on general contractors. Here again, the union was in a tactically good position. First, there was always the possibility that general contractors would be willing to voluntarily agree to enter into such agreements.\textsuperscript{18} Second, the reluctant contractors could be subjected to unlimited picketing; since Local 100 did not seek to represent any of the general contractors' employees the §8(b)(7)\textsuperscript{19} ban on organizational picketing would not apply.\textsuperscript{20}

Connell Construction, a general contractor, found itself to be the object of a campaign to force it to enter into a union-only subcontracting agreement. While voluntary compliance might not be likely, the possibility is not farfetched. An employer with good union relations would enhance its pro-union \textit{bona fides} with such an agreement. Moreover, this agreement would not entail direct costs. Yet, agreements of this type would clearly limit the general contractor's choice of subcontractor which might result in the need to submit a higher bid on the project (assuming that a nonunion subcontractor might be able to underbid a union subcontractor on the work in question). Subcontract prices are passed on to the owner in a construction project as part of the general contractor's bid. But if the bid is too high, the general contractor may not receive the project. Thus, the contractor who signed such an agreement might lose flexibility and yield a competitive advantage to general contractors who were not so restricted.

\textsuperscript{17} The basic organization of a construction project is a tiered system of contracts and subcontracts. One general contractor will be given the responsibility for completing the work according to plans and specifications. This contractor, in turn, will subcontract portions of the work to other firms who specialize in a particular kind of construction work, such as plumbing. A brief description of the structure of the construction industry can be found at Stiglitz, supra, note 8, at 585. For a more comprehensive picture of the industry, see W. Haber & H. Levinson, \textit{Labor Relations and Productivity in the Building Trades} (1956); D.Q. Mills, \textit{Industrial Relations and Manpower in Construction} (1972); [D.Q. Mills, \textit{Construction}, in \textit{Collective Bargaining: Contemporary American Experience} 60 (Somers ed. 1980)].

\textsuperscript{18} While voluntary compliance might not be likely, the possibility is not farfetched. An employer with good union relations would enhance its pro-union \textit{bona fides} with such an agreement. Moreover, this agreement would not entail direct costs. Yet, agreements of this type would clearly limit the general contractor's choice of subcontractor which might result in the need to submit a higher bid on the project (assuming that a nonunion subcontractor might be able to underbid a union subcontractor on the work in question). Subcontract prices are passed on to the owner in a construction project as part of the general contractor's bid. But if the bid is too high, the general contractor may not receive the project. Thus, the contractor who signed such an agreement might lose flexibility and yield a competitive advantage to general contractors who were not so restricted.

\textsuperscript{19} National Labor Relations Act, 29 U.S.C. §158 (1976). Section 8(b)(7)(C) prohibits picketing where "an object" is recognition unless a representation petition is filed within thirty days.

\textsuperscript{20} In a previous organizational drive, the Dallas Building Trades Council had sought such a subcontracting agreement from a general contractor who employed members of unions represented by the Council. A NLRB order to cease from picketing because of a §8(b)(7)(C) violation was enforced by the D.C. Circuit, Dallas Building Trades v. NLRB, 396 F.2d 677 (1968). The Council, thereafter, decided to picket only general contractors who did not employ union members. 483 F.2d 1154, 1158 (5th Cir. 1973).
Since Connell employed no plumbers, the picketing could not be enjoined under §8(b)(7). Connell did attempt to have the Board determine that the agreement violated §8(e), but this strategy was foreclosed by the fact that the General Counsel would not have issued a complaint.

Connell petitioned to have a Texas state court enjoin the picketing as a violation of the antitrust laws of Texas, the Texas "Right to Work" laws and the Sherman Antitrust Act, but the Union was able to remove the case to Federal District Court. When injunctive relief was denied, Connell was compelled by the picketing to enter into the agreement. It did, however, continue to pursue its antitrust claims.

This was the basic controversy that the Supreme Court confronted in Connell Construction Co. v. Plumbers & Steamfitters Local 100. Two fundamental issues were raised by this controversy. One involved whether the subcontracting agreement entered into between Connell and Local 100 was lawful under the NLRA. The second question was whether such an agreement could be the basis of an antitrust suit.

The District Court concluded that the agreement was protected by the construction industry proviso to §8(e). The District Court further concluded that such authorization resulted in the agreement being both

\[21.\] The text of the proposed agreement was as follows:

WHEREAS, the contractor and the union desire to make an agreement applying in the event of subcontracting in accordance with Section 8(e) of the Labor-Management Relations Act;

WHEREAS, it is understood that by this agreement the contractor does not grant, nor does the union seek, recognition as the collective bargaining representative of any employees of the signatory contractor; and

WHEREAS, it is further understood that the subcontracting limitation provided herein applies only to mechanical work which the contractor does not perform with his own employees but uniformly subcontracts to other firms;

THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of the construction, alteration, painting or repair of any building, structure, or other works, that if the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current, collective bargaining agreement with Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry.

[Id. at 1156 n.1.]

22. The General Counsel had refused to issue a complaint in another situation where this union had imposed a subcontracting agreement on a general contractor. [Id. at 1158.]


24. [Id. at 3013.]


26. 78 L.R.R.M. 3012, 3014. The District Court found that since the contract was protected by §8(e), picketing to secure such a contract was not unlawful. [Id.]
non-violative of the federal antitrust law, and not subject to any state regulation.  

The Court of Appeals affirmed. On the antitrust issue, the court rested its decision on the fact that no "conspiracy with a non-labor group" existed and that the union was seeking "an agreement involving a legitimate union interest." On the §8(e) issue, the court sidestepped. It held that it did not have "jurisdiction to directly decide the complex labor [law] issues. . . ."

The Supreme Court reversed in what was a close and controversial decision. It held that the agreement was not authorized by §8(e), and that it was subject to a challenge under the antitrust laws.

On the antitrust issue, the Court described two sources which provided labor with an exemption from the federal antitrust laws. The first source was a "statutory" exemption contained in §§6 and 20 of the Clayton Act and the Norris-LaGuardia Act. "These statutes declare that labor unions are not combinations . . . in restraint of trade." The Court reasoned, however, that since the statutory provisions did not  

27. Id. This portion of the decision was affirmed by both the Court of Appeals, 483 F.2d 1154, 1175 (D.C. Cir. 1973), and the Supreme Court, 421 U.S. at 621.
28. 483 F.2d at 1154.
29. Id. at 1165. For an explication of the antitrust issues, see infra notes 192-94 and accompanying text.
30. Id. at 1167.
31. Id. at 1175. The court eschewed antitrust sanctions because the agreement was either authorized or prohibited by the NLRA and, thus, a labor law question. It declined to decide the labor question because the case before it was premised on alleged antitrust law violations.
32. Four Justices dissented. Justices Douglas, Marshall and Brennan joined in an opinion written by Mr. Justice Stewart. 421 U.S. at 638. Mr. Justice Douglas also wrote a separate dissenting opinion. Id..
35. Id. at 622.
exempt agreements between labor and nonlabor, the statutory exemption could not apply to Local 100's agreement with Connell.\textsuperscript{36}

The Court then noted that there existed a "nonstatutory" exemption to the antitrust laws which sprang from "the strong labor policy providing [for] the ... elimination of competition over wages and working conditions."\textsuperscript{37} This exemption allowed for union-employer agreements which might affect price competition among employers, but it did not protect agreements to restrain competition in a business market.\textsuperscript{38} The agreement demanded by Local 100 was found to have exceeded the scope of the nonstatutory exemption because it achieved both an anticompetitive effect beyond that which was based on the elimination of wage competition\textsuperscript{39}, and because it gave Local 100 the power to control the business market.\textsuperscript{40} The Court specifically recognized, however, that it was not facing an issue as to the scope of the antitrust exemption which might exist had the subcontracting agreement been contained in a lawful collective bargaining agreement.\textsuperscript{41}

The Court then approached the §8(e) problem. Local 100 argued that the subcontracting agreement with Connell was explicitly protected by the construction industry proviso to §8(e) and, therefore, antitrust law must defer to labor law.\textsuperscript{42} The Supreme Court rejected the argument on the grounds that the agreement was not sheltered by the construction industry proviso to §8(e).\textsuperscript{43}

\textsuperscript{36} Id. citing United Mine Workers v. Pennington, 381 U.S. 657 (1965).
\textsuperscript{38} Id. at 622–23.
\textsuperscript{39} Id. at 623–24. The Court noted that a multi-employer agreement entered into between Local 100 and the Mechanical Contractors Association of Dallas contained a "most favored nation" clause which effectively ensured that the terms of all agreements with Local 100 would be the same, even on subjects unrelated to wages, hours and working conditions.
\textsuperscript{40} Id. at 624–25. If Local 100 was able to impose the subcontracting agreement on general contractors, it could eliminate certain mechanical contractors from the market by refusing to enter into collective bargaining agreements with them.
\textsuperscript{41} Id. at 625–26. While this disclaimer related to the antitrust issue, it points out the Court's keen awareness of the fact that Local 100 and Connell were not in a traditional collective bargaining relationship.
\textsuperscript{42} Id. at 626.
\textsuperscript{43} Id. The Court never expressly agreed with the argument that shelter under §8(e) would not result in potential liability under the antitrust laws. The dissenting opinion, however, suggests that such would be the case:

It would seem necessarily to follow that conduct specifically authorized by Congress in the National Labor Relations Act could not by itself be the basis for federal antitrust liability, unless the Court intends to return to the era when the judiciary frustrated congressional design by determining for itself "what public policy in regard to the industrial struggle demands." Duplex Printing Press Co. v. Deering, 254 U.S. 443, 485 (1921) (Brandeis, J., dissenting). See also, United States v. Hutcheson, 312 219 (1941).

\textsuperscript{39} Id. at 648 n.8.
The Court found that §8(e) was "part of a legislative program designed to plug loopholes in §8(b)(4)." Congress apparently wanted to proscribe agreements designed to effectuate the kind of economic coercion that was unlawful under §8(b)(4). Two provisos to §8(e) were enacted; one for the construction industry, and one for the garment industry. The construction industry proviso was the result of a compromise between the House bill which prohibited all hot cargo agreements, and the Senate bill which only outlawed those agreements in the trucking industry.

In trying to ascertain the Congressional intent behind the construction industry proviso, the Court commented upon the paucity of available information and it characterized what little history there was as "bare references to 'the pattern of collective bargaining' in the industry." The Court did suggest, however, that the construction industry proviso was "adopted as a partial substitute for an attempt to overrule . . . NLRB v. Denver Building & Construction Trades Council." The Court recognized the "problems of picketing a single nonunion subcontractor on a multiemployer building project, and the close relationship between contractors and subcontractors at the jobsite."

The Court further quoted from its previous interpretation of §8(e), enunciated in National Woodwork Manufacturers Ass'n. v. NLRB, that the construction industry proviso was "designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there." The Supreme Court also noted that other court decisions had construed the proviso as serving a more narrow function; specifically, to alleviate the friction that might arise when union and nonunion employees worked alongside each other.

44. Id. at 628. Section 8(b)(4) prohibited coercion to enforce a hot cargo agreement, but it did not prohibit an agreement voluntarily entered into and adhered to. Thus, a union could conceivably circumvent 8(b)(4)'s prohibitions if an employer acquiesced. A powerful union was in a good position to achieve such "voluntary" compliance with an employer. Local 1976, Carpenters v. NLRB (Sand Door), 357 U.S. 93 (1958). See infra notes 137-138 and accompanying text.

45. 421 U.S. at 628.
46. Id. at 628-29
47. Id. at 629, citing 341 U.S. 675 (1951). The Denver Building Trades decision prohibited unions from picketing a general contractor to force a subcontractor off a jobsite, even where the union had a collective bargaining agreement with the general contractor.

48. Id. at 629-30.
49. 386 U.S. 612 (1967).
50. Id. at 638-39, quoted in 421 U.S. at 630.
51. 421 U.S. at 630, citing Drivers Local 695 v. NLRB, 361 F.2d 547 (D.C. Cir. 1966); Essex County & Vicinity District Council of Carpenters v. NLRB, 332 F.2d 636 (3d Cir. 1964), and Justice Douglas' dissenting opinion in Denver Building Trades, 341 U.S. at 692-93.
Local 100 was not able to relate the agreement it sought to any of these purposes. Its agreement with Connell was not limited to jobsites where members of Local 100 were working. Moreover, the agreement would have allowed subcontracting to nonunion firms as long as they were not doing unit work. Thus, Local 100 was willing to accept the possibility of having its members work alongside nonunion workers.

