

CHAPTER 6

THE CANADIAN AUTO WORKERS-MAGNA INTERNATIONAL, INC. FRAMEWORK OF FAIRNESS AGREEMENT: A U.S. PERSPECTIVE

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INTRODUCTION

On October 15, 2007, the Canadian Auto Workers (CAW) and Magna International, Inc. (Magna) entered into a historic agreement entitled, “Framework of Fairness Agreement” (FFA).¹ The FFA “went further than any other Canadian neutrality agreement in terms of the organizing benefits it conferred on the CAW,”² creating what York University Professor David Doorey has called “a remarkable scenario for CAW organizers, completely at odds with the environment they would be used to operating under in almost every other organizing campaign.”³ Nevertheless, the FFA has been extremely controversial among unions and their supporters in Canada. Although approved by the CAW Council on December 7, 2007,⁴ there was significant dissent within the

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¹See generally Framework of Fairness Agreement Between: Magna International, Inc. and National, Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Can.) (Oct. 15, 2007), <http://www.caw.ca/en/3642.htm> (last visited Feb 15, 2010) [hereinafter FFA].

²David J. Doorey, *Six Questions About Neutrality Agreements (And Some Answers)* 1 (Apr. 15, 2009) (working paper), available at <http://ssrn.com/abstract=1380342>.

³*Id.*

⁴See Press Release, Transportation and General Workers of Canada, CAW Council Overwhelmingly Endorses Magna Framework of Fairness (Dec. 7, 2007), available at <http://www.caw.ca/en/3552.htm>; Tony Van Alphen, *CAW Membership Formally Approves 'No Strike' Pact*, THESTAR.COM, Dec. 8, 2007, <http://www.thestar.com/Business/article/283706>.

union's ranks.⁵ The Ontario Federation of Labour, of which the CAW is not a member, voted to condemn the FFA.⁶ Commentators suggested that the FFA violated the Code of Ethical Practices in the Canadian Labour Congress Constitution,⁷ and sacrificed "the very cornerstones upon which the Canadian trade-union movement is built."⁸

In this Article, I analyze the FFA from the perspective of United States labor law and use the analysis as a vehicle for examining the ongoing controversy in the United States concerning neutrality and voluntary recognition agreements. In Part I, I review the FFA, its history and background, and the controversy in Canada. In Part II, I discuss why the FFA would be illegal in the United States. In Part III, I use that discussion as a vehicle for examining the controversy over neutrality and card check agreements in the United States and suggest guidelines for evaluating their legality.

I. The Framework of Fairness Agreement

A. *The Parties*

Magna International began in 1957 as a small tool and die shop in Toronto.⁹ It grew to be the largest employer in the Canadian automotive industry with 18,000 hourly production employees at forty-five facilities.¹⁰ Worldwide, it operates 200 plants with 84,000 employees.¹¹ It has ambitions to become an auto assembler as

⁵See, e.g., Van Alphen, *supra* note 4; Tony Van Alphen, *Critics Fume Over Magna Deal*, TORONTO STAR, Nov. 17, 2007 at B2; Tony Van Alphen, *Key CAW Leader Opposes Magna Deal*, WHEELS.CA, Oct. 29, 2007, <http://www.wheels.ca/printArticle/32508>; Jeff Casey, *CAW/Magna Framework of Fairness Agreement*, 14 RUBBER REPORT (CAW-TCA Canada newsletter), Winter 2007, at 2, available at <http://www.cawlocal.ca/4451/newsletters.asp#> (newsletter of CAW Local 4451 arguing against the FFA); *The Magna Charter Dilemma*, NEWSLETTER (CAW TCA Local 2200), Nov. 27, 2007, at 23, available at <http://www.caw2200.ca/Files/Newsletter/2007/Nov%2007%20Newsletter.pdf> (reporting unanimous membership vote to oppose FFA).

⁶See Ian Urquhart, *Labour Condemns CAW Deal*, TORONTO STAR, Nov. 27, 2007, <http://www.thestar.com/news/magna/article/280100>.

⁷Geoff Bickerton, *Magna-CAW Framework of Fairness Agreement Is an Affront to Union Democracy*, BULLET (E-Bulletin No. 67, The Socialist Project), Oct. 24, 2007, <http://www.socialistproject.ca/bullet/bullet067.html>.

⁸Editorial, *The Magna Agreement: Not the Way Forward*, CANADIAN DIMENSION, Jan./Feb. 2008, at 4.

⁹Wayne Lewchuk & Don Wells, *Transforming Worker Representation: The Magna Model in Canada and Mexico*, LABOUR/LE TREVAIL, Fall 2007, at 108 [hereinafter Lewchuk & Wells, *Transforming Worker Representation*].

¹⁰CAW & Magna: A Window of Opportunity (December 2007) at 11, available at www.caw.ca/en/3651.htm (last visited Feb. 15, 2010) (on file with the *Saint Louis University Law Journal*) (PowerPoint presentation on FFA by CAW leadership to the CAW Council) [hereinafter CAW FFA PowerPoint].

¹¹Lewchuk & Wells, *Transforming Worker Representation*, *supra* note 9, at 109.

well. When Daimler sought to divest itself of its Chrysler operations, Magna was one of the unsuccessful bidders.¹² When General Motors sought to sell its Opel Division, Magna was one of the bidders.¹³ Magna's growth may be attributed in part to the strategy of General Motors, Ford, and Chrysler in the 1980s to reduce their labor costs by outsourcing the fabrication of parts and other components.¹⁴ Its production workers' wage scale was about 40% below the wage scales of the Detroit Three—allowing Magna to produce parts and components at a lower cost.¹⁵ It spread its workforce among numerous small plants that it tended to locate on the fringes of urban areas.¹⁶

Magna has drawn its workforce largely from people who previously worked “at farms, restaurants, . . . convenience stores,” and similar employers who paid much lower wages than Magna and offered even fewer benefits, including a large number of immigrants from southern and eastern Europe and Asia.¹⁷ Consequently, Magna's workers have tended to compare their compensation not to that paid at unionized automotive plants, but to what they received in their former jobs.¹⁸ Magna has been able to pay skilled and professional workers, such as engineers, lower wages than the automakers by hiring immigrants who lack the American credentials likely to be found among comparable employees at the Detroit Three, as well as by providing training and promotion from within the organization.¹⁹ It also has relied, to a large extent, on existing employees to refer new hires, particularly family members.²⁰

¹² See National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), *CAW-Magna Timeline*, <http://www.caw.ca/en/3641.htm> (last visited Feb. 15, 2010).

