March 1982

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THE ENFORCEABILITY OF PREHIRE AGREEMENTS

The creation of a collective bargaining agreement between an employer and a labor union prior to majority recognition of the union is an unfair labor practice under the National Labor Relations Act (NLRA or the Act).\(^1\) Section 8(f) of the Act,\(^2\) however, stipulates that an employer engaged primarily in the construction industry may make an agreement with a union before that union has been elected the employee representative under procedures set forth in the Act.\(^3\) Nonetheless, the effect of a prehire agreement\(^4\) is uncertain for two reasons: first, the union, a party to the contract,

\(^1\) National Labor Relations Act §§ 7, 8(a)(5), 8(b)(3), 9(a), 29 U.S.C. §§ 157, 158(a)(5), 158(b)(3), 159(a) (1976); H.R. Rep. No. 510, 80th Cong., 1st Sess. 9, reprinted in [1947] U.S. CODE CONG. SERV. 1135, 1144, 1148-49, 1152. This rule recognizes that a labor union should represent a majority of employees and that an employer cannot grant coveted exclusive bargaining status to a union having the support of only a minority of employees. International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 737 (1961):
\(^3\) Id. The statute reads in part:

It shall not be an unfair labor practice . . . 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 . . . because (1) the majority status of such labor organization has not been established . . . prior to the making of such agreement . . . Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section [9(c) or 9(e) of the Act].

\(^4\) Id.

4. The term prehire agreement refers to an agreement between an employer and a union entered into prior to the hiring of any employees. See Retail Clerks Locals 128 & 633 v. Lion Dry Goods, Inc., 369 U.S. 17, 27 (1962). Because Congress intended to allow prehire agreements only as a means to create an initial bargaining relationship prior to employee hiring, prehire agreements cannot be executed when the union already is the recognized bargaining agent of the employees. Bricklayers & Masons Local 3, 162 N.L.R.B. 476, 478 (1966), enforced, 405 F.2d 469 (9th Cir. 1968). See also Audit Servs. Inc. v. Stewart & Janes, 622 P.2d 217, 220 (Mont. 1981).
has not achieved the status of employee representative when the contract is signed; and second, Congress intended that the prehire agreement be only a temporary accommodation between the employer and union pending the negotiation and execution of a collective bargaining agreement after the signatory union is officially recognized. This Note discusses the question of the enforceability of prehire agreements that have not matured into collective bargaining agreements.

**LEGISLATIVE PURPOSE OF SECTION 8(f)**

Under the Wagner Act, the National Labor Relations Board (NLRB or the Board) declined jurisdiction over the building and construction industry because the Board concluded that the industry was substantially organized and did not require Board protection. After enactment of the Taft-Hartley Act in 1947, the Board determined that Congress intended Board regulation of labor relations in the construction industry, and, therefore, the Board exercised its jurisdiction in cases involving the industry. In so doing, the Board concluded that only a union elected as the majority representative of employees could enter into negotiations for a collective bargaining agreement. This requirement created serious problems for the construction industry, which theretofore had re-

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5. See note 3 & accompanying text supra.


11. Id. at 5.
lied on collective bargaining agreements being executed before the hiring of any employees. Consequently, the inability of the construction industry to conform to the requirements imposed by the Board precipitated the inclusion of section 8(f) in the Landrum-Griffin Act of 1959.

Congressional recognition and approval of prehire agreements came in response to the special needs of the construction industry. The intermittent employer-employee relationships that characterized the construction industry made the conventional prerequisites for collective bargaining impractical. Brevity of the employment term and fluidity among local employers mandated that collective bargaining agreements be concluded before employees were hired for any particular job. Such agreements were necessary because an employer had to be able to compute labor costs in estimating bids for specific job contracts. Furthermore, upon attaining a construction contract award, an employer had to rely on a union to provide quick and easy access to skilled workers.

Enactment of section 8(f) provided the construction industry with the flexibility needed to enter into collective bargaining agreements covering prospective employment before the signatory union established majority employee status. In addition, the hiring hall provision of section 8(f) ensured the employer of access to a pool of skilled union workers after obtaining a contract award.

