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CONSTRUCTION UNION HIRING HALLS: SERVICE UNDER A COLLECTIVE BARGAINING AGREEMENT AS A PREREQUISITE TO HIGH PRIORITY REFERRAL

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As an employment agency, the union hiring hall can be helpful to "hardhats" and their employers in the building and construction industry. Employment tenure in this industry is intermittent, and hardhats work on a job-by-job basis on projects that frequently are short-lived.¹ Because the separation in location and time of different projects undertaken by a particular contractor renders permanent employment relationships uneconomical, most workers must seek new employment at the completion of each job, and their employers must forecast labor needs and recruit for upcoming projects. Union hiring halls can supply construction contractors with manpower efficiently, while simultaneously providing for maximum continuity of employment for hardhats within the construction industry's unique circumstances.²

A construction worker's decision to seek employment through a hiring hall referral system, however, is not always voluntary. Frequently, a person cannot apply for work at the job site or otherwise deal directly with the contractor because an exclusive hiring arrangement exists between the contractor and a union. Collective bargaining agreements may grant the union exclusive authority to refer workers on a priority basis³ to all projects undertaken while the contract is

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1. S. REP. NO. 187, 86th Cong., 1st Sess. 27 (1959), reprinted in I NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 423-24 (1959) [hereinafter cited as LEGISLATIVE HISTORY].

2. For commentary on hiring halls see Craig, *Hiring Hall Arrangements and Practices*, 9 LAB. L.J. 939 (1958); Fenton, *Union Hiring Halls Under the Taft-Hartley Act*, 9 LAB. L.J. 505 (1958); Kavarsky, *Union Security, Hiring Halls, Right-to-Work Laws and the Supreme Court*, 15 LAB. L.J. 659 (1964); Rains, *Construction Trades Hiring Halls*, 10 LAB. L.J. 363 (1959); Rothman, *The Development and Current Status of the Law Pertaining to Hiring Hall Arrangements*, 40 VA. L. REV. 871 (1962); Note, *Unilateral Union Control of Hiring Halls: The Wrong and the Remedy*, 70 YALE L.J. 661 (1961).

3. The priority referral provisions involved in *Bechtel Power Corp.*, 223 N.L.R.B. 925, [1975-76] NLRB Dec. ¶ 16,750 (1976), modified, 229 N.L.R.B. No.

84, [1977-78] NLRB Dec. ¶ 18,159 (1977), typify those usually contained in an exclusive hiring agreement. Article V of the *Bechtel Power* agreement states:

Section 5.00

In the interest of maintaining an efficient system of production in the industry, providing for an orderly procedure of referral of applicants for employment, preserving the legitimate interest of the employees in their employment status within the area and of eliminating discrimination in employment because of membership or non-membership in the Union, the parties hereto agree to the following system of referral of applicants for employment:

Section 5.01

The Union shall be the sole and exclusive source of referrals of applicants for employment.

Section 5.02

The Employer shall have the right to reject any applicant for employment.

Section 5.03

The Union shall select and refer applicants for employment without discrimination against such applicants by reason of membership or non-membership in the Union and such selection and referral shall not be affected in any way by rules, regulations, by-laws, constitutional provisions or any other aspect or obligation of Union membership policies or requirements. All such selections and referral shall be in accordance with the following procedure:

Section 5.04

The Union shall maintain a register of applicants for employment established on the basis of the groups listed below. *Each applicant for employment shall be registered in the highest priority group for which he qualifies.*

Section 5.05

Certain qualifications, knowledge, experience are required of anyone being referred as a journeyman electrician.

Section 5.06 Group I

All applicants for employment who have four (4) or more years experience in the trade, are residents of the geographical area constituting the normal construction labor market, have passed a journeyman's examination given by a duly constituted Local Union of the IBEW, and who have been employed for a period of at least one (1) year in the last four (4) years under a collective bargaining agreement between the parties of this Addendum.

Section 5.07 Group II

All applicants for employment who have four (4) or more years experience in the trade, and who have passed a journeyman's examination given by a duly constituted Local Union of the IBEW.

