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THE RETROACTIVE APPLICATION OF DEKLEWA: INEQUITABLE AND UNJUST RESULTS FOR CONSTRUCTION INDUSTRY EMPLOYERS

[W]e conclude that the statutory benefits from the announced changes in 8(f) law . . . far outweigh any hardships resulting from immediate imposition of those changes.¹

Application of the Board's new 8(f) principles here and to all pending cases will undoubtedly impose on some parties certain obligations and liabilities they would not have incurred under existing law. At most, however, any additional burden imposed must be borne only for the duration of the contract involved.²

National Labor Relations Board

Of relative justice law may know something; of expediency it knows much; with absolute justice it does not concern itself.³

Oliver Wendell Holmes

I. INTRODUCTION

In John Deklewa & Sons,⁴ the National Labor Relations Board (hereinafter "NLRB" or "Board") abruptly⁵ discontinued its adher-

2. Id.
5. See id. at 1389 n.61. In Deklewa, the NLRB recognized that "some may contend that the new law announced today represents a sharp departure from past precedent . . . ." Id. at 1389. Member Stevens was one of those individuals. He specifically believed that Deklewa represented an "'abrupt' departure from past precedent . . . ." Id. at 1389.

In addition to this author, many commentators have regarded Deklewa as a complete turn-around in the NLRB's treatment of construction industry prehire agreements. See, e.g., C. Murphy & P. Miscimarra, Pre-hire Agreements and the NLRB's Deklewa Decision: A Supplemental Evaluation of Collective Bargaining Alternatives to H.R. 281 1-2 (Mar. 5.
ence to its then-existing body of law interpreting and applying section 8(f) of the National Labor Relations Act (hereinafter "NLRA"). The Board found that minor adjustments to section 8(f) law regarding construction industry prehire agreements would not rectify the deficiencies in its prior interpretation of that Section. As a result, the Board abandoned and overruled its existing interpretation which was originally announced in R.J. Smith Construction Company and upheld in later cases, culminating in the Supreme Court's Higdon opinion.

The NLRB's sharp departure from prior section 8(f) law affected construction industry prehire agreements in two ways. First, the Board announced the end of the "conversion doctrine" by holding that a section 8(f) contract could no longer be converted to a full NLRA collective bargaining agreement absent an election and certification of majority status by the union. Second, the Board overruled the holdings in R.J. Smith and Higdon which had allowed a section 8(f) agreement to be unilaterally voidable by the respective employer or union during the term of the agreement. Accordingly,

1987) (unpublished memorandum prepared for the Associated General Contractors of America) (stating that "Deklewa can be fairly characterized as the single most important development in construction industry labor law since the 1959 amendments to the National Labor Relations Act."). See also Mourey, Prehire Agreements: Do the Deklewa Rules Effectuate Labor Policy?, 11 CONSTRUCTION LAW. 21, 21 (Jan. 1991) (describing Deklewa as a "dramatic reinterpretation of Section 8(f) of the National Labor Relations Act"); Comment, Recent Developments in Construction Industry Bargaining: Doublebreasting and Prehire Agreements, 53 Mo. L. Rev. 465, 486 (1988) (authored by Lynce C. Lamy) (characterizing Deklewa as "startling" and a "180 degree turn" in the NLRB's treatment of prehire agreements). Mourey notes that the NLRB's abrupt reinterpretation of prehire agreements has "left employers, unions, and employees in the construction industry scrambling to understand the ramifications of the decision and to modify their behavior accordingly." Mourey, supra, at 21 (citing "Deklewa Developments" issued by General Counsel to United Brotherhood of Carpenters and Joiners of America (Summer 1989)).

6. 282 N.L.R.B. at 1377, 1389.
7. Id. at 1380 n.16.
8. Id. at 1377-78.
10. NLRB v. Local Union 103, Int'l Ass'n of Bridge Structural and Ornamental Iron Workers, 434 U.S. 335 (1978) [hereinafter Higdon].
11. The "conversion doctrine," set up by the NLRB in R.J. Smith, allowed the conversion of a prehire agreement into a standard collective bargaining agreement, effectively operating to force a construction employer, unlike all other employers, to bargain with a union whose majority status has never been established. See International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770, 772 (3d Cir. 1988) [hereinafter Ornamental Iron Workers].
13. Id. at 1377-78.
the Board extinguished the unilateral repudiation rule which it had endorsed and applied for sixteen years.

After setting forth its new interpretation of section 8(f) law, the Board concluded that its new interpretation should be immediately applied retroactively "to all cases pending in whatever stage." Although the Board noted that some parties who undoubtedly had relied on its prior interpretation would be subjected to new obligations and liabilities that they would not have incurred under then-existing law, it nevertheless determined that retroactive application was justified.

Since Deklewa in 1987, six different United States Circuit Courts of Appeals have confronted the changes promulgated by the Board's new interpretation of section 8(f) law. Even though most of these courts approved and adopted the NLRB's new interpretation, these courts split on whether to apply Deklewa retroactively. Specifically, the six different circuit decisions have resulted in a draw: three circuits in favor of the retroactive application of Deklewa and three circuits against retroactivity.

The purpose of this Note is to demonstrate that the retroactive application of the Board's new interpretation announced in Deklewa effectively punishes construction industry employers for conduct that was lawful at the time it had occurred, works manifestly inequitable and unjust results, and should not be applied to all pre-Deklewa repudiation cases, especially those cases involving "strictly historical disputes." First, this Note will provide the background history of construction industry prehire agreements including their common industry origin, their statutory approval, and the NLRB's reversal of interpretation in Deklewa. Second, this Note will discuss retroactivity, in general, and the decisions of the various courts of appeals.
cases for and against the retroactive application of Deklewa.\textsuperscript{21} Third, this Note will align the various courts of appeals cases by discussing the similarities of analysis among the circuits.\textsuperscript{22} Finally, this Note will present the many arguments against the retroactive application of Deklewa and highlight the inequitable and unjust results that retroactivity places on construction industry employers.\textsuperscript{23}

II. THE NLRB's TREATMENT OF CONSTRUCTION INDUSTRY PREHIRE AGREEMENTS: SECTION 8(f) OF THE NLRA AND Deklewa

A. The Origin Of Construction Industry Prehire Agreements

The NLRA generally mandates that a union acquire the support of a majority of the employees it represents before it may act as the collective bargaining representative for that group of employees.\textsuperscript{24} Historically, however, the construction industry had estab-

\textsuperscript{21} See infra notes 127-377 and accompanying text (analyzing in detail the decisions of the various circuit courts of appeals cases for and against the retroactive application of Deklewa).

\textsuperscript{22} See infra notes 378-390 and accompanying text (aligning the decisions of the various circuit courts of appeals and discussing the similarities of analysis among the circuits regarding the retroactive application of Deklewa).

\textsuperscript{23} See infra notes 391-464 and accompanying text (presenting and analyzing in detail various arguments against the retroactive application of Deklewa and pointing out the inequitable and unjust results which are placed on construction industry employers by retroactivity).

\textsuperscript{24} Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1127 (9th Cir. 1988). Sections 8(a)(1), (2), and 8(b)(1)(A) of the NLRA collectively require that a union possess majority support before a collective bargaining agreement can be negotiated. See id.; 29 U.S.C. §§ 158(a)(1), (b)(1)(A) (1988); see also ILGWU v. NLRB, 366 U.S. 731, 737 (1961). Additionally, section 9(a) of the NLRA provides that:

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


Section 8(a)(5) of the NLRA imposes on an employer whose employees have designated or selected an exclusive representative the duty to "bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5) (1988). Employees may compel recognition of their chosen union representative as their exclusive bargaining agent by prevailing in an election and by certification of the union by the NLRB. NLRA §§ (9)(b) & (9)(c), 29 U.S.C. §§ 159(b), (c) (1988). Once established, the majority status of a union as the exclusive representative of the employees is irrebuttable presumed for a reasonable period of time. Ornamental Iron Workers, 843 F.2d at 772; see Brooks v. NLRB, 348 U.S. 96 (1954); Toltec Metals, Inc. v. NLRB, 490 F.2d 1122 (3d Cir. 1974). "Upon the expiration of a collective bargaining agreement, the employer may not withdraw recognition of the union unilaterally unless it has reasonable, good faith grounds for believing that the union has lost its majority status." Ornamental Iron Workers, 843 F.2d at 772 (citations omitted); see supra note 47 (citing additional
lished its own unique collective bargaining practices. One such practice involved the use of prehire agreements between unions and construction companies that allowed these companies to obtain a guaranteed work force prior to beginning a particular job. These prehire agreements allowed the negotiation of contracts between construction employers and unions before the workers to be covered by the contracts had been hired or actual work had begun.

The practice of using prehire agreements originated because of the nature of the construction industry. Work typically varies by the type of season, location and project involved. Unlike most workers, construction workers do not usually remain at a job site long enough to designate a union representative, and due to the mobility of the industry work force, elections and NLRB certifications often prove impracticable. As a result, there is usually no stable group of employees at a particular location—employed by the management in a continuing work relationship—that can follow the normal NLRB procedures for designating a union representative or participating in

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26. *Id.* A prehire or section 8(f) agreement is a contract agreed to by a union and an employer before the workers to be covered by the contract have been hired. *ROBERT'S DICTIONARY OF INDUSTRIAL RELATIONS* 562 (3d ed. 1986); *see also NLRA* § 8(f), 29 U.S.C. § 158(f) (1988).

Prehire agreements may exist in various forms according to the purpose they serve. Essentially, prehire agreements are labor contracts between an employer and a union that has not yet established its majority status. They may be for a specific term or term to term, a particular project, or area wide. An employer may enter into a prehire agreement as an individual employer, a member of a multi-employer association, or by short “assent” or “consent” form to the terms of an existing collective bargaining agreement.


27. *See S. REP. NO. 187, 86th Cong., 1st Sess. 27, reprinted in 1959 U.S. CODE CONG. & ADMIN. NEWS, 2318, 2442, and in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 424 (1959) [hereinafter LEGISLATIVE HISTORY]. In the building and construction industry, “it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year . . . .” *Id.* In many instances, these agreements run as much as 3 years. *Id.* “Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started or may not even be contemplated . . . .” *Id.*

28. *See Ornamental Iron Workers*, 843 F.2d at 772.
29. *Id.* at 772-73. Employment in the construction industry is temporary and transitory in nature. *Trustees for Michigan Laborers Health Care Fund*, 736 F. Supp. at 142. Employees work for short periods for many different employers. *See Higdon*, 434 U.S. at 349. As a result, representative elections to demonstrate majority status were impractical, if not impossible, in a large segment of the industry since normal Board election and certification procedures usually could not be completed prior to the end of many construction projects. *See id.* at 348-49; *Trustees for Michigan Laborers Health Care Fund*, 736 F. Supp. at 142.
a certification election.30

Consequently, problems resulted for both construction industry management and its employees.31 First, employers sought accurate estimates of their labor costs upon which their bids would be based.32 For these employers, having a guaranteed construction union contract prior to submitting a bid was virtually a *sine qua non* toward meeting this goal.33 Second, employers needed the availability of a supply of skilled craftsmen ready for a quick referral.34 A substantial majority of the skilled employees in the construction industry constituted a pool of such help centered about their appropriate craft union.35 Last, construction industry employees desired the benefits of union representation that were available to workers in other fields.36 Thus, in an attempt to satisfy many of these interests, the practice of prehire agreements developed in the construction industry.37

In 1948, the National Labor Relations Board first asserted jurisdiction over the construction industry38 and rejected the industry’s custom of using prehire agreements by applying principles that had been developed in markedly different contexts and industries.39 The Board determined that prehire agreements were illegal because they

30. *See Ornamental Iron Workers*, 843 F.2d at 772. It is apparent from NLRA § 9(a), 29 U.S.C. § 159(a) (1988), and the case law construing it that the NLRA assumes that a stable group of employees who are capable of designating a union representative or participating in a certification election are employed by management in a continuing work relationship. *Id. See generally* Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 48 n.15 (1987). However, this is not the typical situation present in the construction industry.

For the construction employee, “[t]he occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.” *Legislative History*, supra note 27, at 397, 423; *see Deklewa*, 282 N.L.R.B. at 1380 (noting that “sporadic employment relationships” are an important characteristic of the construction industry). It is typical for an employee to be referred from a union hiring hall to one employer for a number of days or weeks and, upon completion of the work, to return to the hiring hall for referral to another employer. *See Deklewa*, 282 N.L.R.B. at 1380.

31. *Ornamental Iron Workers*, 843 F.2d at 773.
32. *Id.; see Legislative History*, supra note 27, at 423-24.
33. *Ornamental Iron Workers*, 843 F.2d at 773.
35. *Id.*
39. *Ornamental Iron Workers*, 843 F.2d at 773; *Mesa Verde*, 861 F.2d at 1127.
designated an exclusive union representative of the employees before either a union election had been held or its majority status had been tested. However, the Board suggested that the construction industry petition Congress to create an exception to its general prohibition against prehire agreements.

### B. Section 8(f) Of The National Labor Relations Act

In 1959, following eight years of construction industry lobbying, Congress finally added section 8(f) to the NLRA, legalizing the use of construction industry prehire agreements. In the body of section

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40. Id.; see, e.g., Daniel Hamm Drayage Co., 84 N.L.R.B. 458, 460 (1950), enforced, 185 F.2d 1020 (5th Cir. 1951); Chicago Freight Car, 83 N.L.R.B. 1163 (1949). "The Board refused to make any exceptions to its general rule that minority contracts were illegal and unenforceable." Mesa Verde, 861 F.2d at 1127. "In a number of cases, the Board rejected the 'general custom and practice in the construction industry' and held that pre-hire agreements were illegal and unenforceable." Id.; see also Deklewa, 282 N.L.R.B. at 1380 (noting that the Board, in a series of cases, had found unlawful the bargaining, referral, hiring and employment practices common in the industry).

41. Ornamental Iron Workers, 843 F.2d at 773. See generally Daniel Hamm Drayage Co., 84 N.L.R.B. at 460-61 (stating that the "custom and practice" argument was better directed to Congress than to the Board).

42. LEGISLATIVE HISTORY. supra note 27, at 397, 423-24. Section 8(f) of the NLRA provides, in pertinent part:

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 (a) of this section [29 U.S.C. § 158(a)] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title [29 U.S.C. § 159] 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 gives such labor organization an opportunity 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 (a)(3) of this section [29 U.S.C. § 158(a)(3)]: 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 159(c) or 159(e) [29 U.S.C. §§ 159(c), (e)] of this title.


The history of the passage of the subsection (f) amendment to section 8 of the NLRA was extremely protracted. See Mesa Verde, 861 F.2d at 1127 n.1. "In 1951, a bill was first introduced by Senators Taft and Humphrey to allow prehire agreements, but it failed to obtain
8(f), Congress explicitly authorized the "negotiation, adoption and implementation of collective-bargaining agreements in the construction industry without initial reference to the union's actual majority status and expressly provided that such agreements could contain 7-day union security clauses, exclusive hiring hall referral procedures, and training and seniority requirements as hiring priorities." At the same time that Congress adopted section 8(f), it also enacted section 8(b)(7)(C) which, inter alia, prevents a union from picketing approval in the 82nd Congress." Id. Synonymous bills, supported by the Eisenhower administration, were introduced in each subsequent Congress. Id. Finally, in 1958, Senators John Kennedy and Samuel Ervin proposed an amendment substantially equivalent to the original Taft-Humphrey bill and it was ultimately signed into law. Id.; see also NLRB Guidelines on Construction Pre-Hire Agreements, reprinted in 1979 LABOR REL. Y.B. 349, 350 n.1 (BNA) (describing in detail the congressional history of the passage of section 8(f)). Section 8(f) was enacted by Congress as part of the 1959 Landrum-Griffin Amendments to the NLRA. Landrum-Griffin Act of 1959, Pub. L. No. 86-257, § 705(a), 73 Stat. 542.

Congress knew that these construction industry prehire agreements were not entirely consistent with "rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired." LEGISLATIVE HISTORY, supra note 27, at 424; see also H.R. REP. No. 741, 86th Cong., 1st Sess., 19, reprinted in 1959 U.S. CODE CONG. & ADMIN. NEWS, 2318, 2424, and in LEGISLATIVE HISTORY, supra note 27, at 759, 777-78 (following Senate Report in discussing special problems of construction industry). Nonetheless, Congress specifically intended to ratify the use of such prehire agreements in the construction industry. See Mesa Verde, 861 F.2d at 1131.


"The union hiring hall, a clearinghouse for both union and non-union employees seeking work and employers seeking workers, is the means of job distribution in short-term employment industries, including maritime, construction, and longshoring." T. BOYCE & R. TURNER, FAIR REPRESENTATION, THE NLRB, AND THE COURTS, 76-77 (1984); see R. GORMAN, LABOR LAW 664 (1976). "Generally, employers request qualified workers for various jobs and the union provides them." BOYCE, supra, at 77. When the hiring hall is designated as the exclusive source for employment referrals, the employer is obligated not to hire through any other source. Id. However, if the employer enters into a nonexclusive arrangement, he is free to reject persons referred by the union and may hire from any other source. Id.; GORMAN, supra, at 664. The collective bargaining agreement typically defines the type of hall and the hiring procedures to be followed by the employer. BOYCE, supra, at 77.

Hiring hall clauses require the employer to notify the union of openings and give preference to their referrals, although the NLRA forbids the union from discriminating in favor of union membership in making referrals. International Union of Elevator Constructors Local 6 (Westinghouse), 204 N.L.R.B. 578, 584-85 (1978), enforced, 493 F.2d 1401 (3d Cir. 1974). These agreements may provide for preference in referral based on factors listed in section 8(f)(4) of the NLRA. 29 U.S.C. § 158(f) (1988). However, the NLRA does not provide an exhaustive list of referral and hiring preference criteria which are permissible for construction industry employers and unions under sections 8(a)(3) and 8(b)(3). See id. A union is permitted to ease local unemployment by giving referral preference to applicants who have been out of work the longest, New York Lithographers & Photoengravers, Local 1-P, 258 N.L.R.B. 1043, 1044-45 (1981), review denied, 742 F.2d 1439 (2d Cir. 1983), cert. denied, Bartels v. NLRB, 467 U.S. 1245 (1984), or on the basis of various measures of seniority, see, e.g., International Marine Terminals, 137 N.L.R.B. 588 (1962).
in order to coerce an employer to sign a prehire agreement. By adopting these sections, Congress expressly approved the established industry practices that the NLRB had previously found unlawful. Hence, construction industry prehire agreements could designate the union as the exclusive representative of a company’s employees without a formal Board election, and the employees could, at any time, vote to decertify the union as their representative by using the formal NLRB procedures. However, the enactment of sections 8(f) and 8(b)(7)(C) failed to resolve two essential issues: (1) whether during its term, a section 8(f) agreement is as binding and enforceable as any other union agreement; and (2) if not, what type of actions would “convert” a prehire agreement into a definitive collective bargaining agreement.

Following Congress’ enactment of section 8(f), the NLRB held that an employer could not unilaterally repudiate a prehire agreement with the respective union. However, in 1971, the Board

44. Ornamental Iron Workers, 843 F.2d at 773.
45. Deklewa, 282 N.L.R.B. at 1381.
46. See Ornamental Iron Workers, 843 F.2d at 773, 775. However, by its express terms, section 8(f) does not protect prehire or exclusive referral agreements in cases where the union has been illegally “established, maintained, or assisted” by the employer in violation of section 8(a)(2) of the NLRA. 29 U.S.C. § 158(f) (1988). Section 8(a)(2) of the NLRA, in pertinent part, makes it an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .” 29 U.S.C. § 158(a)(2) (1988).
47. See Ornamental Iron Workers, 843 F.2d at 773. Another issue that Congress failed to resolve was whether these agreements required “an employer to bargain with the union as the employees’ exclusive representative after the prehire agreement has expired.” Id. at 773-74. In the customary employer-union relationship, the employer is bound to bargain with the exclusive representative even after the contract has expired. Id. at 774. Under these circumstances, recognition of the respective union may only be withdrawn if the employer has a reasonable, good faith belief that the union does not represent a majority of the employees. NLRB v. Gissel Packing Co., 395 U.S. 575, 597 n.11 (1969) (noting that “[t]he right of an employer lawfully to refuse to bargain if he had a good faith doubt as to the Union’s majority status, even if the in fact the Union did represent a majority, was recognized early in the administration of the Act”); id.; NLRB v. Leatherwood Drilling Co., 513 F.2d 270, 272 (5th Cir.) (stating that the employer “can lawfully refuse to bargain with the Union if and only at the time of [the employer’s] refusal [the employer] had reasonable and good faith grounds for doubting the Union’s continued majority status.”), cert. denied, 423 U.S. 1016 (1975); NLRB v. Frick and Co., 423 F.2d 1327, 1331 (3d Cir. 1970). Upon expiration of a collective bargaining agreement, both parties are not released “from the strictures of the agreement until an ‘impasse’ in negotiations is reached.” Ornamental Iron Workers, 843 F.2d at 774; see generally NLRB v. Katz, 369 U.S. 736 (1962); Taft Broadcasting Co. v. AFTRA, 163 N.L.R.B. 475 (1967). “The employer is then free to impose terms on the employees, and the employees in turn, may then picket, strike or exert other forms of pressure.” Ornamental Iron Workers, 843 F.2d at 774.
48. See Bricklayers & Masons Int'l Union, Local 3, 162 N.L.R.B. 476, 477-79 (1966), enforced, 405 F.2d 469 (9th Cir. 1968) (holding specifically that the majority status of a union
changed its position by allowing unilateral repudiation of section 8(f) agreements in *R.J. Smith Construction Company*.\(^4\) In *R.J. Smith* and its companion case, *Ruttmann Construction Company*,\(^6\) the Board interpreted section 8(f) to mean that a prehire agreement is merely a "preliminary step that contemplates further action for the development of a full bargaining relationship."\(^8\) Thus, the Board held that until "further action" occurred, either party was free to repudiate the agreement.\(^6\)

The United States Court of Appeals for the District of Columbia subsequently denied enforcement of the *R.J. Smith* decision.\(^6\) Despite the D.C. Circuit's rejection of the *R.J. Smith* rule, the Board nevertheless repeatedly applied its holding when it faced the same issue in *Iron Workers Local No. 103*.\(^4\)\(^9\) Hence, it was not surprising that three years after the D.C. Circuit's holding, the same issue arose again in *Local Union No. 103, International Association of Bridge, Structural & Ornamental Iron Workers v. NLRB* when the union petitioned for review of the Board's order.\(^5\) As was expected, the D.C. Circuit followed its own precedent and again rejected the *R.J. Smith* rule.\(^6\) However, the United States Supreme Court reversed the D.C. Circuit's ruling in *NLRB v. Local Union* .

with a prehire agreement, similar to a union's status in a traditional collective bargaining contract, could not be challenged in an unfair labor practice proceeding; *Oilfield Maintenance Co.*, 142 N.L.R.B. 1384, 1387 & n.10 (1963).