12. Id.
17. Id.
19. The hiring hall provision of § 8(f) allows the employer to inform the signatory labor union of any employment opportunities or to give the union the opportunity to refer qualified applicants for such employment. National Labor Relations Act § 8(f)(3), 29 U.S.C. § 158(f)(3) (1976). The provision, however, does not give the union license to refuse to refer qualified nonunion employees to the employer. Local 18, Bricklayers, Masons & Plasterers' Int'l Union v. NLRB, 407 F.2d 1309, 1311 (3d Cir. 1969).
the broad language of section 8(f), however, Congress apparently did not intend to exempt the construction industry employer from compliance with the majority representation rule, which requires an employer to bargain with the union that represents a majority of its employees. Rather, Congress enacted section 8(f) with the understanding that a prehire agreement would mature into a full collective bargaining agreement upon determination of the majority status of the union. Thus the issue arose whether a prehire agreement could be enforced when the signatory union never achieved majority support.

The courts and the Board disagreed on the proper resolution of this issue. In the few early court cases that addressed the enforceability issue, the courts held that such agreements were enforceable contracts. The Board, on the other hand, held that prehire agreements could not be enforced unless the signatory union had shown majority employee support. This dichotomy of opinion

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21. Id.


For a discussion of the significance of union membership in assessing support for a union, see Precision Striping, Inc. v. NLRB, 642 F.2d 1144, 1147 (9th Cir. 1981); Authorized Air Conditioning Co. v. NLRB, 606 F.2d 899, 906 (9th Cir. 1979), cert. denied, 445 U.S. 950 (1980).


Although both courts found the respective prehire agreements enforceable, they followed different rationales in reaching that conclusion. The United States Court of Appeals for the District of Columbia Circuit held that until a representation election is held a prehire agreement is valid and enforceable. Local 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d at 1189-91. The United States District Court for the District of Nebraska, on the other hand, held that an action for breach of the prehire agreement could be maintained pursuant to the National Labor Relations Act § 301, 29 U.S.C. § 185 (1976). Construction & Gen. Laborers Local 1140 v. Sheesley-Winter Constr. Joint Venture, 421 F. Supp. at 140. See notes 69-80, 108-116 & accompanying text infra for a detailed discussion of these remedies.

brought the issue before the United States Supreme Court in the 1978 case of NLRB v. Local 103, International Association of Bridge, Structural and Ornamental Iron Workers.\(^{25}\)

In Iron Workers, the Supreme Court affirmed a Board decision\(^{26}\) holding that a union committed an unfair labor practice under section 8(b)(7)(C) of the Act\(^{27}\) by picketing to enforce a prehire agreement against an employer when that union did not represent a majority of the employees.\(^{28}\) The Court adopted the Board’s position that a prehire agreement did not secure protection for the picketing activity of a minority union\(^{29}\) and that, until the union established majority employee status, the prehire agreement was “voidable” by either signatory party.\(^{30}\)

In affirming the decision of the Board, the Court relied on the Board’s interpretation of section 8(f).\(^{31}\) In Iron Workers the Court followed the Board’s reasoning that, because the final proviso of section 8(f) permits an election to be held to determine the status of a union,\(^{32}\) an employer does not commit an unfair practice by refusing to honor the prehire contract and bargain with the union when the union has failed to establish majority support.\(^{33}\) The Court upheld the Board’s opinion that a prehire agreement is nothing more than a preliminary contracting step in the establishment of a lawful collective bargaining relationship\(^{34}\) and that, when a union fails to secure such a relationship, its prehire agreements become unenforceable and an employer has no duty to honor these

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28. 434 U.S. at 340. Section 8(b)(7)(C) provides that picketing by a minority union with an object of attaining recognition as the majority representative is an unfair labor practice unless the union files a petition for an NLRB election within 30 days after the picketing has commenced. National Labor Relations Act § 8(b)(7)(C), 29 U.S.C. § 158(b)(7)(C) (1976).
29. 434 U.S. at 341.
30. Id.
31. Id. at 340.
33. 434 U.S. at 345.
34. Id.
agreements.\textsuperscript{35}