Section 5.08 Group III

All applicants for employment who have two (2) or more years experience in the trade, are residents of the geographical [area] constituting the normal construction labor market and who have been employed for at least six (6) months in the last three (3) years in the trade *under a collective bargaining agreement between the parties to this Addendum.*

in force,⁴ usually from one to three years.⁵ Section 8(f) of the National Labor Relations Act (NLRA)⁶ authorizes such referral agreements, which customarily are made before the hiring of any workers.⁷

Section 8(f) permits employers signatory to contracts establishing hiring halls to recognize the union as the bargaining representative

Section 5.09 Group IV

All applicants for employment who have worked at the trade for more than one (1) year.

Section 5.10

If the registration list is exhausted and the Union is unable to refer applicants for employment to the Employer within 48 hours from the time of receiving the Employer's request, Saturdays and holidays excepted, the Employer shall be free to secure applicants without using the referral procedure, but such applicants, if hired, shall have the status of temporary employees. The Employer shall notify the Business Manager promptly of the names and Social Security numbers of such temporary employees, and shall replace such temporary employees as soon as registered applicants for employment are available under the referral procedure.

(emphasis supplied).

4. The Supreme Court recently has held that a contractor does not commit an unfair labor practice under § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1970), by refusing to honor a prehire agreement negotiated with a union that had not yet obtained majority support. *NLRB v. Local 103, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers*, 98 S. Ct. 651, 658 (1978). Therefore, the union may extract an exclusive hiring agreement from an employer, but the agreement is unenforceable until the union attains a majority status. *Id.* at 659-61.

5. LEGISLATIVE HISTORY, *supra* note 1, at 424.

6. 29 U.S.C. § 158(f) (1971). Section 8(f) states in pertinent 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 . . . or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such employer 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. . . .

7. LEGISLATIVE HISTORY, *supra* note 1, at 424-25. *But see* Wilhoit & Gibson, *Can a State Right-to-Work Law Prohibit the Union-Operated Hiring Hall*, 26 LAB. L.J. 301 (1975), which argues that § 8(f) does not specifically permit exclusive hiring halls. *Id.* at 306.

of employees not yet hired. Consequently, many potential employees participate neither in the selection of a bargaining representative⁸ nor in the establishment of the referral system. In the legislative history accompanying section 8(f) Congress observed: "The practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings of the NLRB [National Labor Relations Board] that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired."⁹ Nevertheless, Congress sanctioned prehire agreements in the construction industry so that contractors could calculate labor costs before bidding on a project and could have a pool of skilled workers available for quick referral.¹⁰

In permitting prehire agreements section 8(f) arguably provides to the building trades a partial exemption from the important labor law policy reflected in section 7 of the NLRA,¹¹ which grants employees the choice either of bargaining through representatives of their own choosing or of refraining from participation in the activities of labor organizations.¹² This deviation from policy commends a narrow construction of section 8(f) that places no greater a burden on a construction worker's ability to exercise his section 7 rights than is required to fulfill the needs of the building industry.¹³ Recognizing the unions' potential abuse of an exclusive job referral power, both Congress and the Supreme Court have limited the types of provisions that may be incorporated into prehire agreements. Thus, contractual provisions establishing the priority of referral for job applicants

8. Section 8(f)(1) of the NLRA, 29 U.S.C. § 158(f)(1) (1970) provides an exception to § 9 of the NLRA, 29 U.S.C. § 159 (1970), which requires that collective bargaining representatives initially be selected by a majority vote of employees.

9. LEGISLATIVE HISTORY, *supra* note 1, at 424.

10. *Id.*

11. 29 U.S.C. § 157 (1970).

12. Section 7 explicitly articulates only one exception to this broad labor policy: an employer and a labor organization that has achieved majority status may establish a security agreement requiring employees to join the union after obtaining employment. *Id.* See NLRA, § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970). In the building and construction industry, § 8(f) permits inclusion of a similar provision in a prehire agreement. *Id.* § 8(f)(2), 29 U.S.C. § 158(f)(2) (1970).