49. 191 N.L.R.B. 693 (1971), enforcement denied sub nom. Local 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186 (D.C. Cir. 1973). In the companion case to *R.J. Smith*, Ruttmann Construction Company, 191 N.L.R.B. 701 (1971), the NLRB stated that: [In enacting Section 8(f) to assist in resolving such problems, Congress merely permitted parties to enter into such prehire agreements without violating the Act. It does not mean that a failure to abide by such an agreement is automatically a refusal to bargain. In essence, therefore, this prehire agreement is merely a preliminary step that contemplates further action for development of a full bargaining relationship . . . .]

191 N.L.R.B. at 702. In *Ruttmann*, the NLRB dismissed *Oilfield Maintenance*, 142 N.L.R.B. 1384, as being "primarily concerned [with] the right of a successor-employer to disavow contracts made by a predecessor" employer. Id. at 701 n.5.


52. Id.


56. *Id.* In support of its holding against the NLRB's *R.J. Smith* rule, the D.C. Circuit Court of Appeals pronounced that "[n]o substantial advantage will be achieved by further analysis of the details of the Board's effort here to justify its rejection of the holding of this court in [R.J. Smith], or the post-hoc efforts of the Board's appellate counsel to distinguish the instant case." 535 F.2d at 90.
In 1978, in *Higdon*, the Supreme Court reviewed and upheld in a 6-3 decision the Board's *R.J. Smith* rule, concluding that "the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections." In 1983, the *Higdon* Court's announcement that section 8(f) agreements are voidable at will until the union achieves majority status was clearly reaffirmed by the Court in *Jim McNeff, Inc. v. Todd*.  

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In *Higdon*, the Iron Workers' union originally filed suit against the Higdon Contracting Company. Iron Workers Local 103, 216 N.L.R.B. 45 (1975). The NLRB had held that it was an unfair labor practice, within the meaning of section 8(b)(7)(e) of the NLRA, for an uncertified union, which did not represent the majority of the employees, to engage in prolonged picketing in order to force an employer to adhere to the terms of a prehire agreement. See id. at 47. The Board, relying on its *R.J. Smith* holding, had ordered the union to cease picketing since the picketing was intended to coerce the respective employer to bargain with a union that was not certified as the bargaining representative of the employees. Id. On review, the Supreme Court upheld the NLRB's decision that an employer need not bargain with a union with which it has a section 8(f) contract unless the union can show its majority status in the appropriate unit. See *Higdon*, 434 U.S. at 340-41.

58. 434 U.S. at 341.

59. 461 U.S. 260, 265-66 (1983). While, in *Higdon*, 434 U.S. 335, the Court addressed an employer's obligation to bargain with a union with which it had a prehire agreement, in *Jim McNeff*, the Court addressed the enforceability of contractual obligations pursuant to a prehire agreement. See 461 U.S. at 261. In *Jim McNeff*, a union sued under section 301 of the Labor Management Relations Act to compel an accounting and payment of any contributions found to be due to fringe benefit trust funds which the respective employer was obligated to maintain in accordance with a prehire contract. Id. at 263-64. The Court affirmed the lower courts' decisions and ordered payment of the unpaid trust fund contributions. Id. at 265. Accordingly, the Court distinguished the present case from the prior situation in *Higdon*, pointing out that Congress' concerns in enacting section 8(f), namely that the employees have a right to select their own representative, and that prehire agreements be voluntary, were not present in *Jim McNeff*. Id. at 269. However, the Court plainly upheld its prior holding in *Higdon*, reiterating that prehire agreements are voidable until the union establishes majority status. Id. at 270-71.

C. Deklewa: The New Rules Governing Section 8(f) Agreements And Their Retroactive Application

Subsequent case law produced a complex, fact-specific analysis for determining what kinds of actions would “convert” a section 8(f) agreement into a full collective bargaining contract. As a result, a series of rules had developed “establishing what was, in effect, a protocol for the resolution of majority status disputes arising under prehire agreements.” At its inception, a section 8(f) prehire agreement was essentially a preliminary step toward the possible future development of a full-fledged collective bargaining relationship between an employer and a union. At this stage, a prehire agreement conferred no presumption of majority status for the union, and both parties were allowed to unilaterally repudiate the agreement at any time and for any reason. If the employer repudiated the agreement, “the union could then litigate its status in [a section] 8(a)(5) proceeding by filing an unfair labor practice charge with the NLRB.”

If the NLRB determined that the union had achieved majority status at any time during the term of the section 8(f) agreement, the agreement would be considered to have been converted into a binding section 9(a) collective bargaining agreement under the NLRA and fully enforceable under the Labor Management Relations Act (hereinafter “LMRA”). Further, if the Board found that the union had attained majority status and that the repudiation had therefore constituted an unfair labor practice, it could have included in the relief which it granted an award of all payments which the employer had failed to make under the 8(f) agreement.”

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60. Ornamental Iron Workers, 843 F.2d at 775.


62. Id.; see Rutmann, 191 N.L.R.B. at 702.


64. Id. Additionally, the question of the union’s status could be resolved by a NLRB election conducted pursuant to a petition filed under NLRA §§ 9(c) or 9(e), 29 U.S.C. §§ 159(c), (e) (1988). Id. at 734 n.3.

65. Id. at 734; see Construction Erectors, Inc. v. NLRB, 661 F.2d 801, 804 (9th Cir. 1982) (stating that if the union “later achieves a majority in a stable unit, the Board deems the contract to be initially a 8(f) agreement that is later converted to a 9(a) agreement.”).

The complexities of the conversion analysis produced an abundance of what the NLRB termed "fractious litigation." In 1987, to forestall such litigation, the Board decided to reconsider the R.J. Smith rule in John Deklewa & Sons. After an exhaustive review of both the legislative history of section 8(f) and the impact of the R.J. Smith decision, the NLRB found serious shortcomings in the law of construction industry prehire contracts and again altered its position by overruling R.J. Smith. First, the Board pronounced the end of the "conversion doctrine" by holding that a section 8(f) contract could no longer be converted to a full NLRA collective bargaining agreement absent both an election and certification of majority status. Second, the Board overruled the holdings in R.J. Smith and later cases, culminating in Higdon, which had authorized a section 8(f) agreement to be unilaterally voidable by the employer during the term of the agreement.

As a result of Deklewa, construction industry employers are no longer free to unilaterally repudiate their contracts with the unions. Deklewa explicitly required that when parties enter into an 8(f) agreement, they will be required ... to comply with that agreement unless the employees vote, in a Board-conducted election, to reject (decertify) or change their bargaining representative. Recognizing that it was directly contradicting its previous position regarding construction industry prehire agreements, the NLRB proffered the following justification for not adhering to its own precedent:

We have not merely parsed the case precedent and legislative history in order to arrive at yet another "tenable" construction of the statutory language. Rather, consistent with our mission as the administrative agency responsible for enforcing the NLRA, we have applied our cumulative individual and institutional experience and expertise toward achieving, consistent with our reading of the statutory language and our interpretation of the legislative intent, what we perceive to be a better application of the statute. Given the present state of the law in this area, we see no alternative but to exercise our prerogative to do so.

68. Id. in Deklewa, the employer unilaterally repudiated its section 8(f) agreement with the union, 282 N.L.R.B. at 1376. The union then filed an unfair labor practice charge with the NLRB, claiming that the employer could not lawfully repudiate its agreement. Id.
69. Deklewa, 282 N.L.R.B. at 1379, 1385. The NLRB specifically adjudged that "[w]hen parties enter into an 8(f) agreement, they will be required ... to comply with that agreement unless the employees vote, in a Board-conducted election, to reject (decertify) or change their bargaining representative." Id. at 1385.

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Id. at 1389 n.40.
70. Id. at 1377; see supra note 11 and accompanying text (discussing the "conversion doctrine").
71. Deklewa, 282 N.L.R.B. at 1377; see R. Pleasure, Construction Industry Labor Law: Contract Enforcement After Deklewa and Consumer Boycotts After DeBartolo and Boxhorn, 10 INDUS. REL. L.J. 40, 42 (1988). The Board held, in relevant part that: (1) section 8(f) agreements are not voidable at will by an employer, or a union; (2) prehire agreements, once voluntarily consummated, are binding until either the agreement expires, or until a representation election is held establishing that the union signatory to the prehire agreement is not a majority representative; and (3) an employer that unilaterally repudiates a prehire agreement when neither of the two alternative conditions precedent in (2) above is present, commits a section 8(a)(5) unfair labor practice. See Deklewa, 282 N.L.R.B. at 1377-78.
longer privileged to repudiate a collective bargaining agreement, entered into pursuant to section 8(f), during the term of that agreement.\textsuperscript{72} “If a union’s majority status is challenged, the only way it can be tested is by a Board-conducted election prompted by a petition filed under section 9(c) of the [NLRA].”\textsuperscript{73} “In the interim, the construction industry employer is required to comply with the terms of the [section] 8(f) agreement, including the making of all payments due thereunder.”\textsuperscript{74}

In essence, the \textit{Deklewa} decision was an attempt by the Board to accommodate the positions taken by both the construction industry employer and the union with respect to the enforceability of prehire agreements.\textsuperscript{75} In response to concerns of construction industry employees that \textit{R.J. Smith} permitted management to void prehire agreements, the Board announced that section 8(f) contracts were no longer unilaterally voidable and were enforceable until expiration.\textsuperscript{76} The Board also responded to construction industry employers’ complaints by abandoning the “conversion doctrine,” and held that section 8(f) prehire agreements were only enforceable during the term of the agreement and, absent an election and certification, could not be converted into traditional collective bargaining agreements with lingering rights and obligations.\textsuperscript{77}

After setting forth its new interpretation of section 8(f), the Board finally confronted the issue of whether its new rules should be applied retroactively.\textsuperscript{78} The Board noted that its usual practice was to apply new policies and standards to all cases no matter what stage in the litigation they had reached.\textsuperscript{79} Although the Board recognized that its new interpretation represented a “sharp departure” from the \textit{R.J. Smith} rule by imposing new liabilities and obligations upon some parties that would not have been incurred under existing law, it nevertheless determined that a retroactive application of the rule was

\begin{itemize}
  \item \textsuperscript{72} \textit{National Automatic Sprinkler}, 680 F. Supp. at 734.
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} Id.
  \item \textsuperscript{75} \textit{See Ornamental Iron Workers}, 843 F.2d at 775.
  \item \textsuperscript{76} Id.; see \textit{Deklewa}, 282 N.L.R.B. at 1377.
  \item \textsuperscript{77} Id.
  \item \textsuperscript{78} \textit{See Deklewa}, 282 N.L.R.B. at 1389 (confronting the “final issue” of retroactivity).
  \item \textsuperscript{79} Id.; see \textit{Deluxe Metal Furniture Co.}, 121 N.L.R.B. 995, 1006-07 (1958) (stating that “[t]he judicial practice of applying each pronouncement of a rule of law to the case in which the issue arises and to all pending cases in whatever stage is traditional and, [the NLRB] believe[s], the wiser course to follow.”); \textit{see also NLRB v. Bell Aerospace Co.}, 416 U.S. 267, 293-94 (1974) (discussing the plurality opinion in \textit{NLRB v. Wyman-Gordon Co.}, 394 U.S. 759 (1969), in which the Court upheld the Board’s right to announce and apply new principles adjudicatively).
\end{itemize}
In making this determination, the Board had to balance various competing factors. On the one hand, the Board had to consider the potential unfairness to employers of imposing upon them additional obligations and liabilities to which they were not subject when they entered into section 8(f) agreements under pre-Deklewa law. On the other hand, the Board had to take into account the public interest in immediately implementing more effectively the policies of promoting employee free choice and labor relations stability underlying the NLRA. Likewise, the Board expressed concern about being "required for an indefinite period of time to perpetuate the administrative and litigational difficulties entailed in application of arcane current law to all pending 8(f) cases."

To ultimately justify the retroactive application of its new Deklewa rules, the Board contended that "any additional burden imposed must be borne only for the duration of the contract involved," and that "the statutory benefits from the announced changes in 8(f) law for employees, employers and unions in the construction industry far outweigh any hardships resulting from immediate imposition of those changes." Hence, regardless of the new liabilities and obligations imposed upon construction industry employers who have previously entered into a section 8(f) prehire agreement, the Board's deci-

80. Deklewa, 282 N.L.R.B. at 1389. While noting that "some employers have probably relied on R.J. Smith as a means of repudiating a prehire agreement," the NLRB stated that: "That reliance interest is not a particularly strong one in light of the purposes which Congress sought to achieve under Sec. 8(f). The interest that is entitled to protection is the ability of an employer to avail itself of the Board processes to determine whether there is continued majority support to undergird the union and the agreement. The new rule, which affirms the Board's election procedures for resolving that issue, does not seriously detract from what an employer should appropriately expect in the way of protection under the old rule."

Id. at 1389 n.61. Member Stevens believed that the rule announced in Deklewa represented an "'abrupt' departure from past precedent, especially in light of the Supreme Court's tacit approval of R.J. Smith in Higdon." Id. However, Stevens agreed that retroactive application was permissible. Id.

81. Id. at 1389.

82. Id. The NLRB concluded that its new interpretations expressed in Deklewa better complimented the congressional purposes behind the NLRA, and specifically, section 8(f), which were: (1) to advance employee free choice in choosing a bargaining representative; and (2) to provide greater labor relations stability in the construction industry. See id. at 1383-84 (discussing employee free choice and labor relations stability).

83. Id. at 1389.

84. Id. The Board stated that it was "doing nothing more than holding parties to the terms and conditions of 8(f) contracts which were voluntarily entered into." Id. For a discussion of "voluntariness" regarding the retroactive application of the Board's Deklewa holding, see infra notes 399-402 and accompanying text.
sion is retroactive in the sense that any case pending at any stage of the proceeding is bound by Deklewa, and an employer's repudiation in reliance on R.J. Smith is improper reliance.

III. THE SPLIT AMONG THE CIRCUITS IN THE RETROACTIVE APPLICATION OF DEKLEWA

Since the NLRB's ruling in 1987, six different United States Courts of Appeals have confronted the changes in Deklewa. Most of these courts of appeals approved and adopted the NLRB's new ruling. However, these courts definitively split on whether to apply Deklewa retroactively. Specifically, the six different circuit decisions have resulted in a draw: three circuits in favor of the retroactive application of Deklewa and three circuits against retroactivity. The following section will discuss retroactivity, in general, the decisions of the various courts of appeals cases for and against the retroactive application of Deklewa, and the similarities of analysis among the circuits.


86. See C.E.K. Indus., 921 F.2d at 357 (delineating which of the circuit courts have or have not adopted the NLRB's Deklewa holding).

87. See id. at 358 (refusing to apply Deklewa retroactively); Mar-Len, 906 F.2d at 203-04 (refusing to apply Deklewa retroactively); Buco Corp., 899 F.2d at 612 (applying Deklewa retroactively); Mesa Verde, 895 F.2d at 518-19 (refusing to apply Deklewa retroactively); W.L. Miller Co., 871 F.2d at 749-50 (applying Deklewa retroactively, except for an interest award); Ornamental Iron Workers, 843 F.2d at 781-82 (applying Deklewa retroactively).

The United States District Courts which have dealt with Deklewa, but whose decisions were not brought to the circuit court level, have also split on the issue of retroactive application. See, e.g., R.W. Granger & Sons, F. Supp. at 29 (applying Deklewa retroactively); National Automatic Sprinkler, 680 F. Supp. at 734-35 (refusing to apply Deklewa retroactively); Construction Indus. Welfare Fund, 672 F. Supp. at 293-94 (refusing to apply Deklewa retroactively).

88. See supra note 87 (listing the six different courts of appeals and their respective holdings); see also infra notes 127-377 and accompanying text (detailing the specific findings of the six different courts of appeals).

89. See infra notes 378-390 and accompanying text (aligning the decisions of the various
A. Retroactivity, In General

1. The NLRB's Retroactive Application Of New Policies And Standards, In General

In determining whether certain NLRB principles should be applied retroactively, it is the Board's usual practice to apply new policies and standards "to all pending cases in whatever stage." The Board does so under a model formulated by the Supreme Court in *SEC v. Chenery Corp.*, which requires a reviewing court to balance:

[S]uch retroactivity . . . against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

Such a balancing test was applied in *Deklewa* and led the Board to conclude that its usual practice of retroactive application for its new rules was appropriate.

*Chenery* involved "the question of whether the Securities and Exchange Commission (hereinafter "SEC") could create legislative rules by adjudication without utilizing its notice and comment procedures, and whether it could then apply those new rules retroactively." In *Chenery*, the management of Chenery Corporation, a circuit courts of appeals and discussing the similarities of analysis among the circuits regarding the retroactive application of *Deklewa*.

90. *Deluxe Metal Furniture Co.*, 121 N.L.R.B. at 1006-07. In *Deluxe Metal Furniture Co.*, the Board established its general "application of new policies and standards" by pronouncing that "[t]he judicial practice of applying each pronouncement of a rule of law to the case in which the issue arises and to all pending cases in whatever stage is traditional and, we believe, the wiser course to follow." *Id.*

91. 332 U.S. 194 (1947).

92. *Id.* at 203; *Bell Aerospace Co.*, 416 U.S. at 294; *NLRB v. Niagara Machine*, 746 F.2d 143, 151 (2d Cir. 1984); *Local 900, Int'l Union of Elec. Workers v. NLRB*, 727 F.2d 1184, 1194 (D.C. Cir. 1984); *Synalloy Corp.*, 239 N.L.R.B. 637, 638 (1978) (former Member Penello, dissenting).

93. See *Deklewa*, 282 N.L.R.B. at 1389.


The Court confronted the identical problem again in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). Like *Chenery*, *Bell* involved the question of whether precedent and interpretation of a statute could be applied retroactively. Unlike *Chenery*, *Bell* involved a case of second impression. Prior administrative decisions suggested that *Bell*'s interpretation was correct. But the National Labor Relations Board (NLRB)
public utility holding company, attempted to reorganize and to issue preferred stock to the company's officers and directors. The SEC was required to decide whether to approve or reject the company's reorganization plan. The governing act, the Public Utility Holding Company Act of 1935, required only that a public utility reorganization be "fair and equitable to the persons affected thereby," that securities not be issued on terms "detrimental to the public interest or the interests of investors," and that the reorganization not result in the "unfair or inequitable distribution of voting power." However, the statute gave little specific guidance. Consequently, the SEC was forced to apply these general provisions to a previously unaddressed situation: a reorganization plan issuing preferred stock to the company's officers and directors. As a result, the SEC rejected the company's reorganization plan and in the process fashioned a general prohibition against such distributions.

The Supreme Court, concluding that the SEC's judgment was justifiably reached in terms of fairness and equitableness, upheld both the SEC's decision to create the rule adjudicatively and to apply the new rule retroactively. "The Court suggested that although reversed its prior decisions, and sought to apply its new decision to Bell. The Supreme Court affirmed the NLRB's right to alter its prior precedent, as well as its right to apply the new precedent retroactively. The Court emphasized that the NLRB was not seeking to impose either a fine or damages on Bell. Moreover, the Court noted that the matter was not final because the case had to be remanded for a final determination about whether Bell had violated the new interpretation. At the same time, the Court held that, under the facts, "the Board 'is not now free' to read a new and more restrictive meaning into the Act."

Id. at 175 n.36 (citations omitted).

95. Chenery, 332 U.S. at 204.

96. See id. at 198 (noting that "neither Congress nor the [SEC] had promulgated any general rule proscribing such action as the purchase of preferred stock" by management). The Court also pointed out that the "only judge-made rule of equity" in this area related to fraud or mismanagement of the reorganization by the officers and directors; matters which were "admittedly absent" in the present case. Id.

97. Retroactive Regulatory Interpretations, supra note 94, at 175-76. The Court pointed out that the Commission had not previously been confronted with the problem of management trading securities during its company's reorganization. Chenery, 332 U.S. at 203.

98. Chenery, 332 U.S. at 204; see id. at 176. Chenery reached the Supreme Court twice. Originally, the SEC refused to approve the company's reorganization plan on the ground that the plan was inconsistent with common law principles of equity. SEC v. Chenery Corp., 318 U.S. 80 (1943). The Court disagreed with the Commission and overturned the SEC's actions. Id. The Court remanded the case to the Commission for such further proceedings as might be appropriate. On remand, the SEC reexamined the problem and reached the same result. However, this time, the SEC premised its disapproval of the company's plan on the governing statute, the Public Utility Holding Company Act of 1935, and the Court upheld the SEC's order. SEC v. Chenery Corp., 332 U.S. 194 (1947).

99. Chenery, 332 U.S. at 209; Retroactive Regulatory Interpretations, supra note 94, at
Retroactive Application of Deklewa

it is generally preferable for an agency to create rules in advance, using its notice and comment procedures, an agency could create adjudicative rules. However, the Court held that, to the extent that the latter rules had a retroactive effect, they had to be subjected to the balancing test. Employing this test, the Court concluded that the regulatory interest in applying the interpretation retroactively outweighed the ill effect and approved the retroactive application of the new rules.