The Supreme Court contrasted the construction industry proviso with the garment industry proviso. The garment industry was specifically exempted from the prohibitions of §8(b)(4)(B) whereas the construction industry was not. Consequently, there was nothing to indicate that Congress wanted to give the construction unions the ability to use subcontracting agreements as a broad organizational weapon.\(^2\) Since Local 100 was not able to relate its agreement to one of the policies behind the proviso, the Court was unwilling to sanction what would be "an almost unlimited organizational weapon."\(^3\) The Court found that one of the major aims of the 1959 Act, which included §8(e), was to limit "top-down" organizing.\(^4\)

The final argument made by Local 100 was that the labor law remedies for §8(e) violations were exclusive and, therefore, Connell's resort to the antitrust laws was improper.\(^5\) The Supreme Court rejected this argument and found no legislative history that labor law remedies were to be exclusive in this situation, or that allowing antitrust remedies would be "inconsistent with the remedial scheme of the NLRA."\(^6\)

The dissenting opinion of Mr. Justice Stewart focused on this last issue. He argued that antitrust remedies were expressly eschewed in 1947 when Taft-Hartley restricted union activity.\(^7\) The 1959 amendments which contained §8(e) also expanded the labor law damage remedy to protect those in Connell's position.\(^8\) Again, antitrust sanctions for

\(\text{\textsuperscript{52}}\) 421 U.S. at 630.
\(\text{\textsuperscript{53}}\) Id. at 631.
\(\text{\textsuperscript{54}}\) These limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso to §8(e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing. Absent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on "top-down" organizing, we are unwilling to read the construction-industry proviso as broadly as Local 100 suggests. Instead, we think its authorization extends only to agreements in the context of collective-bargaining relationships and in light of congressional references to the Denver Building Trades problem, possibly to common-situs relationships on particular jobsites as well.
\(\text{\textsuperscript{55}}\) Id. at 633–34.
\(\text{\textsuperscript{56}}\) Id. at 634.
\(\text{\textsuperscript{57}}\) Id. at 640–46.
\(\text{\textsuperscript{58}}\) Id. at 647.
abuses of union power were discussed and rejected. Stewart argued, nevertheless, that either the agreement at bar was within the construction industry proviso to §8(e), thus lawful and not subject to antitrust actions, or that the agreement violated §8(e) but was not subject to antitrust scrutiny because the labor law remedies were exclusive.

PART II

At three points in the Connell decision, the Supreme Court noted that it was not dealing with an agreement negotiated in the context of a collective bargaining relationship. A question remained as to the effect that a collective bargaining relationship would have on the validity of a restrictive subcontracting agreement. On February 8, 1978, the National Labor Relations Board heard an unprecedented six hours of argument on four cases which raised that and other related questions. This section of the paper will focus on the position taken by the Board and the Circuit Courts on the impact of a collective bargaining relationship on the validity of a restrictive subcontracting clause.

The Board Decision

The Board’s view of the effect of a collective bargaining relationship on the validity of a restrictive subcontracting clause was stated in its decision in Carpenters Locals 944 and 235, United Brotherhood of Carpenters (Woelke & Romero Framing, Inc.).

Since 1974, Woelke and Local 944 had been parties to an executed memorandum collective bargaining agreement. This agreement, in turn, bound Woelke to the terms of the 1974–77 Master Labor Agreement of

59. Id. at 650–53.
60. Id. at 648 n.8.
61. Id. at 625–26, 633, 635.
64. Pacific Northwest Chapter of the Associated Builders and Contractors, Inc. v. NLRB, 609 F.2d 1341 (9th Cir. 1979), reh’g. en banc, 654 F.2d 1301 (1981) and Donald Schriver, Inc. v. NLRB, 635 F.2d 859 (D.C. Cir. 1980).
the Carpenters Union. As the terms of the Master Labor Agreement were about to expire, the parties met to negotiate a successor agreement. These negotiations broke down when the parties reached impasse over, *inter alia*, the issue of the inclusion of a restrictive subcontracting clause. Respondent unions, thereafter, picketed at various job sites

66. *Id.* 239 NLRB at 242-43, 99 L.R.R.M. at 1581-82. Through this agreement, Woelke was contractually related to Local 235 as well.

67. Impasse was also reached over the inclusion of a foreman within the bargaining unit. *Id.* at 243, 99 L.R.R.M. at 1582. Charges stemming from the Union's demand for inclusion of foremen were also filed and determined by the Board in the instant decision. *Id.* at 241, 99 L.R.R.M. at 1580.

68. *Id.* at 243, 99 L.R.R.M. at 1582. The subcontracting provisions demanded by Local 944 are set forth below:

103. The purposes of this paragraph 103 are to preserve and protect the work opportunities normally available to employees and workmen covered by this Agreement, maintenance and protection of standards and benefits of employees and workmen negotiated over many years, and preservation of the right of union employees, employed hereunder, from being compelled to work with non-union workmen.

103.1 In the event that enforcement of paragraph 103.2 is restrained by issuance of an injunction by a United States District Court upon the petition of a Regional Direction [sic] of the National Labor Relations Board, or otherwise, such provision shall be suspended pending its final adjudication, and the provisions set forth in paragraph 103.3 shall be applicable pending final adjudication thereof.

103.1.1 Definition of Subcontractor. A subcontractor is defined as any person (other than an employee covered by this Agreement), firm or corporation holding a valid state contractor's license where required by law who agrees orally or in writing to perform, or who in fact performs for or on behalf of an individual Contractor, or the subcontractor of an individual Contractor, any part or portion of the work covered by this Agreement.

103.2 The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building structure or other work (including quarries, rock, sand, and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

103.3 Because of the close relationship between individual contractors and subcontractors at the jobsite and the close community of interests of the employees on the jobsite with respect to on-site work covered by this Agreement, that is, work done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete or batch plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

103.3.1 The Contractor and his subcontractors shall not subcontract any jobsite work, except to a contractor whose employees on that job are members of a bona-fide labor organization, and whose labor costs on such job, at all times during the term of
where Woelke had contracted to do work.69 Woelke then sought a complaint from the General Counsel charging the unions with violating §8(b)(4)(i) and (ii)(A) by picketing to force it to enter into an agreement prohibited by §8(e).70

The General Counsel issued a complaint and took the position that the subcontracting clause in question was secondary and, therefore, presumptively within the proscription of §8(e), and that it was not, under Connell, sheltered by the construction industry proviso.71 The unions first contended that the subcontracting clause was primary, since it was designed to preserve traditional unit work and to maintain economic standards. In the alternative, they asserted that even if the agreement was secondary, it was protected by the construction industry proviso to §8(e). The unions further argued that Connell was distinguishable in that they had a collective bargaining relationship with petitioner.72

The Board first determined that the subcontracting agreement was secondary. The Board relied upon National Woodwork Manufacturers Ass'n v. NLRB73 and California Dump Truck Owners Ass'n,74 and

his subcontract hereunder are not less than those of contractors performing similar work to that covered by this Agreement, including, but not limited to, costs of subsistence, vacation, holiday, medical, hospitalization, wages, premiums, dental, life insurance and retirement benefits as provided by this Agreement.

103.3.2 The Contractor shall require each such subcontractor to weekly supply to the Contractor, who will then upon request make available to the Union a copy of the subcontractor's certified labor costs for such job, and to submit to an audit of those labor costs by a certified public accountant upon request of the Union to confirm compliance with 103.3.1

103.3.3 Failure to comply with the foregoing subparagraph 103.3.1 and 103.3.2 shall entitle the Union, notwithstanding Article V, to seek judicial relief, upon written notice to the Contractor and the subcontractor, to compel the suspension of such subcontractor's work until there has been compliance, together with attorney's fees for the bringing of such action. In any such court proceeding, the court shall, if it is thereafter in dispute, determine whether there has been compliance.

103.5 All work performed by the Contractors or subcontractors and all services rendered for the Contractors or subcontractors, as herein defined, shall be rendered in accordance with each and all of the terms and provisions hereof.

103.6 If the Contractor or subcontractors shall subcontract jobsite work covered under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, including the furnishing and installation of material, performance of labor, and the operation of equipment, provision shall be made in written contract for the observance and compliance by his subcontractors with the full terms of this Agreement.

69. Id. at 242-43, 99 L.R.R.M. at 1581-82.
71. 239 NLRB at 244, 99 L.R.R.M. at 1583.
72. Id. at 244-45, 99 L.R.R.M. at 1583.
73. 386 U.S. 612 (1967).
74. Heavy, Highway, Building and Construction Teamsters Committee for Northern California, et al. (California Dump Truck Owners Association), 227 NLRB 269, 94 L.R.R.M. 1210 (1976) (former-Member Fanning and Member Jenkins dissenting in part).
distinguished between those agreements designed to preserve traditional work or to maintain economic standards (primary), and those which merely sought to acquire work not traditionally done by the unions, or which would limit subcontracting to employers who were signatories to a union agreement (secondary).\textsuperscript{75} Here, the Board determined that the agreement was secondary, on the grounds that it allowed the subcontracting of unit work and, therefore, was not designed to protect traditional work. Further, the Board reasoned that the subcontracting clause did not limit subcontracting just to employers paying the same wages. Its requirement that subcontractors be party to "this Agreement" rendered it a classic union signatory clause.\textsuperscript{76}

The Board, once it concluded that the subcontracting provision was secondary, had to determine whether the construction industry proviso to §8(e) sheltered the provision. The Board needed to examine the scope of the Supreme Court's decision in \textit{Connell}. The General Counsel and petitioner contended that the existence of a valid collective bargaining relationship was only the beginning of an inquiry as to whether or not a broad restrictive subcontracting clause was validated by the construction industry proviso to §8(e).\textsuperscript{77} Specifically, they argued that the clauses here were overly broad in two respects; they operated whether or not Woelke had craft employees working, and they required allegiance to a particular labor organization. The unions, on the other hand, contended that the absence of a collective bargaining relationship was the critical factor which resulted in the subcontracting clause in \textit{Connell} being found outside of the protection of the proviso to §8(e).\textsuperscript{78}

The Board held that the existence of the collective bargaining relationship between Woelke and the unions was dispositive. It viewed the issue in \textit{Connell} as being "whether the existence of a collective-bargaining relationship constituted a prerequisite to . . . the applicability of the construction industry proviso . . . ."\textsuperscript{79} The Board found the whole \textit{Connell} proviso was dispositive.

\textsuperscript{75} 239 NLRB at 245–46, 99 L.R.R.M. at 1584.
\textsuperscript{76} Id. at 246–47, 99 L.R.R.M. at 1585. The Board also construed a second subcontracting provision which was designed to be in effect should the first one be declared illegal. Once again, the Board found this provision to be beyond the permissible bounds of a lawful area standards provision, because it required union membership, not just union wages.
\textsuperscript{77} Id. at 248, 99 L.R.R.M. at 1586. The General Counsel and Woelke argued that a subcontracting agreement would not be sheltered by §8(e) unless:

1. a valid collective-bargaining relationship exists between the labor organization and the employer,
2. the contractual clause is operational only at times when the employer has employees represented by the labor organization,
3. the clause applies only to sites at which the employer has employees represented by the labor organization,
4. the clause does not require that the employer have collective-bargaining relationships with particular unions.

\textsuperscript{78} Id.
\textsuperscript{79} Id. at 249, 99 L.R.R.M. at 1587.
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nell decision to be “cast in terms of the impact of the absence of a collective bargaining relationship” with the “heart” of the decision being the Connell majority’s concluding statement:

[W]e are unwilling to read the construction industry proviso as broadly as Local 100 suggests. Instead, we think its authorization extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the Denver Building Trades problem, possibly to common-situs relationships on particular jobsites as well.

Pacific Northwest v. NLRB

Review of the Board’s decision in Woelke & Romero was sought in the 9th Circuit Court of Appeals. Initially, in Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB, a divided Court disagreed with the Board and found that the existence of a collective bargaining relationship was not sufficient to distinguish Connell.

Judge Sneed, writing for the Court found the Board’s decision to be at odds with Connell. The court held that a collective bargaining relationship was necessary but not sufficient for the validation of a restrictive subcontracting clause. In addition to the collective bargaining relationship, Judge Sneed found that the proviso would shelter subcontracting clauses only when “the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subcontractor.”

Judge Sneed, conceding that Connell was “not unambiguous,” argued that §8(e) must be construed to be consistent with its primary legislative purpose. He read Connell as determining the legislative intent to be to limit top-down organizing and to strengthen prohibitions against secondary economic pressure.

The union argued that the intent of the proviso to §8(e) was to preserve pre-1959 construction industry law and that subcontracting clauses were lawful pre-1959. Judge Sneed responded, however, that the status of such clauses was not clear. Moreover, he noted that Congres-

80. Id. at 250, 99 L.R.R.M. at 1587–88.
81. Id. citing 421 U.S. at 633.
82. 609 F.2d 1341 (9th Cir. 1979).
83. Id. at 1347.
84. Id. at 1348.
85. Id. at 1347.
86. Id. at 1348.
87. Local 1976, United Brotherhood of Carpenters v. NLRB (Sand Door), 357 U.S. 93 (1958) was distinguished in two ways. First, Sand Door involved a contractual provision prohibiting nonunion goods, rather than a ban on nonunion labor subcontracting. Second, Sand Door involved a contractual provision prohibiting nonunion goods, rather than a ban on nonunion labor subcontracting.
sional statements about §8(e) that indicated that no change in the law was intended were belied by changes that §8(e) expressly made in the law.88

According to Judge Sneed, the main purpose of the proviso was to prevent the potential jobsite friction problem that existed when union and nonunion workers were at the same project.89 The contract clauses in question were, therefore, broader than needed to serve the proviso's purpose since they limited subcontracting even where there was no possibility of union and nonunion workers being at the same site.90

A hearing en banc was granted by the 9th Circuit and the decision of the original panel was reversed.91 A majority of seven Judges found that subcontracting clauses negotiated in the context of collective bargaining relationships were sheltered by the construction industry proviso to §8(e).92 Two dissenting opinions were issued.93

On the issue of whether the subcontracting clauses were within the construction industry proviso to §8(e), Judge Canby, writing for the majority, reviewed the history of the construction industry's treatment under the NLRA prior to the adoption of §8(e) in order to interpret the legislative intent behind the construction industry proviso to §8(e). He observed that unique industry characteristics (occasional, short-term employment relationships, the contractor's need to set wages in binding agreements before workers were hired) made it difficult to fit the industry within a statute designed to deal with the industrial plant paradigm.94

These unique characteristics led to an initial decision by the NLRB to

Door directly involved the legality of coerced enforcement of the contractual provision and the Supreme Court expressly declined to decide the validity of the hot cargo agreement itself. Id. at 1348-49.

