Wars of Attrition

Vietnam, the Business Roundtable, and the Decline of Construction Unions

MARC LINDER

Second Revised Edition

Fānpihuà Press
Iowa City
2000
Unions and the Anti-Union Movement

Programs that are too ambitious (for example, attempts to impose open-shop conditions nationally or in other ways to shift dramatically the locus of power in the industry) will also lead to extensive conflicts, chaos, and, ultimately, very meager results.¹

This judgment in 1972 by one of the best informed and networked construction industry analysts, who also occupied a central role in state efforts to regulate labor-management relations, underscores how risky social science predictions are. For even as Daniel Quinn Mills was writing this final sentence of his influential book, Industrial Relations and Manpower in Construction, antionion forces were already in the process of successfully “impos[ing] open-shop conditions nationally” and “in other ways...shift[ing] dramatically the locus of power in the industry.” In mid-1972 Business Week ominously reported that union overreaching had already set in motion a self-destructive downward spiral: the large volume of unemployment partly provoked by high wages had created “a reserve of crafts willing to work ‘temporarily’ on nonunion projects, usually at union wages but without extras and with fewer benefits. More important for cost savings, they are forgoing the ordinary contractual limits on what and how much a craftsman can do.”²

Mills’s error was not grounded in contemporary ignorance of the prevalence of a menacing nonunion sector. He himself was well aware while writing his book that “a vigorous movement among nonunion contractors had developed and was spreading across the nation from its first foothold in the mid-Atlantic states.”³ Nevertheless, as late as the end of 1975 he called the claim that construction had become 60 percent nonunion was “grossly exaggerated”; he estimated that construction was closer to 80 percent unionized.⁴

¹Daniel Quinn Mills, Industrial Relations and Manpower in Construction 282 (1972).
³Mills, Industrial Relations and Manpower in Construction at 57.
⁴“Troubled Unions: Meaning to Builders, Workers, Home Buyers,” USNWR, Nov. 24, 1975, at 73 (Lexis). In a recent interview, Mills conceded that neither he nor the unions had fully appreciated the threat before the mid-1970s. He stated that until that time unions did not believe that the open shop was a problem outside of the South and Southeast; they also mistakenly believed both that many of those working in open shops outside the South were in fact union members trying to make a living and that if the threat ever materialized, unions could organize those firms top-down. Although disputes over the size of settlements approved by the CISC from 1971 to 1974 did not involve this issue, Mills recollected that contractors often referred to the open-shop threat, but that unions pooh-poohed the notion. Indeed, the mechanical trades (plumbers, electricians, operating engineers, and sheet metal workers), because their labor market control was greater, did not accept the
Fighting Back or Giving Back?

I feel that over the last twenty years...there have been...an awful lot of people of the same skills who could do the job that the automobile workers do and be delighted to do it, if there was no feeling of class consciousness or unions or anything else, for a lot less than we have been getting our automobiles produced for.5

In their history of the Operating Engineers during this period, Mangum and Walsh pointed to the prerequisites of an open-shop breakthrough: qualified contractors willing to operate outside of union structures and able to underbid union firms with an available and sufficient pool of skilled nonunionists. They found that price-sensitive corporate customers formed the market for nonunion firms, unions created the requisite cost advantage by virtue of their large wage increases, while the general and especially construction recessions of the 1970s and 1980s fashioned a work force ready to work without union protections for lower wages. They then identified the chief reasons for the expansion of nonunion construction: the shift of construction from urban union centers to suburbs, exurbs, and the South and Southwest, where unions had always been weaker; unions’ failure to make timely concessions; proemployer labor law administration; the increasing domination of what were once union-oriented contractor associations (especially the AGC) by non- and antiunion contractors; and the increased use of double-breasting.6

A depressed economy promptly fulfilled the prerequisite of working-class insecurity. By May 1975, when the official unemployment rate among construction workers nationally reached 21.8 percent, the highest rate since the BLS began collecting such data in 1950, “a staggering 50% or more” beset some skilled trades in many big cities.7 Local unions’ willingness, by the mid-1970s, to abandon work reality of the threat until later in the 1970s, whereas the basic trades (carpenters and bricklayers) recognized the danger by the mid-1970s. Although the Roundtable purported to be interested primarily in reducing the cost of construction regardless of the impact on unions, Mills speculated that weakening unions was in its own right also one of the Roundtable’s goals. Telephone interview with Daniel Quinn Mills, Harvard Business School (Jan. 4, 1999).


rules, such as organized coffee breaks, to reduce the gap between union and nonunion firms’ costs suggested that labor market pressures had begun to make themselves felt. As the president of the Bricklayers, Thomas Murphy, conceded: “Look, nobody minds when a man has a cup of coffee.... It’s when he comes down from the ninth story to have the coffee that we look bad.” Such acquiescence in the lowering of their standards suddenly qualified as “fighting back...in ways that would have seemed unimaginable” a few years earlier. The president of the Operating Engineers announced to the AGC: “Hedge-hopping, leapfrogging and this business of a strike a month have got to go.” The president of the Plumbers declared that only one work rule should prevail: “A man shows up on time, works the full time required and does the job efficiently. If he doesn’t, he gets fired.” Such comments prompted Edgar Lore, vice chairman of Dravo, to remark at a Roundtable Construction Committee meeting that it was significant that the Plumbers president was “exhibiting genuine concern about the noncompetitiveness of union construction labor.” The pressure of unemployment and nonunion expansion prompted one senior BCTD staff person to observe in 1976: “Five years ago our people were robber barons.... But now all that has changed. We are trying to be reasonable.”

Change, however, did not occur fast enough for the Roundtable, where Lore said bluntly that his greatest disappointment about bargaining in 1976 was that most contractors had not availed themselves of “an opportunity provided by the economic situation and insisted] on work-rule changes in new labor agreements.”

As the unemployment rate among bricklayers in New York City soared to 80 to 90 percent, their union took wage cuts of 33 percent (from $14.52/hour including fringe benefits) for renovation, rehabilitation, small residential, and shopping center work to meet nonunion competition. In Miami, union plumbers took a two-dollar
an hour pay cut, while carpenters and laborers in St. Louis gave up double-time for overtime for the first time in 70 years. Some employers alleged that such mass unemployment "may make some workers 'psychopathic'" enough to commit sabotage so that work had to be done twice. When 33 percent unemployment among the 60,000 members of the Philadelphia Building & Construction Trades Council prompted unions to take wage cuts (ranging from 6.5 to 34 percent in addition to time and one-half instead of double time for Saturday work) in 1976 in exchange for work rehabilitating abandoned government-owned housing, the anti-union ABC, ironically, complained that the move "will undercut our people." The concessions forced by massive unemployment prompted the Economist to call construction workers "fallen aristocrats."

By the end of 1977, with unemployment in bricklayer locals in New York City at 85 percent, the newspaper of record accorded the sea change in construction the status of major national news. Under a front page headline—"Trade Unions Losing Grip on Construction"—The New York Times quoted the BCTD's president: "By the thousands, workers 'put their union cards in their pockets or their shoes and go to work nonunion' because that is the only way they can find jobs...." The same day, Business Week declared: "The increasing use of nonunion work forces in construction has now reached the point where it is exerting a major downward pressure on labor costs." The combination of high construction unemployment and nonunion competition had finally forced construction wage increases below those in manufacturing: the former fell 10 quarters in a row—from 9.9 percent in the first quarter of 1975 to 6.6 percent in the third quarter of 1977. This relative wage depression made itself felt in another respect: for the first time in recent history, construction could no longer boast of the highest average weekly blue-collar wage.

not unprecedented. In 1940, for example, in their drive to organize the residential sector, unions in Philadelphia, Detroit, St. Louis, and Pittsburgh established wage rates between normal urban union rates and nonunion residential construction rates. "The Building Trades," 48 (1) AF 26-27 (July 1940). The Bricklayers' campaign to control one-and two-family residential construction in Philadelphia, Washington, D.C., St. Louis, Detroit, Boston, Cincinnati, and Columbus on the eve of World War II was, ironically, driven by the "menacing situation" that arose when members who left the union to work at lower wages in residential construction "provided a possible field" for organizing by the CIO Construction Workers Union. Bates, Bricklayers' Century of Craftsmanship at 245.

The depression doubtless induced the president of the Plumbers to appear at a Roundtable meeting to propose a voluntary forum for leading union and contractor officials to monitor collective bargaining and use their prestige to preclude unsound settlements. In 1978, with the unemployment rate among New York City electricians approaching 50 percent, the seniority-based layoff system resulted in many unionists' losing their mortgaged houses as their prolonged unemployment outlasted their unemployment benefits. The IBEW therefore negotiated a work-sharing program requiring the base work force not subject to layoffs to take annual eight-week unpaid furloughs. Yet even at the height of this depression—total new construction put in place, adjusted for inflation, was 23 percent lower in 1975 than in 1973 and 11 percent lower than in 1965, while new construction as a share of GNP fell from 11.8 percent in 1965 to 7.9 percent in 1975—Business Week warned that economic recovery “could revive the militancy that is typical of construction unions in tight labor markets.”

As “nonunion companies exploited industry downturns that heightened competition for jobs,” the BCTD for the first time ever established an organizing arm. Breaking with their top-down tradition of pressuring contractors to hire only union members through the union hiring hall, the unions resolved in the late 1970s to organize workers of nonunion firms. Instead of organizing employers at specific construction sites, unions such as the IBEW began focusing on “control of the labor pool within a local union jurisdiction...by organizing employees individually and thereby controlling the availability of the work force.” Where such campaigns were successful, employers were forced either to rely on the union for a supply of workers or to leave the union’s jurisdiction.

---


25WSJ, June 6, 1978, at 1, col. 5. Significantly, the IBEW had to strike over the plan because employers had contended that the plan “directly attacks their right to manage their businesses. They say it would create inefficiency by breaking up work forces that the contractors had each trained and built up over the years.” Lesley Oelsner, “Electricians’ Strike Begins to Hurt at Some New York Building Sites,” NYT, Apr. 8, 1978, at 27, col. 1 at 2.


29Jane Lewis & Bill Mirand, “Creating an Organizing Culture in Today’s Building and
By early 1975, after a decade's warnings and complaints, the normal cyclical workings of the economy had also prompted ENR to announce: "Manpower shortages have nearly disappeared." Even at lower wages, nonunion contractors could "attract the highly skilled craftsman if that craftsman has been out of work long enough and his family is suffering." And although the number of strikes continued at a high level in the construction industry, the vast increase in unemployment did affect unions' "ability to involve a large number of workers for a long period of time."

Emblematic of the sea change in labor relations was the special project agreement into which "job-starved" unions in northern Michigan entered in 1976 with the Shell Oil Company for building a small addition to a natural gas processing plant. Three years earlier, when Shell had used nonunion labor to build the plant in a small town, 350 state troopers were brought in to deal with violent mass demonstrations. In 1976, when Shell announced that it would let one union and nonunion prime contractor compete for the job, the unionized firm warned that it could not secure the work unless the unions abandoned all productivity-impeding practices. The result was full freedom for the employer to decide staffing size, elimination of premium time payments for Saturday work scheduled to make up for work lost because of bad weather during the week, and of travel pay and coffee breaks. Yet Dunlop and representatives of employers associations voiced concern that proliferation of such special project agreements with their differing terms in adjoining regions could further destabilize collective bargaining, conferring unfair advantages on certain employers.

Another illustration of depression-driven concessions was a three-year agreement between the North East Florida Building and Construction Trades Council and Davy International, the U.S. subsidiary of a large British international construction firm, which had won the bid for a $200 million Occidental Chemical Company plant. In exchange for providing virtually full employment for a thousand members of seven unions, the employer secured a two-year wage freeze, elimination of double-time for overtime, and reimbursement of travel expenses. But the chief concession was "an iron-clad agreement against a strike," which was replaced by arbitration enforceable by a back-to-work court order. "This is something we never have liked," according to the business agent of the Operating Engineers local. "The

---


tried and true method of settling disputes is the withdrawal of the labor supply. This contract eliminates our atomic bomb.”34

The complete reversal of construction market shares was glaringly on display in Houston: in 1977 nonunion firms accounted for almost three-quarters of new industrial construction, whereas a decade earlier union firms had controlled 90 percent of such work.35 In response to such dramatic deterioration, the national unions by 1976-77 had begun to develop an innovative strategy of negotiating national contracts for all trades in certain branches such as heavy construction, industrial building, and nuclear power plant construction. The point was to standardize terms and conditions such as hours, overtime, and crew sizes in order to “circumvent local work rules....” Such agreements would continue to permit wages to be set locally, but wage increases would be offset by national work standards, thus making union employers more competitive.36 Nevertheless, in 1979, *Fortune* could gleefully announce that “excessive wage increases,” high unemployment, and the vast expansion of the nonunion construction sector had brought on “A Time of Reckoning for the Building Unions.”37 The same year Secretary of Labor Ray Marshall observed that construction workers’ hourly wage increases during the previous decade had been 25 percent lower than the average for all workers.38

Nevertheless, construction unions retained considerable reserves of strength. For example, in the early 1980s, at the low point of the deepest post-World War II depression, when the union construction sector embraced only 40 percent of the industry or 10 percentage points lower than a decade earlier, *Forbes* declared that the building trades unions “still look invincible”: in 1981, for example, their collectively bargained wage increases averaged a “whopping 13.5%” or 4.5 percent more than the all-industry average.39

That sphere of invincibility, however, was narrowing. In October 1976, after the open shop movement and unemployment had both become more pervasive, the NCA voted unanimously to eliminate the union shop requirement in its union agreements until the BCTD negotiated a single multicraft industrial construction agreement establishing uniform standards that would replace individual special

---

projects agreements. The decision signaled the unions that if they failed to accommodate the large national companies, the latter would "abandon their union-only policy in favor of an outright open shop position or a "double-breasted" stance...."40

The spread of the nonunion sector became so pervasive by the end of 1976 that, when John Oliver of du Pont, the chairman of the Roundtable's Construction Committee, solicited members' suggestions for the group's 1977 agenda, he received this almost embarrassing response from Shell Oil Company's manager of construction relations:

The rapid growth of merit shop work in some areas (e.g. Florida, Alabama) is making it difficult to stimulate local owner interests in Building Trades activities, and to maintain viable local unionized contractor associations. This can result in unreasonable Building Trades settlements, which will ultimately impact the merit shop work. This is likely to be a growing problem. It is sometimes reflected in conflict between the local user group and local union contractor associations, because the latter feel that the users are interested solely in promoting merit shop activity.41

The success of the two-track strategy of strengthening construction firms' bargaining power and eliminating collective bargaining altogether was nicely captured by the director of the Cleveland construction employers association. As he told the Roundtable's national conference of local user groups in 1977: in the Midwest a "more effective factor in moderating construction labor settlements than user groups and the Business Roundtable is the growth of open shop competition with unionized construction."42

By the end of 1977, the BCTD realized that even under the Carter administration no common situs picketing relief would be forthcoming from Congress. At the same time, as major labor law reform legislation passed the House and moved to the Senate, where a majority would have voted for it if an employer-backed filibuster had been broken, the NAM announced the creation of the Council on a Union-Free Environment.43 President Georgine then declared at the BCTD convention that it would directly confront the nonunion movement, which, in conjunction with the enormous pool of unemployed, had caused significant defections by members.44 The BCTD "decided that it was time to wage

42"CUH, June 1977, at 3 (Norman Prusa).
44"Building Trades Launch Organizing Drive to Combat Expanding Open Shop," CLR, No.
an all-out war against the growth of the open shop”—by which it meant that it
would finally embark on the organizing in which unions in other industries had
always engaged. The fact that the “once sacred power generating stations,
including large nuclear plants, are being awarded to Brown and Root, to Daniels,
to Zachary [sic], and others, with little or no hesitation by clients who only a few
years ago would never have considered such a practice” must have contributed to
impelling the building trades unions to this unprecedented step. Amusingly, the
AGC—about one-half of whose members were engaged in nonunion
operation—denounced the announcement as a move to “‘crush rather than
compete with’” the nonunion sector.