Since 1947, the retroactivity test in Chenery has been applied exclusively to administrative agency adjudications—the same context in which Deklewa and all other NLRB decisions have arisen. In addition, "lower federal courts have extended Chenery to interpretations of regulations." "This extension was appropriate because many [administrative] interpretations are initially announced in the form of precedent."

2. Retroactivity Analysis in the Federal Courts: Chevron Oil Co. v. Huron

Even though it is the NLRB's usual practice to apply new policies and standards to all cases no matter what stage in the litigation they have reached, the federal courts are not specifically bound by the Board's views on retroactive application. Courts have the

176.

100. Retroactive Regulatory Interpretations, supra note 94, at 176; see Chenery, 332 U.S. at 201-05.

101. Chenery, 332 U.S. at 203.

102. Id.

103. See Ornamental Iron Workers, 843 F.2d at 780 n.12.

104. See, e.g., E.L. Weigand Div. v. NLRB, 650 F.2d 463, 471 (3d Cir. 1981) (noting that the Chenery retroactivity test must be applied to newly adopted administrative rules and interpretations, including those of the NLRB).


106. Retroactive Regulatory Interpretations, supra note 94, at 176.

107. See supra notes 90-106 and accompanying text.

108. Ornamental Iron Workers, 843 F.2d at 780 (citing NLRB v. Semco Printing Center, Inc., 721 F.2d 886, 892 (2d Cir. 1983)); see, e.g., NLRB v. Chicago Marine Containers, Inc., 745 F.2d 493, 499 (7th Cir. 1984) (pointing out that the court is "not bound by the Board's views on retroactive application"); cf. Bradley v. School Bd. of the City of Richmond,
power to independently interpret administrative rules and regulations.\textsuperscript{109} However, courts generally defer to an administrative agency’s application of a newly adopted rule unless “manifest injustice” would result.\textsuperscript{110}


It is well established that the federal courts have the power to decide against retroactivity. Mr. Justice Cardozo was among the first to establish this right. See Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932). In Great Northern, Cardozo established that a court may choose between two alternatives when new laws are created. A court may apply the new rule retroactively, that is “hold to the ancient dogma that the law declared . . . had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning.” \textit{Id.} at 365. Alternatively, a court may apply the new ruling prospectively, thus avoiding undue hardship to parties who have relied on the old law. In either case, it was Cardozo’s belief that the choice was the court’s, as “the federal constitution has no voice upon the subject.” \textit{Id.} at 364. See also Linkletter v. Walker, 381 U.S. 618, 629 (1965) (holding that “the Constitution neither prohibits nor requires retrospective effect.”).


110. \textit{Bradley v. School Bd. of the City of Richmond}, 416 U.S. 696, 711 (1974). In \textit{Bradley}, the Supreme Court held that an appellate court must apply the law in effect at the time it renders its decision, unless such application would work a “manifest injustice” or there is statutory direction or legislative history to the contrary; even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect. \textit{Id.}

The origin and the justification for this rule are found in the words of Mr. Chief Justice Marshall in \textit{United States v. Schooner Peggy}, 1 U.S. (1 Cranch) 103, 110 (1801):

\begin{quote}
It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.
\end{quote}

\textit{Id.}

Although courts have the authority to independently determine an administrative rule or regulation’s meaning, they frequently defer to agency interpretations. \textit{See Retroactive Regulatory Interpretations, supra} note 94, at 182 n.70 (quoting United States Senator Dale Bumpers’s statement that judicial deference to agency interpretations has been “elevated to a virtual presumption of correctness” in some courts); \textit{see, e.g.}, \textit{Ford Motor Credit Co. v. Milhollin}, 444
The Supreme Court has not thoroughly clarified whether judicial deference is required on retroactivity issues. The lower federal
courts have taken inconsistent positions. A number of these courts have held that deference is required, while others have held that it is not. As a result, in deciding whether a new NLRB ruling, such as Deklewa, is not to be applied to a certain case, the federal courts often look to the factors set out in Chevron v. Huron, as relevant to the question of nonretroactivity.

In Chevron, the claimant commenced an action for personal injuries sustained on a drilling rig off the Louisiana coast two years earlier. At the time of filing, the Fifth Circuit had applied admiralty law to such actions, limited only by the laches doctrine. During pre-trial discovery, the United States Supreme Court decided Rodrigue v. Aetna Casualty & Surety Company, which held that off-shore personal injury cases were governed by the state statute of

reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act.); see also Blackman-Uhler Chem. Div., Synalloy Corp. v. NLRB, 561 F.2d 1118, 1119 (4th Cir. 1977) (remanding the case to the agency for it to determine whether the precedent should be retroactively applied); Corr, Retroactivity: A Study in Supreme Court Doctrine "As Applied," 61 N.C.L. Rev. 745, 785 (1983).

112. See, e.g., Certainteed Corp. v. NLRB, 714 F.2d 1042, 1056 (11th Cir. 1983) (concluding that "[b]arring some extraordinary circumstance, this court will not disturb the purely administrative determination that giving retrospective or prospective effect to a policy change best effectuates the purposes of its governing act."); see also NLRB v. Chicago Marine Containers, Inc., 745 F.2d 493, 498 (7th Cir. 1984) (stating that "[i]n deciding whether to follow an intervening change of policy by an administrative agency, ... it is appropriate to allow the agency to decide in first instance whether giving change retroactive effect will best effectuate policies underlying the agency's governing act."); Retroactive Regulatory Interpretations, supra note 94, at 217.

113. See Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972) (stating that "[w]hich side of [the Chenery balancing test] preponderates is in each case a question of law, resolvable by reviewing courts with no overriding obligation of deference to the agency decision."); Lodge 743 & 1736, Int'l Ass'n of Machinists & Aerospace Workers v. United Aircraft Corp., 534 F.2d 422, 452 n.48 (2d Cir. 1975) (finding that "[w]hether to give retroactive effect to administrative rules promulgated in agency adjudication is a question of law, and reviewing courts are not obligated to grant any deference to the agency decision."); White v. Califano, 473 F. Supp. 503, 506 (S.D. W.Va. 1979) (holding that "[t]he decision whether to grant or deny retroactive force to newly adopted administrative rules is purely a question of law and as such a reviewing court is under no overriding obligation of deference to the agency decision."); see also Pennzoil Co. v. United States Dep't of Energy, 680 F.2d 156, 173 (Temp. Emer. Ct. App. 1982) (stating that "the rule of deference will not sustain the retroactive application of an interpretation of which an affected interest had no fair notice."); Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250, 1258-59 (3d Cir. 1978) (refusing to defer to the agency's decision to apply a new legislative rule retroactively); Retroactive Regulatory Interpretations, supra note 94, at 217.

115. Id. at 98.
116. Id. at 99.
limitations provided in the law of the contiguous state.\textsuperscript{118} Accordingly, the district court dismissed the case, citing the Louisiana time bar of one year.\textsuperscript{119} On appeal, the Fifth Circuit reversed, reaffirming the applicability of the laches doctrine.\textsuperscript{120} Finally, the Supreme Court affirmed the Fifth Circuit ruling as to the claimant at bar, and remanded the case to the trial court.\textsuperscript{121} Simultaneously, however, the Court revised the finding of the Fifth Circuit with regard to the applicable time bar,\textsuperscript{122} and reaffirmed its decision in \textit{Rodrigue} that the state statute of limitations was to be used.\textsuperscript{123} Nonetheless, the Court proclaimed that \textit{Rodrigue} was not to have retroactive application to the case at bar, thus allowing the claimant, whose case was pending at the time of the decision, to rely on the prior law.\textsuperscript{124} In forging this decision against retroactive application, the Court articulated three criteria applicable to retroactivity analysis. The court enunciated the factors to be used in determining whether a law-altering decision should be given prospective, rather than retroactive, effect as: (1) whether the decision to be applied retroactively establishes a new principle of law, either by overruling clear precedent on which litigants may have relied or by deciding an issue of first impression; (2) the effect of retroactivity on accomplishing the purpose of the law; and (3) the inequity imposed by retroactive application.\textsuperscript{125} Over the past twenty years, these three factors have

\textsuperscript{118} \textit{Id.} at 355. The Court held that the Lands Act required that a State's statute of limitations be applied to actions for personal injuries occurring on fixed structures on the Outer Continental Shelf. \textit{Chevron}, 404 U.S. at 99-100.

\textsuperscript{119} \textit{See Chevron}, 404 U.S. at 99. The District Court did not publish an opinion. \textit{Id.} at 99 n.2.

\textsuperscript{120} Huson v. Otis Eng'g. Corp., 430 F.2d 27, 32 (5th Cir. 1970).

\textsuperscript{121} \textit{Chevron}, 404 U.S. at 109.

\textsuperscript{122} \textit{Id.} at 101-05.

\textsuperscript{123} \textit{Id.} at 103.

\textsuperscript{124} \textit{Id.} at 107-08. The Court held that the Louisiana one-year statute of limitations at issue should not bar the claimant's action since retroactive application of that statute would deprive him of any remedy on the basis of an unforeseeable superseding legal doctrine in another case. \textit{Id.} The Court pointed out that the retroactive application of the new \textit{Rodrigue} rule would undermine its purpose, "which was to aid injured employees by providing comprehensive and familiar remedies." \textit{Id.} Furthermore, the Court noted that retroactivity in this case would "produce the most 'substantial and inequitable results' . . . to hold that the respondent 'slept on his rights' at the time when he could not have known the time limitation that the law imposed upon him." \textit{Id.} at 108 (citation omitted).

\textsuperscript{125} \textit{Id.} at 106-07. \textit{Chevron} specifically provides, in pertinent part, that:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that "we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."
remained necessary considerations for federal courts in their determination of nonretroactivity.126

B. Cases In Support of Retroactivity

Three of the six United States Courts of Appeals that have addressed the Deklewa retroactivity issue have applied the NLRB's new rules retroactively.127 These three circuit courts concluded that retroactivity would work no "manifest injustice" on the construction industry employers involved because, at the time that the respective employers had repudiated their prehire agreements, the unions had already achieved majority status.128 Therefore, even under pre-Deklewa law, the employers would have been precluded from lawfully repudiating the agreements.129 The following Third, Eighth and Seventh Circuit decisions supported the retroactive application of Deklewa.

1. The Enforcement of Deklewa: International Association of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB130

In June 1960, John Deklewa & Sons (hereinafter...

126. See, e.g., Mesa Verde, 885 F.2d at 596 (stating that retroactivity analysis is governed by Chevron); Chicago Marine Containers, 745 F.2d at 499 (looking to the Chevron factors to determine whether any manifest injustice would result from the retroactive application of an NLRB rule).


128. See id.; United Bhd. of Carpenters v. Mar-Len of Louisiana, 906 F.2d 200, 204 n.4 (5th Cir. 1990).

129. See Mar-Len, 906 F.2d at 204 n.4.

“Deklewa”), although not a member of the Ironworker Employers Association of Western Pennsylvania (hereinafter “Association”), entered into and consented to be bound by a prehire agreement between the Association and the Ironworkers Union (hereinafter “Union”). Deklewa adhered to all successive agreements between the Association and the Union for twenty years. In October 1980, Deklewa became a member of the Association.

Deklewa engaged in a number of projects which required ironworkers to be employed. When Deklewa performed the work itself, it hired ironworkers through the union hiring hall. When Deklewa required subcontractors, it subcontracted its work only to companies bound by the same union prehire agreement. In September 1983, during the term of a prehire agreement covering the years 1982 to 1985, Deklewa terminated its membership with the Association and notified the Union that it was repudiating the current agreement. Subsequently, Deklewa subcontracted further iron work to an employer who was not a party to the Association-Union agreement. As a result, the Union filed an unfair labor practice charge against Deklewa on October 14, 1983.

The NLRB, in a ruling which reversed its prior construction of the NLRA, held that Deklewa had violated section 8(a)(5) of the NLRA by unilaterally repudiating the 1982-85 agreement, but that Deklewa “was not obligated to bargain with the Union” after the expiration of the agreement in 1985. The Board also held that its

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131. Deklewa was engaged as an employer in the construction business. Ornamental Iron Workers, 843 F.2d at 771.
132. Id. The Ironworkers Union involved in this case was the Local 3 of the International Association of Bridge, Structural and Ornamental Iron Workers. Id.
133. Id. at 771. The twenty year period ran from June 24, 1960 to October 1, 1980. Id. at 771-72.
134. Id. at 772.
135. Id.
136. Id.
137. Id.
138. Id.
139. Id.
140. Id.
141. Id.; see Deklewa, 282 N.L.R.B. 1375 (1987).

The Third Circuit briefly summarized the background of the case, in pertinent part, as follows:

In the instant case, the employer, Deklewa, unilaterally repudiated its prehire agreement with the Union. The Union then filed an unfair labor practice charge with the Board, asserting that Deklewa was not free to repudiate its agreement. The Union's unfair labor practice charge against Deklewa became the vehicle for the Board's reconsideration of the R.J. Smith rule. The Board ultimately concluded that the R.J. Smith rule had proved inadequate, and that in practice the rule served to
decision would apply to all cases then pending, as well as all future cases.\textsuperscript{142}

The NLRB ordered Deklewa to make whole any employees that may have suffered losses as a result of Deklewa's repudiation and resulting failure to adhere to the prehire agreement until the agreement had expired in 1985.\textsuperscript{143} However, the Board declined to extend this remedy beyond the expiration of the agreement.\textsuperscript{144} Thus, Deklewa was not held liable for any financial losses which the Union may have sustained after the prehire agreement's expiration date.\textsuperscript{145} "Not surprisingly, both Deklewa and the Union challenged this decision and . . . petitioned for review."\textsuperscript{146}

In \textit{International Association of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB},\textsuperscript{147} the Third Circuit upheld the NLRB's holding in \textit{Deklewa}, including its revised interpretation of prehire provisions under the NLRA, not permitting employers to unilaterally repudiate prehire agreements with unions.\textsuperscript{148} Additionally, the court upheld the Board's decision to retroactively apply its revised interpretation, since doing so was not manifestly unjust.\textsuperscript{149} Accordingly, both Deklewa's and the Union's petitions for review were denied and the Board's cross-application for enforcement was granted.\textsuperscript{150}

In addressing the retroactive application of \textit{Deklewa}, the Third Circuit recognized that the Second Circuit previously had held that

\begin{itemize}
  \item defeat the very interests that the [NLRA] and 8(f) were designed to protect.
  \item The Board then fashioned a new interpretation of 8(f) which sought to accommodate both employers' and employees' interests . . . . The Board in its present order, abandoned the "conversion doctrine," and held that 8(f) prehire agreements were only enforceable during the term of the agreement and could not be converted into traditional collective bargaining agreements with lingering rights and obligations absent an election and certification.
\end{itemize}

\textit{Ornamental Iron Workers}, 843 F.2d at 775.

\begin{itemize}
  \item 142. \textit{Id.} at 772. The NLRB's decision was based on a detailed examination of both the legislative history of the NLRA and, in particular, section 8(f). \textit{Id.}
  \item 143. \textit{Id.} at 775.
  \item 144. \textit{Id.}
  \item 145. \textit{Id.}
  \item 146. \textit{Id.} In petitioning for review of the NLRB's order, Deklewa and the Union challenged different features of the Board's ruling. \textit{Id.} at 771. Deklewa disputed the Board's finding that prehire agreements were not unilaterally voidable. \textit{Id.} The Union argued that the Board erred in holding that an employer's duty to bargain with the respective union terminates upon the expiration date of the prehire agreement. \textit{Id.}
  \item 148. \textit{Id.} at 781-82.
  \item 149. \textit{Id.}
  \item 150. \textit{Id.}
\end{itemize}
while it was "of course not bound by the Board's views on retroactive application, [it] should defer to them absent some manifest injustice."151 The Third Circuit supported this standard and reiterated its view that in matters involving interpretation of the NLRA, the Board is entitled to deference.152 The court stated that "a decision to hold a new rule retroactive is not strictly a question of statutory interpretation."153 Nevertheless, the court was persuaded that when the "Board changes a [previously established] rule and makes it retroactive, particularly when the Board assigns as its reasons for doing so the furtherance of the fundamental statutory policies of employee free choice and labor relations stability, the Board should be entitled to exercise its broadest power."154 Hence, unless the Board's retroactive application would result in "manifest injustice," the court concluded that it would uphold the Board's order.155

In reviewing the Board's holding in Deklewa, the Third Circuit pointed out many of the Board's actions in arriving at its new section 8(f) principles. For instance, the Board recognized and identified each interest of the parties and related all of the interests involved to the purposes of the NLRA.156 The Board also considered the NLRA's policies of employee free choice and labor relations stability, and it examined the potential problems that would result if it applied the now disclaimed R.J. Smith rule to pending section 8(f) cases.157 Additionally, "[t]he Board, employing the retroactivity

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151. Id. at 780 (quoting NLRB v. Semco Printing Center, Inc., 721 F.2d 886, 892 (2d Cir. 1983)).
152. Id.; see, e.g., E.I. Dupont DeNemours & Co. (Chestnut Run) v. NLRB, 733 F.2d 296, 297 (3d Cir. 1984).

In Ornamental Iron Workers, the Third Circuit noted that the result it reached, would have been the same had it adopted the abuse of discretion standard, as proposed by Deklewa, the Union, and the amicus. 843 F.2d at 780 n.12. The court stated that "[i]n light of the Board's analysis and reasoning, [it would have been] hard-pressed to hold that the Board's retroactivity decision was not an appropriate exercise of its discretion." Id.

Additionally, the court pointed out that their result would have been no different if it engaged in an independent analysis under either Chenery, 332 U.S. 194 (1947) or Chevron, 404 U.S. 97 (1971). Id. The analysis of Chenery is substantively no different than the three factor analysis of Chevron. See id. "Chenery, however, has been applied exclusively to administrative agency adjudications, the same context in which this case has arisen." Id. Chevron on the other hand, "appears to have been applied exclusively to judicial adjudications." Id. at 780 n.12. As noted in the case, however, an independent analysis (based on the record) under either test would have reached the same result in the case. Id.

153. Ornamental Iron Workers, 843 F.2d at 780 (citing Mosey Manufacturing Co., Inc. v. NLRB, 701 F.2d 610, 612 (7th Cir. 1983)).
154. Id.
155. Id. at 781.
156. Id.
157. Id.
analysis of SEC v. Chenery, balanced the claimed ill effects of retroactivity against the 'mischief of producing a result which is contrary to a statutory design or to legal and equitable principles,' and concluded that:

[The statutory benefits from the announced changes in 8(f) law for employees, employers and unions in the construction industry far outweigh any hardships resulting from immediate imposition of those changes. Consequently, we will apply the Board's new 8(f) principles to this case and to all pending cases in whatever stage.]

As a result, the Third Circuit could not perceive any "manifest injustice," indicating that it should not defer to the Board's reasoning on the retroactivity issue. The court, agreeing with the Board, believed that a construction industry employer, such as Deklewa, who relied on the R.J. Smith rule did so at its own risk, since under the conversion doctrine, once the respective union achieved majority status, conversion would occur and the section 8(f) agreement would be automatically binding on the employer. Hence, the court found that the particular facts of Deklewa aptly demonstrated this possibility.

For instance, in 1980, Deklewa became a member of the Association, an organization composed of approximately thirty-five construction industry employers. In so doing, pursuant to the "merger doctrine," the relevant unit of employees for determining the majority status of the Union became all employees who were hired under the Association's agreement with the Union, rather than those employees specifically employed by Deklewa. And, since the stipulated record submitted by the parties indicated that the multi-employer unit of employees obtained majority status, it appeared entirely likely that, even under the old R.J. Smith rule, the Board

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158. Id. (quoting Chenery, 332 U.S. at 203) (citations omitted).
159. Id. (quoting Deklewa, 282 N.L.R.B. at 1389).
160. Id.
161. Id.
162. Id.
163. Id.
164. The NLRB first established the "merger doctrine" in Amado Electric, 238 N.L.R.B. 37 (1978); and Authorized Air Conditioning Company, 236 N.L.R.B. 131 (1978), enforced on other grounds, 606 F.2d 899 (9th Cir. 1979), cert. denied, 445 U.S. 950 (1980). The essence of the rule held that: "when a single employer joins a multiemployer association and adopts that association's collective-bargaining agreement, the single employer's unit 'merges' into the multiemployer unit and the requisite inquiry into majority support occurs in that multiemployer unit." Deklewa, 282 N.L.R.B. at 1379 & n.14; see Amado Electric, 238 N.L.R.B. at 37 n.1; Authorized Air Conditioning Company, 236 N.L.R.B. at 131 n.2.
165. Ornamental Iron Workers, 843 F.2d at 781.
would have held that Deklewa was not free to repudiate its agreement with the Union. The court pointed out that in applying the Board's new interpretation of section 8(f) to Deklewa's case, the Board had done nothing more than "hold Deklewa and the Union to the terms and conditions of the [section] 8(f) contract into which they voluntarily entered." Accordingly, finding no manifest injustice present, the Third Circuit upheld the retroactive application of the Board's new interpretations of section 8(f) prehire provisions announced in Deklewa and granted the NLRB's cross-application for enforcement.

2. *NLRB v. W.L. Miller Company*  

In 1972, W.L. Miller Company (hereinafter "Miller") began performing work in Missouri, but did not establish a continuing bargaining relationship with any union. Seven years later, Miller joined the Associated General Contractors of Missouri (hereinafter "Association"), but declined to adopt the prehire agreements previously negotiated by the Association. In February 1980, the Association informed its members that the terms of the previous prehire agreements were to expire the end of April and that a committee was being formed to negotiate new agreements. "The Association distributed designation of representative forms, which when signed by a member gave the committee the power to bind that member to the labor agreement." On February 8, Miller's president signed the form, but specifically instructed the company's office manager

166. *Id.* "Among the factors which appeared in the record were: (1) a union security clause in the agreement between the Association and the Union; (2) actual union membership of a majority of the employees; and (3) all job referrals came from the Union's hiring hall." *Id.* at 781 n.14 (citations omitted).

167. *Id.* at 781. The Board, with these considerations in mind, "held Deklewa and all pending cases, subject to the new [section] 8(f) principles now adopted." *Id.*

168. *Id.* at 781-82.