88. Judge Sneed cited two examples: The proviso to §8(e) expressly limits its protection to jobsite work. No such limit was mentioned in Sand Door. Further, the proviso does not protect agreements relating to materials and the agreement at issue in Sand Door was an agreement prohibiting a certain kind of material, i.e., a door. Id. at 1349.

89. This is the Denver Building Trades problem. Since, under Denver, a union could not picket to force a nonunion contractor off a jobsite, the potential for conflict existed. Id.

90. One could even go one step farther and suggest that subcontracting could create friction. Suppose Able Contracting Corp., a general contractor, only had a union agreement with the Carpenters and the agreement's subcontracting clause was only applicable to carpentry work. If Able used nonunion subcontractors for all other specialty work, the subcontracting clause would itself introduce a jobsite friction problem.

91. 654 F.2d 1301 (9th Cir. 1981).

92. The majority opinion of Judge Canby was supported by Browning, C.J., Wallace, Schroeder, Fletcher, Nelson and Norris.

93. Judge Sneed wrote a dissenting opinion which was joined by Judges Choy, Anderson and Farris. 654 F.2d at 1324. Judge Farris wrote another dissenting opinion which was joined by Judges Choy and Anderson. Id. at 1327.

94. Id. at 1309-10. For a more extensive treatment of the industry characteristics and their impact on construction industry labor relations, see Stiglitz, supra, n.8.
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decline to exercise jurisdiction over the industry. After the Taft-Hartley Amendments to the Act, the Board decided to apply the Act to the construction industry. This created some problems.

As previously noted, in *NLRB v. Denver Building & Construction Trades Council*, the secondary boycott restrictions, as applied to the construction industry, prevented a union from picketing a general contractor, with whom it had a collective bargaining relationship, to force it to get rid of a nonunion subcontractor. Another problem involved the illegality of prehire agreements.

Thus, Judge Canby found that the legislative agenda for the 1959 amendments to the Act included the accommodation of the Act to the needs of the construction industry. A separate item on the agenda included a desire to limit hot cargo agreements which were tacitly (albeit not specifically) approved by the Supreme Court in *Local 1976, United Brotherhood of Carpenters v. NLRB (Sand Door)*. The Landrum-Griffin Amendments to the Act embodied changes that dealt with both of those items.

After noting that section 8(e) was designed to “narrow or close” the loophole for hot cargo agreements and that the construction industry proviso was a compromise, Judge Canby found that the intent of the

95. *Id.* at 1309, *citing Brown and Root, Inc.*, 51 NLRB 820, 12 L.R.R.M. 278 (1943), and Johns-Manville Corp. 61 NLRB 1, 16 L.R.R.M. 77 (1945).


98. See supra note 47.


100. 654 F.2d at 1310.


102. 654 F.2d at 1311.

Subcontracting Agreements in Construction

construction industry proviso was to preserve the pattern of collective bargaining in the industry. In support, he quoted the Conference Committee report:

The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements . . . . To the extent that such agreements are legal today under section 8(b)(4) . . . , the proviso would prevent such legality from being affected by section 8(e).104

In addition he cited an analysis by Senator Kennedy, who was Chairman of the Senate Conferrees:

The first proviso under new §8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.

* * *

Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a non-union contractor appear to be legal today. They will not be unlawful under §8(e) . . . .105 (Italics by the Court).

Judge Canby then found that the “present law” referred to by the Committee did not restrict subcontracting agreements to jobsites where there were union members present.106

The next issue faced by Judge Canby was whether Connell changed this situation.107 While recognizing the Connell majority’s problem with

104. 654 F.2d at 1312, citing 1 NLRB Leg. Hist. 943.
105. Id., citing 2 NLRB Leg. Hist. 1433.
106. Id. at 1313. In support, he cited Operating Engineers Local Union No. 3 v. NLRB, 266 F.2d 905 (D.C. Cir. 1959), cert. denied sub nom, St. Maurice v. NLRB, 361 U.S. 834 (1959), which upheld a subcontracting agreement as broad as the ones sought by the unions here. Judge Canby noted that the decision in St. Maurice and the problem of union signatory clauses was brought to the attention of the House and Senate in 1959. He also cited to a study of subcontracting clauses done in 1961 which confirmed the existence of broad subcontracting agreements before 1959, 654 F.2d at 1313–14, citing, Lunden, Subcontracting Clauses in Major Contracts Part I, MONTHLY LAB. REV. 579 (1961). Judge Canby indicated that the Lunden report failed to adequately distinguish between union signatory and union standards clauses. He also cited a Memorandum of the General Counsel finding the Lunden study to be inconclusive and stating that no “pattern” existed. (General Counsel Memorandum 76–57, located at LAB. REL. YEARBOOK (BNA) at 295 (1976). But Judge Canby concluded that broad subcontracting clauses i.e., those not restricted to a particular site, did exist [emphasis added] pre-1959, were legal, and that Congress did not intend to change that situation. Id. at 1313–14, see esp. n.23.
top-down organizing, Judge Canby found *Connell* to be distinguishable because it arose outside of the context of a collective bargaining relationship.\(^{108}\)

Judge Canby started with the proposition that because of the transitory nature of construction industry employment relationships, unions (and employees) have a difficult time maintaining wage standards and pension benefits.\(^{109}\) Therefore, subcontracting clauses negotiated in the context of a collective bargaining relationship are, to the extent that they seek to protect employees whose work is to be contracted away, primary in nature, (even though they may be legally secondary because of other potential consequences). It was the legitimacy of interests created by the collective bargaining relationship that made its existence significant.\(^{110}\)

Judge Canby then discussed the jobsite restrictions which the appellants read as limiting the effect of the proviso to potential jobsite friction problems. The restriction is appropriate on the grounds that it is at the jobsite where the special industry characteristics are manifested.\(^{111}\) But, according to Judge Canby, the *Connell* Court’s references to the legislative history of §8(e) suggest that its concern went beyond the shoulder-to-shoulder friction problem that can exist at a jobsite. Rather, the problem suggested is that the union is precluded from picketing the general contractor to protest against a nonunion subcontractor when, in reality, “a general contractor is, in effect, entirely in control of the kind of labor relations taking place on the site he runs.”\(^{112}\)

Judge Canby conceded that the *Connell* Court was concerned with the top-down organizing effect of subcontracting clauses but he argued that some top-down effect is contained in any subcontracting clause (even a subcontracting clause the appellants would concede as being

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107. As Judge Canby stated:

But for the *Connell* decision, we would have no difficulty in enforcing the Board’s order. Prior to *Connell*, this court, other circuits and the Board had upheld broad subcontracting clauses in collective bargaining agreements. See, e.g., *Construction Production & Maintenance Laborers Union, Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963); *Suburban Title Center Inc. v. Rockford Building & Construction Trades Council*, 354 F.2d 1, 2–3 (7th Cir. 1965), cert. denied, 384 U.S. 960, 86 S.Ct. 1585, 16 L.Ed. 2d 673 (1966); *United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry Local 48, 190 N.L.R.B. 415, 416–17 (1971).*

*Id.* at 1315 n.25.

108. Because *Connell* arose outside of the collective bargaining context, Judge Conby stated: “The holding of *Connell*, then, does not in the strict sense control the cases before us.”

*Id.* at 1316.

109. *Id.*

110. *Id.* at 1317.

111. *Id.*

112. *Id.* at 1319 quoting a statement by Senator Morse (2 NLRB Leg. Hist. 1425), cited in *Connell*, 421 U.S. at 629–30 n.9.
authorized). Further, the proviso itself was designed as an exception to the general thrust of §8(e). Moreover, the Connell Court was faced with the prospect of “unlimited” coercive picketing since §8(b)(7) limits would not come into play where the union expressly disclaimed any representational interest. Where a collective bargaining relationship was sought, an employer could invoke §8(b)(7) to restrict picketing. If a collective bargaining relationship already existed, the employer could resist the subcontracting clause “by asserting its own bargaining position and presenting its own demands.” Thus, the top-down organizing potential was subject to limits.

Judge Canby noted that appellants’ suggestion, that subcontracting agreements be limited to sites where the employer had union workers, would create practical problems. Either the unions would have to negotiate on a site by site basis, or police a broad agreement on a site by site basis to ensure compliance.

Appellants also attacked the subcontracting clause’s validity because it required allegiance to a particular union. Judge Canby found nothing in the proviso to §8(e) to suggest a limit to its effect where a “particular union” subcontracting clause was sought. In fact, he argued that such clauses were necessary for unions in order to “protec[t] the wages and benefits of its [union] members in the primary unit who may later work for subcontractors.”

Judge Sneed dissented in an opinion which reiterated the views he expressed in the original panel’s decision. He focused his analysis on Connell as the proper starting point and argued that the en banc panel’s decision is “not empathetic with Connell’s concern with the “top-down” organizing effect of union signatory clauses.”

As for the legislative history, Judge Sneed found it to be inconclusive, but supportive of the proposition that “most congressmen thought

113.  Id. at 1320.
114.  See supra notes 19–20 and accompanying text.
115.  Id. at 1321.
116.  Id. at 1321–22.
117.  In fact, he again cited Operating Engineers Local Union No. 3 v. NLRB, 266 F.2d 905 (D.C. Cir. 1959), cert. denied sub nom, as a pre-59 case, known to Congress, which allowed a particular union subcontracting clause. Id. at 1323. In addition, a similar result was reached by the D.C. Circuit in Donald Schriver Inc. v. NLRB, 635 F.2d 859 (1980).
118.  654 F.2d at 1323.
119.  Id. at 1325. Judge Sneed made the argument that the original panel’s decision would have allowed a contractor to opt for efficiency and economy in more situations, i.e., if one could only choose union firms, the possibility of using a more efficient nonunion firm is precluded, even where such a nonunion firm pays union wages. Id. at 1325–26. Judge Sneed is doubtless correct that such an interpretation is true to Connell’s concern about only restricting wage based as opposed to efficiency based competition. 421 U.S. at 623. But Connell was an antitrust case and here the issue is presented in a purely labor relations context.
the proviso was intended to address the problem of jobsite friction."120 Finally, he argued that no real practical problems were raised by the original panel's interpretation of the legitimate scope of subcontracting clauses. Unions would need to police any collective bargaining agreement on a site by site basis, so having clauses triggered by whether the employer had unit employees on the site would add no burden.121

The dissenting opinion of Judge Farris acknowledged that Congress may have had other problems than jobsite friction in mind when it drafted the proviso to §8(e), but he disagreed with the majority's argument that another purpose of the proviso was the maintenance of contract standards in the industry. These standards, he argued, can be maintained by union standards clauses which are primary and, therefore, don't need the proviso.122 The collective bargaining relationship noted in Connell can only legitimize a restraint that serves the interest of "workers represented by the union in the course of their employment by the employer."123

Donald Schriver, Inc. v. NLRB

Donald Schriver, Inc. v. NLRB,124 was an appeal of one of the companion cases to Woelke & Romero. As in Pacific Northwest, the court was required to construe the construction industry proviso to §8(e). As to the proper interpretation of the construction industry proviso to §8(e), the court in Schriver basically agreed with the en banc decision in Pacific Northwest.125 Judge Edwards, writing for the majority of the court, examined the "statutory setting and circumstances surrounding [§8(e)]'s enactment," and noted that §8(e) did not limit the court, and that Connell did not specifically decide the issues before the court.126

He observed that §8(e) was enacted to close the loophole in the Act illuminated by Sand Door but that the proviso to §8(e) was included, according to Senator Kennedy, "to avoid serious damage to the pattern

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120. Id. at 1326.
121. Id. at 1327.
122. Id. at 1328. This does not, however, deal with the problem of pension benefits. Union standards clauses do not allow workers to continue to accrue pension fund contributions and credit.
123. Id. Unfortunately, Judge Farris didn't give any illustration of non-primary restraints that are validated by collective bargaining agreements. Thus, the hope he holds seems illusory.
124. 635 F.2d 859 (D.C. Cir. 1980).
125. Technically, one would have to say that the en banc decision was in accordance with the Schriver decision since Schriver was decided before the en banc court rendered its decision.
126. 635 F.2d at 877, quoting Connell, 421 U.S. at 628.
of collective bargaining” in the construction industry.127 He then found that this pre-59 pattern included agreements such as those at issue.128