¹³ See Joint Press Release, Magna International, Inc. and Savings Bank of the Russian Federation, Magna and Sberbank Announce Revised Offer for Opel (July 21, 2009), available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9M2A2MDh8Q2hpbGRjRD0tMXxUcXB1PTM=&t=1>.

¹⁴ Lewchuk & Wells, *Transforming Worker Representation*, *supra* note 9, at 109.

¹⁵ *Id.* at 112. This comparison does not take into account the recent wage and benefit concessions that the CAW and its United States counterpart, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) have agreed to with General Motors and Chrysler.

¹⁶ *Id.* at 113.

¹⁷ *Id.* at 121; Wayne Lewchuk & Don Wells, *When Corporations Substitute for Adversarial Unions: Labour Markets and Human Resource Management at Magna*, 61 RELATIONS INDUSTRIELLES/INDUSTRIAL RELATIONS 639, 655 (2006) [hereinafter Lewchuk & Wells, *When Corporations Substitute*].

¹⁸ Lewchuk & Wells, *When Corporations Substitute*, *supra* note 17, at 651.

¹⁹ *Id.* at 655.

²⁰ *Id.* at 654–55.

New hires enter as temporary employees and are paid less than permanent employees.²¹ They have no set probationary period and become permanent employees at management's discretion.²² The temporary employees provide a buffer that protects permanent employees against layoffs²³ and provide another basis of comparison that reinforces permanent employee satisfaction with their wages and benefits.²⁴

Seniority plays a very minor role at Magna. Instead, management enjoys much more discretion than in unionized facilities, and advancement is based on performance and cooperative attitude.²⁵ Workers rely on their relationships with supervisors to pave the way for advancement or favorable treatment, such as approval of vacation schedules and the hiring of family members and friends.²⁶ "To be successful, workers need to adhere to an unwritten code of conduct regarding their work ethic and acceptance of corporate goals."²⁷

Annual wage increases are set unilaterally by management and tied closely to firm profitability. Distribution of wage increases depends on employees' evaluations. The evaluations center not only on performance criteria such as productivity and attendance, but also on criteria tied to worker cooperation with management. Employees who are judged substandard receive only half of the wage increase until they improve and meet performance criteria.²⁸

Magna also distributes 10% of its pre-tax profits to its employees. The money is invested in Magna stock and held in trust in individual employee accounts. Employees may not withdraw assets from their accounts for at least ten years.²⁹

Each of Magna's small plants is semi-autonomous. A plant, or a small network of plants, is responsible for bringing in enough contracts to justify maintaining operations.³⁰ At daily line meetings, weekly department meetings, and monthly plant meetings, supervisors and managers report on worker productivity and on how the plant is doing competitively.³¹ This results in a "workplace

²¹ *Id.* at 651.

²² *Id.*

²³ Lewchuk & Wells, *Transforming Worker Representation*, *supra* note 9, at 116.

²⁴ *See id.* at 121.

²⁵ *Id.* at 116.

²⁶ *Id.* at 115; Lewchuk & Wells, *When Corporations Substitute*, *supra* note 17, at 646.

²⁷ Lewchuk & Wells, *Transforming Worker Representation*, *supra* note 9, at 115.

²⁸ *Id.* at 117.

²⁹ *Id.* at 117-18.

³⁰ *Id.* at 113.

³¹ Lewchuk & Wells, *When Corporations Substitute*, *supra* note 17, at 647.

and corporate-centered model of cohesion in which workers look to management rather than to class-based organizations such as unions . . . to provide a ‘haven in a heartless world.’”³²

This approach appears to undermine worker solidarity. For example, injured workers,

[r]ather than receiving the support of co-workers . . . are more likely to be viewed as faking injuries and violating the implicit bargain of high effort norms. . . . Co-workers, dependent on management honouring the implicit non-contractual labour bargain, fear associating too closely with workers who have fallen out of management favour and who have become a drag on overall company success and profits.³³

Magna maintains a “Concerns Resolution Process,” which features an “Open Door Policy,” under which employees are encouraged to view their concerns as individual problems to be worked out informally with supervision, rather than formally pursued collective grievances.³⁴ If problems are not resolved within forty-eight hours, however, a human resources manager intervenes.³⁵ Each plant employs an employee advocate (EA), an hourly employee selected by management whose continued functioning in office is subject to periodic ratification by majority vote of the EA’s peers.³⁶ Despite the name, the EA’s role is to guide employees in disputes but “not to represent” them.³⁷ A Fairness Committee (FC) consists of managers and employee representatives elected by the workers.³⁸ Employees may take matters to the committee and committee members may accompany employees to meetings with management, but, like the EA, they do not serve as representatives.³⁹ Workers may also appeal to the corporate level by using an employee hotline.⁴⁰ Most issues, however, are resolved with direct supervision at the work group level.⁴¹

Magna’s methods of hiring and rewarding employees and resolving employee grievances strongly encourage workers to internalize corporate values and bond with management, while hampering class-based worker solidarity. Organizing employees at Magna would present a challenge for any union.

