Chapter 7

EMPLOYER NEUTRALITY AND CARD CHECKS

I. Address

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The hottest topic in labor law right now is neutrality and card check agreements or, as you may prefer, voluntary recognition agreements. The Bush Board has taken at least two related cases under review, *Dana Corp.*,[1] and *Shaw's Supermarkets*.[2] *Dana* involves the question of how long card check or voluntary recognition should serve as a bar to an employee decertification petition. *Shaw's* involves the question of whether an after-acquired stores clause amounts to a waiver of the employer's right to file a petition for a National Labor Relations Board (NLRB) election. These cases have been lingering at the Board, awaiting the appointment and confirmation of two additional Board members.

The 108th Congress has competing bills pending on the issue: H.R. 4343 would ban recognition based on card check agreements. In contrast, H.R. 3619/ S.1925 would permit unions, without employer agreement, to seek Board certifications through card check procedures.

Voluntary recognition actually predates the Wagner Act. Indeed, for several years after its passage, the NLRB issued certifications almost exclusively on card checks. As the NLRB noted in an early decision in *General Box.*[3] "Employers and unions do not require Board certifications as a prerequisite to collective bargaining if recognition of a majority representative suffices for their purposes."

Because card checks have been around for a long time, the natural question arises—what happened to light this current fire? The answer is rather simple. In case you haven't noticed, the NLRB

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[1]8-RD-1976 (2004).

[2]343 NLRB No. 105 (2004).

[3]82 NLRB 678, 683 (1949).

has not been very effective in protecting workers' rights to join unions, forcing unions to push voluntary recognition agreements. The NLRB is clogged with delays and ineffective remedies. It is not unusual to have a 2- to 3-year delay from the filing of an election petition to the commencement of bargaining. My own personal record is 13 years of litigation before bargaining started.[4]

NLRB Elections Have Not Protected Worker Rights

The typical election campaign involves the employer's use of a union avoidance lawyer or consultant to conduct a pervasive and very adversarial campaign. Such campaigns typically create the impression that a union election victory would adversely affect the employer's competitive position, that bargaining could lead to lost jobs and benefits, that strikes would mean violence and permanent replacements, etc. In NLRB elections, the employer has unlimited access to the electorate throughout the workday for its campaigning, while the union's access is severely hampered.

Since the 1950s, there has been a four-fold increase in the number of Section 8(a)(3) merit discharge determinations for union activity. One in 18 voters can expect to either be illegally discharged or threatened with discharge. As the Dunlop Commission reported some years ago, 40 percent of all eligible workers believe they would be fired or mistreated if they campaigned for a union.[5] And if the union successfully objects to such employer misconduct, the traditional Board remedy after about a year of litigation is a rerun election and a notice posting with the employer promising not to do those bad things again. Although the Board can issue bargaining orders in response to serious unfair labor practice misconduct if the union once had a card majority, the Courts of Appeals have been reluctant to enforce such orders, citing the passage of time and employee turnover.

It should therefore come as no surprise that unions have sought to negotiate card check and neutrality agreements with employers rather than continue to submit employees to this NLRB quagmire. Thus, in the 1999 negotiations between the United Auto Workers (UAW) and the Big Three automobile companies, those employers agreed to voluntary recognition agreements for its hourly employees. More important, some of the automotive em-

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[4] *Great Lakes Chemical*, 280 NLRB 1131 (1986).

[5] The Dunlop Commission of the Future of Worker-Management Relations—Final Report (Dec. 1994) (Cornell University) 41.

ployers agreed to notify their parts suppliers that they have a positive relationship with the UAW, not to discourage employees of the parts supplier from joining the union, and that they will not retaliate against a supplier if it is organized. NLRB petition activity has been going down for the last two years. Indeed, indications are that more employees are organizing today under voluntary recognition agreements than under NLRB elections.

The Role of the Arbitrator

What is the arbitrator's role under these agreements? It is possible that an arbitrator may be asked to apply some of the more mechanical aspects of voluntary recognition agreements. For example, the parties may not be able to agree on a unit description or may disagree on whether certain classifications should be included. In effect, the arbitrator may be asked to resolve disputes over the appropriate bargaining unit itself including such things as supervisory, managerial, or confidential status. I see nothing difficult here that should cause any basis for concern.

An arbitrator also may be asked to physically perform the card check. This requires production of a list of all employees in the unit, the union authorization cards, and original employer documents with employee signatures, such as an employment application. The arbitrator counts the cards, verifies the signatures, and will probably be asked to sign a statement verifying that as of that date the union did or did not have a card majority. Remember, any person can file a charge with the NLRB challenging the card check. The arbitrator could be interviewed by a Board agent and asked about the details of the card check.