Applying this interpretation of section 8(f) to the section 8(b)(7) situation, the Board had determined that the employer’s right to abrogate the prehire agreement made the union’s picketing to enforce the agreement the equivalent of picketing to obtain recognition as the exclusive bargaining agent of the employees.\textsuperscript{36} In \textit{Iron Workers} the Court affirmed this equation of enforcement picketing with recognitional picketing on the basis of the transitional character of prehire agreements.\textsuperscript{37} A further consideration for the Court, however, was the general policy against picketing by a minority union.\textsuperscript{38} The Court noted that Congress, in adopting section 8(b)(7)(C), sought to minimize union interference with employees’ freedom of choice in selecting their bargaining agent.\textsuperscript{39} In light of the possibility that picketing could coerce employees into selecting one employee representative over another, the Court determined that barring a minority union from picketing to enforce a prehire agreement was not unreasonable.\textsuperscript{40} Thus, the Court affirmed the Board’s opinion and held that recognitional picketing by the union violated section 8(b)(7)(C) in the \textit{Iron Workers} case because the union had not filed a petition for an election within thirty days after picketing commenced.\textsuperscript{41}

The decision in \textit{Iron Workers} is ambiguous and precedentially weak on the question of whether prehire agreements are enforceable contracts when the signatory union has not become the majority employee representative. Because \textit{Iron Workers} involved section 8(b)(7)(C) and the specific situation of a union picketing to enforce a prehire agreement, the decision may be limited to situations involving only recognitional picketing. Several courts have held that the \textit{Iron Workers} case is inapplicable in cases not involving recognitional picketing.\textsuperscript{42} Moreover, in \textit{Iron Workers} the Court

\begin{footnotes}
\footnotetext{35. Id.}
\footnotetext{36. Local 103, Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers, 216 N.L.R.B. 45, 46 (1975).}
\footnotetext{37. 434 U.S. at 345.}
\footnotetext{38. Id. at 346.}
\footnotetext{39. Id.}
\footnotetext{40. Id. at 349.}
\footnotetext{41. Id. at 346.}
\footnotetext{42. See, e.g., Western Wash. Cement Masons Health & Sec. Trust Funds v. Hillis Homes, Inc., 26 Wash. App. 224, 612 P.2d 436 (1980).}
\end{footnotes}
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535 denied the Board’s position the weight of clear precedent by concluding that the Board’s interpretation of section 8(f) was one of many possible valid interpretations. Finally, the determination by the Court that prehire agreements are voidable when the signatory union lacks majority support fails to define whether such agreements are wholly unenforceable or enforceable only until some affirmative voiding act is taken.

PICKETING TO ENFORCE PREHIRE AGREEMENTS

Although the courts have not questioned the precedential effect of Iron Workers in cases involving picketing to enforce prehire agreements, courts have questioned the scope of the holding in Iron Workers. One court construed Iron Workers to proscribe any use of picketing to enforce a prehire agreement. The Board, however, recently rejected this construction of Iron Workers and set forth its interpretation of the Iron Workers holding in International Union of Operating Engineers, Local 150.

In Operating Engineers the Board determined that the Court in Iron Workers did not equate picketing to enforce prehire agreements with recognitional picketing in all situations and held that picketing to enforce past obligations assumed under a prehire agreement was permissible. Specifically, the Board held that the ban on picketing to enforce prehire agreements does not apply when a union uses picketing to pressure the employer to pay previously owed fringe benefit contributions. The Board reasoned that

43. 434 U.S. at 341 n.7. The Supreme Court’s deference to the Board on the question of an unfair labor practice may be no less than any court’s deference to the decisions of that administrative body. A court that reviews a Board decision should not approach the statutory construction issue de novo and without regard to the administrative interpretation of the statutes. Id. at 351. Although the Board’s findings of fact must be given great weight by a reviewing court, e.g., Dycus v. NLRB, 615 F.2d 820, 824-26 (9th Cir. 1980), the Board’s application of the law is subject to judicial review. See, e.g., NLRB v. Madison Courier, Inc., 472 F.2d 1307 (D.C. Cir. 1972).