³²Lewchuk & Wells, *Transforming Worker Representation*, *supra* note 9, at 113.

³³*Id.* at 115.

³⁴*Id.* at 114; FFA, *supra* note 1, at 5.

³⁵Lewchuk & Wells, *Transforming Worker Representation*, *supra* note 9, at 114.

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰Lewchuk & Wells, *Transforming Worker Representation*, *supra* note 9, at 114.

⁴¹*Id.* at 114–15.

In 1936, the UAW organized its first Canadian local at the Kelsey Wheel Windsor, Ontario auto parts plant.⁴² In 1985, all of the Canadian UAW locals split off from their parent union and formed the CAW.⁴³ For decades, first the UAW, and then the CAW, attempted to organize workers at Magna with extremely limited success. In the early part of the new century, the CAW succeeded in organizing about 1000 Magna workers from three plants: Integram Windsor, Mississauga Seating, and Innovatech Windsor. In doing so, the CAW was assisted by pressure on Magna from the Detroit Three.⁴⁴

B. The Framework of Fairness Agreement (FFA)

Negotiations between the CAW and Magna that culminated in the FFA began in 2005.⁴⁵ The FFA declared the parties' joint goals "of not only preserving but expanding Canada's automotive sector through high-performance work practices; investments in both capital and human resources; effective and just labour relations; world-class quality, productivity, and reliability; developing and renewing top-quality skilled trades; and continuing to support and enhance social and environmental sustainability."⁴⁶

Under the FFA, Magna commits to investing in new products and processes; operating efficiently; treating employees fairly; providing employees with training; "maintaining health, safety and environmental practices...;" having employees share in the company's financial successes; communicating regularly to employees; and generating a competitive return for shareholders.⁴⁷ The CAW commits to serving as a check and balance for employees within the Magna system; assisting Magna in sourcing; building employee morale; enhancing employee cooperation and commitment; facilitating relationships with customers; enhancing transparency and credibility in existing Magna labour relations processes; providing professional expertise, particularly with respect to health and safety, wellness, and employee assistance programs; assisting with apprenticeship programs; assisting in achieving racial and gen-

⁴² CAW-Magna Timeline, *supra* note 12.

⁴³ *Id.*

⁴⁴ CAW FFA PowerPoint, *supra* note 10, at 13; Tony Van Alphen, *CAW Shelves Right to Strike: Magna and Auto Workers Aim to Build a New Management-Union Relationship*, THE STAR.COM, Oct. 16, 2007, <http://www.thestar.com/article/267140>.

⁴⁵ CAW FFA PowerPoint, *supra* note 10, at 13.

⁴⁶ FFA, *supra* note 1, at 2.

⁴⁷ *Id.* at 3.

der equality; obtaining better rates for products and services; and partnering on legislative and community projects.⁴⁸

The FFA contains a Memorandum of Agreement (MOA) concerning the union recognition process. Under the MOA, Magna provides the CAW with a list of all employees in a prospective bargaining unit within one week of a CAW request and updates the list monthly. The union gives the company notice of its intent to conduct an election at a particular division. Once an election date is scheduled, Magna allows CAW organizers to meet with employees on Magna property during nonworking time in nonworking areas for a period of seven days. Immediately prior to the election, Magna provides the CAW access to the employees in a meeting called during work time. At the meeting, Magna introduces the union, advises the employees that the two parties have a positive relationship and that they have a national collective bargaining agreement, which commits both parties to the facility's success and growth. Both parties affirm their support for the FFA and the national collective bargaining agreement.⁴⁹

Immediately following the meeting, a mutually agreed upon "election neutral" conducts a secret ballot election which simultaneously asks for acceptance of the CAW as exclusive bargaining representative and ratification of the national collective bargaining agreement. The national collective bargaining agreement is deemed ratified, and the CAW is recognized as the exclusive bargaining representative if a majority of employees who vote approve the agreement.⁵⁰

As indicated above, under the FFA, the CAW commits to serving as a check and balance for employees within the Magna system.⁵¹ Consequently, the FFA does not provide for a typical system of shop stewards and local officers. Instead, it integrates the CAW into the existing Magna human resources system.⁵²

The FFA continues the Magna system of Fairness Committees (FC). An FC is established for each division with members elected from each department or work area and shift. The FFA declares the FC's purpose as "a resource in the Concern Resolution Process in each facility and to work to build a positive and productive work

⁴⁸*Id.* at 3–4.

⁴⁹*Id.* at 21–22.

⁵⁰*Id.*

⁵¹See *supra* note 48 and accompanying text.

⁵²FFA, *supra* note 1, at 5.

environment within their Division.”⁵³ The FFA adds that FC members “are not union representatives nor does their role include the representation of employees.”⁵⁴ A majority of FC members are elected by the bargaining unit, with the remainder appointed by management.⁵⁵

A secret ballot vote of the employees selects bargaining unit FC members.⁵⁶ To be eligible to serve, an employee must not be on probation, must have a “[g]ood disciplinary record,” “must be able to communicate effectively,” and must “[commit] to the principles of the Magna Employees’ Charter, the FFA and the National [Collective Bargaining] Agreement.”⁵⁷ FC members serve staggered three-year terms.⁵⁸

The FFA does not provide for traditional shop stewards. Instead, it continues the Magna position of Employee Advocate. The EA’s duties include providing “support” to employees in the lower stages of the Concern Resolution Process up through appeals to Magna’s hotline. Appeals beyond the hotline are subject to the EA’s control, and the EA, rather than the employee, pursues the matter on behalf of the employee.⁵⁹ This appears to be a significant modification of the Magna policy in its nonunion facilities, where the EA is not regarded as representing the employees.⁶⁰

EAs must have at least three years’ seniority.⁶¹ Applicants for EA positions are evaluated by the facilities’ Fairness Committees, which rank the top three applicants.⁶² The CAW Assistant to the President (CAW AP) selects one of the top three candidates to be the EA.⁶³ Once selected, EAs remain in office until removed by a vote of a majority of bargaining unit employees.⁶⁴ The initial vote is held eighteen months following the EA’s selection with subsequent votes held every thirty-six months.⁶⁵

The FFA establishes an Employee Relations Review Committee (ERRC). The ERRC consists of the CAW AP, the CAW National Representative assigned to the Magna local, the Magna local Pres-

⁵³*Id.* at 10.