Reeling from “one of the most devastating blows” that building trades
unions had ever suffered, Carpenters president Sidell recalled that in 1974
organizing had focused on residential construction, whereas in 1978 “we are
concerned with open shop conditions in every segment of our construction
jurisdiction in practically every area of the United States and Canada.... The battle
lines have been drawn and we must now decide whether we will procrastinate
or...launch the counteroffensive necessary to turn back the open shop threats that
this day jeopardizes our very existence.” The Carpenters had always been
“an advocate of the free enterprise system,” but: “There seems to be developing a
form of class warfare in our continent. Business, management or capital...is not
content to play their traditional role. ... They...will not be happy until they achieve
their goal of a ‘union free environment.’ This is not a slogan nor an idle threat—it
is their goal—to destroy the labor movement....”

The year 1978 also saw presidents of half of the construction unions sign

1153, Dec. 7, 1977, at A-17, A-18. See also “President Robert A. Georgine’s Keynote Address to
Building and Construction Trades Department Convention,” ibid., at D-1.

Proceedings of the Thirty-Third General Convention of the United Brotherhood of
Carpenters and Joiners of America 409-10 (1978) (address of Robert Georgine, president, BCTD).
The building trades’ new bottom-up organizing, if it was correctly depicted, may have been both an
unlawful labor practice and almost optimally designed to alienate nonunion workers. The IBEW
organizing director was quoted as saying that open-shop workers would have to be recruited like those
of old: “‘If they didn’t want to be union we intimidated them and coerced them and put a union card
in their back pocket.’” “Trades to Organize in Atlanta,” ENR, Nov. 24, 1983, at 62 (quoting Michael
Lucas).

Proceedings of the Thirty-Third General Convention of the United Brotherhood of
Carpenters and Joiners of America 412 (1978) (address of Robert Georgine, president, BCTD).

CUH, June 1978, at 3.

“AGC, ABC Rap Building Trades’ Organizing Campaign to Combat Open Shop

Proceedings of the Thirty-Third General Convention of the United Brotherhood of
Carpenters and Joiners of America 28, 29 (1978).

Proceedings of the Thirty-Third General Convention of the United Brotherhood of
Carpenters and Joiners of America 29 (1978).
the AGC Basic Trades Collective Bargaining Impasse Settlement Plan, which privately implemented part of Dunlop’s 1975 antistrike bill. Under the plan, local bargainers notified their national organization of an impasse 15-20 days before the contract’s expiration; if the local rejected the international’s recommendations, the local was to refrain from striking until the international met with local bargaining committees.\textsuperscript{51} Such accommodation throws into relief Georgine’s later rhetorical blast: “the real purpose of the Roundtable is to destroy local unions and take away the gains they have made through the collective bargaining process.”\textsuperscript{52}

Against the backdrop of the vast gains made by the nonunion sector and NCA’s changed by-laws permitting members to open nonunion subsidiaries, the NCA in May 1978 finally achieved the single multicraft national agreement that it had been seeking since 1963, which was to supersede various special project and single-craft national agreements. Members’ nonunion subsidiaries were not covered by the agreement unless they became union shops and signed the agreement.\textsuperscript{53} The agreement, which initially covered eleven southern states and eight unions, declared overtime undesirable and not to be worked outside of unusual circumstances, reduced the scope of supra-statutory premium overtime rates, prohibited all strikes and slow downs arising out of jurisdictional disputes, eliminated travel expenses and time, prohibited all rest periods, organized coffee breaks, and other nonworking time, and entitled the employer to “utilize the most efficient methods or techniques of construction, tools or other labor-saving devices....” The agreement also prohibited all strikes, picketing, honoring of picket lines, and lockouts—with one exception: in the case of an area strike over renegotiation of the local collective bargaining agreement, it permitted the union to refuse to refer workers and the employer to shut down the project, thus achieving the Roundtable’s long sought-after goal of enabling national contractors to support local contractors by not hiring their striking workers. To be sure, NCA members may not always have been grateful for the right to lockout on behalf of local contractors: at one nuclear power plant project in Washington State in 1976, a long strike-lockout, which was settled on the union’s terms, cost the NCA members millions of dollars. Perhaps most importantly with regard to meeting nonunion competition, it permitted one-third of a craft work force to consist of apprentices and subjoumeymen paid 60 percent of the journeyman wage.\textsuperscript{54}

\textsuperscript{54}For the text, see “National Industrial Construction Agreement,” \textit{CLR}, No. 1176, May 24, 1978, at C-1-C-8, which inexplicably omitted the text of the provision on subjoumeymen, which, however, was reprinted in BR, “Subjoumeymen in Union Construction” 25 (Rep. D-1, Nov. 1992 [Feb. 1982]); see also “Union Firms to Fight Open Shop,” \textit{ENR}, Nov. 26, 1981, at 31. By 1981, the
The trend toward regional collective bargaining was underscored by the NCA's decision in 1979 to admit to membership unionized firms performing smaller-scale regional industrial construction. If, as some observers believed, the open shop movement had brought about a deterioration in local bargaining—which by the end of the 1970s had ceased in several states and trades—admission of regional contractors might enable the NCA to push more vigorously for regional bargaining. This shift reflected the sea change that the growth of the nonunion sector had brought about in a few years: in 1968, the NCA president had rejected regional bargaining as a solution to labor-management problems on the grounds that it would require "a vast, nationwide unscrambling and restructuring of our industry's collective bargaining forms and patterns." A decade later, when a new structure had already imposed itself on the industry, homilies about the efficacy of "restraint" had obviously lost their plausibility. A reported spread of wide-area bargaining by 1980, at least in the Midwest, coupled with elimination of post-negotiation ratification by the membership, may have created the basis for the removal of decisionmaking from the rank-and-file for which capital, the state, and some national union leaders had hoped from the beginning.

The defeat of Labor Law Reform in Congress in 1978—against which the Roundtable mobilized significant resources—which would have imposed a modest deterrent on employers who violated workers' rights under the NLRA and made organizing somewhat less burdensome, registered an epochal decline in unions' capacity to effectuate their relatively narrow national legislative agenda. In the wake of employers' defensive victory, the AFL-CIO began to perceive corporations as having returned to the age of class warfare. To this real class struggle the NICA had been extended to four Rocky Mountain states, but to no unions other than the original eight—the plumbers, carpenters, operating engineers, ironworkers, laborers, asbestos workers, boiler makers, and cement masons. At expiration in 1985, it covered 10 unions and 27 states. "NCA Industrial Pact Expires," ENR, May 2, 1985, at 50. On the Washington lockout, see Mills, "Chapter 2: Construction" at 11-31-32.

54"Man of the Year: H. Edgar Lore: Moving an Industry Toward Unity," ENR, Feb. 15, 1979, at 34-40 at 37 (mentioning the Carolinas, Vermont, and parts of New Mexico, Georgia, Texas, and Florida).


57"C(UH, Sept. 1977.

58Thomas Ferguson & Joel Rogers, "Labor Law Reform and Its Enemies," Nation, Jan. 6-14, 1979, at 19-20; Barbara Townley, Labour Law Reform in US Industrial Relations (1986); James
BCTD responded with rhetorical class warfare. Georgine, who spoke of a "terrible conspiracy" as early as 1972,60 accused the Roundtable of seeking the "total annihilation" of organized labor.61 Denouncing the Roundtable's "master strategy,"62 the BCTD issued a special report in 1979 highlighting the union busting activities of the Business Roundtable, which it charged with executing the plan, laid out more than a decade earlier, "to destroy the 17 building trades unions" and "to slash the wages of union carpenters, plumbers and electricians."63 Chief among the Roundtable's tactics was prevailing on local user groups to "push union contractors to be unreasonable in contract negotiations"; it also urged project owners to restrict additional hiring or to discontinue work to prevent striking unions from strengthening their bargaining position by sending their striking members out to work on nonstruck projects.64 The attack on this latter tactic seemed especially incongruous: as early as 1973, in order to remove one of local contractors' central objections to national agreements, construction unions had entered into a national agreement with the NCA that entitled both the union and the employer to stop work in the face of a local economic strike, thus enabling NCA members to support struck local contractors. Back then, unions touted the provision as designed to "promote smooth labor relations."65

By 1981, the NCA reported that the oil and chemical industries were using nonunion firms 40 to 50 percent of the time, while the paper industry was building 70 to 80 percent of its new mills with nonunion workers. The president of the AGC warned the BCTD's convention that year that unless unions eased their work rules, within a decade practically all construction would be nonunion and "reorganized on an industrial basis." The corporate antiunionists became so self-confident that Charles D. Brown, du Pont's construction director, boasted: "We prefer the open-shop culture, where a contractor is limited only by his ability to manage and the initiative of his craftsmen..." But he also allowed as "if unions 'clean up their act where we are still building union, then we might think about using them on new

---

60 Haynes and Kotz, Unions at 138.
jobs. Even in the Far West, long a citadel of unionism, John F. O’Connell, former Bechtel labor relations manager and president and NCA president, told the Roundtable, if trends continued, in five years “no contractor would be able to stay in business...unless he has access to the open shop alternative.”

Depression-level unemployment rates in 1982-83—rising in excess of 90 percent for occupations such as bricklayers in parts of Alabama, Illinois, and New York—put an end to wage settlements that in Business Week’s words had “defied logic....” The Roundtable declared that freezes and rollbacks in more than one-third of collective bargaining agreements in 1983 had reduced the overall increase in construction wages to its lowest level in 20 years, while the first half of 1984 saw an aggregate decrease of 45 cents per hour. In connection with these depression-induced wage reverses, Charles Brown told his fellow members on the Roundtable Construction Committee: “Maybe we should wash our mouths out with soap when we talk about wage increases. ... The stage is now set and the marketplace will determine what happens.”

How far unions had backtracked from their outbursts of rhetorical class struggle became clear at a 1982 meeting that explored ways of halting the decline of union construction. Organized by the AGC, the National Conference on Union Construction heard Georgine signal the demise of construction union militance by conceding that strikes were “‘the most ridiculous thing that exists on a construction site today,”’ for which there was “‘absolutely no justification.”

Also attending was Charles Brown, who represented the Business Roundtable. As general manager of du Pont’s engineering department he had carried through on threats to cancel contracts with union firms whose employees refused to work on sites where nonunion firms also operated (which ousting Brown jocularly called “‘market recovery in reverse’”). As chairman of the Roundtable’s construction committee task force, he led its Construction Industry Cost Effectiveness Project (CICEP)—which had been sparked by concerns that allegedly declining productivity and above-average rising costs in construction had caused users to become less competitive because they replaced facilities less quickly than...
they should have—many of whose 223 recommendations were designed to eliminate union inroads into management prerogatives. In 1977, the Construction Committee decided to undertake a “major, long-term study” of the industry; it was entrusted to a task force, which was at first chaired by Dow Chemical’s construction manager, Jack Turner, and then by Brown. The CICEP involved more than 250 people and published two dozen reports, of which the Roundtable distributed two million free copies. These achievements prompted ENR to name Brown Construction Man of the Year in 1983. The Roundtable was able to create a huge audience for its plans for revamping construction by distributing two million free copies of the various CICEP reports.

In 1985 the Roundtable could report to its members that Georgine had told the annual BCTD convention that the U.S. loss of world market dominance, by making construction costs an important economic factor, had “driven owners into the arms of the nonunion contractor.” By the 1980s, many of the project’s 223 recommendations formed the basis of the working conditions concessions that the construction unions had been forced to yield.

After a delay in securing a new agreement and doubts about its scope and effectiveness contributed to a decline in NCA membership from 55 in 1982 to 32 in 1987, the NCA reached its most comprehensive National Construction Stabilization Agreement (NCSA) ever with the BCTD in 1987, two years after the previous one had expired. Covering all 15 construction unions and the Teamsters, it contained not only by then familiar provisions eliminating coffee breaks and premium overtime, but also a no-strike prohibition enforceable by liquidated damages of $10,000 per shift. The NCA’s Labor Relations Committee concluded in 1991 that the NCSA had helped in “keeping non-union firms out of pro-union

73“Roundtable Tackles Construction Cost Effectiveness,” ENR, Dec. 20, 1979, at 179. Brown told union leaders that “‘unreasonably high’” construction costs were “‘choaking off modernization and expansion, and pricing owners’ products out of the market....’” CUH, Jan. 1983, at 1.