Employer Court Challenges Have Failed

However, experience tells me that almost all neutrality disputes will involve a claim by the union that the employer has not honored its neutrality pledge during a union organizing drive. Short shrift should be given to arguments that neutrality and card check agreements are contrary to public policy and should not be enforced. Every court faced with various public policy or free speech arguments has rejected them.[6] I am not aware of any decision say-

[6] *See, e.g., UAW v. Dana Corp.*, 278 F.3d 548 (6th Cir. 2002); *Hotel & Restaurant Employees Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993); *Hotel Employees Local 2 v. Marriott Corp.*, 961 F.2d 1464 (9th Cir 1992).

ing that an employer cannot waive its right to oppose the union during a campaign among its employees.[7]

As the Supreme Court noted in *Auciello Iron Works v. NLRB*,[8] it is difficult to take any employer very seriously when it claims to be the champion of worker rights.

I will not tell the arbitrator community how to determine when an employer violates a neutrality/card check agreement. That is what arbitrators get the big bucks for. There are too many variations on such agreements and too many fact-specific matters for me to say anything meaningful. I will make this observation, however. The very purpose of a voluntary recognition agreement is the avoidance of the adversarial atmosphere common to NLRB elections. The mutual intent of the parties usually is to permit the union to try to solicit authorization cards without employer interference, and the employer will then recognize and bargain with the union if a majority of employees do sign cards. All of this is supposed to occur without appeals to third parties. Thus, the mere fact that the matter is now in arbitration signals that at least the spirit of the neutrality agreement has been undermined.

Some employers claim that as long as they conduct positive, pro-company campaigns they are not in violation of any neutrality pledge. Our moderator and I had five cases with Dana Corporation as it tried to follow this pro-company road. As Dana found, this is a very difficult, and in their case impossible, path on which to stay.

Establishing a violation of neutrality is the easy part of the case. The hard and tricky part is the remedy. The Supreme Court has made it clear that arbitrators have wide discretion in this area. However, it is also clear that only the NLRB, not arbitrators, can order employers to bargain with the union. Indeed, arbitrators cannot direct the NLRB to conduct an election.

The case of *Service Employees v. St. Vincent Medical Center*[9] illustrates the line of demarcation between contract enforcement and NLRB jurisdiction. The union and the hospital signed something like a neutrality agreement, but not quite. The parties pledged that election campaigns would be free from coercion, intimidation, promises, and threats; the parties would communicate only that which was factual; the hospital would not imply or inform

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[7] *See also* Davies, *Neutrality Agreements: Basic Principles of Enforcement and Available Remedies*, 16 Lab. L. J. 215 (2000).

[8] 517 U.S. 781, 790 (1991).

[9] 344 F.3d 977 (9th Cir. 2003).

voters that they would lose benefits, wages, or working conditions; and there would be no one-on-one conversations with employees on unionization.

The union filed for an NLRB election and lost. The union filed no objections with the NLRB but did file a grievance alleging 18 separate violations of the agreement. The employer refused to arbitrate, claiming that because the alleged misconduct occurred during an NLRB election, the dispute was purely representational and thus within the NLRB's primary and exclusive jurisdiction. The Ninth Circuit directed arbitration, stating: "while this case concerns allegations regarding the parties' behavior before a representational election, and thus has representational overtones, compelling arbitration of the alleged violations of the Agreement—like the enforcement of the neutrality clause in Marriott—raises no representational issue."

It's All About the Remedy

Appropriate remedies for violations of voluntary agreements are among the most difficult decisions arbitrators will ever make. The arbitrator in this context has the nearly impossible job of putting Humpty Dumpty back together. The arbitrator's charge is to restore the status quo, to put the union in as good a position as if there had been no violation by the employer. How does an arbitrator do that? The employer promised to not oppose the union but now all of the employees know that the employer, in actuality, is so opposed. The employees won't forget that, no matter what you do. The arbitrator can't move the clock back. The arbitrator can't unring a bell! In addition, let's remember that the arbitral remedy is usually being imposed in a non-union workplace, where the union has no representational presence, no steward body, and no history of enforcing its rights through a grievance procedure.

Indeed, without an adequate remedy, the employees are given yet another message of futility—that the union is unable to get the employer to live up to its agreement. Moreover, if the remedy is largely a cease-and-desist order, even if spelled out in an employer speech or letter, the employees know that this momentary remedy is due solely to the arbitrator's temporary intervention. How can an arbitrator force the employer to change its "attitude" toward the union?

As you can probably tell, I think remedies that direct or purport to change the employer's future conduct and behavior is very

problematic. When I was General Counsel of the NLRB, I undertook a so-called "remedies initiative" seeking to tweak some of the NLRB's traditional remedies.[10]

Fieldcrest Cannon and *Dana* Provide Guidance

In that article, I suggested that *Fieldcrest Cannon* remedies should be considered in appropriate election cases involving serious unfair labor practices. In *Fieldcrest Cannon*,[11] the Board approved a wide range of remedies for serious campaign misconduct. I will discuss only the more nontraditional of those remedies here. They include orders requiring the employer to:

1. Supply the union, upon request, the full names and addresses of current unit employees;
2. On request, grant the union and its representatives reasonable access to the employee bulletin boards and all places where notices to employees are customarily posted;
3. On request, grant the union and its representatives reasonable access inside the workplace in non-work areas and during non-work times;
4. Afford the union the right to deliver a 30-minute speech to employees during working time; and
5. In addition to the traditional notice posting of the Board remedy on employee bulletin boards, publish the Board's Order in the employer's internal newsletter and the local papers and mail the Order to the employees and have the employer's principal officer at that location read it to the assembled employees.[12]

As you can see, the focus of *Fieldcrest Cannon* was not so much an attempt to change the employer, but to give the union equal access to the employees. The employer already had done the damage by violating the neutrality agreement. Access, in contrast, gives the union a chance to clear the atmosphere after the pollution has occurred.