Judge Edward’s decision precisely clarified why jobsite limitations would be inappropriate. Subcontracting is the norm in construction and unions do not desire to eliminate the practice. A union worker is not committed to a particular employer or project and does not care about working on a particular job or for a particular employer. But the worker does need to ensure that any work is maintained for the employment pool in which he operates and that any work he receives gives him the same benefits. This includes pension benefits. If the subcontractor agreement can be avoided by not having any union workers (the jobsite limit that employers argued for), the purpose of the subcontracting agreement would be “subverted,” i.e., the work would not go to his labor pool.129

Finally, Judge Edwards distinguished Connell by concluding that the union there sought an agreement of a type not part of the pre-59 bargaining pattern.130 (In Connell the union only sought a bare union only subcontracting agreement rather than a subcontracting provision in a broader labor agreement). The unique tactic was also immune to some of the limits on coercive union activity contained in §§8(b)(4) and 8(b)(7). Thus, sanctioning the agreement in Connell would have allowed a union to exert “unlimited” top-down pressure.131

The question of whether “specific union” subcontracting clauses were illegal also was raised and the Court held that they were not. Again, Judge Edwards determined no such limitation in the language of §8(e). He found that specific union clauses were included in pre-59 construction labor agreements and noted that such agreements had been upheld by the Board.132

127. Id. at 878, quoting 2 NLRB Leg. Hist. 1432.
128. Id. at 879. Judge Edwards placed heavy reliance on the Lunden Report (see supra Lunden note 106). This report supports his conclusion in two ways; it demonstrates that the kind of agreement in question existed pre-59 and was, therefore, part of the pattern, and it also notes that no agreements contained the kind of limits that employers argue are required. Lunden, Subcontracting Clauses in Major Contracts, Part II, 84 Monthly Lab. Rev. 715 (1961).
129. 635 F.2d at 881.
130. Id. at 882. Judge Edwards found support for this proposition in the dissenting opinion to the 5th Circuit’s decision in Connell:
   Judge Clark noted that the union in Connell had been unable, in response to a specific request for supplemental briefs, “to point out any source of information which would show that subcontractor contracts such as the one in this case were even occasionally utilized in the industry prior to 1959, much less so common a practice that we could assume Congress intended to preserve that part of the pattern of collective bargaining in the industry.” 483 F.2d at 1182.
131. Id.
132. Id. at 884. Moreover, a union’s need to maintain pension benefits is not aided by a clause that is not union specific. Id. at 885-86.
PART III

Woelke & Romero Framing, Inc. v. NLRB

In Woelke & Romero, the Supreme Court unanimously affirmed the holding of the 9th Circuit that “subcontracting clauses sought or negotiated in the context of a collective bargaining relationship are protected by the construction industry proviso even when not limited in application to particular jobsites at which both union and nonunion workers are employed.” Mr. Justice Marshall, writing for a unanimous Court, started with the proposition that the subcontracting clauses at issue needed the shelter of the proviso since they fell within the terms of the general prohibition of §8(e). While a literal interpretation of the proviso would sanction these agreements, Connell required that §8(e) be “interpreted in light of the statutory setting and circumstances surrounding its enactment.” According to Marshall, the legislative history of §8(e) “clearly” evidences a Congressional intent to protect subcontracting clauses like those in question in the case at bar.

Because Sand Door “indicated” that voluntary compliance with hot cargo agreements was permissible, a gap existed before 1959 in the Act's secondary boycott provisions. Section 8(e), designed to eliminate that gap, was the product of legislative compromise and included the proviso for the construction industry at the insistence of the Senate Conference. The Conference Committee report stated that it did not want to change the law with regard to the legality of agreements regarding site work. Moreover, remarks in the legislative history by then Senator Kennedy, chairman of the Senate Conference, indicate a desire to preserve

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134. Presumably then, the Court agreed that the clauses were “secondary.” See supra notes 73-76 and accompanying text.
135. 456 U.S. at 653.
136. Id. at 654.
137. Id. at 655. Thus, petitioners' argument that Sand Door expressly avoided deciding whether hot cargo agreements were legal is irrelevant. See supra note 87 and accompanying text.
138. The Senate bill would have outlawed hot cargo agreements only in the trucking industry. 105 Cong. Rec. 6556 (1959), 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (Leg. Hist.) 1161-62. The legislation proposed by the House—the Landrum-Griffin Bill—was much broader. It made it an unfair labor practice for any labor organization and any employer to enter into an agreement whereby the employer agrees to “cease doing business with any other person.” H.R. 8400, 86th Cong., 1st Sess. §705(b)(1) (1959), 1 Leg. Hist. 683. Id.
139. Id.
140. Id. at 655-56, quoting from 1 NLRB Leg. Hist. 943.
the status quo. According to Marshall, the remarks of Senator Kennedy were entitled to "substantial weight" since the Senate Conferees were the ones who "insisted" on the proviso. The question thus became, what did Congress perceive to be the status quo, viz., subcontracting clauses.

Marshall found "ample evidence" that Congress believed that "union signatory" clauses were "part of the pattern of collective bargaining in the construction industry." Senator Kennedy is again quoted, and testimony of Senator Curtis, an opponent of the use of subcontracting clauses, is characterized as finding extensive legal use of broad subcontracting agreements.

Marshall also concluded that this perception of the status of subcontracting clauses was correct. First, broad subcontracting clauses had been approved by the Board and the D.C. Circuit. Moreover, petition-
ers were unable to find and to cite any pre-1959 case in which a subcontracting clause was found unlawful because it was not limited to sites where the relevant union members were working.\(^{148}\)

Marshall further relied on findings contained in a report written in 1961 by Leon C. Lunden entitled *Subcontracting Clauses in Major Contracts*.\(^{149}\) Marshall stated:

> The most frequent requirement, found in more than 50 major contracts, obligated contractors to subcontract work only to subcontractors who would apply all the “terms and conditions” of the master agreement. *Id.* at 715–716. The Lunden report does not describe a single agreement that limited the applicability of a subcontracting restriction to job sites at which both union and nonunion workers were employed.\(^{150}\)

Though the Lunden Report itself did not distinguish clearly between union signatory and union standards clauses, Marshall uncovered other evidence that demonstrated that union signatory clauses such as those under review were contained in 12% of the contracts studied.\(^{151}\)

Marshall’s opinion then focused on two arguments made by petitioners. The first argument was that the proviso was designed as an attempt to partially overrule *Denver Building Trades* and that the problem with the decision in *Denver* is that it might lead to “uneasy employee relationships on the jobsite.”\(^{152}\) Thus, argued the petitioners, the subcontracting clauses should be limited by interpreting the proviso to achieve that effect.

Marshall responded by saying that the *Denver* problem was broader than possible jobsite friction:

> Critics of *Denver Building Trades* complained that contractors and subcontractors working together on a single construction project are not the sort of neutral parties that the secondary boycott provisions were designed to protect. They pointed out that the *Denver Building Trades* rule denied construction workers the right to engage in economic picketing at their place of employment. And

\(^{denied, 361 U.S. 834, and noted that the decision of the D.C. Circuit was introduced at House Labor hearings, thus buttressing the argument that Congress perceived these clauses to be legal pre-59. *Id.* at 658–59.\(^ {148}\)

\(^{149}\) *Id.*

\(^{149}\) 84 MONTHLY LAB. REV. 579 (1961).

\(^{150}\) 456 U.S. at 659 (footnote omitted).

\(^{151}\) *Id.* at n.12 citing General Counsel’s Memorandum, December 15, 1976 LAB. REL. YEARBOOK (BNA) at 295, 309 (1976). The Court also cited Pierson, *Building-Trades Bargaining Plan in Southern California*, 70 MONTHLY LAB. REV. 14, 17 and found similar clauses as part of the bargaining pattern in Southern California, where *Wielke & Romero* arose.

\(^{152}\) *Id.* at 661.
they emphasized that the employees of various subcontractors have a close community of interest, and that the wages and working conditions of one set of employees may affect others. In fact, as the Court of Appeals noted, the problem of jobsite friction between union and nonunion workers received relatively little emphasis. See 654 F.2d, at 1319.\textsuperscript{153}

The proviso served these purposes by authorizing agreements which, if adhered to, would prevent nonunion workers from being on the site. Marshall similarly rejected petitioners’ argument because the proviso was also designed to serve purposes other than to alleviate the Denver problem.\textsuperscript{154}

The second argument made by petitioners involved the effect that allowing these clauses would have, i.e., that the unions would have a powerful top-down organizing tool which the 1959 amendments to the Act were designed to eliminate or, at least, curtail.\textsuperscript{155} Marshall responded by stating that top-down pressure is implicit in the proviso itself, which was part of the 1959 package. Therefore, the question was how much pressure did Congress intend to tolerate. The answer to the question that Marshall gave was: “whatever top-down pressure such clauses might entail.”\textsuperscript{156}

Marshall noted that the effect of these clauses is limited by §8(b)(7), which restricts picketing without regard to the wishes of the employees involved,\textsuperscript{157} and by §8(f) which would allow contractors to enter into voidable or temporary agreements.\textsuperscript{158} Nonunion employees would not be “frozen out of the job market” by subcontracting agreements even when the agreements had hiring hall provisions. Union hiring halls are required to refer nonunion members, and even if union membership is required under a union security clause, the obligations of membership would be limited to the normal union financial obligations.\textsuperscript{159} Finally, Denver still prevented secondary picketing, and it was

\textsuperscript{153} Id. at 661–62.

\textsuperscript{154} Id. at 662. Unfortunately the page reference to these other purposes (654–61) does not coincide to any discussion of the reasons for §8(c) and the proviso. Presumably, these numbers are incorrect and the Court intended to refer to the discussion of the intent of the proviso to preserve the pre-59 status quo.

\textsuperscript{155} Id. at 662–63.

\textsuperscript{156} Id. at 663.

\textsuperscript{157} Id. Thus the unions here will not have the unlimited weapon that the union in Connell potentially had. See supra notes 113–15 and accompanying text.

\textsuperscript{158} Id. at 664. The argument here is that a traditionally nonunion subcontractor could bid on a union job, execute a §8(f) union agreement, and walk away from the agreement after the job was through.

\textsuperscript{159} Id. at 664–65. The Court’s language here is equivocal. It does not hold this to be true, it “notes that Courts of Appeals have suggested it.”
suggested that the subcontracting provisions in question here would not be enforceable by picketing.\textsuperscript{160}

It is submitted that the decision of the Court in \textit{Woelke & Romero} is perfectly proper. As will be demonstrated, the Court’s analysis holds up under close scrutiny. Moreover, this decision should help to bring some needed stability to labor relations in this industry.

\textit{Legislative History}

The Court’s decision is based on a simple syllogism, so the validity of the decision rests on the strength of the premises. The Court found (1) that this kind of subcontracting clause existed pre-59; (2) that this kind of clause was either legal pre-59 or, at least, perceived by Congress to be legal; (3) that Congress did not intend to change the law with regard to the legality of such clauses; therefore, (4) these clauses are protected by the construction industry proviso.

As to the proposition that broad, particular union subcontracting clauses existed pre-59, there can be little argument.\textsuperscript{161} What isn’t clear is the extent to which such clauses were used in the construction industry.\textsuperscript{162} The Supreme Court read the General Counsel’s study as establishing that 12\% of the contracts studied had union signatory clauses.\textsuperscript{163} In reality, the number could easily be much higher. The General Counsel found that the “most prevalent” kind of subcontracting clause required adherence to the “terms and conditions” of the prime contract.\textsuperscript{164} If one of the terms and conditions of the prime contract was a union security clause, the subcontracting clause could, in effect, become a union signatory clause. In fact, that precise situation arose in \textit{Northern California Chapter, Associated General Contractors (St. Maurice, Helmkamp & Musser)}\textsuperscript{165} where a combination of a “terms and conditions” subcontracting clause and a union security provision led to a subcontractor not receiving a contract because it would force union membership on its employees.

\textsuperscript{160} \textit{Id.} at 665. The language is less than firm: “as the Court of Appeals held here.” Was the Court afraid to say “correctly held”? \textit{See infra} notes 270–81 and accompanying text.

\textsuperscript{161} Even assuming that the Lunden report is inconclusive, the General Counsel’s Memorandum on \textit{Connell}, [LAB. REL. YEARBOOK (BNA) at 295 (1976)], reported the results of his own survey which showed that 8 of 49 subcontracting clauses reviewed were “particular union” clauses. \textit{Id.} at 309.

\textsuperscript{162} The General Counsel concluded: “From this review of the contracts existing in 1959, the only clear lesson that emerges is simply that there was no uniformity . . . .” \textit{Id.}

\textsuperscript{163} \textit{456 U.S.} at 660 n.12.

\textsuperscript{164} \textit{LAB. REL. YEARBOOK (BNA) at 309 (1976)}.