74BR, “Chapter 2” at 12-16.


areas,” but had not penetrated the South or other nonunion areas. Nevertheless, according to the NCA president, the agreement has essentially eliminated all significant grounds for employers’ complaints especially in conjunction with the virtual disappearance of strikes. And despite their advances in industrial construction, nonunion firms failed to penetrate the multibillion dollar power plant and infrastructure megaprojects.

At the same time, it was reported from Los Angeles that unions were “desperately trying to stave off an onslaught” of nonunion contractors paying wages and benefits “substantially below union scale.” Key to this development was an invasion by large national open-shop commercial and industrial construction firms such as Brown & Root, Daniel International, and Becon Construction (Bechtel’s nonunion subsidiary). And undergirding the whole displacement process was a “general reduction in the skill level required.... Merit-shop contractors say that they can underbid their union competition by paying wages that are close to the union scale to a few key workers, who oversee many other workers who have lesser skills and are lower paid.” This phenomenon of “cut-throat competition” unleashed repeated cycles of lower wages and lower profits in an effort to become the low bidder. As a result, whereas originally firms could increase their profitability “by going non-union and bidding against union firms,” once most competitors were also nonunion, a typical firm’s “profit margin is no better than when the industry was an all-union operation.”

By 1990 construction unions’ efforts to cooperate with management to regain market share had matured to the point that strikes, ENR gloated, had become “so few that the Bureau of Labor Statistics no longer counts them.” The Reagan administration had in fact cut back on the collection and publication of strike data, but the BLS did continue to keep track of the dwindling volume of strikes. All strike indicators fell sharply following 1974 as “increasing competition from nonunion firms” made militance much riskier. From 1984 to 1988, when the BLS tracked only strikes involving 1,000 or more workers, no year witnessed more than seven such construction strikes or 20,000 strikers participating in them; construction during those years never accounted for more than 6 percent of such strikers or 4 percent of striker-days. To be sure, aggregate strike activity trended

---

toward and reached record lows in the 1980s and 1990s, but construction workers' quiescence was even more pronounced. From 1984 to 1997, when the BLS classified work stoppages involving 5,000 or more workers as "major," only four construction strikes (one each in 1984, 1989, 1991, and 1996) reached this threshold; during 10 of these 14 years none did. Between 1993 and 1997, the eight construction strikes involving 1,000 or more strikers accounted for only 5 percent of all such strikes; in turn, the 22,900 participating strikers accounted for only 2 percent of all strikers and 1 percent of striker-days.

The Roundtable's enduring political-economic impact made itself evident at the end of the century in its capacity to shape union leaders' action framework. Attending the Roundtable's annual national construction conference in 1998, the Carpenters' new young president blamed his own and the other building trades unions for their decline: "'We thought we could be exclusive [and] kept people out of the union, but not out of the trade,'" said Douglas McCarron, but "'[f]air competition drives you to be better [and] there is no doubt that the Business Roundtable put a competitive edge back in the industry.'"

by a series tracking only strikes involving 1,000 or more workers. In 1982, construction accounted for 39 percent of such strikes, 14 percent of the strikers, and 7 percent of striker-days. BLS, *Handbook of Labor Statistics* tab. 124 at 410 (Bull. 2217, 1985). By 1985, however, only 1,800 construction workers took part in one such strike.

In 1997, only 29 strikes involving 1,000 or more workers were recorded compared to 424 in 1974; only 4,497,000 striker-days, accounting for 0.01 percent of all working time, were reported in 1997 compared to 52,761,000 and 0.29 percent in 1970. "Major Work Stoppages, 1997," BLS, *News* (USDL 98-57, Feb. 12, 1998). In the years after tables 16a and 16b end, construction strikes, strikers, and striker-days as a proportion of all strikes, strikers, and striker-days dropped to record or near-record lows. BLS, *Handbook of Labor Statistics*, tab. 132 at 401-404 (Bull. 2175, 1983).


Employers and union officials continued in the 1980s to blame local democracy for the market-induced decline of unionism. ENR quoted contractors and even union journeymen as stating that a “radical minority” controls many votes, often preventing moderation in contract terms,” while a plumbers’ business agent added: “Do you see successful businesses operating this way, with branch offices that don’t have to listen to the parent company?” With ignorance added to autonomy and radical democracy, no wonder that plumbers failed to understand that the labor market’s limit was lower than the sky: “some members don’t even understand that contractors have to be the low bidder to get jobs.”

Decentralized local autonomy vis-à-vis international union bureaucracies, when paired with internal democracy and skilled workers’ ability to resist employer overreaching, encouraged an alliance of construction firms, corporate customers, government economic managers, and national construction union leadership to reduce construction workers’ scope for interfering with all these other actors’ plans.

By the late 1990s, employers’ collective bargaining complaints and proposals of the 1960s and 1970s had been stood on their head: national construction union leaders, arguing that locals, bereft of regional coordination, were being “splintered...whipsawed by region wide employers,” systematically consolidated them into regional councils, which then coordinate all collective bargaining. Ironically, this initiative prompted the proemployer Republican chairman of the House Subcommittee on Employer-Employee Relations to assert that the locals’ loss of control over collective bargaining necessitated amendments to the Landrum-Griffin Act. Taking as his point of departure that the “labor movement derives its strength from democracy and unions lacking democracy at the intermediate and local level cannot serve in full measure their economic, social, and political function in a democratic society,” Representative Harris Fawell introduced a bill in 1998 requiring that intermediate union bodies engaged in collective bargaining be elected by secret ballot by the members.

Typical of the steps that unions have taken to make themselves and their employers “more competitive” is the Market Recovery Program for Union Construction that the BCTD and the National Construction Employers Council

---

(consisting of the AGC, NCA, and ten subcontractors’ organizations) developed in 1982-83 to create a “new relationship...to something more appropriate for the construction industry of today and tomorrow.” Against the backdrop of the drastic decline in union workers and contractors since 1971, but also deflecting criticism that the program was designed to cut wages, the organizations contended that union contractors did not always demand lower wages as part of their wishlist of “necessary adjustments.” Instead: “Working conditions such as organized breaks, travel time and overtime appear to be the key to competitiveness.” Wages were cut only where “the deterioration of union construction had been allowed to progress until it no longer dominates the local market” and sheer union survival required wage reductions. As the Roundtable industrial customers, “in a quest for lower building costs, awarded more jobs to nonunion contractors,” the Wall Street Journal reported, the union sector shrank and “cutthroat competition among such firms drove down wages.” The overall success of this accommodationist approach was reflected in the fact that the 1984 and 1985 collective bargaining years produced the lowest average wage increases in 40 years, which were attributed to the Market Recovery Program and the pressure of increased use of subjoumeymen.

Inexplicably, the introduction of subjoumeymen, which as a symbol of everything allegedly progressive about nonunion construction was perched at the top of the list of critical recommendations made by the contractor committee of the CICEP, nevertheless found little favor with the union contractors that had fought for it. The Roundtable asserted in its 1982 CICEP report devoted to this subject: “The major economic advantage enjoyed by open-shop contractors is the ability to use a high percentage of semiskilled workmen, paid accordingly. This not only brings lower labor costs, but also creates a source of manpower to train into experienced journeymen.” In nonunion firms typically 40 percent or more of craft workers are helpers. Remarkably, although the NCA secured in its National Industrial Construction Agreement a provision permitting members to hire a work force consisting of as many as one-third subjoumeymen paid only 60 percent of the journeyman wage, it was among the least used provisions because employers found

---


it "'easier to just call the hiring hall and get so many journeymen....'" Nevertheless, the mere fact that unions yielded on the issue of subjourneymen so soon after Georgine had declared categorically that "'the argument that there should be a difference between skilled and unskilled work within a craft is not workable,'" reveals how quickly the basis of their contrary position must have collapsed.

By the middle of the Reagan administration, rhetorical class struggle against the Roundtable had turned into real class cooperation with the Roundtable. The unions may have viewed themselves as having had little choice at a time when their loss of control over the labor market was reflected in the significant proportion of their membership that found it necessary to seek employment in nonunion firms. In response to a survey, members of the unionized Mechanical Contractors Association of America reported in 1983 that one-half of Davis-Bacon work and 43 percent of industrial work in their areas had become nonunion. Ominously, a large majority stated that owners and general contractors did not even permit union firms to bid. Many of these specialty contractors, complaining that work rule concessions could not compensate for high wages, were considering nonunion or dual-shop operations. Almost half reported that in many areas union plumbers were working at nonunion wages and even forming their own nonunion businesses.

At the Roundtable's 28th national user conference in 1984, unions "acknowledged publicly for the first time that they were working to reduce labor inefficiencies outlined in the Roundtable reports." The BCTD secretary-treasurer Joseph Maloney admitted that two years earlier the Roundtable had challenged unions by portraying them as "'only aroused enough to rearrange the deck chairs on the Titanic.'" But in the meantime, he insisted, unions had made "'more changes in local labor agreements than were made in the prior 82 years.'" Indeed, he claimed that the Market Recovery Program for Union Construction corrected most

---

100 Union Firms to Fight Open Shop," ENR, Nov. 26, 1981, at 31 (quoting NCA president Maurice Mosier). BR, "Subjourneymen in Union Construction" at 11, was unable to find "any substantial use of subjourneymen" on any NCA building project operating under the agreement permitting their use. The only reason adduced by for nonuse of subjourneymen is contractors' and owners' fears of causing "labor unrest...." Id. at 16. Bourdon & Levitt, Union and Open-Shop Construction at 59-60, found that 75 percent of the union firms they surveyed favored introduction of a helper classification. Herbert Northrup, "The 'Helper' Controversy in the Construction Industry," 13 (4) JLR 421-35 at 432 (Fall 1992), who relentlessly mocks unions for their alleged "King Canute performance attempting to stop the economic tides of the future with political action that cannot withstand public examination," fails to explain why union employers fail to take advantage of subjourneymen provisions after securing them.


of the 57 inefficient local labor practices identified by the CICEP. In particular, Maloney stressed, unions were entering into project agreements that made union firms more competitive by permitting them to use subjourneymen. Having made all those concessions, however, the BCTD complained that construction owners continued their “‘adversarial approach’” to unions. In a warning that by this time must have rung hollow, Maloney advised the Roundtable that further efforts to achieve “a union-free business environment might result in ‘a phoenix rising from the ashes’ that might be less to their liking.” For its part, the Roundtable welcomed the Market Recovery Program as an implementation of the organization’s CICEP, which it declared was not an antiunion attack.

Maloney’s mere presence at the Roundtable users conference signaled a remarkable turn of events; his confessions and conciliatory attitude revealed the sea change in labor-management relations that the Roundtable had promoted. Just five years earlier, Maloney had publicly accused the Roundtable of using its members’ combined assets of three-quarters of a trillion dollars—“no greater concentration of economic power has every [sic] been placed in the hands of one centralized group in this Nation’s political history”—to target the entire trade union movement after having eliminated construction unions’ gains.

Maloney’s boss, Georgine, somewhat obliquely and face-savingly, tried to explain at one of the seemingly endless series of congressional hearings on construction labor law why by 1983 unions had had to make certain concessions. Because a dynamic industry had been subject to technological change over the half-century since collective bargaining had begun, many of the things that we bargained for in the earlier years were carried over from collective bargaining agreement to collective bargaining agreement.

Over the past 10 or 12 years the employers have brought those things to our attention. As in any free collective bargaining system, it’s a lot more difficult to get out of an agreement something that you have in it, that employees feel that is a benefit of theirs, even though it may not really apply to what the technological situation is today.

107Maloney correctly recorded the numerous Supreme Court cases, some not even related to construction, that the Roundtable had helped finance. He also correctly noted the Roundtable’s simultaneous promotion of stronger contractor bargaining and open-shop construction. “Address by Joseph F. Maloney, Secretary-Treasurer, AFL-CIO Before the Convention of the New Jersey State Building and Construction Trades Council” (quote at 26) (Atlantic City, June 15, 1979) (copy on file at BR). To be sure, Maloney’s account was confused in claiming that local Roundtable user groups “brought extensive pressure to bear on local contractors to form local or regional bargaining units,” yet portraying this step as a “necessary concession in particular to the specialty contractors who had been seeking the strength of numbers for years.” Id. at 4-5.
So we have, over the past 10 years, entered into all kinds of specialized agreements and project agreements...that...make all the starting times the same, quitting times the same, the overtime pay the same, and all those kinds of things, in order to make our contractors more competitive.\textsuperscript{108}

Georgine misled his congressional interlocutors by suggesting that the point of contention between masters and men had been mere uniformity. What employers in fact wanted was more working time and work for less wages—no coffee breaks, work to begin promptly at starting time, and no premium overtime pay at all for work outside the core weekday, first shift hours, or in excess of eight hours on a given day. Whether abandonment of control over the workday and of supra-statutory overtime pay (such as double-time) represented merely the accommodation of modern conditions, which no longer require such frills, or amounted to the surrender of integral elements of healthful working conditions and the value of labor power under the pressure of high unemployment (20.0 percent in 1982 and 18.4 percent in 1983)\textsuperscript{109} and loss of a quasi-monopoly of the labor market, is precisely the question that labor union officials did not publicly confront.\textsuperscript{110} Yet hazard pay for working more than 75 feet above the ground, which some employers insisted on eliminating, hardly seems a luxury in an occupation as extraordinarily dangerous as structural ironwork. And while employers were complaining that strong unions could extract superfluous double wages for overtime, Congress was discussing an increase in the statutory overtime rate from 50 to 100 percent on the grounds that it was necessary to bring employers’ marginal costs in line with the

\textsuperscript{108}Oversight Hearing, Developments in Labor Law Affecting the Construction Industry: Hearing Before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 98th Cong., 1st Sess. 12 (1983) (testimony of Robert Georgine). Four year earlier, Georgine had been accommodating enough to call construction wage increases in the late 1960s “‘unreasonable.’” “The Building Trades Storm the Guideline,” \textit{BW}, June 18, 1979, at 48 (Lexis). An earlier study explained that “no great difficulty is encountered in accounting for the tenacity of antiquated regulations. They remain...because the skilful business agent knows that rules of this type can be conceded by the union in an emergency without any real loss to the workers, and that at the same time the employer may be willing to make a considerable sacrifice in order to have the rules abandoned.” Montgomery, \textit{Industrial Relations in the Chicago Building Trades} at 146.