⁵⁴*Id.*

⁵⁵*Id.* at 10, 16.

⁵⁶*Id.* at 16.

⁵⁷FFA, *supra* note 1, at 16.

⁵⁸*Id.*

⁵⁹FFA, *supra* note 1, at 5–6.

⁶⁰See *supra* note 37 and accompanying text.

⁶¹FFA, *supra* note 1, at 18.

⁶²*Id.*

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Id.*

ident, and two representatives of Magna's Executive Vice President for Global Human Resources "and one Senior Operating Executive."⁶⁶ In addition to holding quarterly meetings that in other contexts would be thought of as labor-management committee meetings,⁶⁷ the ERRC serves as the lead committee negotiating the national collective bargaining agreement,⁶⁸ and as the final internal step in the Concerns Resolution Process.⁶⁹

Under the FFA, all bargaining units at all Magna FFA facilities constitute a single amalgamated CAW local.⁷⁰ The EAs form the executive committee of the amalgamated local and elect members of the committee to serve as the local's officers.⁷¹

Unlike the overwhelming majority of collective bargaining agreements, which have formal grievance procedures in which employees or the union pursue grievances that require responses by management followed by appeals to, and responses from, successively higher management officials—the FFA retains, with some modifications, Magna's existing Concern Resolution Process. Indeed, the term "grievance" does not appear in the FFA. This appears to be in keeping with Magna's human resources policy that regards "grievances" as individual problems to be resolved at the most local level possible.⁷²

The FFA encourages employees to raise concerns or complaints with their immediate supervisors but provides that they may use Magna's Open Door Process to raise the matter with the supervisor, an FC member, the department manager, the human resources department, the assistant general manager, the general manager, or the Joint Health and Safety Committee.⁷³ Issues not resolved through the informal process may be referred to the FC, which has authority to apply the national collective bargaining agreement, except for termination cases or pay and benefit rates matters.⁷⁴

Employees may appeal to the Magna Hotline for corporate level review of the FC decision, or they may bypass the local level entirely and begin their complaint at the hotline level.⁷⁵ All termination

⁶⁶FFA, *supra* note 1, at 6.

⁶⁷*Id.* at 6–7.

⁶⁸*Id.* at 7.

⁶⁹*Id.*

⁷⁰*Id.* at 6.

⁷¹FFA, *supra* note 1, at 6.

⁷²See *supra* note 41 and accompanying text.

⁷³FFA, *supra* note 1, at 9–10.

⁷⁴*Id.* at 10.

⁷⁵*Id.* at 11.

cases must originate at the hotline level.⁷⁶ Appeals beyond the hotline level are controlled by the EA.⁷⁷ The next level of appeal is the Concern Resolution Subcommittee of the ERRC (CRSC).⁷⁸ The CRSC consists of the EA and a representative from the CAW AP, the Group Human Resources Director, and the facility General Manager or his or her designee.⁷⁹ The CRSC meets monthly and is to decide appeals within forty-eight hours of the meeting.⁸⁰ If it is unable to resolve a case, the CAW AP or the Division General Manager may appeal the matter within ten days to the ERRC.⁸¹ If the employee or division management is not satisfied with the ERRC's resolution, either the CAW AP or the Magna Executive Vice President may appeal the matter to a neutral arbitrator.⁸²

Negotiations for a new national agreement commence within fifteen days of a notice by either party of its desire to bargain.⁸³ The notice must be served within ninety days of the existing agreement's expiration date.⁸⁴ If agreement cannot be reached or a tentative agreement does not win ratification from the executive council of the amalgamated local or the members of the local, the dispute is referred to arbitration.⁸⁵ The FFA does not allow for a resort to economic weapons such as strikes or lockouts.⁸⁶ The FFA expressly provides that the national agreement will reflect, among other things, that each division is a separate profit center with its future dependent on maintaining "an acceptable return on investment."⁸⁷ Thus, the FFA leaves intact a key Magna practice that has led employees to identify with their local facility and its management rather than build class-based solidarity with coworkers company wide.

C. *The Controversy in Canada*

The FFA ignited a fierce debate within the labor movement in Canada. The primary rationale advanced by the CAW for the FFA was the need to arrest the spiraling decline in union density in

⁷⁶ *Id.* at 10.

⁷⁷ *Id.*

⁷⁸ FFA, *supra* note 1, at 11.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 12.

⁸³ FFA, *supra* note 1, at 24.

⁸⁴ *Id.* at 19.

⁸⁵ *Id.* at 24.

⁸⁶ *Id.* at 15.

⁸⁷ *Id.* at 8.