47. Id.

48. Id. at __, 106 L.R.R.M. at 1402-03.
retrospective picketing does not have as its goal union recognition and is intended only to enforce past obligations that the employer undertook in the prehire agreement. By making the delinquent contributions, the employer in Operating Engineers could have satisfied the union demand and achieved removal of the pickets without granting recognition to the union or continuing to apply the terms of the prehire agreement. The Board considered this interpretation to be consistent with the general principle of noncoercion in union selection because permitting retrospective picketing did not interfere with the election of a collective bargaining representative. The Board distinguished Iron Workers because in that case the employer would have needed to apply currently the prehire agreement provisions to its nonunion operations in order to comply with the union demand.

The Board's characterization of Iron Workers is logical. Allowing retrospective picketing to enforce a prehire agreement does not coerce employees in the selection of a representative union. Furthermore, the decision in Operating Engineers is appropriate because in Iron Workers the Supreme Court affirmed a Board decision and the Board has the power to modify its prior decisions.

Another court also has rejected the interpretation of Iron Workers that would proscribe any use of picketing to enforce prehire agreements. In Donald Schriver, Inc. v. NLRB, the United States Court of Appeals for the District of Columbia Circuit recognized that section 8(b)(7)(C) permits picketing for thirty days and indicated that union picketing for less than thirty days would not constitute an unfair labor practice. The Court determined that the prohibition of picketing without knowing whether the union intended to file for an election within the thirty day period required under section 8(b)(7)(C) was unreasonable.

49. Id. at __, 106 L.R.R.M. at 1402.
50. Id. at __, 106 L.R.R.M. at 1402-03.
51. Id. at __, 106 L.R.R.M. at 1403.
52. Id.
53. See notes 31-41 & accompanying text supra.
54. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. at 351.
56. Id. at 868 & n.11.
57. Id.
The Board recently adopted this interpretation of Iron Workers in Albuquerque Insulation Contractor, Inc.\(^5^8\) In Albuquerque Insulation, the Board further determined that employers cannot charge a union with unlawful picketing until the thirty day period provided by section 8(b)(7)(C) has expired.\(^5^9\)

**ENFORCEABILITY OF PREHIRE AGREEMENTS IN NONPIKETING SITUATIONS**

In addition to cases heard after Iron Workers involving picketing to enforce prehire agreements, several cases have dealt with the enforceability of prehire agreements when picketing was not involved. The courts in these cases have been concerned primarily with whether Iron Workers is valid precedent in nonpicketing situations.\(^6^0\) Based on their holdings, the cases fall into three distinct groups. Some courts and the Board have held that the language of Iron Workers supporting a rule of nonenforcement of prehire agreements absent majority support is applicable to all prehire agreements regardless of whether recognitional picketing is involved.\(^6^1\) The courts interpret the term "voidable" in Iron Workers\(^6^2\) to mean that prehire agreements are strictly unenforceable when the signatory union has not obtained majority employee support.\(^6^3\)

Other courts have held that prehire agreements are enforceable retrospectively.\(^6^4\) These courts have adopted the position that under Iron Workers some affirmative act is required to void a prehire agreement.\(^6^5\) Thus, these courts have enforced prehire agreements retrospectively up until the time of repudiation.\(^6^6\)

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59.  Id. at __, 107 L.R.R.M. at 1256.
62.  See note 30 & accompanying text supra.
65.  See, e.g., id. at 25,914-15.
66.  See, e.g., id.
A third group of courts has transcended the parameters of the *Iron Workers* precedent and established a rationale for enforcing prehire agreements that is outside the scope of *Iron Workers*. These courts have held that *Iron Workers* does not preclude enforcement of prehire agreements by means other than bringing unfair labor practice charges. More specifically, these courts have allowed suits to be brought on actions of breach of contract.

**Strict Nonenforcement Cases**

The United States Courts of Appeals for the District of Columbia and Ninth Circuits, several federal district courts, and the Board have held that prehire agreements are unenforceable when the signatory union has failed to establish its status as employee representative. These courts based their decisions on language in *Iron Workers* that purportedly established the rule making majority support a condition precedent to the validity of any prehire agreement. Under this interpretation of *Iron Workers*, prior to a union showing of majority support, a prehire agreement is not a valid, enforceable contract, and adherence to the contract must remain purely voluntary on the part of the signatory parties. An employer, therefore, is free to abrogate the agreement at any time.