\textsuperscript{110}An activist carpenter and director of the Northeast Regional Council of Carpenters, when asked whether such abandoned terms and conditions of employment had been an extravagance resulting from overreaching or elements of construction workers’ social wage, replied that although “overreaching” was a loaded term, when a union controls 80 percent of the labor market, it is able to achieve terms otherwise unavailable. Telephone interview with Mark Erlich, Jamaica Plain, MA, Nov. 20, 1998. More blunt is his admission that “the increasingly antiunion climate in the late 1970s and early 1980s” was exacerbated by the “unyielding defense of well-established but nonproductive practices on union job sites added to the problem. Contracts retained archaic work rules even though they were costly and compromised the competitiveness of signatory contractors.” Grabelsky & Erlich, “Recent Innovations in the Building Trades” at 176-77.
full marginal social costs of working overtime. Yet when unions originally struggled for these terms of employment, they did not regard them as merely creating uniformity, but as crucial to control over the quality and pace of work: "Nowhere has the tension between the contractor’s goal of maximized production and the carpenter’s desire for craft pride exploded more intensely than in the age-old conflict over speed and rest breaks." When Boston area carpenters, for example, finally negotiated a five-minute coffee break for the first time in 1958, contractors strenuously resisted what their employees viewed as "a struggle to preserve workers’ dignity." And even antiunion sources confirmed the need for at least some of these practices. While attacking alleged abuses, ENR conceded: "Almost every union contract provides for coffee breaks, morning and afternoon, and most contractors approve, because they say the breaks could decrease fatigue and increase efficiency." Even the Roundtable, which deemed coffee breaks longer than 10 minutes "excessive," agreed that pauses "are now so ingrained in the American work scene that most observers accept a break of some sort for the construction worker sometime during the first part of his shift." The organization insisted, however, that to be cost-effective, breaks should not be included in collective bargaining agreements; instead, contractors should grant them when they have the flexibility in terms of the work flow.

Contractors and owners, according to a Business Roundtable survey from the early 1980s, also attached great significance to "nonproductive work time" such as unauthorized breaks, late starts, early quits, and excessive time for washing up and putting away tools. More respondents (80 percent) identified them than any other "inefficient work practices" not authorized or actually prohibited by collective bargaining agreements. These sharply conflicting value-laden characterizations of the nature of the dispute reflect the diametrically opposed political economy of labor and that of capital.

The view from the building site was emphatic. One skilled ironworker noted in the early 1980s that project agreements "often make our time start and end at our workplace rather than when we come through the gate. Since on these huge

---

112Erlich, With Our Hands at 154-55.
sites we may be working anywhere from ten to twenty minutes’ walk from the gate, this amounts to about a one-half hour gain for the contractor and loss to us.” The elimination of double-time for overtime also elicited a different view from workers: “I don’t want overtime. We work our life away as it is. The whole reason we bargained for double time in the first place was to make it too expensive for the contractors. Instead of working us longer hours they’d have to hire more men.”

Ironically, although the CICEP report, reminding owners and contractors of “some physiological fundamentals,” emphasized that overtime increased fatigue and injuries and reduced productivity, construction firms appear more interested in eliminating premium pay for overtime than the overtime itself. Even more ironically, although the Roundtable had been preaching against scheduled overtime as multidimensionally disruptive since 1974, a survey of its membership in 1999 revealed that almost 90 percent of chemical and petrochemical firms found it difficult to recruit workers for their construction projects despite offering them guaranteed overtime.

Even the strategy of concessionary bargaining to save what was left of the union sector soon revealed itself to be a trap as nonunion contractors were in a position to beat their competitors in the race to the bottom that atomized labor markets invariably unleash. Despite this inherent contradiction, national construction unions embarked on a concessionary strategy. The Carpenters’ Operation Turnaround, begun in 1982, prompted the AGC’s director of collective bargaining services to praise the “phenomenal...change in attitude,” which reflected the union’s willingness to accept much of the blame for the ascension of nonunion construction. This mood swing did not, however, extend to “healthier” Carpenters locals, especially on the West coast; nor did any national union except the Plumbers endorse the plan. In 1983, the Carpenters’ international president at a meeting that he requested with members of the Roundtable’s Construction

---


Committee pointedly asked whether the Roundtable was seeking a union-free environment, but admitted that the union needed to become competitive.  

To be sure, not all construction unions adopted an accommodationist strategy. In Columbus, Ohio, for example, Local 189 of the Plumbers Union, which had seen its control of the labor market dwindle since the later 1960s, took innovative action in 1978-79 when Kroger Food Stores refused to let union contractors bid on a warehouse it was building. After an injunction interfered with the union’s picket line, which had succeeded in shutting down the site, Local 189, supported by members’ families and other building tradesmen, interrupted business as usual at local Kroger stores. In one store they filled up carts with perishables and left them in the checkout line. After Kroger secured an injunction, unionists collected and converted their cash into $20 bills and bought low-priced items in order to exhaust stores’ small change. Following another injunction, unions bought up all the bread (which they donated to the poor) and other special items at a store to make it less attractive to shoppers. Then they converted their cash into pennies to make purchases (again donated to charities) that would take so long to transact that customers in the long lines left in anger. After enduring weeks of these tactics, Kroger agreed to use union workers.

In 1985, the BCTD was able to pressure General Motors, which was worried about long-term labor relations in the plant, to antagonize nonunion contractors in Tennessee, which had expected to build GM’s huge billion Saturn plant there; instead, all contractors had to agree to recognize unions as the exclusive bargaining representative of all craft employees, who had to be hired through the union hiring hall even if Tennessee’s anti-union shop law permitted them not to become members. Although the project implemented the CICEP recommendations, the IBEW bargained to exempt itself from provisions permitting the use of up to 40 percent subjoumeymen and eliminating supra-statutory premium wages for overtime. Nevertheless, unlike the project agreements that the BCTD had negotiated in the 1960s and 1970s, which secured higher wages than those prevailing locally in order to draw the requisite labor supply, Saturn project wages

---

121BR, CC, Minutes, Sept. 20, 1983, at 6-7 (Patrick Campbell).
were 10 percent below local scale.\textsuperscript{125}

The next year, using much more confrontational tactics, including protests in front of the Japanese embassy in Washington, D.C., and successful lobbying of Congress to eliminate special tax breaks, unions persuaded Toyota and its Japanese construction manager, Obayashi, to change its plans and enter into an agreement similar to Saturn’s for building Toyota’s large plant in Kentucky after some contracts had already been let to nonunion firms. Fearing that they might never secure another all-union project in the area or in the automobile industry, construction unions had taken the risky step of refusing to refer workers to the project despite unemployment rates as high as one-third in some trades.\textsuperscript{126} Emboldened by these victories, Georgine announced that after having given so many concessions, the unions had decided that in addition to making union firms more competitive, it was also vital to make it harder for nonunion contractors to win contracts. Ironically, the aforementioned 1987 no-strike agreement with the NCA was an integral element of this more aggressive tactic.\textsuperscript{127}

Local action in California became especially militant. In 1987, after a $350 million contract to modernize a steel plant jointly owned by USX and a Korean firm had been awarded to low-bidding BE&K, the Alabama-based leader of the open shop movement, local construction unions engaged in a wide variety of protests to prevent the project from becoming the largest nonunion construction job in California history. BE&K, while denying union charges that its wages would be one-fourth of the locally prevailing rate, admitted that “we won’t pay them like lawyers.”\textsuperscript{128} Ironically, United Steel Workers union members who agreed to wage reductions to preserve their jobs at the Pittsburg, California mill, sympathized with the union construction workers, who had offered to work for 80 percent of their regular rate, but viewed the no-strike clause in their collective bargaining agreement as precluding any effective assistance. When the Contra Costa County board of supervisors finally rejected the county Building and Construction Trades Council’s appeal from a decision to exempt the project from environmental review, the unions’ last obstacle to completion was removed.\textsuperscript{129} Nevertheless, the same year, half of the building trades union membership in the San Francisco area agreed to

\textsuperscript{125}Grabelsky & Erlich, “Recent Innovations in the Building Trades” at 177.


a five-cent per hour check-off to fund a computer system to track government permits for construction; the unions then protested every suspected nonunion contractor regardless of the project’s size. The local ABC conceded that the tactic was “causing trouble.” Unions in other parts of the country also strenuously resisted BE&K’s efforts to enter the construction market.

In several localities activist construction unions have been successful in inducing cities to enact ordinances requiring employers that bid for public construction contracts to pay prevailing wages, provide health insurance, pay workers’ compensation premiums and unemployment insurance tax, and treat workers as employees. In Massachusetts, Cambridge, Worcester, Boston, and other cities passed such labor standards measures in the latter half of 1990s. Antiunionists’ objections to such initiatives are telling. Herbert Northrup, the most prominent academic critic of construction unions, lamenting the fact that such an ordinance led Cambridge to reject a $27,000 lower bid from a nonunion firm, asserted that such programs “are based on union demands for monopoly. Unable to compete with the open-shop contractors on an economic basis, the construction unions seek to offset economic considerations with political initiatives. ... The question...is whether politically assisted monopoly will smother economics with the public as the big loser.” Northrup’s fixation on individual firms’ costs and product prices blinds him to the costs to workers caused by such a profit-über-alles perspective. The possibility that the workers producing such cheap output may not receive adequate medical care or even income to sustain themselves in excellent condition for the duration of a normal working life is disqualified as a value-laden “political” detour around the neutral “economic” arbiter of societal well-being. Similarly suppressed is the fact that to the extent that health care providers increase insurance costs to employers with health plans to pay for the expense of care for uncovered persons, such employers are subsidizing nonunion firms.


130In Illinois in the mid-1990s, unions were held liable for $544,000 in damages for having threatened an unlawful secondary strike against a construction company that hired BE&K to work on a refinery. BE&K Constr. Co. v. Will & Grundy Counties Bldg Trades Councils, 156 F.3d 756 (7th Cir. 1998).


132Northrup, “Construction Union Programs to Regain Jobs” at 11. A 1990 Contra Costa County, California, ordinance that required employers on private industrial construction projects costing more than $500,000 to pay prevailing wages as set by state law for public works was held preempted by the NLRA: “A precedent allowing this interference with the free-play of market forces...could redirect efforts of employees not to bargain with employers, but instead, to seek to set minimum wage and benefit packages with political bodies.” Chamber of Commerce of the United States v. Bragdon, 64 F.3d 497, 504 (9th Cir. 1995).

One accommodationist tactic that construction unions have devised defies the traditional pattern. "Job-targeting" has been championed by the IBEW in its dealings with the NECA. The local union increases membership dues across the board in order to finance a fund that bridges the gap between the regular union rate and the lower target rate, which enables the employer to compete with lower-wage nonunion firms. The workers on the job-targeted projects nevertheless receive the full union rate. Rather than singling out a particular group of union members for a lower standard of living who in no way differ from other members, job-targeting is a solidarity-driven technique for sharing losses equally. Job-targeting could be viewed as a belated response to the collapse of the 1960s building boom that disemployed enough workers to make the nonunion sector viable: when many unions refused to conform union wage rates to these depression-like conditions, workers hid their union cards and worked for nonunion firms at even lower wages. By the 1980s, some unions hid the lower rates which they were finally conceding to union employers.

By the 1990s, unions also finally began to take organizing more seriously. They were reported to be "quietly...assembling their troops for an all-out bottom-up organizing blitz" designed to raise nonunion workers' standards rather than defensively lowering union standards. The BCTD's COMET (Construction Organizing Membership Education Training) program, which encourages unemployed unionists to work for and organize nonunion firms, alarmed even the Roundtable, which warned its members that this "significant change from traditional organizing...bears close watching." In Las Vegas, the Building Trades Organizing Project, a pilot project begun in 1997, was so successful that the BCTD in 1999 not only approved it as a permanent program, but agreed to expand it to other cities. Union membership there increased by 35 percent, or 7,000 members, in 1997-98, making it the country's fastest-growing union construction market.

Finally, one strategy that harks back to a long-forgotten cooperative tradition—often as a response to open-shop drives—is the formation by

---


135 Bourdon & Levitt, Union and Open-Shop Construction at 5.

136 Grabelsky & Erlich, "Recent Innovations in the Building Trades" at 178, observe that such "clever" market recovery programs "tended to drive wages down in the local union market."


139 Las Vegas Review-Journal, Jan. 27, 1999, at 1D (Lexis); 160 LRR 158 (Feb. 8, 1999).

140 In 1910, the Bricklayers, supported by the other building trades, struck in Alton Illinois, and with a start-up capital of $5,000 bid on and won contracts below cost, thus forcing out open-shop
metropolitan building and construction trades councils of their own construction companies. Modeled after a similar program in Milwaukee, the Detroit council in 1993 established Building Trades Contracting Inc., whose purpose is to underbid nonunion firms, especially contractors hiring nonunion subcontractors, and to employ its members regardless of profitability.\textsuperscript{141}

\textit{The Role of Labor Law}

Capital has assumed to itself the right to own and control labor for the accomplishment of its own greedy and selfish ends.\textsuperscript{142}

Contrary to a commonplace of the literature on the industry, the NLRB has played a significant part in construction labor relations. From 1959—the year in which the Landrum-Griffin amendments adjusted certain aspects of the NLRA to construction—through mid-1998, the NLRB conducted 9,343 representation elections in the industry, of which unions won 5,002 or 54 percent. In 1989, for example, construction unions accounted for a record 14 percent of all union election victories.\textsuperscript{143} On the enforcement side, as well, construction is one of the Board's prime targets. In 1997, 13 percent of all employer unfair labor practice cases received by the NLRB, but more than half of all unfair labor practice cases involving union violations of the NLRA's secondary boycott, jurisdictional dispute, and picketing provisions stemmed from construction.\textsuperscript{144}

One tactic that construction unions have deployed with great skill in connection with organizing campaigns is "salting" an employer's work force with union organizers. Because it has been a "clever tactic," that is, cheap for union and costly for antiunion employers, firms have fought it through NLRB litigation.\textsuperscript{145}

After the U.S. Supreme Court unanimously rebuffed employers' efforts to persuade the NLRB and courts that such organizers were not covered or protected by the

\textsuperscript{141}CUH, Oct. 1993, at 2.