Canada—in the private sector generally and in the automotive industry in particular. The CAW observed that union density in the Canadian private sector fell from over 30% in the 1970s to 17% in 2006.⁸⁸ Noting the steeper decline in the United States, the CAW cautioned, “We’re at a turning point now in Canada. We can follow the U.S. path. It will take us a little longer. But we are clearly heading the same way. Or we can turn it around. That’s our choice.”⁸⁹

Turning to the automotive industry, the CAW noted that union density among auto assemblers in Canada was 100% until the late 1980s, but had since declined to approximately 70%.⁹⁰ Nevertheless, the union asserted that it was still able to control wages and working conditions across that sector.⁹¹ But in the auto parts sector, the CAW maintained, its density was declining more steeply and approaching 25%.⁹² Again drawing on the experience in the United States, the CAW warned that if the trend was not reversed, its ability to maintain wages and working conditions even at unionized facilities would be threatened.⁹³ With Magna representing 25% of the auto parts sector in Canada, the CAW urged organizing its workforce under the FFA would bring union density back to a level that would restore CAW control over labor standards industry wide.⁹⁴

Critics charge that the FFA represents:

a radical break from many of the union’s basic principles: it gave up the right to strike; it proposed a model of organizing new members that essentially relied on the good will of the employer, rather than the power and potential of the union; it argued for a structure of workplace union representation that was not independent of management, giving up the right to an independent, elected, shop-floor set of union representatives⁹⁵

The University of Toronto’s Center for Industrial Relations and Human Resources devoted its 2008 annual Sefton Lecture to a debate on the FFA by McMaster University Labour Studies

⁸⁸CAW FFA PowerPoint, *supra* note 10, at 3.

⁸⁹*Id.* at 4.

⁹⁰*Id.* at 5.

⁹¹*Id.* at 7.

⁹²*Id.*

⁹³CAW FFA PowerPoint, *supra* note 10, at 7.

⁹⁴*Id.* at 11.

⁹⁵Posting of Herman Rosenfeld to Doorey’s Workplace Law Blogs, <http://www.yorku.ca/ddoorey/lawblog/?p=730> (Feb. 4, 2009) (comments of retired CAW National Representative Herman Rosenfeld).

Professor Charlotte A. B. Yates and CAW Economist Jim Stanford.⁹⁶ Yates criticized the FFA for permanently giving up the right to strike.⁹⁷ She offered two grounds for her criticism. First, she argued, that the right to strike is a human right rather than a commodity and, therefore, is not to be traded off permanently.⁹⁸ Second, while agreeing that the number of strikes had decreased greatly, she nevertheless maintained that, in appropriate circumstances, the strike or the threat of strike could still be a powerful motivator for employer concessions.⁹⁹

Yates maintained that continued divisions within the labor movement in Canada pose an impediment to reversing the decline in union density.¹⁰⁰ She characterized the FFA as “driv[ing] a further wedge” in the movement.¹⁰¹

Yates criticized the FFA’s provisions for selecting union representatives because they give central union administration, and potentially management, influence over the process.¹⁰² She argued that this approach weakens representatives’ networks and independence.¹⁰³ She criticized the CAW for building on Magna’s existing nonunion system.¹⁰⁴

Yates also expressed concern over the FFA’s language. She criticized the use of “corporate competitiveness.”¹⁰⁵ She also highlighted the FFA’s references to “concerns” and “employees” rather than grievances and workers.¹⁰⁶ She urged, “[L]anguage is so very important as it reflects what and who we are, but also shapes the terms and conditions under which we relate to and include others in our lives.”¹⁰⁷

Stanford defended the FFA. He positioned the FFA as a strategy to deal with decreasing union density, which he characterized as

⁹⁶Charlotte A.B. Yates & Jim Stanford, University of Toronto Sefton Memorial Lecture, *New Union Strategies for Tough Times: The CAW-Magna Deal, and other Responses* (Mar. 27, 2008) (transcript available at <http://www.chass.utoronto.ca/cir/library/seftonlectures/seftonlectures.html>); McMaster University Faculty Profile—Charlotte Yates, <http://www.socsci.mcmaster.ca/polisci/Webpages/Staff/charolettetyates.html>.

⁹⁷Charlotte A.B. Yates, University of Toronto Sefton Memorial Lecture, *New Union Strategies for Tough Times: The CAW-Magna Deal, and Other Responses* (Mar. 27, 2008), available at <http://www.chass.utoronto.ca/cir/library/seftonlectures/seftonlectures.html>.

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰Yates & Stanford, *supra* note 96.

¹⁰¹*Id.*

¹⁰²Yates, *supra* note 97.

¹⁰³*Id.*

¹⁰⁴*Id.*

¹⁰⁵Yates & Stanford, *supra* note 96.

¹⁰⁶*Id.*

¹⁰⁷Yates, *supra* note 97.

“a threat to the survival of our movement and a threat to the fundamental nature of Canadian society.”¹⁰⁸ He maintained that the CAW negotiated the FFA from a position of strength derived from its successful organization at the three Magna plants, and that the CAW extracted many concessions from Magna in the negotiations.¹⁰⁹ He characterized the FFA as a “significant step forward,” observing that it gave Magna workers a full-time union representative, a three-year cycle for negotiating new contracts, full arbitration if negotiations do not produce agreement, ratification by secret ballot, and national representation from the union.¹¹⁰

Stanford characterized the selection of the EA as “indirect,” but maintained that such an approach was not unprecedented.¹¹¹ He asserted with respect to the EA, “At the end of the day, the rep will be a union activist with a mandate from his constituency.”¹¹²

Stanford defended the FFA’s substitution of arbitration for the right to strike over impasses in contract negotiations. He relied on data from the Ontario Labour Relations Board which showed that there had been 125 voluntary agreements to substitute arbitration of contract terms for the right to strike in Ontario in the prior ten years and concluded that in this regard the FFA was “nothing new.”¹¹³ He maintained that arbitration could produce results superior to the right to strike, contrasting the contract negotiated under the FFA at Magna’s Windsor Modules plant with the contract negotiated with a strike at a nearby TRW plant.¹¹⁴

In contrast to Yates and others who criticized the FFA for undermining class-based solidarity, Stanford positioned the FFA as a necessary response to current market conditions where globalization leaves “less competitive space for individual companies or even groups of companies to pay higher wages to people and stay in business.”¹¹⁵ The challenge for unions, he maintained, is to organize workers while ensuring that their employers remain in business.¹¹⁶ If unions do not meet that challenge, workers will fear that

¹⁰⁸Jim Stanford, Opening Statement at the University of Toronto Sefton Memorial Lecture, New Union Strategies for Tough Times: The CAW-Magna Deal, and Other Responses 6 (Mar. 27, 2008), available at http://www.chass.utoronto.ca/cir/library/seftonlectures/SeftonLecture26th_2008_Stanford_openingstatement.pdf.