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70. Precision Striping, Inc. v. NLRB, 642 F.2d 1144 (9th Cir. 1981).


prior to the union's attainment of majority status.\textsuperscript{75}

The courts that invoke the rule of strict nonenforcement rely on the Supreme Court decision in \textit{Iron Workers},\textsuperscript{76} and, in fact, certain language in that case indicates that such a rule may be valid.\textsuperscript{77} In a discussion on the tangential question of the enforceability of a prehire agreement by means of a suit on the contract, the Court indicated that a prehire agreement might be unenforceable absent a showing that the union is the majority representative.\textsuperscript{78} This dictum, coupled with the language of the Court defining prehire agreements as transitory, preliminary instruments contemplating further development into full collective bargaining contracts,\textsuperscript{79} has led the strict nonenforcement courts to conclude that majority status of the signatory union is an essential condition precedent to enforcement without which the prehire agreement is meaningless and void.\textsuperscript{80}

The arguments supporting the strict nonenforcement rule do not stand up to scrutiny. The language upon which courts rely for this holding was dictum directed to the irrelevant problem of contract suits.\textsuperscript{81} Although the language indicates that a strict nonenforcement rule may be established, the discussion is speculative and permissive;\textsuperscript{82} the Court's discussion of such a rule cannot be construed as a directive to find prehire agreements unenforceable in all instances. More important to the issue of enforceability is the Supreme Court's agreement with the Board that such contracts are voidable.\textsuperscript{83} Because voidability establishes the validity of the contract until the parties elect to avoid the instrument,\textsuperscript{84} the Supreme


\textsuperscript{76} See Paddock v. Clark, 107 L.R.R.M. 2325, 2327 (D. Or. 1980).

\textsuperscript{77} See NLRB v. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. at 351-52.

\textsuperscript{78} Id.

\textsuperscript{79} Id. at 345.

\textsuperscript{80} See, e.g., Paddock v. Clark, 107 L.R.R.M. 2325, 2327 (D. Or. 1980).

\textsuperscript{81} See NLRB v. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. at 351-52.

\textsuperscript{82} The Court states that "[i]t would not be inconsistent . . . to hold that . . . absent a showing that the union is the majority's chosen instrument, the contract is unenforceable." \textit{Id.}

\textsuperscript{83} Id. at 341.

\textsuperscript{84} Toy Toy v. Hopkins, 212 U.S. 542, 548 (1909); \textsc{Black's Law Dictionary} 1411 (rev. 5th
Court's use of the term "voidable" over the more nugatory word "void" indicated its intent not to make prehire agreements strictly unenforceable. Thus, the rule of strict nonenforcement is neither a logical nor reasonable interpretation of *Iron Workers*.

**Retrospective Enforcement Cases**

In contrast to the decisions holding prehire agreements strictly unenforceable, several federal district courts have held that prehire agreements are enforceable retrospectively. These courts agree with the strict nonenforcement courts that prehire agreements generally are unenforceable and are terminable at will by either party, but they require that an affirmative voiding act be taken before the prehire agreement becomes unenforceable. This requirement allows enforcement of the agreement retrospectively up to the point of affirmative termination. Once such notice has been given, however, the agreement becomes wholly unenforceable.

Having established the requirement of affirmative notice of termination, however, few courts defined what constituted a sufficient act of termination. The United States District Court for the Eastern District of Virginia in *Eastern District Council of United Brotherhood of Carpenters v. Blake Construction Co.* determined that courts should judge the adequacy of notice of termination of prehire agreements by the standard of reasonable notice. The court further concluded that reasonable notice could be determined only on an ad hoc basis. Aside from this general standard,

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88. See, e.g., id. at 2741-42.
89. See, e.g., id. at 2741.
91. Id. at 830.
92. Id.
the court did not establish any tangible guidelines on what comprises reasonable notice. The court found, however, that the notice provision for termination of collective bargaining agreements in section 8(d) of the NLRA\(^9\) was not applicable to prehire agreements.\(^9\)

The arguments advanced by the courts supporting retrospective enforcement of prehire agreements focused on the inequity that the rule of strict nonenforcement creates. Prehire agreements benefit signatory employers as much as they do signatory unions and employees.\(^5\) In exchange for adhering to the provisions of prehire agreements, employers receive the benefits of certainty in their labor costs and ready access to laborers.\(^9\) For an employer to reap these benefits and then to abrogate retroactively the agreement, escaping its contractual obligations and shattering the expectations of the employees, would be grossly unfair.\(^9\) The requirement of affirmative notice of termination protects the employees’ expectations of the wages and benefits that the prehire agreement guaran-

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93. 29 U.S.C. § 158(d) (1976). The section provides, in part, that no party shall terminate a collective bargaining agreement unless the terminating party serves written notice upon the other party 60 days prior to the proposed termination date. Id.