\textsuperscript{142}Harry Bates, Bricklayers' Century of Craftsmanship 106-107 (1955) (quoting from the preamble to the Bricklayers' 1865 constitution).

\textsuperscript{143}These data are tabulated from the NLRB, Annual Report: from 1960 forward the data appeared in appendix table 16; in 1959, in appendix table 17; the data for 1998 appeared in BNA, 159 LRR 466-67 (Dec. 14, 1998).


\textsuperscript{145}Herbert Northrup, "‘Salting the Contractors' Labor Force: Construction Unions Organizing with NLRB Assistance,'" 46 (3) ILRR 469-92 at 484 (Apr. 1993).
NLRA against antiunion discrimination, employers pursued a dual strategy. First, they lobbied Congress to overturn the Supreme Court’s ruling by amending the NLRA to exclude these organizers. While they have thus far failed to secure enactment of such a provision, they have had more success narrowing the protected scope of salting judicially. For example, one federal appellate court has ruled that an employer is not engaged in unlawful discrimination if it refuses to hire a “salt” pursuant to a general policy not permitting its employees to hold a second job.

The salience of salting highlights the issue of the responsibility that labor law bears for the shrinkage of construction unions. Some analysts have argued that, since the relative costs as between union and nonunion construction moved in favor of the former during the 1980s, the decline in union density should have been reversed, whereas in fact it intensified; seeing no other causal factor in play, they find it plausible to attribute the accelerated decline to the increase in double-breasting and abrogation of prehire agreements, the cost of which was markedly lowered by several landmark legal decisions in the 1970s. This legal deregulation is viewed as merely different in form from that in other industries (such as trucking), which has brought about a deterioration in working conditions. Others modify this judgment by including employers’ increasing ability to evade prehire agreements in the indictment. They conclude that construction unions have consequently shared the fate of industrial unions—concessions vis-à-vis employers that continue to bargain with them and retreat into ever narrower bastions impervious to attack by nonunion firms.

To understand such arguments, it is necessary to review briefly the history

---

147 Truth in Employment Act of 1997, H.R. 758 and S. 328, 105th Cong., 1st Sess. (1997). The Senate bill would amend the provision in the NLRA that prohibits employers from interfering, restraining, or coercing employees in the exercise of their right to self-organize by adding that it shall not “be construed as requiring an employer to employ any person who seeks or has sought employment with the employer in furtherance of the objectives of an organization other than the employer.” S. 328, § 4.
148 Architectural Glass & Metal Co. v. NLRB, 107 F.3d 426 (6th Cir. 1997).
149 Steven Allen, “Unit Costs, Legal Shocks, and Unionization in Construction,” 16 (3) JLR 367-77 (Summer 1995); Allen, “Developments in Collective Bargaining in Construction in the 1980s and 1990s” at 24. When the NLRB stated in 1973 that double-breasting was “not uncommon” in construction, it referred to a single case involving a dual entity electrical contractor in New Mexico one of which performed residential and the other commercial work. Peter Kiewit Sons’ Co., 206 NLRB 562 (1973) (Westlaw) (citing Central New Mexico Chapter, Nat’l Elec. Contractors Ass’n, 152 NLRB 1604 (1965)).
of NLRA/NLRB regulation of the construction industry. The NLRB declined jurisdiction over the construction industry under the original Wagner Act. One basis for the Board’s action was the deviant structure of the construction industry: occasional, short-term employment for many employers. It also declined jurisdiction “because the industry was substantially organized and hence had no need of the protection afforded by the act.” The consequence was the Board’s development of labor law without reference to the construction industry’s peculiarities. Ironically, in the first cases after the enactment of Taft-Hartley (whose union unfair labor practices clearly implicated construction unions), the respondent-chargee employers and respondent-chargee union argued in the alternative that the work at issue was not covered interstate commerce and that the Board should not exercise jurisdiction, whereas the union and employer charging parties in those cases supported jurisdiction.

After considerable complaint from unions and employers about “serious problems” arising from the NLRA’s applicability to construction, Congress included several special provisions in the act’s 1959 amendments. The most important provision, sanctioning prehire agreements—which would otherwise subject both union and employer to liability for commission of unfair labor practices for recognizing a union as exclusive bargaining representative of a group of workers a majority of whom have not selected that union as its representative—was included because “[r]epresentation elections in a large segment of the industry are not feasible to demonstrate such majority status due to the short periods of actual employment by specific employers.” Congress’s justified validation of the preexisting consensual collective bargaining practice thus:

Since the vast majority of building projects are of relatively short duration, such labor

\[\text{Unions and the Anti-Union Movement} \quad 373\]

\[\text{Brown & Root, 51 NLRB 820 (1943).}\]


\[\text{Peter Pestillo, a GE official actively involved in the organization of the Roundtable, offered this unconventional private analysis of Taft-Hartley’s impact on construction: “Operating then in a climate of a Republican Congress determined to aid the general business community and aided by the fact that the unions in the building trades have traditionally been Republicans, the construction unions fared pretty well. They got a secondary union shop arrangement, exclusive hiring halls and, most important, a proviso section 8(e).” Peter J. Pestillo, “Construction Problems: In Search of a Solution” at 7 (Mar. 14, 1969), in BR, 1969: CCH.}\]

\[\text{Ozark Dam Constructors, 77 NLRB 1136 (1948) (a joint venture including Brown & Root, Peter Kiewit Sons, and Morrison Knudsen); Local 74, United Brotherhood of Carpenters & Joiners of America, 80 NLRB 533 (1948). In Starrett Brothers & Eken, 77 NLRB 275 (1948), the employer did not contest coverage of the construction industry, but the affected employees were largely white-collar. See also “NLRB to Rule Over Construction Trades,” 1(2) BCTB 1 (Feb. 1948).}\]

agreements necessarily apply to jobs which have not been started and may not even be contemplated. ... One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired.\textsuperscript{157}

The prehire provision is now codified in the NLRA: “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...the majority status of such labor organization has not been established under...section 159...prior to the making of such agreement....”\textsuperscript{158}

In 1971, the Nixon NLRB effectively invalidated this prehire provision by holding in \textit{R.J. Smith Construction Company} that an employer did not commit an unfair labor practice by unilaterally abrogating a validly executed prehire agreement at any time before the union achieves majority support in the bargaining unit.\textsuperscript{159} To be sure, in 1973 the D.C. Circuit Court of Appeals vacated the Board’s order on the grounds that it frustrated congressional purpose to render prehire agreements “voidable at will” and “virtually unenforceable.” The case—in which the employer had refused to negotiate, granted selected wage increases, fired its only union members, and refused to comply with the agreement’s hiring hall and union security provisions—proved that the Board’s interpretation permitted an employer to avoid a prehire agreement “by discouraging union membership through flagrant unfair labor practices, thereby insuring that the union never attains a majority.”\textsuperscript{160}

Because the court’s action failed to deter the Board from adhering to its
R. J. Smith rule, the issue continued to be litigated. After the D.C. Circuit had once again reversed the Board in another case, the U.S. Supreme Court in 1978 afforded tepid sanction to the Board’s approach by 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.” Finally, in 1987, the Reagan Board, in spite of urgings to the contrary by the ABC and National Right to Work Legal Defense Fund as amici curiae and at oral argument, expressly overruled Smith. Concluding that the earlier doctrine did not square with the statutory language or history and failed to serve the legislature’s objectives of labor relations stability and employee free choice, it held in John Deklewa & Sons that construction employers did commit an unfair labor practice in repudiating prehire agreements. However, the NLRB also ruled that, unlike nonconstruction employers, a construction employer is not required to bargain with the union as its employees’ exclusive bargaining representative after the prehire agreement expires. Under Smith the so-called conversion doctrine had been favorable to unions: if they could show majority status for a relevant period, the prehire agreement could be converted to a standard agreement protected under section 9(a) as entered into by the exclusive majority bargaining representative.

---

161 International Association of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770, 774 (3d Cir. 1987).

162 NLRB v. Local No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, 434 U.S. 335, 341 (1978). The case was of additional interest because the employer had breached the prehire agreement by double-breasting. The issue before the court was whether the union had committed an unfair labor practice by peacefully picketing the nonunion subsidiary’s work site for more than 30 days in violation of § 8(b)(7), which prohibits picketing an employer for more than 30 days to force it to recognize the union as its employees’ bargaining representative unless the union is already the certified representative; under the Board’s precedents, the ban did not extend to enforcement of an existing collective bargaining agreement. Id. at 354 (Stewart, J., dissenting). The Court’s underlying motivation may have been its bias in favor of Taft-Hartley’s support for individual worker free choice as opposed to the Wagner Act’s support for collective bargaining: “Privileging unions and employers to execute prehire agreements in an effort to accommodate the special circumstances in the construction industry may have greatly conveinced unions and employers, but in no sense can it be portrayed as an expression of employees’ organizational wishes.” Id. at 349.

163 In various cases the Board had found evidence of majority status in an enforced union security clause, union membership of a majority of the bargaining, or exclusive hiring hall referrals. Because the union now enjoyed an irrebuttable presumption of majority status, conversion also created a bar to any election petitions by employers or employees. John Deklewa & Sons, 282 NLRB 1375 (1987), enforced sub nom. International Association of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988); cert. denied, 488 U.S. 889 (1988). Robert Pleasure, “Construction Industry Labor Law: Contract Enforcement After Deklewa and Consumer Boycotts After DeBartolo and Boxhorn,” 10 IRLJ 40-50 at 46 (1988), tried to explain the Board’s reversal as continuous with the Reagan administration’s deregulatory aspirations. However, the Board may simply have been trying to reduce the volume of disputes and cases generated by the Smith rule,
 Wars of Attrition

The fact that under Deklewa unions lose the presumption of majority status at the time of contract expiration, thus entitling employers to walk away and cease bargaining, prompted BCTD president Georgine to characterize the decision as “even more disadvantageous for unions than were the previous rules.” Indeed, the BCTD has even called for overturning it legislatively while the AGC pushed for its continuation. In the immediate aftermath of Deklewa construction unions continued to lobby for amendments to the NLRA that would also have made it unlawful for an employer to repudiate a prehire agreement unless a majority of bargaining unit employees had voted against the union in an NLRB-certified election.

The Board has also fashioned other rules to accommodate the construction industry’s peculiar features such as intermittent employment for short periods on different projects for many employers. Perhaps the most unusual special rule which because of union allegations of de facto conversion, had not turned out to be the bright-line rule the Board had envisioned. Telephone interview with Matt Glasson, construction union attorney, Cedar Rapids, IA (Dec. 29, 1998). Not all circuit courts of appeal adopted Deklewa as a reasonable interpretation of the NLRA; the two that have retained the pre-Deklewa rule, the Fourth and Eleventh Circuits, have jurisdiction over the most open-shop regions—the South and Southeast. Local Union 48 Sheet Metal Workers v. S.L. Pappas & Co., 106 F.3d 970 (11th Cir. 1997), reh’g en banc denied, 114 F.3d 1204 (1997); Industrial Turnaround Corp., 115 F.3d 248 (4th Cir. 1997).

164 The Construction Industry Labor Law Amendments: Hearing Before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 100th Cong., 1st Sess. 11 (1987) (testimony of Robert Georgine). The BCTD’s attorney, Larry Cohen, conceded that Deklewa’s ruling that “an employer may not unilaterally walk away” from a prehire agreement during its term was “a gain.” Id. at 29.


166 The Construction Industry Labor Law Amendments: Hearing Before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor at 5. H.R. 114, 103d Cong., 1st Sess. (1993), which made no progress after Congressman Clay introduced it, appears to be the last prounion bill designed to deal with prehire agreements and double breasting.

167 Despite the virtually universal view that construction workers typically work for several employers each year, data from several construction industry pension and benefit funds suggest otherwise. In 1993, 58 percent of the workers with the Massachusetts Laborers Benefit Fund worked for only one employer (working on average 1,033 hours). Data for a Bricklayers and an Electricians fund in 1992 revealed similar proportions—58 percent and 63 percent, respectively. Commission on the Future of Worker-Management Relations, Fact Finding Report 95 n.5 (1994).
pertains to eligibility for elections: in addition to workers employed during the payroll period immediately preceding the date on which the Board orders an election, all bargaining unit employees are eligible “who have been employed for a total of 30 days or more within the period of 12 months, or who have had some employment in that period and have been employed 45 days or more within the 24 months immediately preceding the eligibility date for the election..., and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed .” Such a proworker rule can in no way be interpreted as having impeded unionism.

The legal origins of permissible double-breasting are associated with the efforts of a Midland, Michigan general contractor, Gerace Construction, to secure additional work in 1969-70. Gerace, a union contractor and AGC member, had been in business for 12 years with annual revenues of about $5 million derived from projects ranging in value from $100,000 to $1 million. Its president, Francis Gerace, was concerned that beginning in 1969 he had been unable to obtain jobs valued at less than $100,000 because “union jurisdictional problems had unduly increased labor costs.” He therefore considered forming a nonunion entity, unfettered by craft classifications, to recapture the smaller jobs that Gerace Construction had lost. Gerace was galvanized into action in 1970 by news of a remodeling job for Dow Chemical Company. Gerace decided to create a nonunion entity when he could not fulfill Dow’s requirement that he guarantee completion without work interruption because he feared a strike after expiration of his collective bargaining agreement. Gerace owned a majority of the shares in Helger Construction Company, the new nonunion entity, which was initially managed by a Gerace employee. A Gerace trailer became the office of Helger, which also rented its power tools and equipment from Gerace. Gerace reserved for himself authority to decide to what extent Helger would compete with Gerace.