¹⁰⁹*Id.*

¹¹⁰*Id.*

¹¹¹*Id.*

¹¹²*Id.*

¹¹³Stanford, *supra* note 108.

¹¹⁴*Id.*

¹¹⁵*Id.*

¹¹⁶*Id.*

unionization will lead to job loss and will not join.¹¹⁷ To meet that challenge, the FFA represents “a corporatist type of strategy by unions where when they do get in, they are going to do what they can to improve the conditions of their workers, but they’re also going to be looking at ways such as productivity growth, industrial policy measures and other factors to try and keep their employers in business.”¹¹⁸

Perhaps because the CAW’s attention and resources have been diverted by the global economic meltdown, particularly the bankruptcies of Chrysler and General Motors, the first year and a half of the FFA has not produced much progress toward the CAW’s goal of organizing all Magna workers and restoring union density in the Canadian auto parts sector toward 50%.¹¹⁹ In November 2007, workers at Magna’s Windsor Modules plant voted for recognition under the FFA.¹²⁰ The action generated considerable controversy as critics charged that the plant had already been or was on its way to being organized traditionally and did not have to give up the right to strike to gain recognition.¹²¹ In April 2008, workers at Magna’s Qualtech Seating Plant in London, Ontario, voted for CAW recognition under the FFA.¹²² In January 2009, in an action that stirred almost as much controversy as the original FFA, workers at the Mississauga Seating Plant, one of the three plants that the CAW had organized prior to the FFA, voted, over the objection of their local president, to ratify the FFA.¹²³

Perhaps because of the limited activity thus far under the FFA, there is no reported litigation challenging its legality.¹²⁴ Professor Doorey has catalogued the issues the FFA raises under Canadian labor law, particularly the Ontario Labour Relations Act.¹²⁵ The next section considers how the FFA would fare under United States law.

¹¹⁷ *Id.*

¹¹⁸ Stanford, *supra* note 108.

¹¹⁹ See CAW FFA Powerpoint, *supra* note 10, at 11 (detailing CAW goal to organize Magna which employs about 25% of all auto parts workers in Canada and raise union density in the auto parts sector back to around 50%).

¹²⁰ See Van Alphen, *Critics Fume Over Magna Deal*, *supra* note 5.

¹²¹ *Id.*

¹²² See Tony Van Alphen, *Magna Workers Join CAW*, *TORONTO STAR*, Apr. 11, 2008, at B04.

¹²³ See Tony Van Alphen, *Magna Deal Spurs CAW Infighting*, *TORONTO STAR*, Jan. 31, 2009, at B03.

¹²⁴ Doorey, *supra* note 2.

¹²⁵ *Id.*

II. May Unions and Employers Adopt the FFA in the United States?

If the CAW is correct and Magna provides a method whereby Canadian labor can avoid following the path of organized labor in the United States, American unions may look to it as a model to reverse their decline. Would such a model be lawful in the United States? Two provisions of United States' labor law would be implicated by an American version of the FFA: Title IV of the Labor Management Reporting and Disclosure Act (LMRDA)¹²⁶ and section 8(a)(2) of the National Labor Relations Act (NLRA).¹²⁷ Together these statutes envision employees who freely choose to be represented by labor organizations that are independent of their employers and that they control through democratic processes.

A. Title IV of the LMRDA

Enacted in 1959, the LMRDA was a reaction to revelations resulting from 270 days of public hearings spread over two years conducted by the Senate Select Committee on Improper Activities in the Labor and Management Fields, better known as the McClellan Committee, for its Chair, Senator John McClellan, Democratic senator from Arkansas.¹²⁸ The Committee uncovered corruption and mob domination of labor unions and linked such malfeasance to antidemocratic practices it found in the same unions.¹²⁹ It opined that revitalizing union democracy would “substantially improve[]” the conduct of union officials.¹³⁰

Congress' rationale for requiring democratic elections went beyond establishing a safeguard against corruption. Congress regarded workers' democratic participation in the selection of those individuals empowered to represent them as a fundamental

¹²⁶29 U.S.C. §§ 481–83 (2006).

¹²⁷*Id.* §§ 151–69. Section 302 of the Labor Management Relations Act prohibits an employer from giving to a labor organization “any money or other thing of value.” *Id.* § 186(a). The FFA gives the CAW access rights and assistance in organizing the Magna workforce which can be enormously valuable. FFA, *supra* note 1, at 21. In *Adcock v. Freightliner LLC*, however, the court held that the term “thing of value” refers to things that have quantifiable monetary value and does not encompass an employer's agreement to give a union access to its employees or to remain neutral in the union's organizing drive. 550 F.3d 369, 374–76 (4th Cir. 2008).

¹²⁸For background on the LMRDA, see MARTIN H. MALIN, *INDIVIDUAL RIGHTS WITHIN THE UNION* 34–48 (BNA 1988).

¹²⁹*See id.* at 43.