169. 871 F.2d 745 (8th Cir. 1989).

170. *Id.* at 746. Miller was a general construction contractor. *Id.* Its employees did not designate or select the Eastern Missouri Laborers Council [hereinafter the "Union"] or any other labor organization as their representative. *Id.*

171. *Id.* The Eastern Missouri Laborers Council was the Union signatory to the labor agreements in dispute. *Id.*

Prior to 1980, the Association's individual members were not legally bound by these agreements. *Id.* Instead, the members determined individually whether accepting the prehire agreements was in their own best interests. *Id.* Additionally, "no provision in the association bylaws bound a member to any labor agreement." *Id.* Miller originally notified the Association's manager "that it had previously operated on an open shop basis in Missouri, and desired to continue in this manner." *Id.*

172. *Id.*

173. *Id.* This type of form had not been used previously by the Association. *Id.*
not to mail the signed form without first verifying that the form
would not legally obligate Miller in any way. Miller's office man-
ger did not follow these instructions and mailed the form to the
Association. By May 6, a tentative labor agreement was reached
and the Association notified all of its members of a meeting where
the final binding vote would take place. A contract was approved
at that meeting, and a bulletin was forwarded to all of its members
informing them that a binding contract extending from May 1, 1980
through April 30, 1983 had been executed.

While the Eastern Missouri Laborers Council (hereinafter
"Union") immediately began trying to persuade Miller to abide by
the terms of the contract, on July 23, Miller informed the Union
that it believed the contract to be a section 8(f) agreement, that the
majority of Miller employees were not Union members, and that this
gave Miller a unilateral right to repudiate. Miller then terminated
the agreement, and the Union promptly responded by filing an unfair
labor practice complaint with the NLRB.

In an administrative hearing, the Administrative Law Judge
(hereinafter "ALJ") rejected Miller's claim that it was not a party
to the contract and found that "Miller and the seventy-nine other
signatories had unequivocally intended to be bound as a group, and
that therefore, a valid multi-employer bargaining unit had been es-
tablished." The ALJ further concluded that, even though Miller's
employees were not themselves Union members, the Union enjoyed
majority status in the multi-employer unit as a whole. Consequently, the ALJ found Miller to be in violation of sections 8(a)(1)
and 8(a)(5) of the NLRA, and ordered Miller to sign and imple-
ment the 1980-83 contract, apply its terms retroactively to May 1,
1980, and recognize and bargain with the Union as the sole legiti-
mate representative of his workers.

174. Id. at 747.
175. Id.
176. Id.
177. Id.
178. Id.
179. Id.
180. Id.
181. Id. As a consequence of the ALJ's finding, a full collective bargaining relationship
was established between the multi-employer unit and the Union. Id. Under section 9(a) of the
NLRA, this imposed a continuing legal obligation on the two parties to bargain with each
other. Id.; see 29 U.S.C. 159(a) (1988). "Miller's employees were in effect merged with the
employees of the other signatories, with the resultant conversion from a section 8(f) relation-
ship to a section 9(a) relationship." 871 F.2d at 747.
182. W.L. Miller, 871 F.2d at 747. The ALJ issued its order on August 19, 1981. Id.
As a result, Miller filed exceptions with the Board on September 8, 1981, and both parties submitted briefs to the Board. A decision was not issued until July 23, 1987, almost six years after the ALJ's original order. Earlier in 1987, in *Deklewa*, the NLRB abandoned the conversion doctrine that the ALJ had relied on in making his findings. Instead, the Board had held that a section 8(f) agreement may not be unilaterally repudiated during its term, and that the union subject to the agreement acquires a limited section 9(a) representative status only during the agreement’s term. Consequently, the Board abandoned the ALJ's conversion approach in favor of its new *Deklewa* rule. Utilizing its new rule, the Board found “Miller fully liable for the 1980-83 contract, but also found no presumption of Union majority status following the expiration of that contract.” Accordingly, the Board concluded that Miller had violated sections 8(a)(1) and 8(a)(5) “only during the life of the 1980-83 contract, and ordered only damages for breach of that contract, along with the interest on any amount due.” The NLRB then filed a petition seeking to enforce an order against Miller for violation of sections 8(a)(1) and 8(a)(5); both Miller and the Union petitioned for review.

In *NLRB v. W.L. Miller Company*, the Eighth Circuit declined the invitations of both parties to reexamine the *Deklewa* rule and held that it should be applied retroactively. However,

183. Id.
184. Id.
185. Id.; see *Deklewa*, 282 N.L.R.B. at 1377 (overruling the Board's early decision in *R.J. Smith* and abandoning the "so-called conversion doctrine"). The Eighth Circuit pointed out that the conversion doctrine "held section 8(f) agreements to be fully enforceable only if the Union enjoyed majority status in the appropriate unit of workers . . . ." 871 F.2d at 747.
186. *W.L. Miller*, 871 F.2d at 747.
187. Id.
188. Id.
189. Id.
190. Id. “The alleged violations involve[d] Miller's repudiation of a labor agreement validly accepted by the Associated General Contractors of Missouri, a multiemployer bargaining unit to which Miller belonged, and Miller's subsequent refusal to bargain with the Eastern Missouri Laborers Council, the Union signatory to the agreement.” Id. at 746. Miller originally contended that the contract in dispute was simply a section 8(f) prehire agreement which, under *R.J. Smith*, it could unilaterally repudiate at any time. See id. However, the Board rejected this view, and instead retroactively applied its new anti-repudiation rule announced in *Deklewa*. Id. Miller further argued both that the Board erroneously construed section 8(f) in *Deklewa*, and that, in any event, *Deklewa* should not be applied retroactively. Id. “The Union intervene[d], arguing that the limitation of responsibility to the period of the contract was improper.” Id.
191. 871 F.2d 745, 746 (8th Cir. 1989).
192. Id. The Eighth Circuit concluded that the Supreme Court had not definitively re-
the court believed that holding Miller fully responsible for the interest required by the Board’s order would result in manifest injustice and modified the order in this respect.\footnote{194} The court otherwise granted enforcement of the NLRB’s order.\footnote{195}

In addressing whether Deklewa should be applied retroactively, the Eighth Circuit noted that although other circuits had split over which standard of review to apply to administrative retroactivity decisions,\footnote{196} it believed that the issue had already been settled by the court in NLRB v. Monark Boat Company.\footnote{197} In Monark, the court had previously determined that it was required to apply the law as it stood at the time of its decision, particularly when the Board had explicitly stated that it should be applied retroactively.\footnote{198} The only exception to this rule “occurs when the result would be manifestly unjust.”\footnote{199}

Miller advanced two arguments supporting the proposition that retroactive application of Deklewa would be manifestly unjust. “First, Miller argued that the repudiation in question was permitted by law at the time it was made.”\footnote{200} This argument lead the court to solved this issue, and therefore, the Board was “free to change its interpretation to be more consistent with the objectives of the statute.” \textit{Id.} at 746 (referring to Ornamental Iron Workers, in which the Third Circuit’s extensively quoted from the NLRB’s Deklewa opinion to “demonstrate the careful thought and planning behind the new rule”).

\begin{itemize}
  \item \footnote{193} \textit{Id.} at 746.
  \item \footnote{194} \textit{Id.}
  \item \footnote{195} \textit{Id.}
  \item \footnote{196} \textit{Id.} at 748. The Eighth Circuit pointed out that “[s]everal circuits give deference absent a showing of manifest injustice.” \textit{Id.} at 748 n.2 (citing Ornamental Iron Workers, 843 F.2d at 789-81, NLRB v. New Columbus Nursing Home, Inc., 720 F.2d 726, 729 (1st Cir. 1983), and NLRB v. Semco Printing Center, Inc., 721 F.2d 886, 892 (2d Cir. 1983)). On the other hand, the court noted that some courts “have given little deference to Board decisions concerning retroactivity.” \textit{Id.} (citing Retail, Wholesale and Dept Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972), which used its own independent analysis)). The Eighth Circuit believed that Congress had given the NLRB great discretion in interpreting “all aspects of statutory labor policy, justifying a deferential review.” \textit{Id.} (citing Ornamental Iron Workers, 843 F.2d at 780).
  \item \footnote{197} 713 F.2d 355 (8th Cir. 1983).
  \item \footnote{198} \textit{W.L. Miller,} 871 F.2d at 748; see Monark Boat Company, 713 F.2d at 361.
  \item \footnote{199} \textit{Id.}
  \item \footnote{200} \textit{W.L. Miller,} 871 F.2d at 748-49. The court considered this to be a powerful argument. \textit{Id.} (noting that this argument had been used by other courts to avoid retroactive application of Deklewa). However, the Eighth Circuit pointed out that other courts had discarded this argument, “reasoning that the old conversion rule, which upheld section 8(f) agreements only when the Union signatory enjoyed majority status, was so unpredictable that no company could reasonably rely on being able to repudiate section 8(f) agreements.” \textit{Id.} at 749; see, e.g., Ornamental Iron Workers, 843 F.2d at 781 (stating that an employer “who relied on the R.J. Smith rule did so at its own risk, because once conversion occurred, the 8(f) agreement would be automatically binding); R.W. Granger & Sons, Inc. v. United Bhd. of Carpenters & Joiners, 686 F. Supp. 22, 29-30 (D. Mass. 1988) (noting that the employer’s repudiation in reli-
examine whether the respective prehire agreement would have been enforceable under the old conversion rule. The court was satisfied that, in the present case, conversion had already taken place when Miller tried to repudiate since: (1) the ALJ explicitly found the Union to have enjoyed majority status in the multi-employer unit which Miller had voluntarily joined; and (2) the court did not find this determination to be clearly erroneous. "Thus, Miller was already bound to an enforceable contract under the old conversion rule when it tried to repudiate." The court also pointed out that the retroactive application of the Deklewa rule would benefit Miller since, under this rule, Miller would be relieved of any continuing obligation to bargain with the Union that otherwise would have been enforced. Thus, the court concluded that "Miller's reliance on the
former law did not create manifest injustice in this case."²⁰⁵

Second, Miller contended that the long delay of the Board in adjudicating the case resulted in manifest injustice.²⁰⁸ In oral argument, both Miller and the Union clearly established that the active issue before the Eighth Circuit was not "underpayment of the employees, but rather Miller's failure to make contributions to the Union's benefit fund."²⁰⁷ While the court decisively found that the retroactive application of Deklewa rendered Miller liable for the unpaid fund contributions, "[t]he interest, however, raised additional concerns."²⁰⁸ On July 23, 1980, Miller repudiated the contract which was to run from May 1, 1980 to April 30, 1983.²⁰⁹ However, the Deklewa rule arose at a substantially later time.²¹⁰ Since the sole issue before the court involved payment into the Union's benefit fund, and the ALJ found that none of Miller's employees were ever members of the Union, the court concluded that it was "manifestly unjust to award interest for the entire period."²¹¹ Hence, with the exception of the interest assessed against Miller, the Eighth Circuit, absent a showing of manifest injustice, deferred to the NLRB's decision to apply its new Deklewa rule retroactively.²¹²

3. NLRB v. Bufco Corporation²¹³

In 1973, the Corbett Electric Company (hereinafter "Corbett") signed two Letters of Assent authorizing the National Electrical Contractors Association (hereinafter "NECA") to be Corbett's exclusive collective bargaining representative with authority to bind

²⁰⁵. Id.
²⁰⁶. Id.
²⁰⁷. Id.
²⁰⁸. Id.
²⁰⁹. Id.
²¹⁰. Id. at 749-50. The NLRB did not issue its Deklewa ruling until February 20, 1987. Deklewa, 282 N.L.R.B. at 1375. Therefore, four years had past since the expiration of the contract (and seven years since Miller's repudiation) before the Board had pronounced its new Deklewa rule.
²¹¹. W.L. Miller, 871 F.2d at 750. The court was satisfied that interest should have been awarded only for the period from May 1, 1980 to April 30, 1983, and from the time of the Board's decision in the case, July 23, 1987, until the date that the interest was finally paid. Id. The court realized "that the Board had a number of concerns which caused it to reevaluate the issues presented by the case, and that those concerns were not addressed until the decision in Deklewa." Id. However, the court believed that Miller should not have been obligated "to pay interest during this deliberate, if not leisurely, consideration of the issues in this action." Id. (stressing that "to rule otherwise would have been granting the Union a windfall."). Hence, the court was satisfied that the limited interest which it awarded gave the Union just recovery for the loss of their benefit funds. Id.
²¹². Id.
²¹³. 899 F.2d 608 (7th Cir. 1990).
Corbett to certain prehire agreements entered into with the International Brotherhood of Electrical Workers, Local 16 (hereinafter "Union").

Nine years later, in letters to both the NECA and the Union, "Corbett stated that it was terminating its membership in the NECA, severing participation in the multi-employer bargaining group and canceling the letters of assent binding Corbett to bargaining agreements entered into between the NECA and the Union." When Corbett sent these letters, both the NECA and the Union were parties to a contract covering residential electrical work and a contract covering commercial electrical work. After these letters were sent, Corbett dishonored both prehire contracts by failing to "make required dues deductions, contribute to various pension and employee benefit funds, and, in some cases, pay contractual wage rates." Subsequently, on December 9, 1982, the Union filed unfair labor practice charges with the NLRB against Corbett "for repudiating and otherwise failing to comply with the terms of the collective bargaining agreements to which they had previously assented." An administrative hearing was held addressing these charges.

Following this administrative hearing, the ALJ found that, under both the conversion and merger doctrines, the Union had achieved majority status under section 9(a) of the NLRA. The

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214. Corbett was an electrical contractor in the construction industry, and a member of the Evansville Division, Southern Indiana Chapter, of the National Electrical Contractors Association [hereinafter the "NECA"]. Id. at 609. This corporation was closely held by the Corbett family. Id. Additionally, the Corbett family owned the Bufco Corporation [hereinafter "Bufco"], basically a closely-held shell corporation incorporated in 1970. Id. "Sometime prior to 1983, the familial and corporate patriarch, Bill Corbett, transferred ownership of Bufco to his wife and son." Id. at 609 n.2. "Electrical contracting work covered under the NECA agreement was similarly transferred to Bufco." Id.

The Seventh Circuit pointed out that the NLRB had concluded that Bufco was "the alter ego of Corbett and that the two should be treated as a single employer within the meaning of the [NLRA]." Id. Since Corbett did not challenge the NLRB's findings, the court did not waste time addressing "Corbett's sophomoric attempt to use the corporate shell to avoid contractual liability" and enforced the Board's findings. Id.

215. Id. at 609. The letters were dated June 28 and July 2, 1982. Id.

216. Id. The contract covering residential electrical work was effective from October 1, 1981, through September 30, 1983, and the contract covering commercial electrical work was effective from June 10, 1982, to March 31, 1985. Id.

217. Id.

218. Id.

219. Id.

220. Id.; see NLRA § 9(a), 29 U.S.C. § 159(a) (1988) (granting representatives—designated or selected by the majority of the employees in the appropriate unit—the power to collectively bargain on behalf of those employees). Under the R.J. Smith conversion doctrine, once a union signatory has shown majority support, an otherwise revocable section 8(f) prehire agreement converts into a full-fledged collective bargaining agreement, thereby granting to the union all the privileges accorded to unions with majority support under section 8(a).
ALJ's finding of "majority status not only established the Union as the exclusive bargaining representative of the employees during the term of the prehire agreement, but also imposed a continuing obligation to bargain between the two parties after the agreement's expiration." Accordingly, the ALJ found that both Corbett and the Bufco Corporation (collectively, hereinafter "Company") had violated sections 8(a)(1) and 8(a)(5) of the NLRA by repudiating the respective prehire agreements and failing to "recognize the Union as the exclusive bargaining representative of those employees described in these prehire agreements." 

Subsequent to the ALJ's decision, the NLRB issued its Deklewa decision abandoning the conversion and merger doctrines relied on by the ALJ. "Instead, the Board held simply that a signatory to a section 8(f) prehire agreement is bound to its terms for the duration of the agreement unless the employees covered by the agreement reject the signatory union in a Board conducted election." Consequently, the Board applied its recent Deklewa rule retroactively and held that the Company had violated the NLRA by unilaterally repudiating its section 8(f) prehire agreements with the Union. The Board accordingly entered an order requiring the Company to cease and desist from dishonoring its prehire agreements, and filed a petition seeking enforcement of the order.

The Seventh Circuit addressed the Board's petition in NLRB v. Bufco Corporation. The court held that the promulgation of the NLRB's new Deklewa rule was not precluded by either the Supreme Court or circuit case law and found that it was a rational construction of section 8(f). Additionally, the court concluded that retroactive application of the NLRB's new rule was not manifestly unjust...
and, hence, granted the Board's petition for enforcement of its order.\textsuperscript{230}

In addressing the issue of retroactivity, the court noted that, "[g]enerally, a decision which changes existing law or policy is given retroactive effect unless retroactive application would cause 'manifest injustice.'"\textsuperscript{231} The court additionally pointed out that in resolving whether the retroactive application of a newly pronounced Board rule causes manifest injustice, the court considers the following: "the reliance of the parties on pre-existing law; the effect of retroactivity on accomplishing the purpose of the law; and any injustice arising from retroactive application."\textsuperscript{232}

Applying these factors, the Seventh Circuit was convinced that the Company would suffer no manifest injustice from the retroactive application of the Deklewa rule.\textsuperscript{233} The court agreed that "the Board's Deklewa rule was an abrupt departure from the Board's former approach."\textsuperscript{234} Nonetheless, "in light of the Board's merger and conversion doctrines which could be applied at any time to abrogate R.J. Smith's unilateral repudiation rule, [the court did] not believe the Company could have reasonably believed that it could repudiate its [section] 8(f) agreement with impunity."\textsuperscript{235} Specifically, the court concluded that there would be no manifest injustice since: (1) "the ALJ found that, through the merger and conversion doctrines, the Union enjoyed section 9(a) majority status and that the Company would benefit from the retroactive application of a rule which relieved it of a continuing obligation to bargain which it may otherwise have had"\textsuperscript{236} and (2) evidence existed that the Company had obviously anticipated difficulties in repudiating the agreement.\textsuperscript{237} Accordingly, the Seventh Circuit upheld the retroactive application of

\textsuperscript{230} Id.

\textsuperscript{231} Id. at 611 (citing NLRB v. Affiliated Midwest Hosp. Inc., 789 F.2d 524 (7th Cir. 1986) (quoting NLRB v. Lyon & Ryan Ford, Inc., 647 F.2d 745, 757 (7th Cir. 1981) (citing Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)))).

\textsuperscript{232} Id. at 612 (quoting NLRB v. Chicago Marine Containers, Inc., 745 F.2d 493, 499 (7th Cir. 1984)).

\textsuperscript{233} Id.

\textsuperscript{234} Id.

\textsuperscript{235} Id.

\textsuperscript{236} Id. Since the ALJ found that the Union had achieved majority status at the time when Bufco repudiated the prehire agreements, Bufco would have been precluded from repudiating the agreements, even under the pre-Deklewa rule. Id. Therefore, the court noted that it "need not and [did] not express an opinion on the correctness of the ALJ's decision and order applying former Board rules." Id. at 612 n.9.

\textsuperscript{237} Id. at 612. The court pointed out that evidence existed that Bufco's actions were actually a "thinly veiled attempt to funnel work from the prehire signatory Corbett to Bufco." Id.
Deklewa in this case.238

C. Cases Against Retroactivity

Three of the six United States Courts of Appeals that have addressed the Deklewa retroactivity issue have refused to apply the NLRB’s new rules retroactively.239 These three circuit courts concluded that retroactivity would work “manifest injustice” on the construction employers involved because, at the time that the respective employers had repudiated their prehire agreements, there was no evidence that the unions had achieved majority status.240 Additionally, when these cases were finally litigated, each involved “strictly historical disputes,” and thus, a representation election could no longer be effectively held.241 The following Ninth, Fifth and First Circuit decisions held against the retroactive application of Deklewa.


In 1979, Mesa Verde Construction Company (hereinafter “Mesa Verde”)243 reached its first agreement with the Northern California District Council of Laborers (hereinafter “Laborers”),

238. Id.
240. See C.E.K. Indus., 921 F.2d at 358 (stating that “manifest injustice would result from a retroactive application of Deklewa” and that “[t]here [was] no evidence that the Union had achieved a majority within the relevant bargaining unit.”); Mar-Len, 906 F.2d at 203-04 (concluding that “it would work inequitable and unjust results to apply Deklewa retroactively” and that “[t]here [was] no evidence in the record that [the Union] had achieved majority status prior to repudiation.”); Mesa Verde, 895 F.2d at 519 & n.1 (holding “that it would be manifestly unjust to apply Deklewa retroactively in this case” and that the Union’s alleged majority status had never been proven).
241. See C.E.K. Indus., 921 F.2d at 358 (stating that the employer was “no longer in operation, [and therefore,] the “dispute [was] purely an historical one at this point.”); Mar-Len, 906 F.2d at 204 n.4 (noting that “the instant case . . . involved a "strictly historical dispute."”); Mesa Verde, 895 F.2d at 519 (invoking a “strictly historical dispute” in which “a representative election [could] no longer be held.”).
243. Mesa Verde was a general construction contractor, specializing primarily in the construction of shopping centers in Arizona, California, and Colorado. Id. at 1007. “Mesa Verde typically subcontract[ed] out most of its work except for some carpentry and odd jobs.” Id.
and on June 26, 1980, Mesa Verde entered into the prehire agreement with the Laborers that was in dispute in this case. Both parties agreed that the contract would remain in effect until June 15, 1983 and, absent written notice by either party, was to continue thereafter from year to year. "By the contract's terms Mesa Verde agreed to 'comply with all wages, hours, and working conditions set forth in the Laborers' Master Agreement for Northern California.'" In November 1982, both parties agreed to extend their 1980 prehire agreement until June 15, 1986.