Based on these fact findings, the NLRB trial examiner then focused on the issue of whether the two businesses constituted a single employer; the principal factors were common ownership, common management, financial dependence, operational integration, interchange of employees, and, above all, common control of labor relations. He found entrepreneurial unity based on common ownership and direction and Helger’s financial reliance on Gerace, and especially on the joint

168 Daniel Construction Co., 167 NLRB 1078, 1081 (1967). This decision slightly modified Daniel Construction Co., 133 NLRB 264 (1961), and was upheld by Steiny & Co., 308 NLRB 1323 (1992).


determination of Helger's employment and labor relations policies by Gerace's directors. Status as a single employer was, however, not dispositive of the issue of whether Helger's employees were accretions to Gerace's pre-existing appropriate bargaining unit. But the trial examiner quickly concluded that they were accretions based on the traditional criteria, many of which were identical with those used to determine entrepreneurial unity (operational integration, centralization of managerial and administrative control, proximity, similarity of working conditions, skills, and functions, common control over labor relations, collective bargaining history, and interchange of employees). Because the trial examiner found that "Helger was organized to do work which Gerace Construction was equipped to do, had done, and which its principal, Francis Gerace, wanted to do and in order that the Employer's obligations under the contracts between Grace Construction and the [unions] could be circumvented." Consequently, the employer had violated its duty to bargain in good faith and had interfered with the workers' rights to collectively bargain by failing to apply the terms of the pre-existing agreements to Helger's employees.171

On the other hand, the trial examiner dismissed the complaint that the employer had discriminated against the workers to discourage union activity or dissipate the unions' majority status. He hinged this conclusion largely on the finding that the formation of Helger had not deprived Gerace employees of any work they would otherwise have performed. The fact that Helger offered below-union wage rates did not constitute discrimination, but at most contract breach. The remedy required the employer to recognize the union only prospectively as the exclusive bargaining representative at Helger; the trial examiner refused to award backpay because it "would be foolish for the Board to close its eyes to the realities of the operations of the construction industry. The employees who accepted work with Helger knew that they were accepting work with a firm which was operating nonunion.... To give them backpay would be to award them a windfall...."172

Even this meager obstacle placed in the way of double-breasting was removed by the NLRB itself when it reviewed the decision. The Board was apparently willing to let Gerace-Helger bootstrap itself into dual existences by virtue of manipulable formalities (such as separate workers compensation policies and separate membership in the AGC and ABC); even more irrationally, the Board deployed circular reasoning to find insufficient common control of labor relations by reference to the very outcomes that Gerace desired—namely, that "[u]nlike Gerace, Helger operates an open shop without regard to craft lines and pays employees less than Gerace's contract rates." Because it found that Gerace and Helger were separate employers with separate bargaining units, the Board

171Gerace Construction Inc., 193 NLRB at 649-51 (quote at 651).
172Gerace Construction Inc., 193 NLRB at 651, 652 (quote).
concluded that the employers had no obligation to recognize the union at Helger.\textsuperscript{173}

When \textit{Road & Streets} reported on double-breasting in 1972 in the aftermath of the \textit{Gerace} case, the practice appeared to be limited to two contractors.\textsuperscript{174} Gerace boasted, accurately as it turned out, that his case was a "landmark decision, which is why I'm an instant celebrity." Emblematically, Nello Teer, the owner of the other firm, Nello Teer Company of North Carolina, the next year became the president of the AGC, once a largely union-oriented organization, in which open shop firms had become a force to be reckoned with. Teer himself identified one of the movement's major problems—wages and benefits inferior to those of the union sector. Although equalization, he conceded, appeared to deprive open-shop employers of their chief advantage, there would still be "no union hampering management's right to manage."\textsuperscript{175}

\textit{Gerace} may have set the precedent, but the contractor involved was small even though he worked for Dow, a leading force among the Roundtable's corporate users pushing for nonunion construction. The enduring importance of double-breasting jurisprudence is associated with a charge filed in 1972 against Peter Kiewit Sons. Its higher profile stemmed both from the fact that the U.S. Supreme Court ruled on it and that Kiewit was "one of the world's largest construction concerns," whose owner was very wealthy, prominent, and politically well-connected.\textsuperscript{176} Peter Kiewit Sons (Kiewit) and South Prairie Construction Company were both wholly owned subsidiaries of Peter Kiewit Sons, Inc. (Inc.). Local 627 of the Operating Engineers had represented Kiewit workers building highways in Oklahoma since 1960. During contract negotiations in 1970 an official of Kiewit, which was the only union highway contractor in the state, told the union that if it could not induce more contractors to sign the collective bargaining agreement, it would stop bidding and leave Oklahoma. While the 1970-73 agreement was in effect, Inc. decided that it could no longer bid competitively because nonunion

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{173}]Gerace Construction Inc., 193 NLRB at 645-46. The Board has continued to use the circular argument; e.g., United Constructors, 233 NLRB 904, 913 (1977).
\item[\textsuperscript{174}]In fact, a month after \textit{Gerace}, the NLRB specifically noted the similarities to that case in deciding Frank N. Smith Associates, Inc., 194 NLRB 212 (1971).
\item[\textsuperscript{175}]"Open Shop—Problem or Solution?" \textit{Roads & Streets}, Apr. 1972, at 107, 108.
\item[\textsuperscript{176}]Peter Kiewit’s estimated personal wealth of $150-$200 million made him "perhaps the leading figure in Nebraskan social and business circles. His "$400 million dollar empire was amassed through building...public works projects..." He owned a daily newspaper and a television station in Omaha, and was board chairman of railroad, telephone, banking, and gas companies. George Goodman, "Peter Kiewit, 79, Builder in West; Public Works Created an Empire," \textit{NYT}, Nov. 4, 1979, sect. 1 at 44, col. 1. In 1967, President Johnson named him, together with George Meany, Walter Reuther, Whitney Young, Jr., and other public figures to the President’s Committee on Urban Housing. \textit{Report of the President’s Committee on Urban Housing: A Decent Home} iii (1968). Kiewit was the 12th largest U.S. contractor in 1972, gaining new contracts valued at $436 million. "The ENR 400: Top Contractors Increase Domestic Work," \textit{ENR}, Apr. 12, 1973, at 46, 51.
\end{itemize}
\end{footnotesize}
contractors were paying 50 cents to one dollar less per hour in wages. Kiewit’s continuing presence, according to its vice president and Inc. director, would require “a company that wasn’t burdened by the union agreement.” To that end, Inc. activated South Prairie, another wholly owned subsidiary, which built highways in other states without a union work force. In 1972, South Prairie successfully bid on one of the largest highway contracts in Oklahoma history. The administrative law judge (ALJ) found that Inc. set Kiewit’s labor policies and also gave South Prairie its instructions; most of South Prairie’s supervisors had previously worked for Kiewit in the same capacity. She also found that Inc. brought South Prairie in “for the specific purpose of circumventing Peter Kiewit’s statutory duty to honor the agreement.” The ALJ concluded that Kiewit and South Prairie formed a unit appropriate for collective bargaining and that they violated their duty to apply the collective bargaining agreement to South Prairie’s employees; she therefore ordered them to make those workers whole. The NLRB, however, dismissed the complaint. Asserting that common control of labor policies was a critical factor in determining whether both employers were a single enterprise, the Board conclusorily held that: “Although Inc. determined that South Prairie would operate on a nonunion basis, South Prairie’s labor policy determinations within that framework are set by South Prairie’s president, whereas Kiewit’s labor policies are determined by an official of Inc.”177 The same three Board members, two Republicans and a conservative former Regional Office director appointed during the Eisenhower administration, had also decided Gerace.178

Two years later, the D.C. Circuit vacated the Board’s order. Although the court observed that centralized control of labor relations was not “‘critical’ in the sense of being the sine qua non of ‘single employer’ status,” it emphasized that Inc.’s exercise of control in imposing the nonunion framework on South Prairie “constitutes a very substantial qualitative degree of centralized control of labor relations.” In addition, however, the court found strong evidence in favor of substantial interrelation of operations and common management.179 The Board’s proemployer bias had been amply on display in its assertion that the union was merely “‘attempting to seize upon common corporate ownership to achieve initial representation without engaging in an organization campaign.”180 Gerard Smetana, the Roundtable’s chief labor law litigator, warned the group that the appellate decision prevented contractors from using double-breasting to avoid the economic consequences that lawful subcontractor agreements posed.181

177Peter Kiewit Sons’ Co., 206 NLRB at
178Gross, Broken Promise at 195, 219-21.
179Local No. 627, International Union of Operating Engineers v. NLRB, 518 F.2d at 1040, 1046 (quote), 1047 (D.C. Cir. 1975).
180Local No. 627, International Union of Operating Engineers v. NLRB, 518 F.2d at 1049.
The Supreme Court affirmed the D.C. Circuit’s ruling that Kiewit and South Prairie were a single employer—but only on the grounds that Congress had charged the appellate courts and not the Supreme Court with the primary responsibility of denying or enforcing Board orders. However, it vacated the lower court’s ruling that the two firms’ employees formed an appropriate bargaining unit on the grounds that the court had invaded the Board’s statutory jurisdiction instead of permitting the NLRB to determine the appropriate unit.182 In the interim before the Board decided the case, one perceptive commentator, offering a “somewhat cynical and speculative reading,” asked: “Was the Supreme Court hinting that the Board could insulate future ‘double breasted’ decisions from reversal on the basis of unit, rather than single employer, grounds?”183 On remand in 1977, the Board did indeed determine that the operations of South Prairie, which were exclusively involved in highway construction, and Kiewit, which also included such heavy construction work as airports, mills, and railroad bridges, were “not so closely intertwined in all respects” as to create one community of interests.184 The Court of Appeals, which is restricted by the NLRA to determining whether the Board has determined an (not the most) appropriate bargaining unit, is required to affirm unless it finds that the Board’s determination is arbitrary and unreasonable. In 1979 it affirmed.185

Since that time the Board has approved double-breasting “except in those few instances in which an ill-planned employer...blatantly transferred unit work to a jointly owned and supervised nonunion firm.”186 In contrast, the NLRB deems

---

186Stephen Belfort, “Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation,” 1987 Wisc. L. Rev. 67, 82. One such exception was Appalachian Construction, Inc., 235 NLRB 685 (1978), where the Board’s finding that the same people conducted day-to-day supervision prompted it to see that the “subcontract was nothing more than an attempt to deceive the Union and thereby circumvent their obligations under the labor agreement.” The contingency in juridical-economic development is signaled by the fact that during the pendency of the Kiewit litigation, even astute legal observers argued that it was unclear “whether the ‘double breasted’ movement is likely to gather great momentum and to become a movement of national importance or whether it will be utilized only by a handful of smaller contractors in isolated markets. The emerging law on this sensitive issue appears to favor the contractor, but it is still in such an early and tentative stage of development that it would be premature to assume that the would-be ‘double breaster’ can proceed to organize a non-union affiliate in the secure knowledge that the NLRB and courts will smile upon his efforts—far from it.” Bomstein, “The Emerging Law of the ‘Double Breasted’ Operation in the Construction Industry” at 77. See also
irrelevant employers’ admission that their chief purpose in creating the nonunion entity is to avoid the uncompetitive consequences of their labor contracts.\textsuperscript{187} By the mid-1980s, the consolidation of this proemployer jurisprudence prompted union lawyers to conclude that the Board mechanically approved double-breasting “so long as the same person does not exercise the day-to-day control of labor relations” regardless of common control and ownership or of joint use of the same offices, equipment and technicians. From the union perspective, therefore, “the NLRB has made a joke of collective bargaining in the construction industry. ... By manipulating their...corporate structure, contractors can work either union or nonunion as they choose.”\textsuperscript{188}

By 1986, 20 of the 25 largest U.S. construction firms operated dual shops,\textsuperscript{189} the most prominent example being the purchase in 1977 by Fluor, an NCA member and one of the largest construction firms, of nonunion Daniel.\textsuperscript{190} To nullify this administrative and judicial promotion of the antiunion movement, the BCTD sought to persuade Congress to amend the NLRA to make double-breasting an unfair labor practice. Bills were filed, hearings held, and reports issued on the subject during the 1980s.\textsuperscript{191} In 1986, a bill embodying that provision passed the House 229-173. Unions undertook their biggest push in the 100th Congress, when the Construction Industry Labor Law Amendments of 1987, passed the House again 227-197.\textsuperscript{192} The perception that the NLRB and the courts had eroded the illegality

\textsuperscript{187}Belfort, “Labor Law and the Double-Breasted Employer” at 86.