¹³⁰S. Rep. No. 1417, at 452 (1958).

right of American union members.¹³¹ The House and Senate Committees expressed this sentiment almost identically:

It needs no argument to demonstrate the importance of free and democratic union elections. Under the National Labor Relations and Railway Labor Acts the union which is the bargaining representative has power, in conjunction with the employer, to fix a man's wages, hours, and conditions of employment. The individual employee may not lawfully negotiate with his employer. He is bound by the union contract. In practice, the union also has a significant role in enforcing the grievance procedure where a man's contract rights are enforced. The Government which gives unions this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent... [T]he best assurance which can be given is a legal guaranty of free and periodic elections.¹³²

Section 401(b) of the LMRDA requires every local labor organization to elect its officers at least once every three years by secret ballot of its membership.¹³³ The statute requires international labor organizations to elect their officers at least once every five years and intermediate bodies to do so at least once every four years, but gives these bodies the option of election by secret ballot or by delegates elected by secret ballot.¹³⁴

The statute mandates that in every election required to be held by secret ballot, every member in good standing be eligible to be a candidate "subject to...reasonable qualifications uniformly imposed."¹³⁵ In *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*,¹³⁶ the Supreme Court held violative of section 401(c) a union requirement that candidates for major offices have had previous experience on the union's executive board or assembly or its predecessor body.¹³⁷ Based on the explicit detailed provisions in Title IV regulating union elections, the Court opined, "Congress plainly did not intend that the authorization in § 401(e) of 'reasonable qualifications uniformly imposed' should be given a broad reach... The check of democratic elections as a preventive measure is seriously impaired by candidacy qualifications which

¹³¹S. Rep. No. 187, at 20 (1959); H.R. Rep. No. 741, at 15–16 (1959).

¹³²S. Rep. No. 187, at 20; *see also* H.R. Rep. No. 741, at 15–16.

¹³³29 U.S.C. § 481(b) (2006).

¹³⁴*Id.* § 481(a), (d).

¹³⁵*Id.* § 481(e). This provision clearly applies to local unions. *See* LABOR UNION LAW AND REGULATION 233 (William W. Osborne, Jr. et al. eds. 2003). It is an open question whether it applies to internationals and intermediate bodies who elect their officers by conventions of delegates rather than secret ballot.

¹³⁶391 U.S. 492 (1968).

¹³⁷*Id.* at 493–95.

substantially deplete the ranks of those who might run in opposition to incumbents.”¹³⁸

The Court observed that the requirement led to only 1725 of the union’s 27,000 members being eligible to run for major offices.¹³⁹ It concluded that, “[p]lainly, given the objective of Title IV, a candidacy limitation which renders 93% of union members ineligible for office can hardly be a ‘reasonable qualification.’”¹⁴⁰ The Court rejected the union’s justification that, in light of the size of the union and its treasury, the requirement reasonably assured that principal officers would have prior experience with the local’s affairs.¹⁴¹ The Court reasoned that Congress modeled the requirements for union elections on political elections and that in both types of elections the voters are presumed capable of evaluating candidate qualifications, including prior experience.¹⁴²

In *Local 3489, United Steelworkers of America v. Usery*,¹⁴³ the Court invalidated a requirement that candidates for local union office have attended at least half of the union’s meetings within the three years prior to the election.¹⁴⁴ The Court found the case controlled by its decision in *Hotel Employees Local 6* because the record demonstrated that the rule disqualified 96.5% of the membership.¹⁴⁵ The Court rejected the local’s attempts to distinguish *Hotel Employees Local 6*.¹⁴⁶ The local argued that, unlike the requirement in *Local 6*, its meeting attendance requirement could be met by any member and the requirement did not have an effect of entrenching incumbent union officers.¹⁴⁷ The Court dismissed the argument that any member could qualify by attending the meetings, observing that to attend a sufficient number of meetings, a member would have to decide to qualify at least 18 months prior to the election, a time when it was unlikely that there would be much interest in running for office.¹⁴⁸ The Court deemed irrelevant the lack of any pattern of entrenched incumbent officers, stating, “Procedures that unduly restrict free choice among candidates

¹³⁸ *Id.* at 499.

¹³⁹ *Id.* at 501.

¹⁴⁰ *Id.* at 502.

¹⁴¹ *Hotel Employees Local 6*, 391 U.S. at 503–04.

¹⁴² *Id.* at 504.

¹⁴³ 429 U.S. 305 (1977).

¹⁴⁴ *Id.* at 310.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 310–11.

¹⁴⁷ *Id.*

¹⁴⁸ *Local 3489*, 429 U.S. at 310–11.

are forbidden without regard to their success or failure in maintaining corrupt leadership.”¹⁴⁹

From these two cases, it appears that in evaluating the reasonableness of a qualification for office, the Court will balance the union’s institutional interests served by the rule against the rule’s antidemocratic effects. In both cases, the rule in question was not shown to serve any legitimate union interest, but precluded over 90% of the members from candidacy. Moreover, the antidemocratic effects were inherent in the operation of the rules. The prior office-holding requirement made it impossible for most members to qualify, while the attendance requirement forced the candidates to decide to run at a time when interest in candidacy was likely to be low. The cases also suggest that a rule that entrenches incumbent officers is not likely to survive judicial scrutiny, but the absence of a history of such entrenchment will not save an otherwise unreasonable requirement.¹⁵⁰

Consideration of whether unions in the United States who adopt FFA-like agreements will run afoul of the LMRDA focuses attention on the FFA’s provisions concerning the employee advocate. EAs are not elected by direct secret ballot of the membership.¹⁵¹ Applicants are screened by the Fairness Committee, which ranks the top three and submits them to the Assistant to the CAW President who makes the appointment.¹⁵²

As previously noted, the EAs’ duties include providing “support” to employees in the lower stages of the Concern Resolution Process, up through appeals to Magna’s hotline. Appeals beyond the hotline are subject to the EA’s control, and the EA, rather than the employees, pursues the matter on behalf of the employees.¹⁵³ In performing these duties, the EA would appear to be comparable to a traditional union steward or business agent.

Title IV of the LMRDA only requires the election of “officers.” Section 3(n) defines “officer” as “any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.”¹⁵⁴ The definition is a broad one that com-

¹⁴⁹*Id.* at 312.

¹⁵⁰MALIN, *supra*, note 128, at 213–14.