13. The Supreme Court has stated: "The only special consideration given [unions] in organizational campaigns is § 8(f), which allows 'pre-hire' agreements in the construction industry, but only under careful safeguards preserving workers' rights to decline union representation." *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616, 632 (1975).

must be based on objective criteria¹⁴ that do not interfere excessively with workers' rights subsequently to select their own bargaining agent.¹⁵

Although many provisions could comply with these liberal requirements, several unions have included a priority referral provision in their prehire agreements that may exceed permissible legal limits.¹⁶ Under this provision, before a construction worker can qualify for the highest priority referral group he must have worked a designated number of years pursuant to a collective bargaining agreement between the signatories to the present contract, regardless of his skill, experience, or prior job performance.¹⁷ Such a priority referral mechanism may protect workers who reside in an area from itinerant laborers' employment competition and may extend preference to employees who have previous experience, either with an employer or in an industry. Section 8(f) (4) authorizes both objectives: prehire agreements may specify "minimum training or experience qualifications for employment or [provide] for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area."¹⁸

The specific provisions in question, however, award priority according to service under a collective bargaining agreement and do not contain section 8(f) (4)'s limiting language. Consequently, their practical application could produce results not specifically authorized by section 8(f). Nevertheless, the NLRB upheld the validity of this employment priority mechanism in *Interstate Electric Co.*, decided in 1977.¹⁹ In *Interstate Electric* the NLRB also gave an expansive inter-

14. See notes 39-41 *infra* & accompanying text.

15. See text accompanying notes 31-38 *infra*.

16. See *Interstate Elec. Co.*, 227 N.L.R.B. —, [1976-77] NLRB Dec. ¶ 17,848 (1977); *Local 68 (Howard Electric)*, 227 N.L.R.B. —, [1976-77] NLRB Dec. ¶ 17,847 (1977); *Bechtel Power Corp.*, 223 N.L.R.B. 925, [1975-76] NLRB Dec. ¶ 16,750 (1976), *modified*, 229 N.L.R.B. No. 84, [1977-78] NLRB Dec. ¶ 18,159 (1977); *Local 77, Int'l Bhd. of Painters and Allied Trades (Colorite, Inc.)*, 222 N.L.R.B. 607, [1975-76] NLRB Dec. ¶ 17,113 (1976); *Nassau-Suffolk Chapter of Nat'l Elec. Contractor's Ass'n, Inc.*, 215 N.L.R.B. 894, [1974-75] NLRB Dec. ¶ 15,383 (1974).

17. For the relevant text of a typical prehire agreement establishing a priority referral system based on service under the agreement see §§ 5.04-.09 of the collective bargaining agreement quoted at note 3 *supra*.

18. NLRA, § 8(f) (4), 29 U.S.C. § 158(f) (4) (1970).

19. 227 N.L.R.B. —, —, [1976-77] NLRB Dec. ¶ 17,847, at 29, 618 (1977). Prior to *Interstate Electric* the NLRB had held that a collective bargaining agreement giving priority referral because of previous work under a bargaining agreement "penalize[d] employees for having exercised their statutory right to refrain from bargaining collectively through (the Union) in the past, while

pretation to the term "such employer" in section 8(f) (4), holding that the words not only signify a particular employer signatory to the agreement and for whom a potential employee has worked but also include any member of a multi-employer association signing the agreement or any employer consenting to be bound thereby while performing work in the union's jurisdiction.²⁰

The NLRB's decision in *Interstate Electric* will force employers who subscribe to or consent to be bound by an established multi-employer prehire agreement to extend priority employment status to workers whose experience under the collective bargaining agreement has enabled them to reach the top priority groups. To accommodate these workers, the entering employer may be required to discharge longstanding employees simply because they have not worked under the agreement. *Interstate Electric* thus creates for at least one group of workers an extreme hardship that may be unauthorized by section 8(f) and therefore violative of their section 7 rights. This Article evaluates whether the priority referral system approved in *Interstate Electric* conforms to the limitations placed on section 7 by section 8(f). It concludes that, under the NLRB's interpretation of "such employer," the priority mechanism is inconsistent with the purposes of the section 8(f) exemption and should be invalidated.