\textsuperscript{188}Robert Connerton, “Collective Bargaining: A Process Under Siege,” in \textit{American Labor Policy: A Critical Appraisal of the National Labor Relations Act} 246-58 at 254 (Charles Morris ed. 1987) (general counsel, Laborers Int’l). The president of the NCA, Robert McCormick, observed that unions’ weakened position combined with the fact NCA member firms no longer sign local contracts (and therefore no longer have other collective bargaining agreements in force in the same geographic area) has meant that since the late 1970s employers have not had to resort to “tricks” to engage in double-breasted operations. Telephone interview with Robert McCormick, Washington, D.C. (Mar. 9, 1999).


of "sham" double-breasting prompted bipartisan support for amendments to "restore the law's original intent." S. 492/H. R. 281 would have amended the NLRA's definition of "employer" by adding: "In the construction industry, any two or more business entities performing or otherwise conducting or supervising the same or similar work, in the same or different geographical areas, and having, directly or indirectly (A) substantial common ownership; (B) common management; or (C) common control; shall be deemed a single employer." It would then have applied this definition to a new provision added to section 8(d) of the NLRA, which defines the employer's obligation to bargain in good faith: "Whenever the collective bargaining involves employees of a business entity comprising part of a single employer in the construction industry...the duty to bargain collectively...shall include the duty to apply the terms of a collective bargaining agreement between such business entity and a labor organization to all other business entities comprising the single employer within the geographical area covered by the agreement." 194

Congressional testimony in 1987 on double-breasting by union and management officials underscored their respective positions as supplicants and power-holders. Georgine, representing the BCTD, confided to the Senate Labor Subcommittee that the building trades unions "are sympathetic to the need of our employers to remain competitive, and I am proud of the record of the building trades over the last decade in actively pursuing the elimination of non-competitive work practices...." He then explained the unions' view that the NLRA "dictates that workers and management must together negotiate solutions to the non-competitive aspects of collective bargaining agreements, and the Act should prohibit employers from unilaterally solving such problems through a decision to become double-breasted." All that the statutory protection boiled down to was labor's entitlement to "the opportunity to attempt to preserve our jobs through collectively bargained modifications, or concessions if you will...." 195

The NCA, whose members had created nonunion entities to compete on the basis of nonunion wages and working conditions, strongly opposed the bill. 196

---

195. Construction Industry Labor Law Amendments of 1987: Hearing Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 100th Cong., 1st Sess. 57 (1987). If all that were at stake was servants' right to petition their masters to acquiesce in the latter's demands for lower wages and inferior working conditions, it is unclear what the unions hoped to gain. After all, even under the proposed amendments, employers could still lawfully negotiate with them to impasse and then implement those wages and conditions; the unions would then have to strike to determine which side controlled the labor market—the same option available to them whenever employers create sham double-breasted operations.
Asserting that neither construction companies nor the law could alter the fact that “it is ultimately the construction user who determines the division between union and non-union market share,” their general counsel told Congress that in the sector that was—whether “for reasons of competitive cost, geographic considerations, perceived productivity factors, or simple preference”—“owner determined as open shop,” failure to establish open-shop subsidiaries would have “totally foreclosed” that market to their firms.197

The NCA’s view was fully corroborated by the CEO of du Pont, the corporate user that since 1970 had perhaps done most to support the Roundtable-inspired assault on construction unions. (For example, in 1983, du Pont, which awarded contracts to both union and non union low-bidding qualified contractors, cancelled five contracts with unionized firms after other unions had honored the picket set up by pipefitters at the separate gate for nonunion workers.)198 Richard Heckert sought to place the anti-dual shop bill in the larger framework of U.S. industry’s worldwide competitiveness. From the end of World War II until the 1970s, the fact that union contractors “had a virtual monopoly” on industrial projects did not concern industrial customers: because U.S. manufacturers faced little competition from non-U.S. producers, at least in the U.S. market, “construction costs were not a major constraint as we expanded capacity”: being “in the same boat,” no U.S. producer “suffered a competitive disadvantage.” But in the 1970s, under the dual impact of an increase in construction costs and especially construction labor costs in excess of the already high general rates of inflation and the increasing competitiveness of non-U.S. producers with lower capital and operating costs, the “situation could not continue long without the loss of domestic business and jobs in capital-intensive industries.” Fortunately, for U.S. capital, by the 1970s “free market economics finally worked and some sorely needed alternatives began to develop. In addition to the few open-shop contractors who were scaled to do major work, many large union contractors acquired new open-shop capabilities. It became possible to award construction contracts on the basis of competitive costs.”199


199Construction Industry Labor Law Amendments of 1987: Hearing Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 100th Cong., 1st Sess. 111 (1987) (statement of Richard Heckert). The competition after the 1960s was described by the National Coalition to Defeat S. 492 as “preclud[ing] manufacturers from continuing to transfer their
The happy end for du Pont was that by 1987, its $2 billion annual capital budget was equally split between union and open shops: “Construction costs came down as open shops submitted bids at a lower unit cost, and union shops reduced their bids to stay competitive.” The anti-dual shop amendment, however, would “break what the free market fixed.” Because the result would be the closing of the contractor’s union or nonunion entity, du Pont and other manufacturers would lose: as the pool of available contractors bidding shrank, “competitive bidding would inevitably become less intense.”

In the welter of all this big-picture discussion of the centrality of cost- and especially wage-cutting to competitiveness, Senator Metzenbaum was unable to elicit an adequate response from his interlocutor to this facetiously thought-provoking question: “Why doesn’t Du Pont form a separate operation and get some cheap executives. [Laughter]” What du Pont in fact got was cheap engineers. The NCA reported in 1991 that du Pont in the course of an unprecedented cost-cutting program expected to lay off more than 550 engineers and professional support staff in Delaware. To leap into the breach, BE&K, one of the most prominent exponents of the antiunion construction movement, which had a five-year relationship with du Pont, planned to open an office in Delaware employing more than 200 people.

Regardless of the economic advantages conferred on construction employers by the administrative and judicial rulings facilitating the establishment of nonunion entities by unionized firms, considerable force attached to Northrup’s speculation that “if the Kiewit decision had gone the other way, the vacuum would have been filled by unionized companies becoming fully open shop, and by newly created companies formed to work open shop. The market has worked in this manner. Undoubtedly, it will continue to do so.” Indeed, although Northrup made this the-laws-of-economics-are-stronger-than-the-laws-of-men argument in 1995 in criticizing Steven Allen’s efforts to single out the law of double-breasting as the primary explanation of the continued decline of the building trades unions in the 1980s, Allen had already conceded the point in 1987 at the time of congressional debates over amendments to the NLRA to make double-breasting an unfair labor practice: “If this law is passed, the unionized contractors, who are already declining in number, will simply stop signing new contracts, and more construction costs to the consumer.” Id. at 296.
construction will go to the non-union sector."204

Thanks in part to the intense lobbying that the Roundtable—which rhetorically asked its members to consider the possibility that next manufacturing firms would be prohibited from maintaining union and nonunion plants205—mobilized, the anti-double-breasting proposals were not enacted. But construction unions succeeded in keeping the issue alive by means of the Clinton administration’s Commission on the Future of Worker-Management Relations. In connection with its focus on the socially deleterious impact of the trend toward treating employees as contingent workers, the commission recommended that the threshold coverage definitions of “employee” and “employer” in all federal labor and tax legislation be made uniform and rooted in the economic realities of employment relations. Within this framework the commission also recommended that the NLRB expand the single employer doctrine to prevent union construction firms from spinning off subsidiaries to do the same kind of work free from collective bargaining obligations.206

Membership and Wages

Evidently a fair percentage of the plumber’s work can be done by less-skilled men; otherwise the plumbers would not fear their competition so greatly.207

Some sense of the enormous membership reduction that the construction unions have suffered since the 1960s can be gleaned from Table 22, which shows their average per capita membership paid to the AFL-CIO in 1965 and 1995.

Among the larger craft unions, the boilermakers, bricklayers, carpenters, ironworkers, painters, and plasterers all experienced membership losses ranging between 30 and 61 percent. Among unions virtually all of whose members worked in construction, only the plumbers and operating engineers were able to increase their membership even slightly. These figures become much more stark in contrast with the 45 percent increase in the number of construction workers between 1965 and 1995.208

208From 1965 to 1995, production or nonsupervisory workers in construction rose 45 percent (from 2,749,000 to 3,993,000). Calculated according to Handbook of U.S. Labor Statistics 139 (2d ed.; Eva Jacobs ed. 1998).
Table 22: Construction Union Membership, 1965 and 1995

<table>
<thead>
<tr>
<th>Union</th>
<th>1965</th>
<th>1995</th>
<th>Change (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asbestos</td>
<td>12,000</td>
<td>12,000</td>
<td>0</td>
</tr>
<tr>
<td>Boilermakers</td>
<td>108,000</td>
<td>42,000</td>
<td>-61</td>
</tr>
<tr>
<td>Bricklayers</td>
<td>120,000</td>
<td>84,000</td>
<td>-30</td>
</tr>
<tr>
<td>Carpenters</td>
<td>700,000</td>
<td>378,000</td>
<td>-46</td>
</tr>
<tr>
<td>Electrical</td>
<td>616,000</td>
<td>679,000</td>
<td>10</td>
</tr>
<tr>
<td>Elevator Constructors</td>
<td>12,000</td>
<td>20,000</td>
<td>67</td>
</tr>
<tr>
<td>Ironworkers</td>
<td>132,000</td>
<td>82,000</td>
<td>-38</td>
</tr>
<tr>
<td>Laborers</td>
<td>403,000</td>
<td>352,000</td>
<td>-13</td>
</tr>
<tr>
<td>Operating Engineers</td>
<td>270,000</td>
<td>298,000</td>
<td>10</td>
</tr>
<tr>
<td>Painters</td>
<td>160,000</td>
<td>95,000</td>
<td>-41</td>
</tr>
<tr>
<td>Plasterers</td>
<td>68,000</td>
<td>29,000</td>
<td>-57</td>
</tr>
<tr>
<td>Plumbers</td>
<td>217,000</td>
<td>220,000</td>
<td>1</td>
</tr>
<tr>
<td>Roofers</td>
<td>22,000</td>
<td>21,000</td>
<td>-5</td>
</tr>
<tr>
<td>Sheet Metal</td>
<td>100,000</td>
<td>106,000</td>
<td>6</td>
</tr>
</tbody>
</table>


The minimal diminution in the number of unions contradicts repeated predictions over the years of mergers that would reduce the building trades unions to four to six by the end of the century. The persistence of small and overlapping unions results, no doubt, primarily from internal resistance by officials who would lose their positions. Nevertheless, employers would presumably not welcome the additional bargaining strength that union amalgamation would effect. Moreover, the tens of thousands of specialty contractors may guard craft lines as jealously as unions.209

209In the 1920s, the Communist William Z. Foster declared that the existence of 22 building trades unions was “not only incredibly stupid but also, in view of the rapid concentration of the enemy’s forces, a criminal betrayal of the workers’ interests.” W. Z. Foster, Misleaders of Labor 321 (1927). See also W. Cummins, “Industrial Unionism in the Building Trades of the United States,” 15
A 1980 Census Bureau special survey revealed that 31.6 percent of employed wage and salary workers in the construction industry were in labor organizations. Viewed occupationally, 33.0 percent of carpenters, 48.7 percent of other construction craft workers, and 32.9 percent of construction laborers were union members.

Questions that have been included in the CPS annually since 1983 also underscore the ongoing sharp decline in construction union membership. In 1983, 27.5 percent of employed wage and salary workers in construction were union members; by 1998, the share had fallen to 17.8 percent. This decrease resulted from the fact that while construction employment rose 44.7 percent, from 4,109,000 to 5,946,000, union membership fell 6.6 percent, from 1,131,000 to 1,056,000. This pattern of stagnating membership despite explosive growth in employment deviates strongly from developments in manufacturing: there, a 3.7 percent increase in employment accompanied by a catastrophic 41.0 percent decline in membership depressed the unionization rate from 27.8 percent to 15.8 percent in 1998. More ominous is that the proportion of union workers receiving less than the union wage in construction rose markedly during the 1980s.

In certain trades, however, union density has remained far above average. Structural metal workers, electricians, and plumbers occupied the highest rungs with rates of 65, 43, and 37 percent in 1995, down from 74, 46, and 43 percent, respectively, in 1985. At the other extreme, only 10 percent of painters and roofers were organized in 1996.

(4) ILR 568-80 (Apr. 1927). When the CIO tried to organize construction workers along industrial lines, it found contractors as resistant as workers. “C.I.O. Makes Sorties in Building Field,” NYT, Mar. 21, 1940, at 1, col. 3, at 20, col. 3-4.

---


213Steven Allen, “Declining Unionization in Construction: The Facts and the Reasons,” 41 (3) ILRR 343-59, tab. 3 at 349 (Apr. 1988). This series, which ran from 1973 to 1981, showed stability through 1978, at which point the share jumped from 30.0 percent to 45.6 percent by 1981. Allen's data also show that the unionization rate among blue-collar construction workers declined from 47.3 percent in 1966 to 44.8 percent in 1970; large declines then occurred between 1977 and 1978 (41.1 to 36.6 percent) and 1981 and 1983 (39.0 to 32.0 percent). Id. tab. 1 at 345. Allen does not explain the timing. Allen, “Developments in Collective Bargaining in Construction in the 1980s and 1990s” at 15, tab. 3 at 37, also points out that the organization rate among all construction employees fell steadily from 42 percent in 1970 to 22 percent in 1987, when it leveled off.


Although the decline in unionization has gone hand in hand with a diminution of the gap between union and nonunion wages, the union premium remains significant. The CPS also reveals that in 1983 the usual weekly earnings of full-time wage and salary workers in construction were $522 for union members or 74 percent higher than the $300 that their nonunion counterparts received; by 1998, the premium was smaller albeit still large—59 percent ($790 and $496). The premium has thus increased relative to the premium for all private sector nonagricultural employees, which declined by one-half, from 39 percent to 26 percent. Private employer surveys for 1996 reveal even larger gaps: a weighted average hourly wage (including benefits) for all crafts of $15.28 for nonunion journeymen compared to $28.39 for union workers or 86 percent higher.

Remarkably, the ten components of wages that employers decried most bitterly—overtime, shift premium, show-up pay, manning restrictions, fringes paid on hours paid, time paid not worked, and subsistence, premium, holiday, and travel pay—amounted to only $2.27 or 17 percent of the total difference of $13.11. In individual occupations the decline in the union-nonunion wage gap varied but not in any obvious conformity with differential rates of union density. Thus, from 1985 to 1995, the gap in weekly earnings fell from 80 to 53 percent among bricklayers, 65 to 53 percent among carpenters, from 75 to 66 percent among painters, from 58 to 30 percent among structural metal workers, and from 73 to 65 percent among laborers; among electricians and plumbers, however, the gap actually rose—from 41 to 45 percent and 61 to 68 percent, respectively.

More interesting still is the Roundtable’s admission that even from customers’ and employers’ perspective, “the absence of travel and/or subsistence pay provisions is not necessarily advantageous. In cases where employees are drawn from a union whose jurisdiction includes both an urban and distant rural areas, it may be very difficult to attract sufficient numbers of skilled craftsmen in the more distant areas without travel/subsistence pay.” Implicit in this logic is
the conclusion that the abandonment of these wage components must have caused either employers to make do with less skilled workers or craftsmen to acquiesce in totally uncompensated longer commutes to and from work or disruption of their nonwork lives.