94. 457 F. Supp. 830. The court reasoned that, because a prehire agreement is not the result of collective bargaining but is merely a preliminary step to the development of a collective bargaining agreement, the notice provisions of § 8(d) regarding termination of collective bargaining agreements do not apply. Id. The court in Blake went on to determine that the denial of the very existence of a contract, although not necessarily the same as a positive termination, was a sufficiently material breach as to satisfy notice of intent to terminate. Id. at 831.

Other examples of ad hoc determinations of adequate notice of termination have been both obvious and tentative. One court found that receipt of a telegram of termination prior to receipt of the unsigned prehire agreement was sufficient to terminate. W.C. James, Inc. v. Oil, Chem. & Atomic Workers Local 4-449, 646 F.2d 1292, 1295 (8th Cir. 1981). Another court held that an employer’s election to make trust fund contributions only for union employees was not a sufficient act to terminate the prehire agreement provision requiring contributions for nonunion employees. Florida Marble Polishers Health & Welfare Trust Fund v. Megahee, 102 L.R.R.M. 2740, 2741 (M.D. Fla. 1979). The court determined that this act did not necessarily put the trust fund on notice that the contract had been declared void and unenforceable as to nonunion employees. Id.


96. Id.

Furthermore, allowing an employer to abrogate retroactively a prehire agreement at any time would render the agreement meaningless. According to the courts, Congress did not intend, in establishing the section 8(f) exception, that prehire agreements should be ignored arbitrarily.

The retrospective enforcement rule is both a fair and logical interpretation of the rule of voidability of prehire agreements established in Iron Workers. Although the inconclusive nature and uncertain language of Iron Workers make a rule of strict nonenforcement possible, reason and equity dictate that prehire agreements should be valid until some affirmative act of termination is taken. The use of the term "voidable" by the Supreme Court indicates that the Court intended such an interpretation, but other considerations also compel this conclusion. The retrospective enforcement rule is superior to the strict nonenforcement rule because the retrospective enforcement rule considers the unfairness of allowing subsequent abrogation of a prehire agreement by the employer and does no serious injury to the majority representation principle. An employer that has received benefits from a prehire agreement reasonably can be expected to fulfill its contractual obligations under that agreement when it has given no notice of an intent to abrogate the prehire agreement. Although an employer's failure to live up to all the terms of a prehire agreement could be construed as notice of an intent to terminate the agreement, the question of termination should be one of fact to be determined by a court and should not be assumed under a rule of strict nonenforcement.

Although one may argue that enforcing prehire agreements absent union majority status violates the majority representation

98. Id.
101. See notes 77-80 & accompanying text supra.
102. See notes 83-84 & accompanying text supra.
103. See notes 96-100 & accompanying text supra.
104. See note 94 supra.
rule,\textsuperscript{105} this contention loses credibility when the realities of retrospective enforcement are explored. Because section 8(f) creates an exception to the majority representation rule,\textsuperscript{106} the provisions of valid prehire agreements unquestionably are legitimate if the parties voluntarily adhere to them.\textsuperscript{107} Enforcement of prehire provisions pending notice of termination breaches the majority representation rule no more than does section 8(f). Rather, enforcement ensures that expected benefits will accrue to the workers until an act of termination occurs. Retrospective enforcement thus protects the interests of the workers and does not impose an unreasonable burden on the employer.