THE SECTION 7 TEST: THE ADDITIONAL RESTRAINTS ON PREHIRE AGREEMENTS

The Supreme Court in *Local 357, International Brotherhood of Teamsters v. NLRB*²¹ established the threshold test for determining whether the practices of a union or employer have violated an employee's section 7 rights. Respondent Slater, a union member, customarily had sought employment through the union hiring hall. In August, 1955, however, he obtained casual employment with an employer signatory to a hiring-hall agreement without having been dispatched by the union. Slater's employer discharged him several months later after the union complained that Slater had circumvented

rewarding those employees who have chosen to work in units represented by (the Union)." *International Photographers of the Motion Picture Indus., Local 659 (MPO-TV of California Inc.)*, 197 N.L.R.B. 1187, 1189 [1972] NLRB Dec. ¶ 24,388 (1972), *enforced*, 477 F.2d 450 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974) (footnotes omitted), *as quoted in* *Bechtel Power Corp.*, 223 N.L.R.B. 925, 933 [1975-76] NLRB Dec. ¶ 16,750 (1976), *modified*, 229 N.L.R.B. No. 84, [1977-78] NLRB Dec. ¶ 18,159 (1977).

20. 227 N.L.R.B. at —, [1976-77] NLRB Dec. at 29,618.

21. 365 U.S. 667 (1961).

the hiring hall in violation of the collective bargaining agreement, which provided:

Casual employees shall, wherever the Union maintains a dispatching service, be employed only on a seniority basis in the Industry whenever such senior employees are available. . . . Seniority rating of such employees shall begin with a minimum of three months service in the Industry, *irrespective of whether such employee is or is not a member of the Union.*

. . . . No casual employee shall be employed by any employer who is a party to this Agreement in violation of seniority status if such employees are available and if the dispatching service for such employees is available.²²

Slater alleged that the enforcement of this clause by the employer and the union interfered with the exercise of his section 7 rights in violation of sections 8(a) (1) and 8(b) (1), and encouraged union membership by discriminating against him in violation of sections 8(a) (3) and 8(b) (1) (A) of the NLRA.²³

Although the NLRB²⁴ and the Court of Appeals for the District of Columbia Circuit²⁵ held that the hiring hall agreement was illegal per se, the Supreme Court reversed, stating: "There being no express ban of hiring halls in any provision of the [NLRA], those who add one . . . engage in a legislative act. The [NLRA] deals with discrimination either by the employers or unions that encourages or

22. *Id.* at 668.

23. Section 8 of the NLRA provides in pertinent part:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7];

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;

. . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section [7] . . . ;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section

29 U.S.C. § 158(a) (1), (3), (b) (1) (A), (2) (1970).

24. Los Angeles-Seattle Motor Express, Inc., 121 N.L.R.B. 1629, 1630, [1958-59] NLRB Dec. ¶ 55,818 (1958).

25. Local 357, Int'l Bhd. of Teamsters v. NLRB, 275 F.2d 646, 647 (D.C. Cir. 1960).

discourages union membership.”²⁶ Finding the hiring-hall agreement facially free from discrimination, the Court continued: “When an employer and the union enforce the agreement against union members we cannot say without more that either indulges in the kind of discrimination to which the [NLRA] is addressed.”²⁷ Thus, the Supreme Court has concluded that the provisions of an agreement establishing a hiring hall violate an employee’s section 7 rights if they either encourage or discourage union membership through discrimination. If the agreement affects union membership through means other than discrimination, however, the *Local 357* test has not been violated.²⁸

Under the standard enunciated by the Court in *Local 357*, the priority system approved by the NLRB in *Interstate Electric* clearly would violate an employee’s section 7 rights if it required that he be a union member to qualify for the highest priority referral group.²⁹ Instead, the provision requires experience under the collective bargaining agreement, which may be obtained by union and non-union workers alike. A non-union member will not join the union to qualify for the highest priority referral group, because both union and non-union workers can achieve that status only after working under a collective bargaining agreement for the required number of years. Because a worker is neither benefited by union membership nor penalized for the lack of it, the *Interstate Electric* priority referral term does not discriminate to encourage union membership. *Local 357* consequently does not prohibit the provision’s enforcement.³⁰

Nevertheless, *Local 357* does not legitimize all prehire agreements whose provisions do not conflict with the standard established in that case. In *Local 357* the union that negotiated the hiring hall agreement had attained the status of majority representative. In a situation involving a prehire agreement promulgated pursuant to section 8(f), however, the future employees have not had an opportunity to select their representative. Consequently, the Supreme Court has intimated that section 8(f) should be construed strictly so that the prehire

26. 365 U.S. at 674 (footnote omitted).