Mesa Verde also entered into a collective bargaining agreement with the Carpenters 46 Northern California Counties Conference Board (hereinafter "Carpenters") in August 1979, and accepted the terms of the Carpenters' Master Agreement for Northern California. Through a subsequent memorandum agreement executed in June 1980, the parties accepted a new Carpenters' Master Agreement covering June 16, 1980 to June 15, 1983. In September 1982, while the new Master Agreement was still in effect, Mesa Verde and the Carpenters extended the agreement to June 15, 1986, "with certain modifications limiting wage increases and providing more flexible working conditions for Mesa Verde."

In May 1984, Mesa Verde informed both the Laborers and Carpenters of its intent to abrogate its agreements with them. At that time, Mesa Verde was working on a construction project in Hercules, California, at which it employed members of both unions. Mesa Verde notified the Carpenters of its repudiation through a May 8, 1984 letter, and notified the Laborers through a

244. Id. The Ninth Circuit summarized the facts of this case in its original opinion. See id. at 1007-08.
245. Id.
246. Id. The agreement was a sixty-seven-page contract between the Laborers, the Associated General Contractors of California, Inc. and the Bay Counties General Contractors Association. Id. The agreement "set wage rates for numerous jobs and provide[d] for arbitration, with certain exceptions, of 'any dispute concerning the interpretation or application of the agreement.'" Id. at 1007-08.
247. Id. at 1008.
248. Id. The agreement was a forty-nine page contract between the Carpenters, the Building Industry Association of Northern California, the California Contractors Council, Inc., and the Millwright Employers Association. Id. It "set rates for numerous jobs and provided for arbitration of '[a]ny dispute concerning the relationship of the parties, any application or interpretation of the agreement.'" Id.
249. Id.
250. Id.
251. Id.
252. Id.
After its notices to the unions, in either late May or early June 1984, Mesa Verde began another construction project in Orland, California without union workers, in contravention of the collective bargaining agreements, if they were still in effect. Both unions notified Mesa Verde of their grievances and requested arbitration proceedings with regard to Mesa Verde’s contractual obligations for the Orland project. "Mesa Verde then brought suit against both unions seeking a declaration that it need not comply with the agreements regarding projects begun after its repudiations in May 1984."

In *Mesa Verde Construction Company v. Northern California District Council of Laborers*, the district court stayed the Laborer’s arbitration proceeding pending resolution of the declaratory judgment action, and later granted Mesa Verde’s summary judgment motion. In an unpublished opinion, the district court also granted Mesa Verde’s summary judgment motion against the Carpenters. "The court held that the collective bargaining agreements at issue were construction industry ‘prehire’ agreements, and that therefore, under [section 8(f) of NLRA], Mesa Verde’s May 1984 letters were sufficient to effectively repudiate the agreements with respect to future projects."

The Ninth Circuit affirmed the district court’s rulings, finding that circuit precedent permitted an employer to unilaterally repudiate a prehire collective bargaining agreement. Upon rehearing,

253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* Mesa Verde did not seek a declaration of its obligations to either the Laborers or Carpenters at its ongoing Hercules project. *Id.*
258. *Mesa Verde*, 820 F.2d at 1008. “The court denied a subsequent motion by the Laborers to vacate its judgment and grant the Laborers additional discovery to demonstrate the existence of a core group of employees.” *Id.* (citing 602 F. Supp. 327 (N.D. Cal. 1985)).
259. *Id.*
260. *Id.*
261. *Id.* at 1013 (finding that the Deklewa decision stood in conflict with prior decisions of the Ninth Circuit which, absent majority support by the union in the appropriate bargaining unit, had allowed unilateral repudiation of a prehire agreement).
262. In the original Ninth Circuit opinion, the court noted that “[u]nder Royal Development Co. v. NLRB, 703 F.2d 363, 369 (9th Cir. 1983), [it was] not permitted to overrule prior panels’ interpretations of the [NLRA], even with intervening NLRB case law.” *Id.* The court believed that this issue should be addressed by the full court in a petition for rehearing en banc. *Id.* Additionally, the court noted that the suitability of the *Royal Development* rule
the Ninth Circuit's en banc panel adopted Deklewa as the law of the circuit, holding that a prehire agreement "may not be unilaterally repudiated by either a union or an employer prior to its termination or absent an election among the appropriate bargaining unit's employees to reject the union."263 However, the en banc panel remanded the case to determine whether Deklewa should be applied retroactively.264

In addressing the retroactive application of Deklewa, the en banc panel directed that retroactivity analysis be governed by Chevron Oil Company v. Huson265 on remand.266 The en banc panel pointed out that Deklewa overruled "clear precedent that the employer in Mesa Verde obviously relied on in repudiating the pre-hire agreements."267 The Laborers took issue with this statement, contending that, at the time Mesa Verde repudiated the agreements, Ninth Circuit case "law did not permit an employer to unilaterally repudiate an agreement absent a NLRB election."268 However, the court agreed with the en banc panel's determination that Mesa Verde had relied on clear precedent in unilaterally repudiating the prehire agreements.269 The court pointed out that "[a]lthough neither the Supreme Court nor [the Ninth Circuit] had specifically addressed the proper method for repudiation, both courts had clearly held that 'an employer is able to exercise the right of repudiation also might warrant the review of the full court. Id. at 1013 n.7.

263. Mesa Verde, 861 F.2d 1124, 1137 (9th Cir. 1988) (en banc).
264. Id. The Ninth Circuit's en banc panel remanded the case for determination of the retroactivity issue to a typical three-man panel of the Ninth Circuit. See Mesa Verde, 895 F.2d 516, amending and superseding 885 F.2d 594 (9th Cir. 1989). This panel consisted of Circuit Judges Nelson, Wiggins and Noonan. See 895 at 517. Circuit Judge Wiggins wrote the final opinion. Id.
265. 404 U.S. 97 (1971). In Chevron, the Supreme Court articulated three factors germane to retroactivity analysis: "(1) whether the decision to be applied retroactively established a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression; (2) the effect of retroactivity on accomplishing the purpose of the law; and (3) the inequity imposed by retroactive application." Mesa Verde, 895 F.2d at 518-19 (paraphrasing the actual Chevron language); see id. at 106-07; supra notes 107-126 and accompanying text (discussing retroactivity analysis in the federal courts under Chevron).
266. Mesa Verde, 861 F.2d at 1136-37.
267. Id. at 1137.
268. Mesa Verde, 895 F.2d at 519. The Ninth Circuit noted that the case cited by the Laborers, Operating Eng'rs Pension Trust v. Beck Eng'g & Surveying, 746 F.2d 557 (9th Cir. 1984), however, did not support that proposition. Id. Instead, Operating Engineers, recognizing that the Supreme Court had not yet resolved "the question of what specific acts would effect repudiation of a prehire agreement, expressly declined to decide the issue." Id.; see Operating Engineers, 746 F.2d at 564-65 (citing Jim McNeff, Inc. v. Todd, 461 U.S. 260, 270-71 n.11 (1983)).
269. Mesa Verde, 895 F.2d at 519.
In support of retroactive application, the Laborers argued that applying Deklewa retroactively would promote the NLRA's statutory objectives of employee free choice and labor relations stability. The Laborers, pointing out that the NLRB had applied Deklewa retroactively to all cases pending at the administrative level, the Laborers contended "that the federal courts should also apply the rule retroactively to ensure uniformity of decision." However, the Ninth Circuit specified that "[t]he Board's decision to apply Deklewa retroactively was not binding on [the] court," and indicated that at least two district courts had refused to apply Deklewa retroactively. The Laborers claimed "that employee free choice [would] suffer if the Deklewa rule [was] not applied retroactively because courts lack the ability to conduct an election allowing employees to express their preference." However, the court pointed out that this argument completely disregarded the fact that in cases such as the one before the court, "‘involving strictly historical disputes, a representation election can no longer be effectively held.’" If Deklewa was applied retroactively, the court concluded that Mesa Verde would have been "‘subjected to a penalty for having taken action which was entirely lawful under pre-Deklewa law without being afforded the opportunity to have their assertion of the union’s lack of majority status tested either by election or by litiga-

270. Id. at 519 (quoting Jim McNeff, 667 F.2d 800, 803 (9th Cir. 1982), aff’d, 461 U.S. 260 (1983)).
271. Id. at 519.
272. Id.
273. Id.; see id. at 519 n.1 (citing NLRB v. Best Products Co., 765 F.2d 903, 913 (9th Cir. 1985)). In Best Products, the Ninth Circuit held that “while the court is not bound by the Board’s view on retroactive application, it should defer to those views absent manifest injustice.” 765 F.2d at 913. The Mesa Verde court pointed out that the Eighth Circuit had adopted this standard in deciding whether to apply Deklewa retroactively. 895 F.2d at 519 n.1; see NLRB v. W.L. Miller Co., 871 F.2d 745, 748 (8th Cir. 1989) (deferring to the NLRB's decision to apply Deklewa retroactively).

Additionally, although the en banc panel directed the court, on remand, to review retroactive application independently under Chevron, the court pointed out that it would have reached the same conclusion were it to apply the deferential standard. Mesa Verde, 895 F.2d at 519 n.1. The court concluded that it would have been “manifestly unjust to apply Deklewa retroactively in this case because it would [have] effectively punish[ed] the employer for conduct that was lawful at the time it occurred.” Id.

275. Id.
Determining that retroactive application of Deklewa would not have significantly advanced statutory objectives, the Ninth Circuit ruled that "imposing such an injustice on the employer was clearly unwarranted."\footnote{Id. (quoting National Automatic Sprinkler, 680 F. Supp. at 735).}

Applying the Chevron factors to the facts before it, the court ascertained that:

1. the existing law [at the time of Mesa Verde's repudiation] clearly allowed either party to repudiate the pre-hire agreement prior to the union's attainment of majority status;
2. retroactive application would [have punished Mesa Verde] for doing something that was lawful when done; and
3. advancement of statutory objectives [was] only questionably served by retroactive application when the relationship between the parties had been terminated.\footnote{Id. at 519-20. The Ninth Circuit phrased its conclusions regarding the Chevron factors in a very broad fashion. Even though the case before it specifically dealt with Mesa Verde, the Laborers, and the Carpenters, the court chose to state its conclusions using the broad terms of "the employer" and "the unions." See id. This could be viewed as a deliberate effort to stress the injustice—created by the retroactive application of Deklewa—placed upon any construction industry employer who has properly relied upon pre-Deklewa law when repudiating a prehire agreement with a union.}

Accordingly, the Ninth Circuit held that retroactive application of the Deklewa rule was inappropriate and affirmed the judgment below.\footnote{Mesa Verde, 895 F.2d at 520.}

2. United Brotherhood of Carpenters and Joiners Local Union 953 v. Mar-Len of Louisiana, Inc.\footnote{906 F.2d 200 (5th Cir. 1990)}

In 1981, Mar-Len of Louisiana, Inc. (hereinafter "Mar-Len"),\footnote{Mar-Len was a construction industry contractor. Id. at 201.} entered into prehire agreements with the United Brotherhood of Carpenters and Joiners of America, Local Union 953 (hereinafter "Carpenters"), the International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 678 (hereinafter "Iron Workers"), and the Construction and General La-
borers, Local Union 207 (hereinafter "Laborers"). These prehire agreements bound the various "parties to the terms of master collective bargaining agreements entered into between the unions and the Associated General Contractors, Inc."

On April 15, 1983, Mar-Len commenced work on the DeRidder, Louisiana Phase Two Wastewater Improvements-Transfer Stations pursuant to a contract with the City of DeRidder, Louisiana, (hereinafter "DeRidder"). However, after a contract dispute with DeRidder, Mar-Len ceased work on the project on January 19, 1984, as a result of the city's failure to pay Mar-Len for work performed under the contract. On June 5, 1984, Mar-Len notified the Carpenters, Iron Workers, and Laborers that it was unilaterally repudiating any collective bargaining agreements that were allegedly in effect. On July 12, 1984, Mar-Len similarly informed each of the union's fringe benefit funds of its repudiation of the agreements and refused to make any further contributions.

283. Id. Mar-Len entered into prehire agreements with the Carpenters on January 27, 1981; the Iron Workers on February 29, 1981; and the Laborers on January 27 and August 5, 1981. Id.

284. Id.; see Brief for Appellee at 4, United Bhd. of Carpenters and Joiners Local Union 953 v. Mar-Len of Louisiana, Inc., 906 F.2d 200 (5th Cir. 1990) (No. 89-4456) [hereinafter Appellee Brief]. These agreements were designated and captioned as "short form" and "assent agreements." Appellee Brief, supra, at 4. These agreements were the only contracts, or collective bargaining agreements, entered into between the parties, and were applicable only to work being performed by Mar-Len on the DeRidder Phase Two Wastewater Improvements Project. Id. With the exception of the prehire agreement between Mar-Len and the Iron Workers, each prehire agreement contained an expiration date and automatic renewal provision in the absence of notice from either party of its desire to modify or terminate the agreements at least sixty days prior to the anniversary date of the agreements. Id. at 4-5.


286. Id. On or about August 19, 1983, Mar-Len instituted arbitration proceedings against DeRidder because of a dispute with DeRidder and its consulting engineer over the project design. Appellee Brief, supra note 284, at 4. DeRidder filed a counterclaim against Mar-Len, and around November 7, 1983, ceased payment to Mar-Len for the work performed under the contract. Id. at 5-6. On December 21, 1983, the Council of DeRidder passed an ordinance authorizing DeRidder to institute legal and arbitration proceedings against Mar-Len for the settlement of the dispute. Id. at 6. Subsequently, on or about January 19, 1984, as a result of DeRidder's failure to pay Mar-Len, Mar-Len ceased work on the project. Id.


288. Id. At the time of Mar-Len's repudiation, no work was being performed on the DeRidder wastewater project, and concomitantly, there were no employees on the project performing work under the prehire agreements. Appellee Brief, supra note 284, at 7.

Mar-Len did not resume work on the project until October 9, 1985, following a settlement with DeRidder. 906 F.2d at 201. Afterwards, "the unions formally grieved the company's failure to rehire the workers laid off in January 1984 and its failure to use the unions' hiring

http://scholarlycommons.law.hofstra.edu/hlelj/vol8/iss2/6
The Carpenters and the Laborers commenced an action against Mar-Len on March 10, 1986, alleging that Mar-Len had unlawfully repudiated the collective bargaining agreements which covered work it was performing at the DeRidder wastewater facility.\(^{289}\) The Iron Workers also filed suit against Mar-Len on April 28, 1986, claiming substantially the same allegations.\(^{290}\) "Both actions, which were consolidated, were brought under section 301 of the [LMRA]\(^{291}\) and sought declaratory and monetary relief [for breach of the prehire agreements], including lost wages, benefits, and attorney's fees."\(^{292}\)

The district court issued its opinion on November 17, 1988.\(^{293}\) The court stated that the main issue involved in the case "was whether, in repudiating the collective bargaining agreements with the unions, Mar-Len violated section 8(f) [of the NLRA]."\(^{294}\) The district court then noted when the parties entered into the prehire agreements, the NLRB's interpretation of section 8(f) was that "prehire agreements [were] unilaterally voidable unless and until the relevant union achieve[d] majority status."\(^{295}\) However, the district court also pointed out "that the NLRB had later reversed itself in Deklewa, holding that prehire agreements may not be repudiated prior to expiration, except pursuant to a vote to decertify the union under [sections] 9(c) or 9(e) [of the NLRA]."\(^{296}\) The district court approved the NLRB's new interpretation of section 8(f) law an-

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290. *Id.*
293. *Id.*
294. *Id.* The court first determined that it had jurisdiction of the case under section 301 of the LMRA. *Id.*
295. *Id.* The district court specifically noted that when Mar-Len and the unions first entered into the prehire agreements, the NLRB's interpretation of section 8(f) had been affirmed by the Supreme Court in *Higdon*. *Id.* at 202; see *Higdon*, 434 U.S. 335 (1978) (upholding the Board's R.J. Smith interpretation of section 8(f) law). Furthermore, the court pointed out that the Supreme Court's *Higdon* decision had been followed by the Fifth Circuit. *Id.* (citing Carpenters Local Union No. 1846 v. Pratt-Farnsworth, 690 F.2d 489 (5th Cir. 1982), Baton Rouge Bldg. and Constr. Trades Council v. E.C. Schafer Constr. Co., Inc., 657 F.2d 806 (5th Cir. 1981), and NLRB v. Haberman Constr. Co., 641 F.2d 351 (5th Cir. 1981)).
nounced in Deklewa, but refused to apply it retroactively. In support of this conclusion, the district court pointed out that:

the policies Deklewa identified as underlying section 8(f)—freedom of contract and promoting employee free choice and labor relations stability—would not be furthered by retroactive application under the circumstances of this case: that is, prohibiting Mar-Len from voiding its prehire agreements with the unions would serve to penalize the company for undertaking an act that, at the time it did so, it was legally permitted to do.

However, the district court found that at the time Mar-Len repudiated the prehire agreements, “the unions had achieved majority status.” Therefore, the court concluded that, even under the pre-Deklewa rule, Mar-Len was precluded from unilaterally repudiating the prehire agreements. The court further held, however, that Mar-Len’s June 5, 1984 letters to the unions, “in which it denied the existence of any valid collective bargaining agreements and repudiated any agreement alleged to exist, caused the prehire agreements to expire by their own terms on the following dates: the Laborers, on April 30, 1985; the Carpenters, on May 1, 1985; and the Iron Workers, on April 30, 1986.”

Accordingly, the district court entered judgment in favor of the unions on June 1, 1989. The court awarded back pay and fringe benefits to two individuals represented by the Iron Workers. However, neither the Carpenters nor the Laborers received any compensation since all work performed on the DeRidder project by individuals of these unions occurred after the respective prehire agreements terminated. As a result, Mar-Len, the Carpenters, and the Laborers appealed.

In United Brotherhood of Carpenters and Joiners Local Union 953 v. Mar-Len of Louisiana, Inc., the Fifth Circuit reversed the district court’s ruling and remanded the case for entry of a judgment.
of dismissal. The Fifth Circuit stated that the primary question before it was "whether the NLRB's present interpretation of [section] 8(f), announced in Deklewa, is the controlling law in [the Fifth Circuit] and [was] to be applied retroactively in this case." The court "assume[d] for the purpose of the opinion that Deklewa [was] the controlling law in this [case]," but did not adjudicate the actual question because it held that, "in any event, Deklewa could not be applied retroactively in this case."

In deciding whether to apply Deklewa retroactively to the present case, the court applied the factors set out in *Chevron v. Hunt*, and made various determinations. First, the court found that "the nonvoidability of prehire agreements [was] a new rule insofar as it overruled clear past precedent on which Mar-Len clearly relied" in repudiating its prehire agreements with the unions, and the NLRB's turnabout regarding section 8(f) of the NLRA "was not

306. *Id.* at 204.
307. *Id.* at 203.
308. *Id.* In support of its assumption, the court cited a number of circuit cases which had previously adopted Deklewa as controlling law. See *id.* (citing *Ornamental Iron Workers*, 843 F.2d 770 (3d Cir. 1988), *W.L. Miller Co.*, 871 F.2d 745 (8th Cir. 1989), *Mesa Verde*, 885 F.2d 594, on remand after 861 F.2d 1124 (9th Cir. 1989) (en banc), and *Bufco Corp.*, 899 F.2d 608 (7th Cir. 1990)).

To adjudicate whether Deklewa was the controlling law in the Fifth Circuit, the court would have had to "examine an issue that had not been briefed or argued: whether [it was] bound by the precedent of prior panels." *Id.* at 203 n.2 (referring to its prior decisions in Carpenters Local Union No. 1846 v. Pratt-Farnsworth, 690 F.2d 489 (5th Cir. 1982), Baton Rouge Bldg. and Constr. Trades Council v. E.C. Schafer Constr. Co., Inc., 657 F.2d 806 (5th Cir. 1981), and NLRB v. Haberman Constr. Co., 641 F.2d 351 (5th Cir. 1981)). The prior panels had expressly affirmed the NLRB's pre-Deklewa interpretation of section 8(f) prehire agreements. *Id.* The court noted that "[t]his analysis [would have] involve[d] close, complex issues that [the court] thought should not be addressed in the absence of briefing and argument, especially when it was unnecessary to do so in order to resolve the case before [it]." *Id.* (citations omitted).

310. 404 U.S. 97 (1971); see supra notes 107-126 and accompanying text (discussing retroactivity analysis in the federal courts under *Chevron*).
311. 906 F.2d at 203. The Fifth Circuit considered the following factors:

[F]irst, whether Deklewa establishes a new principle of law, either by overruling clear past precedent on which the parties may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; second, whether in the light of the prior history of section 8(f), its purpose and effect, retroactive application of Deklewa furthers or retards its operation; and third, whether retrospective application would produce substantial inequitable results. *Id.*; see *Chevron*, 404 U.S. at 106-07; *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 1036 (5th Cir. 1990). *Mar-Len*, the Carpenters, and the Laborers stipulated to all of the facts which the Fifth Circuit based its determinations regarding the *Chevron* factors. See *Mar-Len*, 906 F.2d at 201.
clearly foreshadowed by the Board’s prior cases.”\footnote{312} Second, the court was “unable to conclude that retrospective application of Deklewa would have further\[ed\] the operation of the Board’s new interpretation of [section] 8(f) because work on the job at issue [wa]s complete.”\footnote{318} Third, “with respect to the third Chevron factor, [the court] conclude[d] that retroactive application of Deklewa would have produce[d] ‘substantial inequitable results.’”\footnote{314} The court based this finding on the fact that, upon entering into the prehire agreements, Mar-Len had expressly relied on its then-existing right to unilaterally repudiate, absent majority status by the union.\footnote{315} And, furthermore, as the stipulated record showed, both the Carpenters and Laborers presented no evidence that either of them had achieved majority status prior to Mar-Len’s repudiation—almost three years prior to the Board’s decision in Deklewa.\footnote{316}

Accordingly, the Fifth Circuit concluded that the retroactive application of Deklewa would have worked inequitable and unjust results, and held that, “even if [it] adopted Deklewa, [it] would not apply it retroactively so as to hold Mar-Len liable.”\footnote{317} Therefore,


313. \textit{Mar-Len}, 906 F.2d at 203.