\textit{Section 301 Contract Remedy Cases}

In addition to the cases holding prehire agreements strictly unenforceable and those holding them retrospectively enforceable, another line of cases has permitted the enforcement of prehire agreements through suits for breach of contract.\textsuperscript{108} These cases are difficult to distinguish from the retrospective enforcement cases because both types of cases involved section 301\textsuperscript{109} suits for breach of contract.\textsuperscript{110} Although similar in format and result to the retrospective enforcement cases,\textsuperscript{111} the cases allowing a breach of con-

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\textsuperscript{105} See notes 73-75 & accompanying text \textit{supra}.
\textsuperscript{106} See notes 1-3 & accompanying text \textit{supra}.
\textsuperscript{107} Id. In debate on § 8(f), Senator John F. Kennedy remarked: "It was not the intention of the committee to require . . . the making of prehire agreements, but, rather, to permit them . . . The purpose of this section is to permit voluntary prehire agreements." 104 CONG. REC. 11308 (1958).
\textsuperscript{109} Section 301 of the National Labor Relations Act provides that parties may bring suit in federal court for a violation of a contract between an employer and a labor organization regardless of the amount in controversy or diversity of the parties. National Labor Relations Act § 301(a), 29 U.S.C. § 185(a) (1976).
\textsuperscript{111} The contract remedy cases to date have not gone beyond retrospective enforcement of prehire agreements. See, e.g., New Mexico Dist. Council of Carpenters v. Mayhew Co., 107 L.R.R.M. 2930, 2932-34 (10th Cir. June 24, 1981).
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tract remedy are grounded in a quite different rationale. The unique rationale makes the contract remedy for enforcement of prehire agreements a questionable substitute for retrospective enforcement and, if followed to its logical conclusion, opens the door for prospective enforcement of prehire agreements.

Courts applying the section 301 contract remedy have held that the holding in *Iron Workers* does not preclude enforcement of prehire agreements by a section 301 suit for breach of contract. In *Iron Workers* the Supreme Court held that picketing by a minority union to enforce a prehire agreement was equivalent to recognition of picketing and thus was an unfair labor practice under section 8(b)(7)(C) of the Act. Courts in the section 301 contract remedy cases, however, limited the *Iron Workers* decision to cases involving enforcement of prehire agreements by means of unfair labor practices (picketing) and distinguished section 301 contract enforcement cases from *Iron Workers* because section 301 suits did not involve coercive recognition of a minority union as majority representative. In section 301 suits, the union merely asked the courts to enforce prehire agreement provisions regarding vested trust fund benefit payments made for the benefit of individual em-

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113. 434 U.S. at 346; notes 26-41 & accompanying text *supra*.


Even though the courts distinguished *Iron Workers* from § 301 cases, the courts still applied the voidability rule of *Iron Workers*, see note 30 & accompanying text *supra*, by allowing prehire agreements to be repudiated upon reasonable notice. New Mexico Dist. Council of Carpenters v. Mayhew, 107 L.R.R.M. at 2932-33; Trustees of Atlanta Iron Workers Local 387 Pension Fund v. Southern Stress Wire Corp., 509 F. Supp. at 1105. If, however, *Iron Workers* does not affect § 301 enforcement cases, then the voidability rule of *Iron Workers* also should not apply. Thus, enforcement of prehire agreements under § 301 may lead to prospective enforcement of prehire agreements.
ployees regardless of the union's majority status. These courts, therefore, held that under section 301 third party beneficiary trustees could enforce trust fund provisions of prehire agreements.

Two federal district courts that applied the rule of strict non-enforcement to prehire agreements also considered and rejected the availability of section 301 to enforce prehire agreements. In these cases, employers defended section 301 suits on the prehire agreements by invoking the Iron Workers holding that prehire agreements are unenforceable absent majority support. Plaintiffs argued that in suits involving trust funds an employer may not assert any defense it has to the prehire agreement. In Iron Workers the Supreme Court determined that, even though it had held earlier that suits on the contract pursuant to section 301 were within the jurisdiction of the federal courts, that holding did not resolve whether a contract is enforceable. The Court then said, "[T]he union's majority standing is subject to litigation in a § 301 suit to enforce a [prehire agreement], just as it is in a[n]... unfair labor practice proceeding, and that absent a showing that the union is the majority's chosen instrument, the contract is unen-


116. See, e.g., Trustees of Atlanta Iron Workers Local 387 Pension Fund v. Southern Stress Wire Corp., 509 F. Supp. 1097, 1099-1100 (N.D. Ga. 1981). The obligation of an employer owed to a third party trust fund may be greater than that owed to the usual third party beneficiary. Although an employer has a valid defense against enforcement of the contract by a usual third party beneficiary, he will be estopped from asserting that defense in a union trust fund suit because of the strong public policy of protecting the contracted-for trust fund benefits of workers and their beneficiaries. Id.