27. *Id.*

28. *Id.* at 675-76.

29. Such a requirement would perpetuate a closed shop, which has been outlawed by § 8(a)(3) of the NLRA. 29 U.S.C. § 158(a)(3) (1970). *See, e.g.*, NLRB v. General Motors Corp., 373 U.S. 734, 740-41 (1963); *Local 357, Int’l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 673 (1961).

30. This analysis pertains only to the facial logic of the referral procedure approved in *Interstate Electric* and not to the practicalities of its application. A more comprehensive examination would require a consideration of such factors as the mechanics of the job market and the effect of psychological pressures.

agreement does not prevent employees from later petitioning for an election to designate a majority representative.³¹

In *NLRB v. Local 103, International Association of Bridge, Structural and Ornamental Workers*³² the Court accepted a very narrow construction of section 8(f). The Court agreed with the NLRB that a union's picketing for more than thirty days without requesting an election constituted an unfair labor practice under section 8(b)(7) of the NLRA,³³ although the picketing's purpose was to enforce a prehire agreement.³⁴ The occurrence of picketing before the employees had been given an opportunity to vote on representation could interfere with their right to select the bargaining agent of their choice.³⁵ The Court recognized that section 8(f) created a limited exception to section 7, which ordinarily would prevent the negotiation of prehire agreements,³⁶ and stated: "Except for § 8(f), neither the employer nor the union could execute prehire agreements without committing unfair labor practices."³⁷

In *Local 103* section 8(f)'s failure explicitly to authorize picketing intended to force compliance with a prehire agreement influenced the Court to accept the NLRB's decision restricting such practices.³⁸ The logical extension of *Local 103*, therefore, would be to invalidate, as violative of section 7, those provisions that are contained in a prehire contract but not authorized expressly by section 8(f). Consequently, a valid priority clause must comply with the statutory policy enunciated by the Congress in the language of section 8(f).

SECTION 8(F) : A DISCREPANCY BETWEEN CONGRESSIONAL INTENT AND NLRB INTERPRETATION

The legislative history of section 8(f) indicates that the priority of referral for job applicants must be based on objective criteria.³⁹ Obviously, both employers and unions will be benefited maximally when the most experienced and skilled construction workers receive priority in job referral. Such a process would best fulfill Congress's

31. See *NLRB v. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Workers*, 98 S. Ct. 651, 657-59 (1978); *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616, 632 (1975).

32. 98 S. Ct. 651 (1978).

33. 27 U.S.C. § 158(b)(7) (1970).

34. 98 S. Ct. at 656-61.

35. *Id.* at 658.

36. *Id.* at 657.

37. *Id.* at 659-60.

38. *Id.* at 658.

39. LEGISLATIVE HISTORY, *supra* note 1, at 424.

policy goal of making available in the construction industry a ready supply of skilled craftsmen. Similarly, both union and non-union construction workers will gain confidence in the union's operation of its hiring hall if its decisions in extending priority among potential employees are governed by such manifestly fair standards as experience and skill.

Although the NLRA's legislative history does not define "objective criteria," the meaning of that term may be derived from the context of its usage in the committee reports. Congress enacted section 8(f) so that construction contractors could calculate labor costs before submitting bids on projects and could have a group of skilled workmen available for speedy referral.⁴⁰ Objective criteria, therefore, should further the legislative purpose of providing contractors with continuous and ready access to a pool of experienced and skilled workers at predictable labor costs, and any provision excluding workers from the highest priority group should accommodate either one or both of these interests. Likewise, an objective criterion should accord equal treatment to all similarly situated workers.

Section 8(f) (4) suggests three possible objective criteria that may be used to establish the priority of employee referral from union hiring halls: residence in a geographical area, experience in an industry, and service with an employer.⁴¹ The referral provision approved in *Interstate Electric* complies partially with all three of these criteria. When implemented within the context of the NLRB's interpretation of section 8(f) (4), however, the provision denies a top priority classification to at least one important group of employees and conflicts with Congress's goal of objectivity.