314. \textit{Id.}

315. \textit{Id.}

316. \textit{Id.} at 203-04. The Unions had conceded at oral argument that there was “no evidence in the record that they had achieved majority status prior to Mar-Len’s repudiation [of the prehire agreements].” \textit{Id.} Mar-Len had argued to the court that, when he had repudiated the agreements, “the unions had not achieved majority status because, as a result of Mar-Len’s dispute with DeRidder, the contract had terminated and no employees were on the job site.” \textit{Id.} at 204 n.3. The district court rejected this argument since it “held that Mar-Len’s contract with DeRidder had only been interrupted, not terminated . . . .” \textit{Id.} Assuming “that the unions had achieved majority status prior to the cessation of work on January 9, 1984, [the court] concluded that their majority status remained intact upon their return to work following Mar-Len’s settlement with DeRidder on October 9, 1985.” \textit{Id.} However, the court failed to delineate what it had based its assumption on. See \textit{id}. Nevertheless, the Fifth Circuit pointed out that the unions had conceded the absence of evidence in the record supporting this assumption. \textit{Id.}

317. \textit{Id.} at 204. At the time that Mar-Len was decided, four other circuits had addressed the retroactive application of Deklewa and had split in their decisions. \textit{Id.} at 204 n.4. The court, aware of these decisions, pointed out that the Third, Seventh, and Eighth Circuits had applied Deklewa retroactively. \textit{Id.} (citing \textit{Ornamental Iron Workers}, 843 F.2d 770 (3rd Cir. 1988), NLRB v. Bufco Corp., 899 F.2d 608 (7th Cir. 1990), and NLRB v. W.L. Miller Co., 871 F.2d 745 (8th Cir. 1989)). These courts had held that retroactivity would work no “manifest injustice” on the respective employers “because, at the time the respective employers repudiated the prehire agreement, the unions had achieved \textit{majority} status; therefore, even under the pre-Deklewa rule, the employers would have been precluded from repudiating the agreements.” \textit{Mar-Len}, 906 F.2d at 204 n.4. On the other hand, the court recognized that “a
although the court agreed with the district court’s holding against the retroactive application of Deklewa, the court found no evidence supporting the district court’s conclusion that the unions had ever achieved majority status.\textsuperscript{318} Hence, the Fifth Circuit reversed the district court’s holding that Mar-Len was precluded from unilaterally repudiating its prehire agreements with the unions, and dismissed the Carpenters’ and Laborers’ claims.\textsuperscript{319}

3. \textit{C.E.K. Industrial Mechanical Contractors, Inc. v. NLRB}\textsuperscript{320}

In November 1979, Robert Bradley incorporated CAM-FUL Industries, Inc. (hereinafter “Cam-Ful”), to enter into the real estate business.\textsuperscript{321} Bradley and his partner, Peter Nowyj, provided all of Cam-Ful’s financing.\textsuperscript{322} Upon its inception, Cam-Ful was a weekend operation and both men were employed full-time with other companies.\textsuperscript{323} Cam-Ful’s “primary function was preparing foreclosed-upon properties for resale, and its activities included general construction, plumbing and janitorial services.”\textsuperscript{324} Bradley and Nowyj originally performed most of Cam-Ful’s work themselves.\textsuperscript{325}

In April 1981, Bradley dropped his other job and formed C.E.K. Industrial Mechanical Contractors, Inc. (hereinafter “CEK”), a construction contractor specializing in plumbing.\textsuperscript{326} After incorporating CEK, Bradley modified Cam-Ful’s certificate of organization to provide that Cam-Ful’s primary function was performing construction work.\textsuperscript{327} “Bradley’s goal in forming CEK was apparently to run it as a double-breasted operation, parallel with Cam-Ful’s work.”\textsuperscript{328}

\textsuperscript{318} Mar-Len, 906 F.2d at 204.
\textsuperscript{319} Id.
\textsuperscript{320} 921 F.2d 350 (1st Cir. 1990).
\textsuperscript{321} Id. at 351.
\textsuperscript{322} Id. at 351-52. “Bradley provided 75\% of financing for Cam-Ful and acted as its president; his partner Peter Nowyj provided the balance of the capital and held the title of secretary-treasurer.” Id.
\textsuperscript{323} Id. at 352.
\textsuperscript{324} Id.
\textsuperscript{325} Id.
\textsuperscript{326} Id. “Bradley was the sole owner of CEK, but because of local licensing requirements, CEK issued 51\% of its stock to a licensed master plumber.” Id.
\textsuperscript{327} Id.
Ful, enabling him to bid on both union (via CEK) and non-union (via Cam-Ful) contracts.\footnote{328}

Pursuant to this goal, Bradley signed, on behalf of CEK, a collective bargaining agreement (hereinafter “Agreement”) between the Master Plumbing Association (hereinafter “Association”), a multi-employer group, and the Plumbers and Gasfitters Local 54 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (hereinafter “Union”) in September 1981.\footnote{329} The Agreement was a construction industry prehire agreement authorized by section 8(f) of the NLRA.\footnote{330} However, CEK did not join the Association as a member.\footnote{331}

The Agreement between the Association and the Union operated from July 1, 1981, to June 30, 1983, and “provided for a one-year automatic renewal unless either party gave 60 days written notice to the other of intent to terminate.”\footnote{332} Adhering to this clause, the Association timely notified the Union of its termination and requested renegotiation of the Agreement in 1983.\footnote{333} In June 1983, both parties reached a new collective bargaining agreement and, during the following month, the Union invited CEK and the other respective contractors to adopt the new Agreement.\footnote{334} Shortly thereafter, CEK declined to adopt the new Agreement.\footnote{335} However, CEK notified the Union of its willingness to engage in individual bargaining for a separate collective bargaining agreement.\footnote{336}

\footnote{328} Id. The First Circuit briefly described “double-breasting” as follows: A double-breasted operation occurs when the same owner owns both a union and a non-union company. The non-union company bids on jobs that do not require a union contractor, while the union company bids on union jobs. Both companies can thus bid more competitively in their respective markets. Double-breasted operations in the construction industry are not inherently illegal under the NLRA. Id. at 352 n.3 (citing A. Dariano & Sons, Inc. v. District Council of Painters No. 33, 869 F.2d 514, 517 (9th Cir. 1989)); see also Levine, Pre-hire Agreements and “Doublebreasting” in the Construction Industry: Prospects for Legislative Change, 39 LAB. L.J. 247 (1988) (discussing the history and present status of construction industry “double-breasting”).

\footnote{329} C.E.K. Indus., 921 F.2d at 352. “Local 54, the original charging party, subsequently merged with other locals to become Local Union No. 267 of the Plumbers Union.” Id. at 352 n.4.

\footnote{330} Id. at 352.

\footnote{331} Id.

\footnote{332} Id.

\footnote{333} Id.

\footnote{334} Id.

\footnote{335} Id.

\footnote{336} Id. During this period, the Union became aware that Bradley was operating two construction companies—one union and one non-union. Id. When originally approached by the Union, Bradley denied the Union’s allegations; however, he later contended that the two companies constituted a legitimate double-breasted enterprise. Id. Subsequently, the Union made
In the fall of 1983, Bradley closed down CEK.337 "Its two remaining employees, both Union members, were transferred to Cam-Ful's payroll...[and] CEK's equipment was divided between Bradley and Cam-Ful."338 Cam-Ful then assumed and completed all work remaining on projects begun by CEK and "continued to operate as a construction contractor handling some plumbing work."339

Subsequently, the Union filed an unfair labor practice charge with the NLRB.340 The charge was based upon the failure of CEK and Cam-Ful "to apply the terms of the CEK collective bargaining agreement with the Union to the workers performing plumbing work for Cam-Ful."341 The Union also filed another charge based upon Bradley's failure to provide the Union with certain information it requested.342 As a result, the NLRB issued a complaint.343

After a hearing addressing these charges, an administrative law judge (hereinafter "ALJ") dismissed the complaint, refusing to find alter ego status as between CEK and Cam-Ful.344 "The ALJ also found that the Agreement between CEK and the Union had not been automatically renewed; rather, it had been effectively terminated when the Association gave timely notice to the Union."345 Finally, the ALJ concluded that Bradley's failure to provide the requested information did not constitute a violation.346

"The Board disagreed with the ALJ, finding that an alter ego relationship existed between CEK and Cam-Ful based on the common ownership, financial management, and business purpose of both companies."347 The Board also found that CEK had sent no individ-

several attempts "to obtain more information from Bradley about the structure of the two companies, but these efforts generated only late and sketchy responses." Id.

337. Id.
338. Id.
339. Id.
340. Id.
341. Id.
342. Id.
343. Id.
344. Id. at 353. The Fifth Circuit noted that "[a]lthough there was no doubt that both CEK and Cam-Ful shared common ownership, and in fact constituted a single employer under the NLRA, the ALJ concluded that because of an absence of anti-union motive, and because Cam-Ful had pre-existed CEK, the two companies were not alter egos." Id. "These two facts, in the ALJ's view, precluded a finding that Bradley had structured both companies so that he could divert work from the union to the non-union operation." Id.

345. Id.
346. Id.
347. Id. "The Board treated Cam-Ful's prior existence as nondeterminative, because after the creation of CEK, Cam-Ful's incorporation certificate was modified to allow it to perform work similar to that for which CEK was incorporated." Id. Moreover, the Board believed that "the nature of Cam-Ful's operations after the closing of CEK demonstrated the existence
ual termination notice to the Union, and therefore, the Agreement had been automatically renewed.\footnote{348} Based on these determinations, the Board concluded that both companies had violated sections 8(a)(1) and 8(a)(5) of the NLRA.\footnote{349} Additionally, the Board held that Bradley's failure to provide information to the Union amounted to bargaining in bad faith, and thus, constituted a violation of section 8(a)(5).\footnote{350} Accordingly, CEK and Cam-Ful petitioned the First Circuit for review of the Board's Order and the Board cross-petitioned for enforcement.\footnote{351}

In \textit{C.E.K. Industrial Mechanical Contractors, Inc. v. NLRB},\footnote{352} the First Circuit was presented with the issue of whether the NLRB's finding that CEK and Cam-Ful violated the NLRA by failing to apply the terms of its section 8(f) prehire agreement to unit employees was supported by substantial evidence.\footnote{353} In order to resolve this issue, the court was required to address several subsidiary issues: "(1) whether CEK and Cam-Ful \textit{were} alter egos; (2) whether the collective bargaining agreement between CEK (through an employers association) and the Union 	extit{had} terminated or was automatically renewed; and (3) whether the Companies \textit{should} have been held retroactively to the Board's new position \textit{in Deklewa} regarding the repudiation of [section] 8(f) prehire construction agreements."\footnote{354} \textit{Id.}

\begin{footnotes}
\item[348] Id. The Board held that CEK, "a non-member which had not delegated its bargaining authority, was not entitled to rely upon the notice sent by the Association." \textit{Id.}
\item[351] \textit{C.E.K. Indus.}, 921 F.2d at 353. The Union intervened in support of the Board's holdings. \textit{Id.}
\item[352] 921 F.2d 350 (1st Cir. 1990).
\item[353] \textit{See id.} at 351.
\item[354] \textit{Id.} The court also addressed the issue of whether the Board's finding that Bradley's failure to provide the information requested by the Union constituted an unfair labor practice was supported by substantial evidence. \textit{Id.} at 359-60. While the court found that substantial evidence did exist in support of the Board's finding of an unfair labor practice, since the remedy of ordering Bradley to supply the requested information at the time of the decision was pointless, the court declined to enforce that portion of the Board's order. \textit{Id.}
\end{footnotes}

CEK and Cam-Ful also raised the statute of limitations for unfair labor practice proceedings. \textit{Id.} at 351 n.2; see NLRB § 10(b), 29 U.S.C. § 160(b) (1988). However, the court found that both Cam-Ful and CEK had "waived this affirmative defense by failing to raise it before the Board." \textit{Id.} at 351 n.2; see Woelke and Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665-66 (1982) (holding that judicial review was barred under NLRA section 10(e) since the issue in dispute was not raised during the proceedings before the Board); NLRB § 10(e), 29 U.S.C. § 160(e) (1988).
First, the First Circuit found that the Board’s finding of alter ego status was supported by substantial evidence. Second, the court agreed with the Board’s finding that the Agreement was automatically renewed, and thus, “had remained in force with respect to CEK.” Third, the court held that the retroactive application of Deklewa would result in manifest injustice and refused to retroactively hold CEK and Cam-Ful to the Board’s new position regarding the repudiation of section 8(f) prehire construction agreements. Accordingly, the First Circuit denied the enforcement of the Board’s order.

In addressing the issue of whether Deklewa should be applied retroactively, the court pointed out that although most of the courts of appeals that had confronted Deklewa had approved the rule, those courts had split on whether to apply Deklewa retroactively. While the court had not yet considered the issue, they noted the

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355. C.E.K. Indus., 921 F.2d at 354; see id. at 353-55 (discussing in-depth the “alter ego” issue, including the alter ego concept, in general; alter ego analysis; relevant case law; and their application to the evidence in the record). Both CEK and the Union agreed on the factors used to determine alter ego status. Id. at 354. The First Circuit recognized these factors as anti-union animus and “substantially identical management, business purpose, operation, equipment, customers, and supervision, as well as ownership.” Id. (quoting Advance Elec., 268 N.L.R.B. 1001, 1002 (1984)).

356. Id. at 356; see id. at 355-56 (discussing the “termination or automatic renewal” issue).

The court noted that the circuit courts were “divided on the issue of the degree of deference to give to Board interpretations of collective bargaining agreements.” Id. at 356. Compare, e.g., Local Union 1395, IBEW v. NLRB, 797 F.2d 1027, 1031 (D.C. Cir. 1986) (stating that “the Board’s interpretation of contractual provisions is entitled to ‘no particular deference’”) with NLRB v. Southern Cal. Edison Co., 646 F.2d 1352, 1362 (9th Cir. 1981) (noting that deference is appropriate). The court found, “however, that even under a less deferential posture, the Board’s analysis of the contract was reasonable and supported by the evidence.” C.E.K. Indus., 921 F.2d at 356.

357. Id. at 358.

358. Id. at 360.

359. Id. at 357. The court agreed with their fellow circuits in holding that:

(1) Supreme Court precedent is not an obstacle to adoption of Deklewa, because in Jim McNeff, Inc., 461 U.S. 260, and Higdon, 434 U.S. 335, the Court was merely accepting the old R.J. Smith rule as within the Board’s authority and not adopting the rule based on the Court’s independent analysis; (2) the legislative history of 8(f) supports the Deklewa non-repudiation rule better than the R.J. Smith approach; and (3) the Deklewa rule is an improvement over R.J. Smith in furthering the NLRA’s policies of labor stability and employee free choice.

Id; see Mesa Verde, 861 F.2d at 1128-34. Therefore, the court adopted Deklewa as the controlling law in the First Circuit. C.E.K. Indus., 921 F.2d at 357.

360. C.E.K. Indus., 921 F.2d at 357. See supra notes 131-139 and accompanying text (discussing the split in the retroactive application of Deklewa among the other circuit courts of appeals).
clear import of Deklewa, especially in the case at hand.\textsuperscript{361} The court found that, under “[p]re-Deklewa, CEK would have been acting fully within its rights in repudiating its prehire agreement with the Union, provided that the Union had not achieved majority status under the conversion and merger doctrines.”\textsuperscript{362} However, “[u]nder Deklewa, CEK would have had to conduct an election to ensure that the Union lacked a majority before repudiating the contract with impunity.”\textsuperscript{363} Therefore, the court was required to adjudicate whether it was appropriate to apply Deklewa retroactively against CEK and Cam-Ful.\textsuperscript{364} Lastly, the court stressed that “[a]ccording a newly adopted rule retroactive effect is proper unless ‘manifest injustice’ results.”\textsuperscript{365}

In examining the various circuit cases deciding whether or not to give retroactive effect to Deklewa, the First Circuit noted that two factors appeared to be controlling—one weighing for retroactivity and the other against.\textsuperscript{366} The first factor that the court pointed out was the apparent majority status of the unions prior to repudiation.\textsuperscript{367} In those cases applying Deklewa retroactively against the construction industry employer, “there was evidence that the unions had nearly or actually achieved majority status through the conver-

\begin{itemize}
  \item \textsuperscript{361} Id.
  \item \textsuperscript{362} Id.
  \item \textsuperscript{363} Id.
  \item \textsuperscript{364} Id.
  \item \textsuperscript{365} Id. at 357 (quoting NLRB v. New Columbus Nursing Home, Inc., 720 F.2d 726, 729 (1st Cir. 1983) (citing Bradley v. School Bd. of Richmond, 416 U.S. 696, 711 (1974))).
  \item The court pointed out in a footnote that last term in Kaiser Aluminum & Chemical Corp. v. Bonjorno, _____ U.S. _____, 110 S. Ct. 1570, 1577 (1990), the Supreme Court had identified, but failed to resolve, an apparent tension between the approach announced in Bradley v. School Bd. of Richmond, 416 U.S. at 715 (ruling that courts should apply newly enacted law in effect at the time of appellate decision unless retroactive application would result in manifest injustice) and that expressed in Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (stating that “[c]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”). Id. at 357-58 n.7.
  \item In deciding the retroactivity issue, the First Circuit has suggested that the standard is whether retroactive application of a newly promulgated “principle would alter substantive rules of conduct and disappoint private expectations.” Id.; see Demars v. First Serv. Bank for Sav., 907 F.2d 1237, 1239-40 (1st Cir. 1990) (recognizing the “disappointment of private expectations” as an essential factor in considering the retroactivity issue); see also American Trucking Ass'ns v. Smith, _____ U.S. _____, 110 S. Ct. 2323, 2338 (1990) (stating that “[w]hen the Court concludes that a law-changing decision should not be applied retroactively, its decision is usually based on its perception that such application would have a harsh and disruptive effect on those who have relied on prior law . . . . If the operative conduct or events occurred before the law-changing decision, a court should apply the law prevailing at the time of the conduct.”)
  \item \textsuperscript{366} C.E.K. Indus., 921 F.2d at 358.
  \item \textsuperscript{367} See id.
\end{itemize}
“These courts reasoned that there would be no manifest injustice in applying *Deklewa* because even under the old rule the employer had acted at their own risk in repudiating the agreement.” The second factor which the court noted was “the historical or ongoing nature of the dispute.” In those cases in which there was “no representation election still to be held and where the dispute was purely historical, the policies of labor stability and employee free choice would not [have been] served by applying *Deklewa* to past conduct.” These courts held that under the circumstances, retroactivity was clearly inappropriate.

Considering these factors, the First Circuit found that the present dispute was one in which a retroactive application of *Deklewa* would result in manifest injustice. The court found that there was no evidence in the record that the Union had ever achieved majority status within the relevant bargaining unit. “Moreover, as CEK [wa]s no longer in operation, the dispute [wa]s purely an historical one at th[at] point.” Accordingly, the First Circuit concluded that applying *Deklewa* retroactively would subject both CEK and Cam-Ful “to a penalty for having taken action which was entirely lawful under pre-*Deklewa* law.” Hence, the First Circuit refused to uphold the retroactive application of the Board’s new interpretations in *Deklewa*.

### D. Aligning The Split Among The Circuits

Although the six United States Courts of Appeals cases discussed above split in their decisions regarding retroactivity, each court based its holding on the same underlying consideration. As demonstrated throughout these cases, under certain circumstances, pre-*Deklewa* law and post-*Deklewa* law can generate two vastly different results for construction industry employers. Each of the six circuit courts recognized these results in determining whether the retroactive application of the Board’s new section 8(f) interpretatio-
tions, as announced in Deklewa, would produce “manifest injustice” for the respective construction industry employer.\(^{378}\)

In the three circuit cases holding for retroactivity, each court specifically discerned that the record involved contained persuasive evidence that the respective union(s) had achieved majority status.\(^{379}\) These courts pointed out that, even under pre-Deklewa law, the construction industry employers could not lawfully have repudiated their prehire agreements since the union(s) had achieved majority status.\(^{380}\) In these cases, the Third, Seventh and Eighth Circuits determined that pre- and post-Deklewa law yielded the same results, and therefore, held that the retroactive application of Deklewa would work no manifest injustice on the respective employer.\(^{381}\) Accordingly, these courts upheld the retroactive application of Deklewa.\(^{382}\)

In the three circuit cases holding against retroactivity, each court specifically recognized that the respective record contained no

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378. See C.E.K. Indus., 921 F.2d at 357 (pointing out the specific difference in result under pre-Deklewa and post-Deklewa law); Mar-Len, 906 F.2d at 203-04 & n.4 (noting that the retroactive application of Deklewa would penalize Mar-Len for action which was rightful under pre-Deklewa law); Bufco Corp., 899 F.2d at 612 (concluding that the Union had achieved majority status, and thus, under both pre- and post-Deklewa law, Bufco could not have rightfully repudiated); Mesa Verde, 895 F.2d at 519 (stating that applying Deklewa retroactively would subject Mesa Verde “to a penalty for having taken action which was entirely lawful under pre-Deklewa law”); W.L. Miller Co., 871 F.2d at 749-50 (holding that “Miller was already bound to an enforceable contract” under pre-Deklewa law, and thus, the retroactive application of Deklewa would not produce manifest injustice); Ornamental Iron Workers, 843 F.2d at 781 (stating that “even under the old R.J. Smith rule it appears entirely likely that the Board would have held that Deklewa was not free to repudiate its agreement with the Union.”).

379. See Bufco Corp., 899 F.2d at 612 (finding that “through the merger and conversion doctrines the Union enjoyed 9(a) majority status”); W.L. Miller Co., 871 F.2d at 749 (supporting the ALJ’s findings that the Union enjoyed “majority status in the multiemployer unit which Miller voluntarily joined”); Ornamental Iron Workers, 843 F.2d at 781 & n.14 (pointing out that the record included evidence of “actual union membership of a majority of the employees”)

380. See Bufco Corp., 899 F.2d at 612 (concluding that the Union had achieved majority status, and thus, under both pre—Deklewa law, Bufco could not have rightfully repudiated); W.L. Miller Co., 871 F.2d at 749-50 (holding that, under pre-Deklewa law, Miller was bound to an enforceable contract, and thus, could not lawfully repudiate its agreement with the Union); Ornamental Iron Workers, 843 F.2d at 781 (stating that “under the old R.J. Smith rule it appears entirely likely that the Board would have held that Deklewa was not free to repudiate its agreement with the Union.”).