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[10] *See* Page, *NLRB Remedies: Where Are They Going?*, 16 Lab. L. J. 365 (2000).

[11] 318 NLRB 470 (1995), *enforced in pertinent part*, 97 F.3d 65 (4th Cir. 1996).

[12] As General Counsel, I did not seek to enforce the reading part of *Fieldcrest Cannon*. I thought it raised potential enforcement problems based on the tone or style of the delivery and was perhaps unnecessary and too embarrassing. But then again, I have always been viewed as a softy.

The useful point about an arbitrator using *Fieldcrest Cannon* remedies is that the arbitrator is not reinventing the wheel. These remedies, or parts of them, have been routinely enforced against employers in other cases.

In the *Dana* case enforced by the Sixth Circuit,[13] arbitrator Paul Glendon ordered a number of these remedies, including:

1. Sending a letter to employees, signed by the plant manager and the President, pledging to comply fully with its neutrality;
2. Granting UAW representatives access to the plant to address all employees for one hour on paid time; and
3. Permitting UAW representatives to attend and videotape any meeting at which management presents a position on unionization.

Again, both the more recent *Dana* case and the court in *AK Steel Corp. v. United Steelworkers*[14] upheld the traditional view that the arbitrator has broad discretion in drafting remedies, including granting the union greater access rights for violations of neutrality agreements.[15]

Finally, I would submit that the arbitrator almost always has to retain jurisdiction to police compliance with the remedy. The concern is that the employer will tone down or change its prior message but still violate its neutrality pledge. The injured party should not have to go through this twice. If you read the series of five decisions involving Dana and the UAW, you will see that on each subsequent campaign, the employer argued that it had complied with the arbitrator's prior award by avoiding the specific misdeeds noted in the prior decisions. As the *Dana* saga shows, there are many ways to violate neutrality agreements. I might also add that while Dana lost every arbitration case, they never lost an election.

If the employer violations are egregious in nature, arbitrators should consider requiring prior clearance of employer communications dealing with the selection of a union.

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[13] 8-RD-1976 (2004).
[14] 163 F.3d 403 (6th Cir. 1998).
[15] Other reported decisions enforcing neutrality agreements include *Carson International and Hotel Employees Local 450*, 39 LA 640 (Greco 1992) and *Dana Corp. and UAW,* 76 LA 125 (Mittenthal 1981).

Conclusion

Let me end this with a good news/bad news admonition. The good news is, given the basic purpose of voluntary recognition agreements, arbitration proceedings should be relatively rare. The bad news is that for any arbitrator who gets such a case, it will be a most vigorous contest with about 99 percent of his or her job being the selection of the appropriate remedy.

II. NAVIGATING THE UNCHARTED SEAS OF NEGOTIATED TRANQUILITY: A MANAGEMENT PERSPECTIVE ON EMPLOYER NEUTRALITY AGREEMENTS AND CARD CHECKS

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Introduction

During the past quarter-century, labor unions have found it increasingly difficult either to expand or even to replenish their membership roles through the traditional means of winning union representation elections. It was estimated in 1997 that unions would need to organize approximately 400,000 new members annually in order to maintain the combined private- and public-sector union density rate at that time.[1] Yet, it has been reckoned that there were only 86,325 employees eligible to vote in representation elections conducted by the National Labor Relations Board that unions won that same year[2] and, notwithstanding a 5 percent increase in private, nonfarm employment during the intervening six years,[3] only 75,058 such employees in 2003.[4] The net result is that unions have found it increasingly necessary to turn to means

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[1]Bacon, *The Promise of a Raise Is Not Enough*, Dollars & Sense, Number 213 September/October 1997, at 20, cited in Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement,* 22 Berkeley J. Emp. & Lab. L. 369, 371–72 nn.6, 10 (2001).

[2]Daily Lab. Rep. (BNA) No. 4, at C-2 (Jan. 7, 2003).

[3]*See* Bureau of Labor Statistics, U.S. Department of Labor, Employment, Hours, and Earnings from the Current Employment Statistics Survey (National), available at www.bls.gov/webapps/legacy/cesbtab1.htm (Establishment Data, Table B-1, Total Private, not seasonally adjusted).

[4]Daily Lab. Rep. (BNA) No. 245, at C-2 (Dec. 22, 2004).