Section 8(f) Criteria

Residence in the Area

The establishment of a residence requirement as a criterion for selection to the highest priority group would protect workers with homes and families within a community against job competition from itinerant laborers and would provide these stationary workers with a measure of job security. This requirement is the least objective of the three standards enunciated in section 8(f) (4) because no general correlation exists between a worker's area of residence and his experience or skill. The geographical restriction, however, does encourage

40. *Id.*

41. NLRA, § 8(f) (4), 29 U.S.C. § 158(f) (4) (1970). For the pertinent text of § 8(f) (4) see note 6 *supra*.

workers to settle in a particular area and thereby promotes the maintenance of a stable pool of employees from which a contractor may draw. The *Interstate Electric* priority referral mechanism fulfills the goal of protecting workers in a geographical area: to qualify for top priority status, an employee must live in or near the area covered by the collective bargaining agreement at least long enough to obtain the requisite experience under the contract. The classification system is not truly objective, however, because not all workers who have lived in the area for the required number of years receive a top priority ranking. Hence, the provision cannot be justified fully as a geographical restriction.

Experience in an Industry

A contract provision extending a preference in referral to those employees with the most experience in their respective trades can be very beneficial to employers, providing assurance that the contractor will have access to the most capable personnel available. An objective industry experience requirement should award priority to all employees in the relevant trade who have worked a designated number of years, except as its scope permissibly might be limited by a bona fide residency restriction or a requirement of service with an employer. In addition to requiring experience in the trade, however, the *Interstate Electric* criterion would extend a top priority classification only to those workers who previously had worked under a collective bargaining agreement. This provision prevents some highly skilled employees from obtaining priority in referral merely because they have never worked pursuant to a prehire agreement; consequently, it fails to qualify simply as a term establishing an industrial experience requirement.

Service With an Employer

A third suggested criterion through which employees may be granted priority pursuant to section 8(f)(4) would establish a "length of service with such employer" classification. Although this type of requirement is stricter than the industry experience provision, it provides an even greater benefit to the employer. Workers who qualify under this criterion not only have experience in the industry but also are familiar with the employer's particular operations. In protecting those persons who have worked with a single company, the service with an employer provision also promotes a lower turnover rate in the construction industry.

Nevertheless, the NLRB's opinion in *Interstate Electric* construed the term "such employer" in section 8(f)(4) to include not only indi-

vidual employers but also members of signatory multi-employer associations.⁴² If the NLRB's interpretation is correct, the advantage to an employer of using this third criterion to establish a priority referral system is eliminated. Because they would lack the requisite experience under the contract, the long-term employees of a company that enters a multi-employer bargaining agreement would be ineligible for a top priority status, although they are the persons Congress intended to protect through its adoption of the "such employer" criterion. The company might be required to discharge its longstanding employees so that it could hire other workers who, although unfamiliar with the business operations of their new employer, nevertheless previously had worked under the contract and attained a privileged classification. Thus, the NLRB's interpretation of "such employer" not only threatens the job security of those persons Congress intended to protect but also promotes an increased rate of employee turnover in the industry.

If Congress had envisioned the construction of "such employer" adopted by the NLRB in *Interstate Electric*, it probably would not have enacted the provision permitting a priority system to be based on service with an employer. The less restrictive criterion of experience in the industry could have permitted the referral of workers whose overall capabilities and whose knowledge of a particular company's operations were indistinguishable from those attributes of employees who worked under a multi-employer collective bargaining agreement. Although the enforcement of a priority provision under the NLRB's interpretation of "such employer" does not discriminate per se by requiring union membership to qualify for priority referral, it clearly forces an employee into unnecessary union contact inasmuch as it discriminates against those workers who previously have not sought employment under the prehire agreement. Consequently, the *Interstate Electric* priority provision should not be upheld under the NLRB's interpretation of "such employer" because it could require the discharge of workers whom Congress intended to protect.