381. See supra note 378 and accompanying text (noting that in these cases, both pre- and post-Deklewa law yielded the same results).

382. See Bufco Corp., 899 F.2d at 612 (joining “the Third and Eighth Circuit in their acceptance of the Board’s decision to retroactively apply the Deklewa rule to cases such as the one before [it]”); W.L. Miller Co., 871 F.2d at 750 (deferring to the Board’s decision to apply Deklewa retroactively); Ornamental Iron Workers, 843 F.2d at 781 (enforcing the Board’s order applying Deklewa retroactively).
evidence of majority support by the union. These cases had been pending for some time and representation elections could no longer have been effectively held either because the construction projects involved had been completed, the appropriate prehire agreements had expired by their own terms, or circumstances had changed with the passage of time. These courts pointed out that, under pre-Deklewa law, the construction industry employers had lawfully repudiated their prehire agreements since the unions had not achieved majority support of the workers. However, each court generally discerned that the respective employer's repudiation would be unlawful under post-Deklewa law since the anti-repudiation rule announced in Deklewa made union majority status irrelevant. In these cases, since pre- and post-Deklewa law yielded substantially different results, the First, Fifth and Ninth Circuits found that undeniable manifest injustice would result if the Board's Deklewa interpretation of section 8(f) law was applied retroactively.

383. See C.E.K. Indus., 921 F.2d at 357 (finding that "[t]here [wa]s no evidence that the Union has achieved a majority within the relevant bargaining unit."); Mar-Len, 906 F.2d at 203-04 & n.4 (noting that "there [wa]s no evidence in the record that [the Union] had achieved majority status prior to repudiation"); Mesa Verde, 895 F.2d at 519 (pointing out that no representation election was ever held, or could be held, to prove that the Unions had achieved majority status).

384. See Brief for Appellee at 13, Mar-Len, 906 F.2d 200 (5th Cir. 1990) (No. 89-4456) (noting that as of the date that the NLRB announced its decision in Deklewa, the work being performed on the DeRidder project had been completed).

385. See C.E.K. Indus., 921 F.2d at 356 (pointing out that the prehire agreement in issue, even if automatically renewed, had expired five years prior to the Board's ruling on the case).

386. See Mesa Verde, 895 F.2d at 520 (finding that "the relationship between the parties ha[d] been terminated" over four years prior to the adjudication of the case); see also Reply Brief in Support of Petitioner's Petition for Review at 23 & n.24, C.E.K. Indus., 921 F.2d 350 (1st Cir. 1990) (No. 89-2008) (pointing out that there were no longer any CEK employees since CEK was no longer in operation and had been out of business for seven years when the Board finally rendered its decision).

387. See C.E.K. Indus., 921 F.2d at 357 (pointing out there was no evidence of the Union's majority status and that the Cam-Ful's and CEK's actions were entirely lawful under pre-Deklewa law); Mar-Len, 906 F.2d at 203-04 & n.4 (finding that there was no evidence that the Union had achieved majority status and that Mar-Len's repudiation was lawful under pre-Deklewa law); Mesa Verde, 895 F.2d at 519 (pointing out that Mesa Verde's action was entirely lawful under pre-Deklewa law).

388. These circuit courts generally recognized out that the Board's new Deklewa opinion forced the respective employers to comply with the prehire agreement until its expiration, regardless of whether the union had achieved majority status. See C.E.K. Indus., 921 F.2d at 357; Mar-Len, 906 F.2d at 203-04; Mesa Verde, 895 F.2d at 519. Hence, all three employers' repudiations would have been unlawful under Deklewa.

389. See C.E.K. Indus., 921 F.2d at 358 (concluding "that this dispute [wa]s one in which manifest injustice would result from the retroactive application of Deklewa.")
ingly, these courts held against retroactivity.90

Therefore, although the six United States Courts of Appeals cases discussed above have split in their decisions regarding retroactivity, each court has similarly based its holding regarding retroactivity on whether the application of pre-Deklewa law and post-Deklewa law would derive two vastly different results for construction industry employers. Where the circuit court found that the Board's new interpretation of section 8(f) law would subject the respective employer to a different penalty than was previously allowable, the court found "manifest injustice" and held against retroactivity.

IV. THE INEQUITABLE AND UNJUST EFFECTS OF THE NLRB'S RETROACTIVE APPLICATION OF DEKLEWA ON CONSTRUCTION INDUSTRY EMPLOYERS

Although an inevitable degree of injustice occurs whenever regulatory agency interpretations are modified or replaced midstream, agencies are generally justified in immediately applying new and improved rules and regulations. Specifically, the NLRB's prospective application of its new Deklewa rules to all section 8(f) prehire agreements, effective at the time of its decision, was reasonable. Similarly reasonable was the Board's prospective application of Deklewa to all cases where such an agreement had been recently repudiated and in which an election to test the union's majority status could then have been held.391 "The interests of uniformity, clarity, ease of application

apply Deklewa retroactively."; Mesa Verde, 895 F.2d at 519 n.1 (stating that "it would be manifestly unjust to apply Deklewa retroactively in this case").

390. See C.E.K. Indus., 921 F.2d at 358 (denying the Board's order for enforcement); Mar-Len, 906 F.2d at 204 (refusing to apply Deklewa retroactively and remanding the case for entry of a judgment of dismissal); Mesa Verde, 895 F.2d at 519 n.1 (holding that the retroactive application of Deklewa was inappropriate and accordingly affirming the judgment below).

391. The NLRB's new Deklewa interpretation of section 8(f) prehire agreements, including its anti-repudiation rule, seems entirely reasonable. See National Automatic Sprinkler, 680 F. Supp. at 735; see also Mourey, supra note 5, at 26 (concluding that the Board's new Deklewa rules "more adequately respond to the building and construction industry's needs... [and] are a more manageable block from which the Board can build and refine the law."). See generally Mesa Verde, 861 F.2d at 1128-34 (discussing and determining the reasonableness of Deklewa).

It is this author's opinion that the NLRB's Deklewa principles are generally reasonable interpretations of the NLRA. The only major change to NLRB policy wrought by the Deklewa decision is to deprive both construction industry employers and unions of the ability to repudiate section 8(f) prehire agreements during the term of a contract. The Board, along with the United States Supreme Court in Jim McNeff, Inc. v. Todd, 461 U.S. 260 (1983), has always held that such agreements are voidable, but not void. As a result, they are enforceable
and effective promotion of fundamental statutory policies all dictate that result.\textsuperscript{392}\textsuperscript{92} Under certain circumstances, however, reasonableness dictates that the Board's Deklewa holdings should not be uniformly and retroactively applied to all pre-Deklewa repudiation cases. The following section discusses many of the arguments against the retroactive application of Deklewa and underscores the inequitable and unjust results which are placed on construction industry employers by such retroactivity.

In Deklewa, the NLRB balanced various competing factors in determining whether its newly announced anti-repudiation rule should be retroactively applied to all cases pending before the Board at any stage. On the one hand, the Board considered the "ill effects of retroactivity"\textsuperscript{393}\textsuperscript{93}—the potential unfairness to construction industry employers of imposing upon them additional obligations and liabilities to which they were not subject when they had entered into section 8(f) agreements under pre-Deklewa law. On the other hand, the Board noted "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."\textsuperscript{394}\textsuperscript{94} After weighing these factors under the Chenery balancing test,\textsuperscript{395}\textsuperscript{95} the Board concluded that the statutory benefits from its newly announced changes in section 8(f) law far outweighed any hardships resulting from the immediate and retroactive application of those

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changes.\textsuperscript{386} In balancing the two sides, the Board concluded that several countervailing interests had justified imposing this additional burden on those parties who had relied on pre-\textit{Deklewa} law, including construction industry employers.\textsuperscript{387} The Board listed these interests as follows:

First, the Board is doing nothing more than holding parties to the terms and conditions of 8(f) contracts that were voluntarily entered into. Second, . . . the need to serve better the fundamental statutory policies of employee free choice and labor relations stability compels our actions here. Finally, if we were to apply the new 8(f) law prospectively only, we would then be required for an indefinite period of time to perpetuate the administrative and litigational difficulties entailed in application of arcane current law to all pending 8(f) cases.\textsuperscript{388}

While these countervailing interests generally have merit, the advancement of these interests through retroactive application is questionable at best.

First, while the NLRB offered, as support of \textit{Deklewa} retroactivity, the countervailing interest of “holding parties to the terms and conditions of 8(f) contracts which are voluntarily entered into,”\textsuperscript{389} the furtherance of this purpose is clearly debatable. Rather than holding the parties to their voluntarily assumed obligations, retroactive application of the Board’s new \textit{Deklewa} interpretations could, instead, undermine the prior prehire agreements between the respective parties.\textsuperscript{400} The right to repudiate a section 8(f) prehire agreement is admittedly a key element upon which parties rely in entering new contracts and in modifying existing ones.\textsuperscript{401} Hence, \textit{refusing} to apply \textit{Deklewa} retroactively to either construction industry employers or unions would be more consistent with the terms of the respective agreements since this would hold the parties to the original terms which they voluntarily entered into, not those which the Board would be forcing upon them.

Second, the NLRA’s overarching statutory objectives—which

\begin{itemize}
  \item \textsuperscript{396} \textit{Deklewa}, 282 N.L.R.B. at 1389.
  \item \textsuperscript{397} \textit{Id}.
  \item \textsuperscript{398} \textit{Id}.
  \item \textsuperscript{399} \textit{Id}.
  \item \textsuperscript{400} \textit{See}, e.g., \textit{Construction Indus. Welfare Fund}, 672 F. Supp. at 294. (noting that retroactive application of \textit{Deklewa} could specifically undermine the prior contracts between the construction industry employer and union involved).
  \item \textsuperscript{401} \textit{See id}.
\end{itemize}
the Board found to compel retroactive application of its new anti-repudiation rule—may not be pertinent in all cases arising under section 8(f) prehire agreements. Specifically, the retroactive application of the Board’s new Deklewa interpretations may not serve either the policy of employee free choice or labor relations stability in cases where the parties no longer have any relationship that retroactive application could affect. Under these circumstances, the Board’s remedies, this late in the game, fail to serve the NLRA’s objectives.

The NLRB and unions may contend that employee free choice suffers if the Deklewa rule is not applied retroactively because courts lack the ability to conduct an election allowing employees to express their preference. While this argument is persuasive, it ignores the fact that in all cases “involving strictly historical disputes, a representation election can no longer be effectively held.” Concomitantly, an employee’s right to expression of free choice can no longer be asserted in this instance and retroactivity will not further this congressional statutory objective.

Likewise, the beneficial effect of retroactive application of Deklewa on the stability of the labor relationship between a construction industry employer and the respective unions is dubious. Even if, pursuant to Deklewa, a court held an employer’s repudiation ineffective, it is likely that the contractual relation between the parties would appear to have long since terminated for several other reasons. Hence, the stabilizing effect of retroactive application on...
the relations between the parties would be negligible, at best.408

For example, in *C.E.K. Industrial Mechanical Contractors*,409 at the time when the case was finally adjudicated, the parties no longer had any relationship that could be affected by retroactive application. The contract at issue, even if it had renewed automatically in 1983, expired in 1984. CEK, a construction employer, had no employees since 1984, and thus a representation election could no longer be held. As a result, when the First Circuit finally ruled on the case six years later, there were no employees to protect. Retroactivity, therefore, could not further effective expression of employee free choice, and could not damage the maintenance of labor stability in this particular construction setting.410

by its own terms, see, e.g., *C.E.K. Indus.*, 921 F.2d at 356 (pointing out that the prehire agreement in issue, even if automatically renewed, had expired five years prior to the Board's ruling on the case), or because circumstances have changed with the passage of time, see *National Automatic Sprinkler*, 680 F. Supp. at 735 n.4 (noting that, in *Deklewa*, the underlying circumstances had "changed with the passage of time"); see, e.g., Reply Brief in Support of Petitioner's Petition for Review at 23 & n.24, *C.E.K. Indus.*, 921 F.2d 350 (1st Cir. 1990) (No. 89-2008) (pointing out that there were no longer any CEK employees since CEK was no longer in operation and had been out of business for seven years when the Board finally rendered its decision); *Mesa Verde*, 895 F.2d at 520 (finding that "the relationship between the parties ha[d] been terminated" over four years prior to the adjudication of the case).


409. 921 F.2d 350 (1st Cir. 1990); *see supra* notes 321-377 and accompanying text (discussing the case in detail).

410. Federal Courts have been charged by congress with "responsibility for the reasonableness and fairness of Labor Board decisions." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951); *see Emhart Indus. v. NLRB*, 907 F.2d 372, 379 (2d Cir. 1990). For this reason, courts "must withhold enforcement of orders that will not effectuate any reasonable policy of the act, even where the problems with the order are caused primarily by the lapse of time between the practices complained of and the remedy granted." *Emhart Indus.*, 907 F.2d at 379; *cf. NLRB v. Koenig Iron Works, Inc.*, 856 F.2d 1, 3-4 (2d Cir. 1988) (denying enforcement of bargaining order where twelve years expired between the expiration of a collective bargaining agreement and order); *NLRB v. J. Coty Messenger Serv.*, 763 F.2d 92, 99-101 (2d Cir. 1985) (denying enforcement of bargaining order where board failed to analyze the effect of passage of time and employee turnover). Additionally, Board orders should be reversed when they have no reasonable basis in law, *Allied Chem. & Alkali Workers of America, Local Union No.1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 156, 166 (1971), or are "fundamentally inconsistent with the structure of the Act," *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965).

Employing this reasoning, the Second Circuit has recently refused to enforce a NLRB order that had arisen out of a historical dispute. *See Emhart Indus.*, 907 F.2d at 380. In *Emhart*, the Board held that the company's action in 1983 and 1984 gave rise to an unfair labor practice. *Id.* at 376. Refusing to enforce the Board's decision, in part because the realities of the relationship between the parties had changed, the Second Circuit stated that it "believe[d] that the board's inexcusable delay in deciding this case—or, more precisely, the effects of that delay on the efficacy of the Board's remedy—provide[d] an independent ground for denying enforcement." *Id.* at 378. The court found that due to the passage of time—six years—the underlying situation at Emhart Industries had changed. *Id.* at 379-80 (pointing out that the only plant which the Board's cease and desist order applied to had closed down five
Finally, the Board points out as one of its countervailing interests that it would be burdened with administrative and litigational difficulties if it must apply two different sets of law—its prior section 8(f) interpretations and its new interpretations—to all pending section 8(f) cases. Indeed, most cases involving retroactive application of newly promulgated agency interpretations will implicate some regulatory interest. Retroactivity relieves the agency from the administrative inconvenience of contemporaneously applying two conflicting sets of rules or interpretations. Retroactivity also enables the agency to implement its new policy changes immediately.

These considerations, however, are not overriding. For instance, the Board's concern about the litigational difficulties that would result if its new interpretations of section 8(f) law were to continue to apply, may not be at issue in each pending case. Additionally, inconvenience resulting from the existence of two contrary interpretations should not, by itself, substantiate retroactivity. Only when the circumstances result in severe administrative hardships should the regulatory convenience argument justify retroactivity. The Board did

 años prior). Consequently, the court held that "the enforcement of the order now not only would undermine more labor policies that [sic] it would advance, but also would mock reality." Id.

Similarly, the retroactive application of Deklewa in "strictly historical disputes" not only fails to further the NLRA's statutory policies of employee free choice and labor relations stability, but clearly undermines more labor policies than it would advance. Retroactivity under these circumstances also indubitably mocks reality where employees' rights can no longer be effectively asserted and contractual relations between the parties have long since terminated.

411. Deklewa, 282 N.L.R.B. at 1389.
412. See Retroactive Regulatory Interpretations, supra note 94, at 213.
413. Id.; see, e.g., Leedom v. IBEW, Local 108, 278 F.2d 237, 242-43 (D.C. Cir. 1960) (noting that the NLRB contended that with retroactive application, its policy changes could be implemented immediately as opposed to being precluded from "putting its new policies fully into effect for as long as five years from the date the change was announced.").
414. Retroactive Regulatory Interpretations, supra note 94, at 213. But cf. Leedom v. IBEW, 278 F.2d at 243 (stating that "[a]dministrative flexibility is, after all, one of the principal reasons for the establishment of the regulatory agencies. It permits valuable experimentation and allows administrative policies to reflect changing policy views.").
415. See, e.g., National Automatic Sprinkler, 680 F. Supp. at 735 (noting that "the Board's concern about the litigation difficulties that would result should the old rule continue to apply [was] not present" in the case before it). For instance, majority status questions are not properly resolvable in LMRA section 301 litigation, Id.; LMRA § 301, 29 U.S.C. § 185 (1988); see generally C.E.K. Indus., 921 F.2d at 359; Mar-Len, 906 F.2d at 203-04, and therefore, litigation difficulties in applying two different sets of rules would not exist.
416. Retroactive Regulatory Interpretations, supra note 94, at 213; see e.g., Leedom v. IBEW, 278 F.2d at 243 (stating that "[h]ere in the nature of the problem the Board could not promulgate these rules prospectively without having to wait up to five years to put its new policies into full effect.").
not mention any such problems in Deklewa.

When an agency overrules an interpretation that has been in effect for a considerable period of time, the administrative interest that the agency asserts will be less compelling. As noted below, the longer an interpretation has been in effect, the more likely it is to generate reliance and expectations regarding that interpretation.417 In such a situation, it is less probable that there will be an overriding need to retroactively apply a new interpretation. If a governmental agency has endorsed an interpretation over a considerable period of time, "it is difficult for it to argue, absent significantly altered circumstances, that it has a compelling need to replace that interpretation immediately."418

Prior to Deklewa, the Board had consistently upheld its earlier R.J. Smith interpretation of section 8(f) law which it originally announced in 1971, and which was upheld by the Supreme Court in Higdon in 1978. As a result, as noted below, the Board's earlier in-

417. See infra notes 441-443 and accompanying text; see, e.g., C.H. Guenther & Sons, Inc. v. NLRB, 427 F.2d 983, 986 (5th Cir.) (concluding that retroactive effect was permissible since the new decision had been foreshadowed by prior judicial and administrative precedent which had undercut the then-existing precedent), cert. denied, 400 U.S. 942 (1970); American Mach. Corp. v. NLRB, 424 F.2d 1321, 1328 (5th Cir. 1970) (rejecting assertions that agency's new decision came as a complete surprise, and noting that the agency's prior decision "demonstrated the erosion of employers' freedom in treating jobless economic strikers as new applicants."); see Retroactive Regulatory Interpretations, supra note 94, at 213; cf. C. Sands, Sutherland Statutory Construction § 41.05, at 371 (4th ed. 1986) (stating that "[w]ith further relevance to the question of what expectations can be taken to have been reasonably and seriously held, there is authority for greater tolerance toward retroactive application of laws which coincide with long-standing public policy.").

The general principles of reliance that apply to judicial decisions overruling prior precedent apply to administrative interpretations as well:

[A]lthough litigants may have actually relied on a prior rule in conducting their daily affairs, courts only protect justifiable or reasonable reliance. For example, courts have generally not protected reliance when the overruled decision has been repeatedly weakened by cases that stopped short of explicitly overruling it or when the prior rule's abandonment has been clearly foreshadowed. In these situations, a litigant's claim that his reliance was justified becomes "weaker and weaker as the warning signs mount."

Comment, Prospective Application of Judicial Decisions, 33 ALA. L. REV. 463, 478 (1982) (authored by J.B.R.). See also Munzer, A Theory of Retroactive Legislation, 61 TEX. L. REV. 425, 430-32 (1982) (discussing the rationality of expectations); Retroactive Regulatory Interpretations, supra note 94, at 211 n.190; Comment, Prospective Overruling and Retroactive Application in the Federal Courts, 71 YALE L.J. 907, 947 (1962) (stating that "[d]ecades of cases limiting the original decision to its facts, distinguishing it from almost indistinguishable situations, declining to overrule it in apologetic tones that seem to admit that consistency would compel such an overruling . . . would seem to make it a weak reed upon which to rely.").

Retroactive Application of Deklewa interpretation generated reliance and expectations among parties in the construction industry.\textsuperscript{419} For instance, the six circuit court cases discussed in the previous section all involved construction industry employers who had relied on the Board's earlier interpretation when they repudiated their respective prehire agreements. Even though the Board pointed out that the development of the law "under \textit{R.J. Smith} and \textit{Higdon} [had] exposed significant deficiencies,"\textsuperscript{420} it still allowed its prior interpretation to remain in effect for sixteen years.\textsuperscript{421} Additionally, the Board did not rely on significantly altered circumstances to justify its "‘abrupt’ departure from past precedent."\textsuperscript{422} Rather, it based its sharp changes on the "unsettled and confusing nature of that precedent" which had perpetuated over a long period of time.\textsuperscript{423} Under these circumstances, the existence of a compelling or overriding need for the Board to apply its new interpretation retroactively is doubtful.