\textsuperscript{165} \textit{119 NLRB} 1026, 41 L.R.R.M. 1209 (1957), \textit{review denied and enforced sub. nom. Operating Engineers Local Union 3 v. NLRB}, 266 F.2d 905 (D.C. Cir.), \textit{cert. denied}, 361 U.S. 834 (1959).
Thus, it hardly can be argued that subcontracting clauses, such as those in issue here, were not a significant part of construction industry labor agreements before 1959.

The Court again seems to be on solid ground with respect to the legal status of these clauses pre-59. While Sand Door did not expressly establish their legality, there is no support for the proposition that these clauses were illegal. Conversely, the Supreme Court correctly cited Operating Engineers Local Union No. 3 v. NLRB which held that voluntary compliance with a union subcontracting clause did not constitute a violation of §§8(a)(1)(2) or (3) by the employer or §§8(b)(1)(A) or (2) by the union.

The perception of Congress as to the legality of subcontracting clauses is as clear as Congressional perception ever can be. One petitioner argued that Sand Door held these clauses to be "unenforceable" and that the term "unenforceable" was used, by legislators, synonymously with "illegal." This argument, however, seems to be a slender thread in the face of the gloss on the legislative history of §8(e) previously given by the Supreme Court in National Woodwork Manufacturers Ass'n v. NLRB:

Section 8(e) simply closed still another loophole. In Local 1976, United Brotherhood of Carpenters v. Labor Board (Sand Door), 357 U.S. 93, the court held that it was no defense to an unfair labor practice charge under §8(b)(4)(A) that the struck employer had agreed, in a contract with the union, not to handle nonunion materials. However, the court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause because of its prevalence in Teamsters Union contracts), or its voluntary observance by the employer, was not unlawful under §8(b)(4)(A). Section 8(e) simply closed still another loophole. In Local 1976, United Brotherhood of Carpenters v. Labor Board (Sand Door), 357 U.S. 93, the court held that it was no defense to an unfair labor practice charge under §8(b)(4)(A) that the struck employer had agreed, in a contract with the union, not to handle nonunion materials. However, the court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause because of its prevalence in Teamsters Union contracts), or its voluntary observance by the employer, was not unlawful under §8(b)(4)(A). Section 8(e) simply closed still another loophole. In Local 1976, United Brotherhood of Carpenters v. Labor Board (Sand Door), 357 U.S. 93, the court held that it was no defense to an unfair labor practice charge under §8(b)(4)(A) that the struck employer had agreed, in a contract with the union, not to handle nonunion materials. However, the court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause because of its prevalence in Teamsters Union contracts), or its voluntary observance by the employer, was not unlawful under §8(b)(4)(A). Section 8(e) simply closed still another loophole. In Local 1976, United Brotherhood of Carpenters v. Labor Board (Sand Door), 357 U.S. 93, the court held that it was no defense to an unfair labor practice charge under §8(b)(4)(A) that the struck employer had agreed, in a contract with the union, not to handle nonunion materials. However, the court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause because of its prevalence in Teamsters Union contracts), or its voluntary observance by the employer, was not unlawful under §8(b)(4)(A). Section 8(e) simply closed still another loophole. In Local 1976, United Brotherhood of Carpenters v. Labor Board (Sand Door), 357 U.S. 93, the court held that it was no defense to an unfair labor practice charge under §8(b)(4)(A) that the struck employer had agreed, in a contract with the union, not to handle nonunion materials. However, the court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause because of its prevalence in Teamsters Union contracts), or its voluntary observance by the employer, was not unlawful under §8(b)(4)(A). Section 8(e) simply closed still another loophole. In Local 1976, United Brotherhood of Carpenters v. Labor Board (Sand Door), 357 U.S. 93, the court held that it was no defense to an unfair labor practice charge under §8(b)(4)(A) that the struck employer had agreed, in a contract with the union, not to handle nonunion materials. However, the court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause because of its prevalence in Teamsters Union contracts), or its voluntary observance by the employer, was not unlawful under §8(b)(4)(A). Section 8(e) simply closed still another loophole. In Local 1976, United Brotherhood of Carpenters v. Labor Board (Sand Door), 357 U.S. 93, the court held that it was no defense to an unfair labor practice charge under §8(b)(4)(A) that the struck employer had agreed, in a contract with the union, not to handle nonunion materials. However, the court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause because of its prevalence in Teamsters Union contracts), or its voluntary observance by the employer, was not unlawful under §8(b)(4)(A). Section 8(e) simply closed still another loophole. In Local 1976, United Brotherhood of Carpenters v. Labor Board (Sand Door), 357 U.S. 93, the court held that it was no defense to an unfair labor practice charge under §8(b)(4)(A) that the struck employer had agreed, in a contract with the union, not to handle nonunion materials. However, the court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause because of its prevalence in Teamsters Union contracts), or its voluntary observance by the employer, was not unlawful under §8(b)(4)(A).
§8(e) was designed to plug this gap in the legislation by making the "hot cargo" clause itself unlawful. The Sand Door decision was believed by Congress not only to create the possibility of damage actions against employers for breaches of "hot cargo" clauses, but also to create a situation in which such clauses might be employed to exert subtle pressures upon employers to engage in "voluntary" boycotts. (Footnotes omitted)

Realistically, there would seem to be little purpose to §8(e) if these clauses were not legal.

The critical inquiry must focus upon the third leg of the syllogism: Did Congress intend to preserve this state of affairs? The answer to this question depends on the weight one gives to the remarks of Senator Kennedy, for even Judge Sneed, who opposed the use of these clauses, admitted that "Kennedy thought that the proviso would permit subcontracting clauses such as those challenged here." The only reason to question Marshall's logical conclusion, that the views of Kennedy are entitled to "substantial weight," is that these same remarks previously had been dismissed by the Supreme Court in Connell as "bare references." Obviously, the Supreme Court in Woelke found that Connell was decided in a context sufficiently distinct so that the language of Connell is inapposite. Perhaps, too, Connell was just a little misleading.

The Collective Bargaining Relationship

The characteristic that distinguishes Woelke & Romero from Connell is the presence of a collective bargaining relationship. The Supreme Court found such a distinction to be sufficient. Strong arguments support the Court's position.

As indicated previously, the union's tactics in Connell were particularly effective because the picketing was not subject to the limits of §8(b)(7). The Court in Woelke characterized the Connell situation as "novel" and "foolproof." The situation, however, is not quite as simple. Petitioner Oregon-Columbia argued that a union could exert equal coercive force even in the context of a collective bargaining relationship. A union that is certified can insist on a subcontracting clause and

172. Id. at 634. See also Connell, 421 U.S. at 628.
173. 654 F.2d at 1326.
174. 456 U.S. at 656, n.9.
175. 421 U.S. at 628-29.
177. 456 U.S. at 653 n.8.
178. Petition for Certiorari of Oregon-Columbia at 15, 15 LAB. LAW REPRINTS (BNA) No. 16 at 95 (1982). Petitioners also argued that even unions that do not represent any
picket to obtain it without regard to §8(b)(7), since §8(b)(7) is only limited to recognitional picketing.

A response to this argument is suggested by Judge Canby in the en banc decision. An employer bargaining with a certified union can resist economic pressure in the bargaining process by its status as a party in a position to give something to the union (e.g., higher wages instead of a subcontracting clause). In this regard, the pressure on an employer in construction is the same as that which all employers face. A stranger employer, such as an employer in the position of Connell Construction, has nothing to trade or gain and, thus, it cannot resist union pressure.

Similarly, Petitioner Pacific Northwest also rejected the distinction between Connell and the instant case. It argued that §8(b)(7) covered secondary picketing such as existed in Connell. It also cited a General Counsel Memorandum as suggesting that where an employer has no unit employees and a union pickets to obtain an 8(f) contract, §8(b)(7)(C) is violated from the first day. However, the proposition that §8(b)(7) covers secondary picketing was apparently rejected by the General Counsel. The antitrust action in Connell was a response to this determination. The proposition that picketing to obtain a §8(f) contract violates §8(b)(7) ab initio is disputed by the Board in its brief, and, unfortunately, this is one of the questions neither addressed nor answered by the Court.

One final argument regarding §8(b)(7) was raised by the employers during oral argument before the D.C. Circuit in Schriver. They argued that even when applicable, §8(b)(7) just wasn't effective because under Board rulings picketing could easily go on for 75 to 100 days. The D.C. Circuit's response to that was, quite correctly, that such a problem

employees can engage in informational picketing, even if there is, ultimately, a recognitional objective. Id. citing Smitley v. NLRB, 327 F.2d 351, 352-53 (9th Cir. 1964) and Barker Bros. Corp. v. NLRB, 328 F.2d 431 (9th Cir. 1964).

179. Petition for Certiorari of Oregon-Columbia at 16, 15 LAB. LAW REPRINTS (BNA) No. 16 at 96.

180. 654 F.2d 1301, 1321. See also, NLRB Brief at 34 n.37, 15 LAB. LAW REPRINTS (BNA) No. 16 at 494 n.37.


182. Id. citing LAB. REL. YEARBOOK (BNA) at 354 (1979).

183. See the 5th Circuit opinion in Connell, 483 F.2d at 1157-58.

184. NLRB Brief at 28, 15 LAB. LAW REPRINTS (BNA) No. 16 at 488.

185. "[W]e do not reach the question whether a union may use economic pressure to obtain a subcontracting agreement. We also do not reach the question whether a union may picket to obtain a pre-hire agreement." 456 U.S. at 664 n.17.

186. 635 F.2d at 876 n.24.
was not to be solved by judicially rewriting a "careful statutory scheme established by Congress."\textsuperscript{187}

Aside from the §8(b)(7) ramifications, the collective bargaining relationship is important in other ways. The Act itself is structured to achieve industrial peace through collective bargaining.\textsuperscript{188} It is not a vehicle through which strangers may enter into boycott agreements.\textsuperscript{189}

Petitioner Oregon-Columbia had attempted to counter this asserting that subcontracting agreements outside of collective bargaining relationships were "commonplace" and part of the bargaining pattern before 1959.\textsuperscript{190} If this was part of the pre-59 pattern, \textit{Connell} should have gone the other way. Since \textit{Connell} didn't allow bare §8(e) agreements, the critical factor could (should?) not have been the presence or absence of the collective bargaining relationship.

A reasonable explanation for the \textit{Connell} Court's reasoning is either that it didn't know of these pre-59 skeleton agreements or that it refused to accept the evidence presented. On these grounds, the Court couldn't sanction Local 100's position. This, however, does not mean

\begin{itemize}
  \item \textsuperscript{187} \textit{Id.} at 876.
  \item \textsuperscript{188} Section 1 of the National Labor Relations Act, 29 U.S.C. §151 (1976), reads in pertinent part:
    \begin{quote}
      It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.
    \end{quote}
  \item \textsuperscript{189} Arguably, the phrase "or other mutual aid or protection" might encompass naked §8(e) agreements. But, that is all the more reason why §8(e) agreements within collective bargaining agreements should be allowed.
  \item \textsuperscript{190} Oregon-Columbia Brief at 9-10, 15 \textsc{Lab. Law Reprints} (BNA) No. 16 at 89-90. The brief quotes the following passage:
    \begin{quote}
      . . . organizing in the building and construction industry both prior to and subsequent to the 1959 amendments, was and is primarily carried on by building and construction trades councils on behalf of their constituent craft locals. The building trades agreements proffered are not conventional collective-bargaining agreements, nor is a conventional collective-bargaining relationship sought, but rather an attempt is made to obtain skeleton agreements (containing little more than subcontracting provisions) which in turn are augmented by the execution of collective-bargaining agreements by the individual trade unions, the latter agreements containing provisions governing wages and other substantive conditions of employment. As the Court observed in \textit{Dallas Building and Construction Trades Council v. N.L.R.B.}, 396 F.2d 677, 68 LRRM 2019 (C.A.D.C.), at p. 682:
      \begin{quote}
        . . . Congress intended by means of Section 8(e) to preserve the status quo of bargaining in the construction industry; and in 1959 "umbrella" agreements like the one proposed here were, as they are today, commonplace, for collective bargaining is traditionally conducted at several levels in the construction industry. . .
      \end{quote}
    \end{quote}
\end{itemize}
that the *Connell* Court wouldn't find the presence of a collective bargaining agreement to shelter a subcontracting clause. The language of *Connell* discusses the lack of a collective bargaining relationship too often.191 At best, all petitioner succeeds in accomplishing is to suggest that *Connell* was incorrectly decided, and that, possibly, a naked §8(e) agreement is entitled to the protection of the proviso.