The priority provisions approved in *Interstate Electric* clearly are unacceptable as geographical, experience in the industry, or service with an employer restrictions. Nevertheless, the legislative history of section 8(f) indicates that these three criteria were not exclusive but merely were illustrative of the types of priority provisions that could be incorporated into a prehire agreement.⁴³ Even as a separate criterion, however, the *Interstate Electric* clause is invalid: in requiring

42. See text accompanying note 20 *supra*.

43. LEGISLATIVE HISTORY, *supra* note 1, at 424.

service under the contract, it creates a preferred employee group without providing any corresponding benefit to the employer.⁴⁴

“SUCH EMPLOYER”: AN ALTERNATIVE INTERPRETATION

The NLRB's interpretation of “such employer” excludes from a preferred status one employee group that Congress had intended to protect under all of the three criteria enumerated in section 8(f). These workers comprise the longstanding employees of a company that has been located in the geographical area of the union for an extended time period and that has entered into a multi-employer pre-hire agreement with the union. If the contract contains a priority provision requiring experience under the agreement, these employees risk the possibility of discharge.⁴⁵ This potential consequence should render the provision invalid unless the referral mechanism could be construed to protect these workers. If the term “such employer” in section 8(f)(4) meant a single employer, its application could not lead to the discharge of the long term employees of a company that enters a prehire agreement containing a referral mechanism similar to that used in *Interstate Electric*. Because no employees would have worked under the contract, none would qualify as a top priority worker, and, unless the company's employees were excluded by a valid geographical or industry experience restriction,⁴⁶ they would be included in the highest priority referral class established under the agreement. The workers thus could choose to remain in the contractor's employ under the bargaining agreement. Moreover, the company's longstanding employees would be among the first workers to acquire the requisite experience under the contract and thereby to qualify as members of the top priority referral group.⁴⁷

44. See text accompanying notes 40-41 *supra*.

45. All other employees excluded by the *Interstate Electric* referral provision could be denied top priority status through the implementation of restrictions establishing geographical, experience in the industry, and service with an employer requirements.

46. For example, all of the employees of a company moving into an area and entering a hiring hall agreement validly could be subordinated under § 8(f)(4) in favor of local employees. See text accompanying note 41 *supra*.

47. If a long-term employee had quit his job or was discharged prior to or during the initial period that the agreement was in force, he could not acquire sufficient experience under the contract to be a member of the preferred referral class. Consequently, the employer might be prevented from rehiring the employee, after other workers had qualified as members of the highest priority referral group. This result might be permissible because § 8(f)(4) may not protect an applicant who, during a period of unemployment, might have become unfamiliar with the employer's current practices.

Absent the single employer construction of the term "such employer," the *Interstate Electric* referral provision is illegal.⁴⁸ Many of the employees excluded from the top priority group by that referral mechanism could be eliminated validly through the enforcement of geographical, industrial experience, and service with an employer requirements. Nevertheless, any worker who has been denied a preferred status under an *Interstate Electric* clause, whether or not a member of the employee group to whom Congress intended to give priority, should be permitted to challenge the legality of the referral provision. Certainly, no union should be allowed to accomplish an otherwise permissible objective through unlawful means.⁴⁹

CONCLUSION

Under the NLRB's interpretation of "such employer" in section 8(f)(4) of the NLRA, the effect of the priority referral provision approved in *Interstate Electric* could deprive some contractors of their most experienced workers. Because this result conflicts with Congress's intent in enacting the section 8(f) exemption, it also contravenes the section 7 rights of those employees discharged through the provision's enforcement. If the NLRB's interpretation of "such employer" is reversed, however, the referral term could protect adequately those job applicants Congress intended to favor and would comply with section 8(f).

48. The NLRB's construction of the term "such employer" to include a multi-employer bargaining unit could create unwarranted results in situations other than when the collective bargaining agreement required the top priority referral group to have experience under the contract. For example, if a contractor accepted a referral provision that required the top priority class to have two years experience with an employer, it would be required to extend a preference to those employees who had worked the requisite time in the unit, regardless of whether those workers were familiar with the particular employer's operations. This provision would be similar to a requirement of experience in the industry. By excluding all persons who did not work within the employer unit, however, the restriction would reduce the number of potentially qualified job applicants without providing any corresponding benefit to the employers. Such a discriminatory elimination of skilled workers from the employee pool probably would not comply with § 8(f). Consequently, the problems created by the NLRB's construction of "such employer" suggest strongly that the interpretation is incorrect. Rather, the term should include employers only on an individual basis.

49. *Cf. Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616, 625 (1975) (union's actions not immune from antitrust laws merely because ultimate goal is lawful).