Despite huge gaps in wage and benefit levels,221 and the epidemic violation of labor standards laws by nonunion firms that deprive workers of overtime, social security, unemployment and workers compensation, and OSHA protection by unlawfully misclassifying them as self-employed,222 management audaciously asserts that unions lack any appeal: "There are no sweatshops left. In fact there are no union war cries left that people can identify with." Yet if even the Roundtable could be appalled that construction was so dangerous that in 1979 injuries accounted for 6.5 percent of the total cost of industrial, commercial, and utility construction, is it implausible that workers themselves in the 1990s would regard their places of employment as sweatshops from which they required protection when those costs had risen to between 7.9 and 15.0 percent?224

The decline in the degree of unionization beginning in the 1970s suggests that construction unions were no longer seeking to extend their scope, but rather were preoccupied with defending positions in various geographic areas and sub-branches against open-shop inroads. This restrictive strategy raises the question as to whether it remained true that: "For the well-established employers, it is...important to have a floor under competitive labor costs. Otherwise, the threat is always present of a competitor securing cost advantages through undercutting labor standards."225 This argument was hardly obsolete, but its applicability may have been confined to regions and sub-branches that traditionally counted as

\( (1978). \)

221Benefits, especially pensions and health plans, in nonunion firms are "less common and generous...." Northrup, Open Shop Construction Revisited at 578 (quote); "The Hidden Issue in Bargaining," ENR, June 24, 1984, at 56.


225Frank Pierson, "Building-Trade Bargaining Plan in Southern California." 70 (1) MLR 14 (Jan. 1950). See also Haber, Industrial Relations in the Building Industry at 255; Bertram and Maisel, Industrial Relations at 40.
organized.

Further discontent may arise from the fact that while average hourly earnings of production or nonsupervisory workers in construction rose 164 percent from $6.06 in 1972 to $16.00 in 1997, those of their counterparts in manufacturing and the total private economy rose 245 percent (from $3.82 to $13.17) and 231 percent (from $3.70 to $12.26), respectively. Thus, while hourly construction wages exceeded those in manufacturing and the total private economy by 59 percent and 64 percent, respectively, in 1972, by 1997 the excess had declined to 21 percent and 31 percent, respectively. Weekly earnings adjusted for inflation put into sharper relief the absolute and relative decline of construction wages. Average weekly earnings in construction increased from $235.89 in 1973 to $622.40 by 1997; but the $511.69 in constant (1982) dollars in 1973 represented the high point, from which the sum fell by more than 26 percent to a low of $377.07 by 1992, rising only slightly to $382.78 by 1997. Workers in other sectors also experienced real weekly earnings declines, but much smaller ones: 6 percent in manufacturing (from $361.08 in 1973 to $340.18 in 1997), and 17 percent in the total private economy (from $315.38 to $260.89). Accordingly, the excess of deflated weekly construction over manufacturing and total private-sector earnings fell from 42 and 62 percent in 1973 to 13 and 47 percent, respectively, by 1997.226 That the increasing weight of the low-wage nonunion construction sector is reflected in the relative and absolute deterioration of the industry’s wages is suggested by the fact that construction unemployment, though remaining high, moderated vis-à-vis aggregate unemployment.227

The proposition that sweatshops are alive and well in open shop construction found its most credible support in an absolutely unimpeachable witness, Ted C. Kennedy, cofounder and chairman of BE&K, one of the largest construction firms in the United States, former president of ABC, and one of the leading spokesmen of the open shop movement, who in 1982 was finally coopted into the Roundtable’s Contractors Advisory Committee.228 In the most blunt public speech ever delivered by a construction employer, Kennedy told the Engineering and Construction Conference of the American Institute of Chemical Engineers in 1992:

---


227 Between 1948 and 1975, the ratio of the unemployment rate in construction to the aggregate rate averaged 2.2:1; between 1976 and 1997 it declined to 2.05. Likewise, unemployment in construction as a proportion of total unemployment declined from 10.6 percent to 9.6 percent. Calculated according to Handbook of U.S. Labor Statistics at 85-86.

We shift the cost of benefits to our employees. We eliminate any wage increases. We retire the older, more expensive talent. We reclassify people as probationary, and we abandon any meaningful retirement plan except social security. We do it all in the name of competitiveness and a free market. We are without a doubt the biggest whores in the business. ... And if we contractors and engineers are the biggest prostitutes, you owners are the pimps and procurers. You've reveled in the competitive world of union and merit shop contractors fighting it out for market share. You've sat back and watched with glee as we beat each other down.... The average wage increase in the merit shop industry over the last 10 years is less than 10 cents per hour per year. Few craftsmen have any kind of meaningful retirement program. Fewer still have any kind of medical or hospitalization [sic] beyond workman's compensation. And, if they have a heart attack, we'll probably have to take up a collection for the burial. And our idea of job security—as long as the sun is shining and there's a weld to be made. But, if either stops, your severance pay is just as long as it takes you to get to the gate. We'll train you—on your own time.... You'll be exposed to one of the more dangerous occupations, but if the law doesn't protect you, in all likelihood—we won't either. ... You owners are sitting there watching us degrade what is supposed to be our most valuable commodity—our people. And, as the wages fall, the benefits disappear and more and more leave the industry, you take refuge by saying, "it's the American way—the competitive market place at work—the free enterprise system in action." B-a-l-o-n-e-y!!!!!! It's shortsighted...and destined to turn over our industry to others—outside the United States. How in the world do we attract bright, energetic, young people into a business where they can't earn a retirement; they can't expect to work a full year; they may get a 10 cents per hour per year raise; and other benefits are virtually nonexistent. ... I detest monopolies. And one of the more positive moves in the last 20 years is the rise of the merit shop movement as a viable competitor to the union monopoly. But, as valuable as the breakup of the monopoly was, we contractors and you owners have absolutely abandoned the responsibility that goes with increased competition. The increased competition has provided a large portion of its cost savings at the expense of the individual employees' well-being. ... But, it does not need to be. We could all raise craft wages a reasonable amount, provide benefits we're not ashamed of, create a career for young people instead of a revolving door.... As long as owners believe that efficiency and cost effectiveness are directly related to low wages and minimal fringe rates, we are going to have continuing high turnover.... As long as contractors continue to treat their employees as seasonal harvest hands instead of skilled professionals, we cannot expect to maintain a work force of skilled 20-year veterans.... If either the contractors or the owners believe that this type of work force can compete with the Germans, or Scandinavians, or Japanese in the 21st century, you need to take a drug test!229

Conditions like these, in which a few experienced and highly paid skilled workers supervise a dozen or more narrowly trained, semi-skilled, and low-waged 18- to 25-year-olds, exacerbated by employers’ misclassification of their employees

as self-employed in order to avoid employment taxes and labor standards statutes, and a piecework system that induces workers to drive themselves at a pace that cannot be sustained for more than 10 or 15 years, lend credence to unionists’ claims that open-shop “[m]anagement will blow it themselves.... They’ll push and push and push until there’ll be a rebellion.”

As even John Dunlop, who prided himself on working on problems that took at least a decade to solve, conceded, the “conflict of interest” between unions’ desire for broadly trained craft workers and employers’ preference for narrow specialists “is not readily solved....”

Even construction unions’ worst enemies profess a desire to retain them. The Roundtable, presumably buoyed by the experience of pitting nonunion and newly chastened union firms against each other, proclaimed in 1982 that a construction industry that wishes to “remain vigorous...cannot afford the demise of the union sector...which offers experienced and capable contractors and a skilled manpower pool. The long-term interests of owners, contractors and labor will be best served by a competitive balance between the union and open-shop sectors.”

But a decade later, when the Roundtable asserted that the union sector had shrunk to 25 to 30 percent from 75 to 80 percent in the early 1970s, it made clear how limited a union role it was willing to tolerate. Reacting to the “union tool box of intimidation tactics” such as corporate campaigns, mass picketing, salting, job targeting, local prevailing-wage ordinances, and environmental permit “extortion,” designed to re-expand unionization, the Roundtable declared that “the business community must take measures now to insure that the merit-based, free-enterprise system is preserved and strengthened to keep American business competitive in a fiercely competitive global marketplace.” Unsurprisingly, it especially called on owners to support the antiunion ABC.

The decline in union membership in the private sector in general and in construction in particular by the end of the century reached such precarious low points that even Herbert Northrup, who has devoted 60 years to combating them and the last 25 to touting open shop construction, was moved to concede that “it may well be that unions have declined below the level that is best for the public.

230 Erlich, With Our Hands at 189-91. 173 (quoting a union carpenter). Early in the nineteenth century, a leading orthodox political economist observed: “Workmen...when they are liberally paid by the piece, are very apt to overwork themselves, and to ruin their health and constitution in a few years. A carpenter in London, and in some other places, is not supposed to last in his vigour above eight years.” J. R. McCullough, The Principles of Political Economy, with some Inquiries Respecting Their Application 347 (5th ed., 1864 [1825]; reprint 1965).


good.” After watching building trades unions lose much of their membership since the 1970s, ENR, too, has reminded its readers periodically that the industry “needs a viable union sector. Unions help to make sure that the standard of living for the industry’s millions of workers fall no further than it has. And they can act as a watchdog and voice for construction workers in general.” To be sure, even ENR has in mind “more businesslike” unions, that are “much more willing to put any rule on the negotiating table.” Indeed, ENR editorially praised unions for the “vigorous peaceful market competition” with nonunion firms, from which “owners stand to gain most.”

A quarter-century after their meteoric rise and efforts to specialize and deskill their workers, nonunion firms’ chief problems remains their failure to train an adequate supply of labor. ENR bluntly conceded that “[i]f not for a series of economic recessions and a feast of skills available from former union workers, that sector’s every-which-way, on-the-job or not-at-all training would have strangled its ability to compete.”

The irony that antiunion firms have parasitically flourished by undermining the union labor market is compounded by the fact that, the nonunion sector, which had trumpeted union racism as one of the key elements of its propaganda campaign against the building trades unions in the 1960s and 1970s, not only made no progress in integrating its work force, but also became marginally more white than its union foes: from 1977-78 to 1989 whites as a share of all union construction workers declined from 90.6 to 89 percent, while the share in the nonunion sector remained stagnant at 91 percent. Indeed, how little progress the entire governmental civil rights thrusts of the late 1960s and early 1970s secured for black workers in the skilled construction crafts can be gauged by the proportions of blacks among such trades at the 1980 and 1990 census of population displayed in Table 23.

---


236“A More Businesslike Union,” ENR, Sept. 1, 1997, at 58 (editorial). See also “Union Construction Needs Help,” ENR, Nov. 5, 1981, at 104 (editorial) (“A strong union sector helps keep wages and working conditions at decent levels on nonunion as well as union jobs...”); “BMW Corporate Attack May Not Be a Winner,” ENR, Apr. 12, 1993, at 94 (editorial) (“unions deserve credit for representing members’ interests in a competent and peaceful manner. They also sent a valuable message to international firms seeking to do business in the U.S. that at least one segment of our society militantly guards wages, benefits and working conditions of workers”).


241See generally, GAO, Federal Efforts to Increase Minority Opportunities in Skilled
Table 23: Blacks as a % of Selected Construction Crafts, 1980 and 1990

<table>
<thead>
<tr>
<th>Craft</th>
<th>1980</th>
<th>1990</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brick- &amp; stonemason, tile setter</td>
<td>14.9</td>
<td>12.8</td>
</tr>
<tr>
<td>Carpenter</td>
<td>5.1</td>
<td>5.1</td>
</tr>
<tr>
<td>Electrician</td>
<td>4.9</td>
<td>6.0</td>
</tr>
<tr>
<td>Painter</td>
<td>9.8</td>
<td>9.1</td>
</tr>
<tr>
<td>Plumber</td>
<td>6.6</td>
<td>7.1</td>
</tr>
<tr>
<td>Structural metal worker</td>
<td>5.2</td>
<td>5.7</td>
</tr>
</tbody>
</table>


Some observers have attributed the shrinkage of the union sector during the last quarter of the twentieth century to a relatively simple mechanism—"the market has again done its job of checking the abuse of private power...." The CISC also "performed well in breaking the wage spiral more quickly and less painfully than it could otherwise have been done, but basically sanity has been restored to construction bargaining by old-fashioned competitive forces."242

The displacement of unions of skilled workers by less skilled nonunionists presupposes some restructuring of the work processes that rendered once scarce and monopolizable skills redundant. If, as the Roundtable claimed in the early 1980s, "[a]t least 40 to 50% of construction work requires a minimum of skill and can be efficiently and safely done by helpers or subjoumeymen," loss of control over the labor market by unions of the skilled would not be surprising.243 To some extent the trade press focuses on this very point:

Among specialty contractors, innovations in materials and equipment may be playing the greatest role in allowing open shop firms into the marketplace. For example, "You don't have to know how to calk a joint or sweat lead to put hot water-heating and sanitary sewer systems in a house anymore" says a management source. "It's plastic pipe.

243BR, "Subjourneymen in Union Construction" at 16.
All you need is a hacksaw, a can of glue and a little sense.”

Union activists also concede that the simplification brought about by preassembled materials and modular components, produced in factories by industrial workers, has gradually transformed the traditional skilled fabricator into a less skilled installer. Many nonunion contractors, in order to “speed up production...have broken down the crafts into dozens of repetitive tasks and teach a worker only to install toilets, hang doors or build chimneys.” Whether the accelerated fragmentation of the crafts into numerous subspecialties will mean that workers who are no longer masters of a whole trade will, like the deskilled before them, decide that, unable to rely on their collective skill, they can defend their working conditions and living standards only with the aid of a union’s political-economic power remains to be seen. When, however, such division of labor is combined with antiunion contractors’ admission that “our pay is substandard. We’re paying less than Wal-Mart,” a renaissance of unionism is hardly implausible.