The collective bargaining relationship also may be relevant in that it changes the antitrust considerations involved. In *Connell*, the Court noted that the federal policy favoring collective bargaining agreements could not provide a shelter to Local 100's agreement.192 If the inclusion of the agreement within a collective bargaining agreement avoids an antitrust problem, then the Court has less of a need to read the proviso to §8(e) narrowly.193 This analysis, perhaps, begs the question since not all collective bargaining provisions are above antitrust scrutiny, and it may not be so clear that a subcontracting clause's validity under §8(e) eliminates antitrust scrutiny.194

**Jobsite Restrictions**

As indicated by the Supreme Court, petitioners were willing to concede that the presence of the subcontracting clause in a collective bargaining context was significant (i.e. necessary) but they argued that it was not a sufficient condition. Specifically, they argued that: (1) the proviso to §8(e) was a partial substitute for the *Denver Building Trades* problem; (2) the problem in *Denver* was jobsite friction created by hav-

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191. See supra notes 78–79 and accompanying text. The *Connell* Court noted the absence of the collective bargaining relationship at three points, 421 U.S. at 625–26, 633, 635. Respondent Unions also argued that the references at 631 n.10 in *Connell*, where the Court distinguished two Board decisions, are also distinctions based on the presence of a collective bargaining relationship. Unions' Brief at 32–33, 15 LAB. LAW REPRINTS (BNA) No. 16 at 544–45.

192. 421 U.S. at 626.

193. This is not to suggest that the presence of a collective bargaining agreement necessarily would immunize the subcontracting clause from antitrust scrutiny. See United Mine Workers v. Pennington, 381 U.S. 657, 664–65 (1965).

194. Judge Stewart, in his dissenting opinion in *Connell*, suggested that a lawful §8(e) agreement should be immune from antitrust scrutiny. 421 U.S. at 648 n.8. But in Consolidated Express, Inc. v. New York Shipping Ass'n, Inc., 641 F.2d 90 (3d. Cir. 1981) the court, trying desperately to work out a complicated problem involving an alleged §8(e) violation and the antitrust laws, said "[W]hile the court owes no particular deference to the Board's antitrust views, its own views on the reach of the antitrust laws cannot but be enlightened by the Board's opinion on whether the [contract clauses in question] are lawful as a matter of labor law." Id. at 94. This seems equivocal. However, the Court later stated,

Finally, we cannot close our eyes to the reality that although one count of the complaints before us on this appeal charges violations of the antitrust laws, in a very real sense the labor law questions are primary, while the antitrust law questions are, if not secondary, at least dependent.

*Id.* at 95.
ing union and nonunion workers side by side on a project; and (3) a subcontracting clause should be valid only to the extent that it alleviates that problem. The petitioners concluded that the clauses in question, which were operable even if no union employees were working for the contractor or on the site, were overly broad and beyond the protection of the proviso. Petitioners support this reasoning by citing Connell as well as numerous other cases where the problem of jobsite friction is referred to.\footnote{195}{For the complete statement of this argument with appropriate citations see Oregon-Columbia Brief at 4–7, 15 LAB. LAW REPRINTS (BNA) No. 16 at 84–87; Woelke & Romero Brief at 30–33, 15 LAB. LAW REPRINTS (BNA) No. 16 at 294–97; Amicus Brief of Associated General Contractors, Inc. at 9–10, 15 LAB. LAW REPRINTS (BNA) No. 16 at 223–24.}

The petitioner's argument was attacked in several ways. First, it was argued that such interpretation would entail site by site negotiations, or, at least, site by site policing to determine if a union member was present along with nonunion workers.\footnote{196}{See Judge Canby's discussion, 654 F.2d at 1321–22.} The practical difficulties of this requirement may not be substantial since unions already are required to establish the presence of a union employee of a primary contractor in order to engage in common situs picketing.\footnote{197}{See Carpenters Council of Milwaukee, 196 NLRB 487, 490 (1972); Local 519, Journeymen v. NLRB, 416 F.2d 1120, 1124–26 (D.C. Cir. 1969).} In addition, union employees often may be able to notify the unions if nonunion workers are at the site. However, the unions already have a burdensome policing problem,\footnote{198}{Witness the fact that Donald Schriver, Inc. signed a contract with a union-only subcontracting clause in June of 1972, and successfully ignored that provision until May of 1975. Donald Schriver, 239 NLRB 264, 265, 99 L.R.R.M. 1593, 1594.} and any additional policing merely exacerbates their difficulties.

The more critical response to the petitioner's argument is that the Denver decision treated a subcontractor as a neutral party, thus making the union's picketing against the general contractor secondary. The subcontractor, though, is hardly a neutral.

The Denver "friction" problem was just the issue raised by Justice Douglas in his dissenting opinion in that case.\footnote{199}{341 U.S. at 692.} The larger problem is that unions in construction, unlike those in industry, are prevented from picketing at the site of the labor dispute.\footnote{200}{See Unions' Brief at 16–18, 15 LAB. LAW REPRINTS (BNA) No. 16 at 528–30.}

The other problem with the petitioners' Denver argument is that it too narrowly construes Congressional intent regarding the scope of the proviso to §8(e). It assumes that Congress in enacting the proviso only cared about a problem with Denver regarding friction at the jobsite. Subcontracting clauses do more:
By permitting contract clauses requiring that all construction site work be performed by contractors who are bound to honor the terms of the applicable area-wide agreement with the appropriate union, the construction industry proviso seeks to preserve the means that unions and employers in that industry had adopted for insuring not only that labor relations on particular job sites are harmonious (see subpoint b, infra) but also that the pool of workers represented by the union will enjoy the opportunities for regular employment and the continuity in wages, fringe benefits, and other terms and conditions of employment enjoyed by employees in more stable industries.201

**Particular Union Clauses**

The petitioners also argued that particular union clauses should not be allowed since they grant the unions in question a monopoly. Furthermore, the petitioners contended that the unions already possessed sufficient protection for legitimate union needs through the use of union standards provisions.202 Support for this proposition can be found in the language of *Connell*.203

As the Supreme Court recognized, however, there really aren’t many competing unions in construction.204 Moreover, as indicated pre-

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201. *Id.* at 484.
203. The Court stated:
The agreements with general contractors did not simply prohibit subcontracting to any nonunion firm; they prohibited subcontracting to any firm that did not have a contract with Local 100. The union thus had complete control over subcontract work offered by general contractors that had signed these agreements. Such control could result in significant adverse effects on the market and on consumers—effects unrelated to the union’s legitimate goals of organizing workers and standardizing working conditions. For example, if the union thought the interests of its members would be served by having fewer subcontractors competing for the available work, it could refuse to sign collective-bargaining agreements with marginal firms. Cf. *Mine Workers v. Pennington*, supra. Or, since Local 100 has a well-defined geographical jurisdiction, it could exclude “traveling” subcontractors by refusing to deal with them. Local 100 thus might be able to create a geographical enclave for local contractors, similar to the closed market in *Allen Bradley*, supra.
421 U.S. at 624–25.
204. 456 U.S. at 664 n.15, citing Carpenters Local 15, 240 NLRB 252, 261 (1979). It should be noted that the Court’s reference to “note 17 *supra*” is an error.

A situation not discussed by the Supreme Court or raised in any of the cases is whether a union specific contracting clause for non-unit work is permissible. Both the “friction” argument (*see supra* note 48 and accompanying text) and the “maintenance of a pool of union work” argument (*see supra* note 129 and accompanying text) would fail. Yet a union might prefer one of two competing unions for other reasons such as respect for jurisdictional lines.
viously, particular union clauses were part of the pre-59 pattern. Finally, particular union clauses are necessary to maintain the continuity of pension and fringe benefits.

**Top-Down Organizing**

Petitioners further argued that allowing the subcontracting clauses without the limitations suggested would result in the kind of top-down organizing pressure that the Connell Court said Congress intended to eliminate in 1959. Connell, they asserted, struck the balance between §7 rights and the problem of jobsite friction. Similarly, in NLRB v.

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205. See supra notes 163-66 and accompanying text.

206. As Respondent Unions argued:

In addition to the obvious purpose of assuring the union employees will have jobs in the future at all, there is an additional interest arising from the form of fringe benefits provided in the construction industry. Typically, benefits are provided through contributions to a trust fund jointly administered by the union and employer parties to a collective bargaining agreement, pursuant to §302(c)(5) of the LMRA, 29 U.S.C. §186(c)(5). Section 302 forbids payments into such funds except if "specified in a written agreement with the employer" and also provides that any funds contributed must be "for the sole and exclusive benefit of the employees of such employer . . . ." See, e.g., NLRB v. Amax Coal Co., 453 U.S. 322 (1981). Thus potential employees of an employer who has promised to provide fringe benefits in this manner have an interest in protecting the integrity of the economic aspects of the collective bargaining agreement which goes beyond a promise not to engage a subcontractor who pays less in total wages and benefits than the monetary equivalent provided in the collective bargaining agreement of the primary contractor. For, a subcontractor who is not a signatory to a written agreement is forbidden by §302 from paying into the trust fund, and therefore, the fund from which the employees covered by the agreement will later draw their benefits will have less money available than if the subcontractor was also obliged to pay into the fund. Further, the alternative used in Walsh v. Schlecht, 429 U.S. 401—permitting subcontracting to a nonsignatory subcontractor but requiring the primary contractor then to make contributions measured by the hours worked by the subcontractor's employees—solves the problem only in part. The flow of contributions into the fund is maintained, but the union employees who would otherwise have worked on the project are not themselves credited with hours worked for purposes of later benefit calculation; and the employees of the subcontractor, even if they turn out to be the same individuals, are "ineligible for trust fund benefits based on . . . work performed for [a nonsignatory subcontractor]." Walsh, 429 U.S. at 407.

Union Brief at 21-22 n.11, 15 LAB. LAW REPRINTS (BNA) No. 16 at 533-34 n.11. See also, NLRB Brief at 24-25, 15 LAB. LAW REPRINTS (BNA) No. 16 at 484-85. Cf. Oregon-Columbia Reply Brief at 7, 15 LAB. LAW REPRINTS (BNA) No. 16 at 601.

207. 421 U.S. at 631-32 where the Court stated: "[I]f we agreed with Local 100 . . . our ruling would give construction unions an almost unlimited organizational weapon . . . It is highly improbable that Congress intended such a result. One of the major aims of the 1959 Act was to limit "top-down" organizing campaigns . . . ."


Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or
Iron Workers (Higdon), the Supreme Court analyzed the unique needs of the construction industry and determined, albeit in the §8(f) context, that "Congressional concern about coerced designations of bargaining agents did not evaporate as the focus turned to the construction industry . . . ."

If the Court's response in Woelke is that some top-down pressure is implicit in §8(e) then the Court's only question of how much pressure should be tolerated seems correct. First, the Higdon language relies on Connell, and Connell can be distinguished on the grounds that the union there had an "unlimited" weapon. Thus the balance struck in Connell is not necessarily appropriate where other limits on top-down organizing are present. In addition, the §7 rights of nonrepresented employees to refrain from joining a union have to compete with the rights of unionized employees trying to preserve the benefits that they have fought for and won.

One also must question the petitioners' assumption that nonunion workers have freely chosen not to be represented. Employees may tolerate nonunion status for lack of knowledge, or because the time, expense, and job jeopardy involved in organizing an employer may seem overwhelming. It appears equally valid to assume that many employees would welcome the unionization of their employer. In fact, §8(f), enacted as part of Landrum-Griffin in 1959, was predicated on the notion that unions were the choice of a significant number of workers in construction.

PART IV

Subcontracting Clauses In 8(f) Agreements

The decision in Woelke & Romero clearly indicates that the presence of a collective bargaining relationship will bring a subcontracting
clause within the protection of the construction industry proviso. The Court, though, does not fully explore the issue of what constitutes a collective bargaining relationship. Specifically, a question arises as to whether a prehire agreement, i.e., an agreement authorized by §8(f), is a sufficient collective bargaining relationship. This question is of some significance since prehire agreements are common in the industry.

In Los Angeles Building and Construction Trades Council; Local 1497, United Brotherhood of Carpenters (Donald Schriver, Inc.), the Board examined the scope of the phrase and took a rather broad view. Schriver involved two different labor disputes. In one, a general contractor (Donald Schriver, Inc.) had entered into an agreement with the Los Angeles Building and Construction Trades Council in 1972 which contained an automatic renewal provision and incorporated the Master Labor Agreement between the Council and various employer associations. Apparently, Schriver never abided by the union subcontracting provisions, nor did its employees ever designate the Council or any affiliate as its bargaining representative. In 1975, Local 1497 decided to enforce the contract. It demanded that Schriver execute the 1974-77 Master Labor Agreement (to which, it claimed, Schriver was legally bound). Schriver attempted to negotiate different terms. The Trades Council refused and threatened suits and picketing.

The other labor dispute involved a framing subcontractor, Topaz Contracting & Development Co., Inc., who previously had never been a party to an agreement with the Carpenters. In 1977, Topaz was approached at a project where it employed carpenters by a union representative, who wanted Topaz to agree to the Carpenters' Master Labor Agreement. Topaz was willing to sign a union agreement limited to the project in question, but not one binding it generally. The union refused this offer and picketed.