While the Board listed the factors discussed above, it failed to elaborate on or, in some instances, even mention other relevant considerations. Such considerations are essential in determining whether the Board's alleged benefits of retroactivity outweighed the new obligations and liabilities imposed on certain parties. First, the considerations relevant in determining whether the anti-repudiation rule should be applied retroactively vary substantially from case to case. Therefore, it is analytically unsound to observe the rule in a vacuum. The anti-repudiation rule "must be understood against the background of the overriding principle enunciated in \textit{Deklewa} from which it is derived: that majority status disputes arising under 8(f) agreements should be resolved by election rather than by litigation."\textsuperscript{424} According to pre-\textit{Deklewa} law, construction prehire agreements were unilaterally voidable unless and until the relevant union

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{419} \textit{See infra} notes 447-450 and accompanying text.
\item \textsuperscript{420} \textit{Deklewa}, 282 N.L.R.B. at 1378.
\item \textsuperscript{421} The Board's new \textit{Deklewa} interpretation overruling \textit{R.J. Smith} were not issued until 1987, sixteen years after the Board first ruled in \textit{R.J. Smith} that section 8(f) of the NLRA allowed the unilateral repudiation of construction industry prehire agreements. \textit{See Deklewa}, 282 N.L.R.B. at 1377.
\item \textsuperscript{422} \textit{Id.} at 1389 n.61.
\item \textsuperscript{423} \textit{Id.} at 1389. In \textit{Deklewa}, the Board found flaws permeating the entire existing 8(f) analytic scheme, and "determined that minor adjustments or changes to current law would not [have been] sufficient to rectify its deficiencies." 282 N.L.R.B. at 1380 n.16. Even though the Board reiterated several times that changes were necessary to the existing law, it did not point out any particular incidents or recent occurrences which specifically compelled it to retroactively apply \textit{Deklewa} immediately.
\item \textsuperscript{424} \textit{National Automatic Sprinkler}, 680 F. Supp. at 735.
\end{enumerate}
\end{footnotesize}
achieved majority status. However, in cases involving "strictly historical disputes," a representation election can no longer be effectively held. Thus, the uniform retroactive application of the Board’s anti-repudiation rule to these cases would only give selective retroactive effect to the Deklewa holding.

The three circuit cases holding against the retroactive application of Deklewa all involved "strictly historical disputes." In these cases, the construction industry employers repudiated their prehire agreements with the unions long before the cases were finally adjudicated. These cases were pending for some time and representation elections could no longer be held either because the construction projects involved had been completed, the appropriate prehire agreements expired by their own terms, or circumstances changed with the passage of time. In addition, the respective unions presented no evidence that they achieved majority status. For example, in C.E.K. Industrial Mechanical Contractors, by the time the First Circuit adjudicated the case, there was no longer any CEK employees, and a representation election had never been held. Thus, whether CEK lawfully repudiated its prehire agreement with the union was simply a "historical dispute" since a representation election by the CEK employees could no longer be effectively held and union majority status could not be determined.

Second, the unfairness of retroactive application of the Board's new anti-repudiation rule to construction industry employers is most manifest in cases such as these. For instance, retroactivity would subject construction industry employers to harsh penalties for taking action that was entirely lawful and sanctioned by both the NLRB and the federal courts under pre-Deklewa law. Additionally, these

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425. See supra notes 49-52 and accompanying text.
426. Mesa Verde, 895 F.2d at 519; National Automatic Sprinkler, 680 F. Supp. at 735; see Mar-Len, 906 F.2d at 204 n.4; see also C.E.K. Indus., 921 F.2d at 358.
428. See C.E.K. Indus., 921 F.2d at 358; Mar-Len, 906 F.2d at 203-04; Mesa Verde, 895 F.2d at 519.
429. 921 F.2d 350 (Ist Cir. 1990); see supra notes 321-377 and accompanying text (discussing the case in detail).
431. See Mesa Verde, 885 F.2d at 597; National Automatic Sprinkler, 680 F. Supp. at 735.

Under the retroactive application of Deklewa, a construction employer who strictly adheres to the terms of a prehire agreement with the employees of the union represented in the agreement, and then repudiates under the law established and enforced by the appropriate bodies would be held liable, even if that activity took place several years before the NLRB changed its interpretation in Deklewa. See, e.g., C.E.K. Indus., 921 F.2d at 359 (showing that C.E.K. repudiated its agreement in 1983, four years before the Deklewa ruling); Mar-Len, 906
penalties would be inequitably and unjustly imposed without afford-
ing the construction industry employers “the opportunity to have
their assertion of the union’s lack of majority status tested either by
election or by litigation.”�32

Third, the Board’s retroactive application of Deklewa contra-
dicts fundamental legal doctrine. The concept that everyone is pre-
sumed to know the law, which is based on the principle that igno-
rance of the law is no excuse,433 has become a fundamental doctrine of
this country’s legal system.433 This doctrine, however, cannot be eq-
uitably utilized when the law is uncertain and unknown,434 and can
perpetrate unfairness when “unanticipated regulatory interpretations
are applied retroactively to the detriment of legitimate reliance inter-
ests.”�435 Nonetheless, the Board held for retroactive application of its
new regulatory interpretations even though construction industry
employers lacked fair notice of these new interpretations when they
legally repudiated their agreements. The Board has done so even
though it previously construed section 8(f) of the NLRA differently
for the sixteen years prior to Deklewa. Therefore, the Board’s retro-
active application of Deklewa subjects construction industry employ-
ers to penalties for actions taking place several years before the
NLRB changed its interpretations in Deklewa, and unbelievably, at

F.2d at 201 (noting that Mar-Len repudiated its agreement in 1984, three years before the
Deklewa ruling); Bufco, 899 F.2d at 609 (stating that Bufco repudiated its agreement in 1982,
seven years before the Deklewa ruling); Mesa Verde, 885 F.2d at 595 (showing that Mesa
Verde repudiated its agreement in 1984, three years before the Deklewa ruling); W.L. Miller
Co., 871 F.2d at 747 (noting that Miller repudiated its agreement in 1983, four years before
the Deklewa ruling). This was the specific case in Deklewa since Deklewa repudiated its agree-
ment in 1983, four years before the NLRB’s ruling. See Ornamental Iron Workers, 843 F.2d
at 772.

432. Mesa Verde, 885 F.2d at 597 (quoting National Automatic Sprinkler, 680 F.
Supp. at 735).


Over a century ago, Mr. Justice Holmes avowed that “to admit the excuse [of ignorance
of the law] at all would be to encourage ignorance where the lawmaker has determined to
make men know and obey, and justice to the individual is rightly outweighed
by the larger
interests on the other side of the scales.” O. Holmes, THE
COMMON LAW 48 (1881). See also
J. Austin, Lectures on Jurisprudence 498 (1869).

434. See C. Sands, supra note 417, § 41.02, at 340-41:
It is a fundamental principle of jurisprudence that retroactive application of new
laws is usually unfair. There is general consensus that notice or warning of the rules
should be given in advance of the actions whose effects are to be judged. The hack-
neyed maxim that everyone is held to know the law, itself a principle of dubious
wisdom, nevertheless presupposes that the law is at least susceptible of being known.
But this is not possible concerning law that has yet to exist.
See also B. Cardozo, THE
GROWTH OF THE LAW 3 (1924) (stating that “[l]aw as a guide to
conduct is reduced to the level of mere futility if it is unknown and unknowable.”).

a time when the Board's contrary interpretations were not susceptible to being known.

Fourth, the retroactive application of the *Deklewa* principle, involving altered rules of substantive conduct, also clearly defeats reasonable private expectations existing at the time of the relevant conduct regarding the right to lawfully repudiate prehire agreements. Generally, retroactive application of new laws, rules or regulations, "present special problems for a legal system because they can [easily] upset settled expectations, and can deprive citizens of notice of, and an opportunity to comply with, legal requirements." The First Circuit has recently suggested that "the touchstone for deciding the question of retroactivity is whether retroactive application of a newly

436. *C.E.K. Indus.*, 921 F.2d at 358; *see American Trucking Ass'ns*, ___ U.S. at ___, 110 S. Ct. at 2338 (1990); *see also* *Demars*, 907 F.2d at 1239-40.


Retroactive application of new laws is suspect to the upsetting settled expectations based on prior law. See, e.g., Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250, 1260 (3d Cir. 1978) (stating that "[r]etroactive laws interfere with the legally-induced settled expectations of private parties to a greater extent than do prospective enactments."); Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d 1077, 1080 (1st Cir. 1970) (noting that "laws that unsettle settled rights can be harsh, and they deserve a special scrutiny."); Leedom v. IBEW, Local 108, 586 F.2d 1027, 1032 (D.C. Cir. 1978) (finding that "[t]he vice inherent in retroactivity is, of course, that it tends to destroy predictability and to undercut reliance—both important aims of the law."); *see Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 692 (1960) (noting that "[p]erhaps the most fundamental reason why retroactive legislation is suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences."); C. *SANDs*, supra note 417, § 41.05, at 366:

One of the fundamental considerations of fairness recognized in every legal system is that settled expectations honestly arrived at with respect to substantial interests ought not to be defeated. There is evidence that results achieved through application of judicial instinct, manifested in the pattern of decisions on retroactivity problems, are perhaps best explained in terms of this fundamental principle of justice.

(Emphasis added.)

Retroactive application of new laws also deprives individuals of a chance to appropriately guide their actions without penalty. *See Munzer, A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425, 426-27 (1982). Munzer points out that:

The central purpose of law is to guide behavior. When legislatures create rules, a person properly forms expectations about how the legal system will respond to his actions. Retroactive laws frustrate the central purpose of law by disrupting expectations and actions taken in reliance on them. This disruption is always costly and rarely defensible. Moreover, retroactive lawmaking violates what is often called the rule of law, namely, an entitlement of persons to guide their behavior by impartial rules that are publicly fixed in advance. This violation undermines human autonomy by hindering the ability of persons to form plans and carry them out with due regard for the rights of others.

*Id.; see also* *Munzer, Retroactive Law*, 6 J. Legal Stud. 373, 391 (1977) (stating that "[a] person is morally entitled to know in advance what legal character and consequences his acts have."); C. *SANDs*, supra note 417, § 41.02, at 340.
announced principle would alter substantive rules of conduct and dis-
appoint private expectations.” Additionally, and most importantly, in its last term, the Supreme Court stressed that:

[w]hen the Court concludes that a law-changing decision should not be applied retroactively, its decision is usually based on its per-
ception that such application would have a harsh and disruptive
effect on those who have relied on prior law. . . . If the operative
court or events occurred before the law-changing decision, a
court should apply the law prevailing at the time of the conduct.

By retroactively applying the Board’s new anti-repudiation rule, the
Board clearly upsets settled expectations among construction indus-
try employers who have relied on prior well-established Board law.

The simple existence of an expectation does not, however, neces-
sarily justify protection. Some well-grounded expectations deserve
protection, while others do not. Courts must ascertain the legitimacy
of a particular expectation as well as the severity of the new inter-
pretation’s impact, and balance these findings against the regulatory
interests advanced by the respective agency. Reliance on an
agency’s interpretation is greater legitimized if that interpretation
has remained in effect for an established period of time without be-
ing modified or overruled. The courts, including the Supreme
Court, have held that a person may legitimately conclude that a
longstanding interpretation is both correct and worthy of reliance.

438. C.E.K. Indus., 921 F.2d at 357-58 n.7 (citing Demars, 907 F.2d at 1239-40). In
Demars, the First Circuit stated that “[u]nder the manifest injustice standard, ‘the disappoint-
ment of private expectations that results from the implementation of a new rule must be bal-
anced against public interest in the enforcement of that rule.’” 907 F.2d at 1240 (quoting
New England Power Co. v. United States, 693 F.2d 239, 245 (1st Cir. 1982)). Accord Aledo-
Garcia v. Puerto Rico Nat’l Guard, 887 F.2d 354, 357 (1st Cir. 1989); Dedham Water Co. v.
Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1084 (1st Cir. 1986).


440. See Retroactive Regulatory Interpretations, supra note 94, at 199. See generally
supra notes 90-106 and accompanying text (discussing the Chenery balancing test).

441. See, e.g., Mehta v. INS, 574 F.2d 701, 705 (2d Cir. 1978) (holding that a new
interpretation could be retroactively applied since the alleged reliance on prior administrative
interpretation occurred almost a year after the interpretation was revoked); see Retroactive
Regulatory Interpretations, supra note 94, at 210 & n.186; see also Traynor, Quo Vadis,
Prospective Overruling: A Question of Judicial Responsibility, 28 HASTINGS L.J. 533, 547-48

Court has repeatedly emphasized that long-standing interpretations are entitled to greater def-
Additionally, they have emphasized that such regulatory interpretations should not be overturned lightly.\textsuperscript{443}

In \textit{Deklewa}, the NLRB ascertained the legitimacy of the expectations involved as well as the severity of impact resulting from the Board's new interpretation, and balanced these findings against the regulatory interests advanced by its new holdings. The Board concluded that the stated countervailing interests far outweighed any hardships to parties affected by retroactivity, and stated that the reliance interest involved:

\begin{quote}
[\ldots] [wa]s not a particularly strong one in light of the purposes that Congress sought to achieve under [section] 8(f). The interest that is entitled to protection is the ability of an employer to avail itself of the Board processes to determine whether there is continued support to undergird the union and the agreement. The new rule, which affirms the Board's election procedures for resolving that is-
\end{quote}

\textsuperscript{443} See \textit{Retroactive Regulatory Interpretations}, supra note 94, at 210.

\begin{flushright}
\textsuperscript{443} See \textit{Retroactive Regulatory Interpretations}, supra note 94, at 210.
\end{flushright}
sue, does not seriously detract from what an employer should appropriately expect in the way of protection under the old rule.\textsuperscript{444}

The Board also pointed out that some employers probably had relied on \textit{R.J. Smith} as a means of repudiating a prehire agreements.\textsuperscript{446} However, the Board noted that due to the infirmities and uncertainties in the pre-\textit{Deklewa} law, it was less likely that a construction industry employer could knowingly have acted in reliance on that law in order to avoid liability.\textsuperscript{448}

As noted above, even though the Board pointed out that the development of the law "under \textit{R.J. Smith} and \textit{Higdon} had exposed significant deficiencies,"\textsuperscript{447} it still allowed its prior interpretations to remain in effect for sixteen years.\textsuperscript{448} As a direct result, the Board's earlier interpretations induced widespread reliance and expectations among construction industry employers in the construction industry.\textsuperscript{449} These expectations were well-grounded, and this reliance was legitimized when the Board continued to effectuate its prior interpretation of section 8(f) law for a substantial period of time without modification or reversal.\textsuperscript{450}

Additionally, the Board's argument that the legitimate reliance interests of employers are unimportant due to other superseding interests is faulty. The Board's argument fails to take into account that in "strictly historical disputes," a representation election can no longer be effectively held. Therefore, the employer's interest in availing itself of the Board processes to determine whether there is majority support to undergird the union and the respective prehire agreement is impossible either by election or by litigation.\textsuperscript{451} Hence, the retroactive application of \textit{Deklewa}: (1) leaves the construction industry employer without any interests protected; (2) seriously detracts

\textsuperscript{444} \textit{Deklewa}, 282 N.L.R.B. at 1389 n.61.
\textsuperscript{445} \textit{Id}.
\textsuperscript{446} \textit{Id.} at 1389.
\textsuperscript{447} \textit{Id.} at 1378.
\textsuperscript{448} \textit{See supra} note 421 and accompanying text.
\textsuperscript{449} The six United States Courts of Appeals cases discussed in the preceding section involved construction industry employers who had relied on the unilateral right to repudiate prehire agreements under pre-\textit{Deklewa} law. The fact that these employers conducted business in six different regions of the country supports the conclusion that widespread reliance and expectations based on the Board's prior interpretations existed.
\textsuperscript{450} NLRB Member Stevens specifically recognized in his concurring opinion that the Board was overturning a reading of section 8(f) of the NLRA that the Board "not only [had] previously embraced but [had] defended before the Supreme Court of the United States." \textit{Deklewa}, 282 N.L.R.B. at 1391.
from what an employer should appropriately expect in the way of protection under the old rule; and (3) yields results which are contrary to the purposes that Congress sought to achieve under section 8(f).

Finally, there are procedural reasons that counsel against retroactive application of Deklewa in the context of an unfair labor practice charge. For instance, an NLRB ruling that a construction employer has committed an unfair labor practice in violation of section 8(a)(5) appears to have no basis in Board practice prior to Deklewa. Before Deklewa, unrepudiated section 8(f) agreements previously were enforceable under section 301 of the LMRA. But until Deklewa, it was settled that section 8(f) did not “expand the duty of an employer under section 8(a)(5), which is to bargain with a majority representative, to require the employer to bargain with a union with which he has executed a prehire agreement but which has failed to win majority support in the covered unit.” Thus, it is apparent that a section 8(f) agreement was not generally enforceable under section 8(a)(5). It is, at the very least, arguable that under the R.J. Smith rule—in effect when any proceeding is commenced before Deklewa—a construction industry employer could not have committed an unfair practice under section 8(a)(5) when it refused to honor a section 8(f) prehire agreement, unless the union had attained majority support and thereby created a full section 9(a) collective bargaining agreement through conversion.

In Deklewa, of course, the Board overruled R.J. Smith, abandoning the conversion doctrine and deciding that a section 8(f) agreement could be enforced through the mechanism of a section 8(a)(5) proceeding. But courts should not be inclined to uphold and enforce a Board order requesting retroactivity, especially when it is partially founded on the conclusion that an employer violated section 8(a)(5) at a time when the settled avenue for resolving prehire agreement disputes was solely through a section 301 lawsuit.

452. See generally C.E.K. Indus., 921 F.2d at 358-59.
453. See id. at 359.
454. See generally Jim McNeff, Inc., 461 U.S. at 270 (enforcing retroactively a monetary obligation created by a prehire agreement under section 301 of the LMRA); Plumbers & Pipefitters Local Union 72 v. John Payne Co., 850 F.2d 1535, 1539-40 (11th Cir. 1988).
455. Higdon, 434 U.S. at 346.
456. C.E.K. Indus., 921 F.2d at 359.
457. See Higdon, 434 U.S. at 345; id.
458. 282 N.L.R.B. at 1377.
459. See C.E.K. Indus., 921 F.2d at 359.

In this instance, hostility towards the retroactive application of Deklewa can be compared to the hostility against retroactive criminal laws. “Hostility towards retroactive laws is re-
V. CONCLUSION

There is little doubt that the NLRB's retroactive application of...
Deklewa works manifestly inequitable and unjust results by effectively punishing construction industry employers for conduct that was lawful when it occurred. While the countervailing interests announced by the Board in Deklewa generally have merit, the advancement of these interests through retroactive application is questionable at best, and completely fail to justify the hardships inflicted on these employers.

The six United States Courts of Appeals cases addressing this retroactivity issue split in their decisions for justifiable reasons. Under certain circumstances, pre-Deklewa law and post-Deklewa law derive two vastly different results for construction industry employers. In cases where the unions had achieved majority status, even under pre-Deklewa law, employers could not have lawfully repudiated their prehire agreements. In these cases where pre- and post-Deklewa law would yield the same results, the courts held that the retroactive application of Deklewa would work no manifest injustice on the respective employers. In cases where there was no evidence of majority support by the union and a representation election could

interpretations, supra note 94, at 168 n.4. For instance, “[i]n many instances, an agency’s adjudicatory arm will render interpretations, making them judicial in character.” Id.; cf. Collaborative Model of Statutory Interpretation, supra, at 581 (noting that “cases become more like statutes by being applied prospectively.”) Additionally, Weaver points out that:

“Although the ex post facto clause deals with criminal laws, one of its key components, the requirement of notice, does extend to civil laws and therefore to [agency] regulatory interpretations. This notice requirement is reflected in the prohibition against laws that are unduly vague or ambiguous.

Id. (collecting cases for support). Lastly, since it is the “general consensus that notice and warning of [a] rule should be given in advance of the actions whose effects are to be judged,” C. SANDS, supra note 417, § 41.02, at 340, retroactively applying newly promulgated agency interpretations without providing notice seems to be in direct opposition to the fundamental purposes of the ex post facto clause.

Hence, by upholding and enforcing a Board order that a construction industry employer is in violation of section 8(a)(5) for actions taken at a time when the settled avenue for resolving prehire agreement disputes was solely through a LMRA section 301 lawsuit, an argument can be made that courts would be violating the ex post facto clause of the United States Constitution. This is particularly applicable in Deklewa-related cases since notice that a section 8(f) prehire agreement could be enforced through the mechanism of a section 8(a)(5) proceeding was not susceptible to construction industry employers prior to the Board’s new holding in Deklewa.

See supra text accompanying notes 391-459 (presenting and analyzing in detail various arguments against the retroactive application of Deklewa and pointing out the inequitable and unjust results which are placed on construction industry employers by retroactivity).

See supra text accompanying notes 391-423 (presenting and analyzing in detail the NLRB’s arguments in support of the retroactive application of Deklewa).

See supra text accompanying note 380.

See supra text accompanying notes 127-238 (analyzing in detail the decisions of the various circuit courts of appeals cases for the retroactive application of Deklewa).
no longer be held, under pre-\textit{Deklewa} law, employers had lawfully repudiated their prehire agreements.\footnote{See supra text accompanying note 387.} However, these repudiations would not be lawful under post-\textit{Deklewa} law.\footnote{See supra text accompanying note 388.} In these cases, since pre- and post-\textit{Deklewa} law yielded substantially different results, the courts found undeniable manifest injustice and properly held against retroactivity.\footnote{See supra text accompanying notes 239-377 (analyzing in detail the decisions of the various circuit courts of appeals cases against the retroactive application of \textit{Deklewa}).}

Retroactivity subjects construction industry employers to harsh penalties for having taken actions which, prior to \textit{Deklewa}, were entirely lawful and sanctioned by both the NLRB and the federal courts.\footnote{See supra text accompanying note 431.} In “strictly historical disputes,” these penalties are inequitably and unjustly imposed, since construction industry employers are not afforded the opportunity to have their assertion of the union’s lack of majority status tested either by election or by litigation.\footnote{See supra text accompanying note 432.} Retroactive application of the Board’s new anti-repudiation rule also clearly upsets settled expectations among construction industry employers who have relied on prior well-established Board law.\footnote{See supra text accompanying notes 436-451.} Furthermore, retroactivity in these instances unjustly subjects construction industry employers to section 8(a)(5) unfair practice violations under the NLRA for taking actions that, under pre-\textit{Deklewa} law, would not have constituted unfair practices.\footnote{See supra text accompanying notes 452-459.} Hence, the retroactive application of the NLRB’s new interpretations regarding section 8(f) prehire agreements as announced in \textit{Deklewa} causes inequitable and unjust results to the detriment of construction industry employers’ legitimate reliance interests.

\textit{Howard Douglas Fineman}