The United States Court of Appeals for the Tenth Circuit, in New Mexico Dist. Council of Carpenters v. Mayhew Co., 107 L.R.R.M. 2930 (10th Cir. June 24, 1981), briefly discussed the applicability of § 301 to non-trust fund provisions of prehire agreements. The court determined that wages and other provisions of the prehire agreement were enforceable by contract suit just as were trust fund benefits. Id. at 2933.


119. Id. at 817; see note 116 supra.


121. 434 U.S. at 351-52.
forceable.' Accordingly, the district courts held that employers could defend section 301 suits by proving that the prehire agreement lacked majority support and thus was unenforceable.

Beyond the dictum found in Iron Workers, however, the courts advanced other arguments against enforcement of prehire agreements by section 301 suits on the contract. The general policy of disallowing contractual defenses in third party trust fund cases is based on the premise of guaranteeing workers the health and retirement benefits that they reasonably expect as the terms of their employment. The United States District Court for the District of Columbia, however, argued that the rationale of protecting future expectations is not applicable when an agreement by its nature makes no promise of future benefits.

Although the courts allowing the section 301 remedy have developed sound legal arguments supporting this method of enforcing prehire agreements, the potential for prospective enforcement of section 8(f) prehire agreements makes the rule one that should not be followed. Section 301 is a powerful tool for the enforcement of collective bargaining agreements. As the Supreme Court suggested in Iron Workers, however, a prehire agreement should not be enforceable in a section 301 suit unless the union shows majority support. If the courts extend section 301 suits to allow enforcement of prehire agreements, the courts will have directed an entrenched relationship between unions and employers. Such enforcement of a prehire agreement of a minority union disrupts the integrity of the majority representation rule.

This problem has no remedy other than legislative clarification or Supreme Court action. The section 301 contract remedy is a le-

122. Id. (dictum).
125. Id. Future expectations based on a prehire agreement cannot be anticipated when a prehire agreement may be repudiated at any time. Id.
126. 434 U.S. at 351-52; see notes 121-123 & accompanying text supra.
127. See note 114 supra.
128. See note 1 & accompanying text supra.
gitimate use of that provision absent an authoritative prohibition to the contrary. The dictum of Iron Workers on the possible unenforceability of prehire agreements in the context of section 301 contract suits may have an influential impact on future cases, but the discussion is not mandatory precedent and will not dissuade a court intent on distinguishing Iron Workers. Should the Supreme Court directly address the enforcement of section 301 contract suits, the Court could declare section 301 suits to be inconsistent with the legislative intent of section 8(f) and thus not a proper remedy in such instances, or the Court could permit the use of section 301 to enforce prehire agreements retroactively. Because such a limitation merely would duplicate the retrospective enforcement rule, however, the better solution is an absolute bar on the use of section 301 suits to enforce prehire agreements.

CONCLUSION

Neither section 8(f) nor the Supreme Court ruling in Iron Workers give much guidance on the problem of enforceability of prehire agreements when picketing is not involved. The dilemma arises because the majority representation rule conflicts with the equitable argument that employers should be held to their contractual obligations when the union has carried out its duties. The retrospective enforcement rule best accommodates these divergent interests because the rule gives effect to prehire agreements up until notice of termination is given, thus avoiding the inequity of retrospective abrogation that occurs under the strict nonenforcement rule. The rule also preserves the majority representation rule by holding prehire agreements unenforceable upon reasonable notice. By contrast, the section 301 remedy rule allows plenary enforcement of prehire agreements, thus wholly subverting the majority representation principle, which is a basic tenet of labor law.

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129. See notes 120-123 & accompanying text supra.
130. See note 82 & accompanying text supra.
131. See notes 85-94 & accompanying text supra.