In both cases, the Board found that there was a sufficient collective bargaining relationship to distinguish the situation from Connell. The Board found that Schriver had never repudiated the collective bargaining relationship that it clearly had with the Carpenters since 1972. Schriver merely desired to negotiate different terms. With regard to Topaz, the Board found the attempt to enter into a "complete" contract (one setting forth wages and other conditions of employment) was suffi-

216. Id. at 265, 99 L.R.R.M. at 1595.
217. Id. The Board noted that there was no indication that the unions were aware of Schriver's projects.
218. Id.
219. Id. at 268, 99 L.R.R.M. at 1598.
Subcontracting Agreements in Construction

The Board rejected any distinction based on the fact that these were "8(f)" collective bargaining relationships. The Board found nothing in Connell to suggest a contrary conclusion, and it reasoned that the protection of the construction industry proviso should be coordinated with contracts that are authorized for the industry.

The Board's position on the §8(f) issue was affirmed by the D.C. Circuit in its decision in Donald Schriver, Inc. v. NLRB. Judge Edwards, writing for the unanimous court, again started with the proposition that Connell itself was not dispositive, in that the union in

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220. Id.
221. 29 U.S.C. §158(f) (1976). Section 8(f) provides:
   It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer or to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

This proviso allows the so-called "prehire" agreement whereby a union can enter into an agreement with an employer in construction even before the employer has any employees to be represented. See generally, articles cited after NLRB Local 103, Iron Workers, note 11, supra.

222. Id. at 269, 99 L.R.R.M. at 1598-99.
223. In fact, the Board found that the Court in Connell hinted that a §8(f) relationship was sufficient:

Thus, in rejecting an argument that the Board had previously approved general subcontracting agreements with "stranger" employers in B. & J. Investment Company, the Court speculated that the employer and union, rather than strangers, "may have . . . [had] a prehire contract under Sec. 8(f)." Moreover, the Court referred to §8(f) prehire contracts as a "special consideration" that Congress gave to organizational campaigns of unions in the construction industry. (421 U.S. at 632.)

224. The Board was not concerned about the use of §8(f) contracts as an organizational weapon in that §8(b)(7)(C) has been construed to limit picketing for recognition in a §8(f) context and §8(b)(4)(B) limits picketing to enforce a §8(f) agreement. Id. at 270.
225. 635 F.2d at 876 (1980).
Connell expressly repudiated any interest in representing Connell's employees. This repudiation of any representational interest was critical to avoid the picketing limitations of §8(b)(7). As a result of the absence of any §8(b)(7) limitation, the Supreme Court in Connell feared that an interpretation of §8(e) sanctioning these agreements would subject Connell, and others in a similar situation, to unlimited picketing. Employees of other contractors would also be subjected to unlimited top-down organizing. Judge Edwards reasoned that the inclusion of a subcontracting clause in the context of a §8(f) bargaining relationship was critically distinguishable from Connell since the unions' ability to picket, and to pressure a contractor, would be subject to the "stringent" limitations of §8(b)(7).

This position was also supported, argued Judge Edwards, by the legislative history to §8(f). That history makes it clear that §8(f) was needed in construction because of the short-term employment relationships, the need for contractors to bid jobs before workers are employed, and the impracticability of elections in the industry. Therefore:

[It] would make little sense to conclude that this necessary and most common type of collective bargaining relationship in the construction industry specifically recognized and authorized by Congress, is not a "collective-bargaining relationship" as the term is used in Connell.

* * *

There is no reason why Congress would protect subcontracting agreements in the construction industry under §8(e), and at the same time prohibit the most common and possibly the only effective means by which such an agreement may be obtained.

The argument that §8(f) agreements are not fully enforceable, as are traditional §9(a) collective bargaining agreements, was found to be irrelevant. What was considered critical was that §8(f) relationships prevent a union from "sidestepping" §8(b)(7), and from being able to "apply unlimited secondary pressure on nonunion subcontractors."

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226. Id. at 873.
227. Id. at 873-74.
228. Id. at 874.
229. Id. at 874-75.
230. In NLRB v. Local 103, Ironworkers, 434 U.S. 335 (1978), the Supreme court held that the duty to honor a §8(f) agreement was "contingent on the union's attaining majority support at the various construction sites." Id. at 345.
231. 635 F.2d at 875.
232. Id.
We do not have a definitive answer to the question of whether §8(f) agreements come within the protection of the construction industry proviso because the Supreme Court denied certiorari in Schriver.\textsuperscript{233} There is language in Woelke & Romero, nevertheless, which suggests that the Supreme Court would agree with the D.C. Circuit’s decision in Schriver.

To begin with, the Supreme Court does refer to Schriver as a decision which supports the Court’s conclusion on the basic question of whether subcontracting clauses within collective bargaining relationships are valid under the construction industry proviso.\textsuperscript{234} More importantly, the Court directly analyzes the §8(f) contract in response to the suggestion that allowing broad subcontracting clauses would have too great a top-down organizing effect.\textsuperscript{235}

The Court suggests that §8(f) protects the subcontractors from some of the potential harm of a subcontracting clause. Even if a traditionally nonunion subcontractor signs a union agreement in order to get work on a project where the general contractor has agreed to a union subcontracting agreement, the subcontractor can walk away from the §8(f) agreement after the project is over and there are no longer any union employees.

Extending that logic, the contractor who negotiates the subcontracting clause in the context of the §8(f) agreement is not as locked into the clause because it is not as tied to a §8(f) agreement as it is to a full §9 collective bargaining relationship. There are so many unanswered questions about the nature and effect of an §8(f) agreement, though, that one cannot rely too heavily on the Schriver opinion as enunciating the definitive word.

It is not clear, for example, exactly what constitutes a §8(f) relationship. The Board originally held that §8(f) applied only to initial attempts to establish a collective bargaining relationship,\textsuperscript{236} and successive prehire agreements have been treated as full-fledged collective bargaining agreements.\textsuperscript{237} Recent decisions suggest that §8(f) agreements do not ripen into binding collective bargaining agreements unless the union demonstrates its majority status at each site where it seeks to enforce the agreement.\textsuperscript{238} The question of whether one may picket to obtain a §8(f) agreement was expressly left open in Woelke,\textsuperscript{239} yet there is certainly

\textsuperscript{233} 451 U.S. 994 (1981).
\textsuperscript{234} 456 U.S. 645, 652 n.6.
\textsuperscript{235} Id. at 664.
\textsuperscript{236} Bricklayers & Masons Local 3, 162 NLRB 476, 64 L.R.R.M. 1085 (1966).
\textsuperscript{238} See, e.g. NLRB v. Haberman Construction Co., 641 F.2d 351 (5th Cir. 1981).
\textsuperscript{239} 456 U.S. at 664 n.17.
language in *Higdon* which suggests that the Court will not countenance coerced §8(f) agreements.\(^{240}\)

There is also uncertainty as to whether §8(f) agreements are enforceable in any way. *Higdon* clearly holds that picketing to enforce these agreements is subject to §8(b)(7), and that these agreements can be freely repudiated by an employer. The Circuit Courts, nevertheless, have split on the issue of whether a §301\(^{241}\) suit for breach of these agreements is permissible.\(^{242}\)

Until all of these questions are resolved, one is left with the *Schriver* decision which holds that a §8(f) relationship can shelter a subcontracting agreement because §8(f) agreements were specifically sanctioned in 1959 to fit the needs of the industry. These agreements were, thus, intended to dovetail with the proviso which was concurrently drafted to accommodate the industry.

\(^{240}\) Although the issue of *Higdon* was the legality of picketing to enforce a §8(f) agreement, the Court stated, in passing:

Congress was careful to make its intention clear that prehire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle. Representative Barden, an important House floor leader on the bill and a conferee, introduced as an expression of legislative intent Senator Kennedy's explanation the year before of the voluntary nature of the prehire provision:

Mr. Kennedy: I shall answer the Senator from Florida as follows—and it is my intention, by so answering, to establish the legislative history on this question: It was not the intention of the committee to require by section 604(a) the making of prehire agreements, but, rather, to permit them; nor was it the intention of the committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a prehire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary prehire agreements. 105 Cong. Rec. 18128 (1959); 2 Leg. Hist. 1715.

The House Conference Report similarly stressed that 'Nothing in such provision is intended . . . to authorize the use of force, coercion, strikes, or picketing to compel any person to enter into such prehire agreement.' H. R. Rep. No. 1147, 86th Cong., 1st Sess., 42 (1959); 1 Leg. Hist. 946.

\(^{241}\) U.S. 335, 348 n.10.

Picketing To Obtain Subcontracting Clauses

One issue expressly left open by the Supreme Court in Woelke was whether picketing to obtain a lawful subcontracting clause was proscribed by §8(b)(4)(A). Neither Woelke nor the General Counsel had raised this question before the Board; they had alleged a violation of §8(b)(4)(A) because the picketing had been to secure an agreement "prohibited by section §8(e)." Under §10(e) of the Act, the Court of Appeals was without jurisdiction to consider an issue not raised before the Board, unless excused by "extraordinary circumstances." The Supreme Court refused to find such extraordinary circumstances, despite its conclusion that the Board had, in fact, decided the issue.

It is not clear whether the Board did reach this question. The issue, as stated by the Board, did not encompass the question of §8(b)(4)'s application to a lawful §8(e) agreement. Nor did the Board discuss the §8(b)(4) question in the context of a lawful subcontracting agreement in the text of its decision. The Supreme Court has read much into the Board's final conclusion of law: "respondents have not violated the Act in any other manner."

Assuming that the Supreme Court is correct in finding that the Board did decide the issue, its decision not to find "extraordinary circumstances" is amply supported by precedent. A decision to find extraor-

244. 239 NLRB 241, 99 L.R.R.M. 1580 (1978). Emphasis added. Nor was the issue raised in Pacific Northwest since the agreement there was voluntarily entered into. 239 NLRB 274, 275, 99 L.R.R.M. 1589, 1589-90.
246. Id.
247. "Woelke could have objected to the Board's decision in a petition for reconsideration or rehearing. The failure to do so prevents reconsideration of the question by the Courts." 456 U.S. at 666.
248. Id. at 666; citing 239 NLRB at 251, 99 L.R.R.M. at 1588.
249. 239 NLRB at 242, 99 L.R.R.M. at 1582. The Board's position was affirmed by a limited en banc court in Pacific Northwest, 654 F.2d 1301 (9th Cir. 1981). Judge Canby, writing for the majority, noted that the legislative history was "in conflict," but he concluded that the language of §8(b)(4)(ii)(A) supplied the answer by "negative implication" in that it only prohibited coercing a person into entering a prohibited agreement. Id. at 1323.
250. Petitioner Woelke contended that the issue was raised during consolidated argument before the Board. Woelke Reply Brief at 7, 15 LAW LAB. REPRINTS (BNA) No. 16 at 567.
251. See, e.g., International Ladies' Garment Workers' Union v. Quality Manufacturing Co., 420 U.S. 276, 281 n.3 (1975) where the Court also considered the failure to move for reconsideration, rehearing or reopening critical. See also NLRB v. District 50, United Mine Workers, 355 U.S. 453, 463-64 (1958); NLRB v. Ochoa Fertilizer Corp., 368 U.S. 318, 322 (1961); Detroit Edison Co. v. NLRB, 440 U.S. 301, 311-12 n.10 (1979).
dinary circumstances, though, could also have been justified here.\textsuperscript{252} As will be discussed, \textit{infra}, the General Counsel had taken the position that §8(b)(4) is \textit{not} violated by picketing to secure a lawful subcontracting agreement. No complaint will be issued charging a §8(b)(4) violation under these circumstances and the issue could continually escape review.

Since the Supreme Court has essentially ducked this issue,\textsuperscript{253} and since the Court may not soon get another opportunity to deal with it, the position of the Board and the Courts of Appeal on this question will control. It is appropriate therefore, to review, briefly, the position taken by the Board and the Circuit Courts on the relationship between §8(b)(4) and §8(e).

The Board, in \textit{Construction, Production \\& Maintenance Laborers Union, Local 383 (Colson \\& Stevens Construction Co.)},\textsuperscript{254} originally took the position that §8(b)(4)(A) was violated by picketing to secure a subcontracting agreement protected by the construction industry proviso. In \textit{Colson \\& Stevens}, the union had attempted to obtain a subcontracting agreement that, if complied with, would have forced the termination of existing contracts. The Board found that under pre-59 law, such picketing would have as "an object" the forcing of the employer to cease doing business with another, and would therefore be in violation of §8(b)(4)(A).\textsuperscript{255} The Board read \textit{Sand Door} as implicitly agreeing with the proposition that picketing to obtain a subcontracting clause was as

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\textsuperscript{252} See, e.g., Amcar Division, ACF Industries v. NLRB, 596 F.2d 1344, 1350 n.8 (8th Cir. 1979) where the court found that the issue had been "implicitly" raised.

\textsuperscript{253} This is not meant in a perjorative sense. Rather, the point is that the Court has chosen to avoid a question that it could have legitimately decided.

\textsuperscript{254} 137 NLRB 1650, 48 L.R.R.M. 2791 (1962), enforcement denied in relevant part, 323 F.2d 422 (9th Cir. 1963). See also Local 825, Operating Engineers (Building Contractors Association of New Jersey), 145 NLRB 952, 55 L.R.R.M. 1094 (1964); Local 300, Hod Carriers Union (Fiesta Pools, Inc.), 145 NLRB 911, 55 L.R.R.M. 1070 (1964); Los Angeles Building Trades Council (Treasure Homes), 145 NLRB 279, 54 L.R.R.M. 1381 (1963); Southern Calif. District of Laborers (Swimming Pool Gunite Contractors), 144 NLRB 978, 54 L.R.R.M. 1165 (1963); Los Angeles Building and Construction Trades Council (Stockton Plumbing Co.), 144 NLRB 49, 53 L.R.R.M. 1513 (1963); Essex County and Vicinity District Council of Carpenters, 141 NLRB 858, 52 L.R.R.M. 1416 (1963); Los Angeles Building \\& Construction Trades Council (Interstate Employers, Inc.), 140 NLRB 1249, 52 L.R.R.M. 1215 (1963); Operating Engineers Union (Sherwood Construction Co.), 140 NLRB 1175, 52 L.R.R.M. 1198 (1963). Building and Construction Trades Council of Orange County (Sullivan Electric Company), 140 NLRB 946, 52 L.R.R.M. 1163 (1963); Local Union 825, Operating Engineers (Nichols Electric Company), 140 NLRB 458, 52 L.R.R.M. 1043 (1963); Building and Construction Trades Council of San Bernardino, etc. (Gordon Fields), 139 NLRB 236, 51 L.R.R.M. 1493 (1962); Local 60, United Association of the Plumbing \\& Pipefitting Industry (Binnings Construction Co., Inc.), 138 NLRB 1282, 51 L.R.R.M. 1782 (1962).

\textsuperscript{255} 137 NLRB at 1651, 50 L.R.R.M. at 1445. Section 8(b)(4)(A) as it existed pre-59 is now §8(b)(4)(B).

\textsuperscript{256} 357 U.S. 93 (1958).
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unlawful as picketing to enforce one, since “in both situations the evil sought to be remedied is the cessation of business relationships by prohibited tactics.” The Board read the legislative history of the 1959 Amendments as preserving the existing law with regard to “the legality of a strike to obtain such a contract.”

The Court of Appeals disagreed and refused to enforce that part of the Board’s order. Although §8(e) may have been addressed to voluntary agreements, §8(b)(4)(A), which is the part of the Act that prohibits coercion, outlaws only coercion to enter agreements prohibited by §8(e). The court agreed that the 1959 Amendments were designed to preserve existing law with regard to picketing to secure §8(e) agreements, but the court found that existing law allowed such picketing. The court also rejected the argument that since existing contracts would be terminated if the subcontracting clause were enforced, picketing to obtain such a clause violated §8(b)(4)(B). Reviewing the legislative history, the court concluded:

The Board’s position was also rejected by every other Circuit that faced the question. In Northeastern Indian Building and Construction Trades Council (Centerlivre Village Apartments), the Board finally reversed itself and held that picketing to secure an agreement within the proviso to §8(e) did not violate §8(b)(4)(A).

The legislative history of the 1959 Amendments lends support to this position. In Sand Door, the Court held that a hot cargo agreement was not a valid defense to a charge of secondary picketing. The Court recognized that the hot cargo agreements themselves might have been

257. 137 NLRB at 1651, 50 L.R.R.M. at 1445.
258. Id. at 1651–52, quoting Senator Kennedy, reprinted in 2 NLRB Leg. Hist. 1433.
259. 323 F.2d 422 (9th Cir. 1963).
260. Id. at 424.
261. Id. at 425.
262. Id. at 426–27.
263. Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB, 332 F.2d 636 (3d. Cir. 1964); Orange Belt District Council of Painters No. 48 v. NLRB, 328 F.2d 534, 537 (D.C. Cir. 1964); Building and Construction Trades Council of San Bernadino, 328 F.2d 540 (D.C. Cir. 1964); Construction, Production & Maintenance Laborers Union, Local 383, 323 F.2d 422 (9th Cir. 1965); Local 48, Sheet Metal Workers v. Hardy Corp., 332 F.2d 682 (5th Cir. 1964).
coerced. Section 8(e) was designed to deal with the problem of voluntary agreements not found unlawful per se in Sand Door. Proponents of Landrum-Griffin (which would have outlawed all hot cargo agreements) argued that changes were needed to prevent coerced agreements. When §8(b)(4)(A) was adopted by the Conference [linking its prohibitions to §8(e)], it represented a compromise analogous to the one involving the proviso to §8(e) and left the law intact. Unfortunately, the status of the law and the perception of that status is just not conclusive. It cannot be said, therefore, that the decisions relying on the language of §8(b)(4)(A) are improper, and for now there is agreement that picketing to obtain lawful subcontracting agreements is permissible.

Picketing To Enforce Subcontracting Agreements

Another issue which arises in the discussion of subcontracting agreements is their enforceability. Specifically, can they be enforced by picketing or other coercive tactics. This issue was mentioned only in passing by the Supreme Court in Woelke & Romero because it was not specifically raised by any of the parties. The issue, though, had been raised and fully discussed in International Union of Operating Engineers, Local 701 (Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.), one of the companion cases to Woelke.

In Pacific Northwest, the Board was asked to determine the effect of an intertwined self-help enforcement provision on an otherwise valid §8(e) subcontracting clause. The Board reviewed the legislative history of §8(e) and found it to be clear that even lawful secondary clauses could

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265. 357 U.S. 93, 106.
266. See supra note 100 and accompanying text.
268. Senator Kennedy stated that "it was not intended to change the law... with respect to the legality of a strike to obtain such a contract." 2 NLRB Leg. Hist. 1433.
269. Especially, since the Supreme Court chose not to decide the question.
271. The relevant provisions, contained in the collective bargaining agreement provided:

ARTICLE IX
Settlement of Disputes

Section 5. Should the parties involved fail to comply with the findings within five (5) days after such written notification by either party or fail to comply with any of the provisions and/or time limits established in this Article, unless mutually agreed to extend such limits, then all means of arbitration shall be considered exhausted. Either party may take such action as they deem necessary to enforce the findings and/or time limits and they shall not be considered in violation of any part of this Agreement.
not be enforced by threats, restraints or coercion prohibited by §8(b)(4). Several of its own prior decisions to that effect were cited. The Board found that Article IX of the agreement in question allowed any kind of self-help to enforce the subcontracting provisions of the contract. It rejected the union’s argument that self-help was expressly authorized only to enforce the provisions of the grievance-arbitration mechanism.

The effect of a self-help provision was also raised in one of the other companion cases to Woelke, Los Angeles Building and Construction Trades Council; Local No. 1497, United Brotherhood of Carpenters (Donald Schriver, Inc.), with a slightly different result. Member

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**ARTICLE X**

**Strikes and Lockouts**

Section 1. Unless otherwise provided herein, it is mutually agreed that there will be no strikes or lockouts, or cessation of work by either party, for the duration of this Agreement. All disputes arising under this Agreement shall be submitted to the procedures for the settlement of disputes as provided in this Agreement and/or any addendum relating thereto. **Id. at 275, 99 L.R.R.M. at 2333.**

272. The Board quoted then Senator Kennedy on the effect of §8(e):

> Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) . . .
>
> It is not intended to change the law with respect to the judicial enforcement of these contracts . . . reprinted in 105 Cong. Rec. 16415 (1959) also reprinted in 2 NLRB Leg. Hist. of the LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1433 (1959).

*Id.* at 277, 99 L.R.R.M. at 2333 quoting Senator Kennedy, S. Doc. No. 51, 86th Cong.


274. The Board reasoned that to hold otherwise would allow unions to “insulate self-help clauses” by tying them to the grievance machinery when, in reality, the self-help would really be aimed at the underlying problem, i.e., the enforcement of a secondary agreement. *Id. at 278, 99 L.R.R.M. at 2333.*

275. 239 NLRB 264, 99 L.R.R.M. 1593 (1978). The provision in question read:

306. Nothing contained in this Agreement, or any part thereof, shall affect or apply to the Union in any action it may take against any Contractor or subcontractor who has failed, neglected or refused to comply with or execute any settlement or decision reached at any step of the grievance procedure or through Arbitration under the terms of Article V hereof.

See also *Id.* at 270, 99 L.R.R.M. at 1599.
Murphy found the provision to be ambiguous and capable of being construed in a lawful way. Chairman Fanning dissented, reiterating his view that the mere existence of self-enforcement features did not make the proviso to §8(e) inapplicable. He also found that the provision in question merely exempted economic sanctions from the no-strike proviso of the contract.

The Board’s decisions on the enforcement issue were affirmed by both the Ninth Circuit in its en banc decision in Pacific Northwest, and the D.C. Circuit in its decision in Schriver. The Supreme Court, although not directly faced with the issue, did state that these “secondary clauses” may not be enforced “by picketing or other forms of concerted activity.” At this point, one must conclude that extra-judicial attempts to enforce subcontracting agreements will not be permitted even when provided for by appropriate language in the collective bargaining agreement itself.

CONCLUSION

The importance of Woelke & Romero is that it, in fact, construes Connell and lays to rest a critical question left open in Connell. The message of Woelke is that Connell was a unique situation which required a restrictive view of the construction industry proviso to §8(e), but the construction industry proviso is not to be narrowly construed when applied in a more traditional collective bargaining context.

In evaluating whether Woelke & Romero was correctly decided, a distinction must be made. A decision should be both true to law and to precedent, and be appropriate in a normative sense. Here the decision, by definition, meets the first requirement. The literal text of §8(e) supports the Court’s conclusion. So, too, does precedent; since the Supreme Court wrote Connell, its view of what Connell says must perforce be authoritative. This is particularly true since the make-up of the Court has not changed significantly since the Connell decision.

Art. V covers the procedure for settlement of grievances and disputes, and provides for submission to that procedure of any grievances or disputes arising out of the interpretation or application of any of the terms or conditions of the contract.

276. Id. at 270 n.6.
277. Id. at 270 n. 28, noting Member Fanning’s previous dissent in Muskegon Bricklayers Union #5, Bricklayers, Masons and Plasteiers Inequalion Union of America (AFL-CIO) (Greater Muskegon General Contractors Association), 152 NLRB 360, 59 L.R.R.M. 1081 (1965).
278. 654 F.2d 1287 (9th Cir. 1981).
279. 635 F.2d 859 (D.C. Cir. 1980).
281. The only changes are Justice Steven’s replacement of Justice Douglas and Justice O’Connor’s replacement of Justice Stewart.
As to the normative issue, the answer really depends on one's philosophy and view of labor relations in construction. If one believes that unions are the natural choice of employees (or, at least, that employees would prefer unilateral union action to unilateral employer action), that elections in construction are not really practical, and that unionization of construction is not destined to raise prices and eliminate competition based on efficiency, the decision in *Woelke* is correct.

If, on the other hand, one sees unions as a major reason for unnecessary escalation of construction costs, then the Court in *Woelke* has erred, since its decision will, to some extent, promote unionization in construction.

What is probable, however, is that the decision in *Woelke*, by itself, will have only a modest impact on the industry. Despite the list of dire consequences presented by one petitioner, all *Woelke* does is return the industry to pre-Connell status. If unions in 1974 could not use the proviso to §8(e) to dominate construction, there is no reason to believe that they will now be able to do so. The decision may be more significant now because there appears to be a trend towards more subcontracting of work, and, thus, unions need to be more concerned with negotiating subcontracting agreements.

The potential impact of the decision will also depend on how it is treated by the general counsel and the Board. In one set of cases, the general counsel's office has broadly construed §8(e)’s “employer in construction” language. The cases held that an owner who employed a construction supervisor and two assistants was “an employer in construction.” This decision will allow unions to directly approach and negotiate union only subcontracting agreements with owners, so long as they play an active role in the supervision of the project.

One can hope that this decision will have a stabilizing effect on labor relations in the construction industry. Recent Supreme Court decisions such as *Higdon* and *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers* have sharply curtailed the

284. IUOE, Local 3, Case No. 27-CE-27 and Utah Building & Construction Trades Council, Case No. 27-CE-28. Decision of Mary M. Shanklin, Acting Director, Office of Appeals, affirming Regional Director's refusal to issue a complaint.
285. This decision may also be justifiable as an illustration of what the Supreme Court in Connell meant when it said that §8(e) would apply “to common-situs relationships on particular jobsites as well.” 421 U.S. 616, 633.
287. 425 U.S. 800 (1976). The problem created by these two decisions on the stability of labor relations was the subject of hearings before the House Subcommittee on Labor-Management Relations on March 8, 1983.
stability of labor relations in the industry by providing construction companies with the ability to avoid collective bargaining agreements. The unions have attempted to fight back with antitrust suits and other weapons.\textsuperscript{288} If the Act’s goal of industrial peace through collective bargaining is to be effectuated in construction, more decisions like \textit{Woelke & Romero} are needed.

\textsuperscript{288} See, e.g., the recent decision of the Supreme Court in \textit{Associated General Contractors of California, Inc. v. California State Council of Carpenters, --- U.S. ---, 51 U.S.L.W. 4139} (1983), where the union sought to impose antitrust sanctions on an employer group for coercing some construction companies to operate nonunion. While the union lost on the issue of standing, the case illustrates how the battle has escalated.