¹⁵¹FFA, *supra* note 1, at 18.

¹⁵²*Id.* at 10, 18.

¹⁵³See *supra* note 59 and accompanying text.

¹⁵⁴29 U.S.C. § 402(n) (2006).

bines “title, function and position.”¹⁵⁵ However, business agents, shop stewards, and professional staff are considered as performing ministerial duties or duties that implement rather than make policy decisions, and therefore, these personnel are not considered officers.¹⁵⁶

The EAs, however, do more than act as a steward or business agent. They also comprise the executive committee of the amalgamated Magna local, and they elect the local’s officers from among their ranks.¹⁵⁷ Consequently, the EAs are clearly officers under the LMRDA and, therefore, the failure of the local membership to elect them by direct secret ballot would appear to run afoul of Title IV.

EAs must have three years’ seniority with Magna.¹⁵⁸ An important fact in determining whether this would be considered a reasonable requirement for a union officer under Title IV is the percentage of members that this requirement disqualifies. Although we do not have that information, there is some indication that the three-year seniority requirement would be problematic. Department of Labor regulations provide that a rule requiring candidates for office to have been employed at the trade for a reasonable period of time is generally reasonable.¹⁵⁹ The regulations do not further define a “reasonable period.”¹⁶⁰ There is some indication, however, that three years may be too long. Although there is some older authority to the contrary, courts and the Department of Labor seem to regard a requirement of continuous good standing in the union of more than two years to be unreasonable.¹⁶¹ In any event, it appears clear that the Canadian critics of the FFA’s dilution of rank-and-file control over their representatives would find vindication in the United States under the LMRDA.

B. Section 8(a)(2) of the NLRA

Section 8(a)(2) of the NLRA makes it illegal for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support

¹⁵⁵ See LABOR UNION LAW AND REGULATION, *supra* note 135, at 231.

¹⁵⁶ 29 C.F.R. § 452.19 (2009).

¹⁵⁷ FFA, *supra* note 1, at 6.

¹⁵⁸ See *supra* note 61 and accompanying text.

¹⁵⁹ 29 C.F.R. § 452.41(a) (2009).

¹⁶⁰ See *id.* § 452.36 (“The question of whether a qualification is reasonable is a matter which is not susceptible of precise definition, and will ordinarily turn on the facts in each case.”).

¹⁶¹ See LABOR UNION LAW AND REGULATION, *supra* note 135, at 235.

to it.”¹⁶² Two key purposes have been ascribed to section 8(a)(2): (1) to assure employee freedom of choice and (2) to assure that an organization representing employees is independent of their employer. The following subsections explore these purposes and then apply section 8(a)(2), in light of these purposes, to the FFA.

1. *Employee Free Choice*

There is general agreement that a purpose of section 8(a)(2) is to assure employee free choice. Employee selection of an exclusive bargaining representative should be free of undue employer or union interference or coercion. Preservation of employee free choice was a driving force behind the Supreme Court’s decision in *International Ladies’ Garment Workers’ Union v. NLRB (Bernhard-Altmann Texas Corp.)*.¹⁶³ The union in that case began an organizing campaign among the employer’s production and shipping employees.¹⁶⁴ During the campaign, some employees went on strike and some of the strikers signed cards authorizing the union to act as their exclusive bargaining representative.¹⁶⁵ The union and employer engaged in negotiations with respect to some of the issues involved in the strike.¹⁶⁶ On August 30, 1957, based on a representation from the union that it had secured authorization cards from a majority of employees, the parties signed a “memorandum of understanding” which provided for employer recognition of the union as exclusive bargaining representative, an end to the strike, and improvements in wages and working conditions.¹⁶⁷ Neither party verified the union’s claim of majority status, and it later turned out that the claim was erroneous.¹⁶⁸ On October 10, 1957, the parties signed a formal collective bargaining agreement.¹⁶⁹ As of that date, the union did represent a majority of the employees.¹⁷⁰

The Supreme Court held that the grant of exclusive recognition to a union at a time when it did not have the support of a majority of the employees violated the NLRA, even though the parties in good faith believed that, at the time of recognition, the

¹⁶²29 U.S.C. § 158(a)(2) (2006).

¹⁶³366 U.S. 731, 737 (1961).

¹⁶⁴*Id.* at 733–34.

¹⁶⁵*Id.*

¹⁶⁶*Id.* at 734.

¹⁶⁷*Id.*

¹⁶⁸*Int’l Ladies’ Garment Workers’ Union AFL-CIO*, 366 U.S. at 734.

¹⁶⁹*Id.*

¹⁷⁰*Id.* at 735.

union enjoyed majority support.¹⁷¹ It premised its holding on the need to protect employee freedom of choice:

Bernhard-Altman granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority. There could be no clearer abridgment of § 7 of the Act, assuring employees the right ‘to bargain collectively through representatives of their own choosing’ or ‘to refrain from’ such activity.¹⁷²

The Court found it irrelevant that the union had obtained majority support by the time the parties signed the formal collective bargaining agreement. It accepted the lower court’s characterization of the situation as “a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative.”¹⁷³

A corollary to the prohibition on recognition of a union lacking in majority support is the Board’s long-standing rule that an employer may not recognize a union until it has hired a representative complement of its workforce.¹⁷⁴ In *Majestic Weaving Co.*,¹⁷⁵ the employer entered into negotiations with the union at a time when it had yet to hire a representative complement, with the understanding that any resulting contract would depend on the union attaining majority support at the appropriate time.¹⁷⁶ Twenty-five years earlier, in *Julius Resnick, Inc.*,¹⁷⁷ the Board had approved such conditional recognition. In *Majestic Weaving*, however, the Board considered *Julius Resnick* inconsistent with the Court’s decision in *Bernhard-Altman* and overruled it.¹⁷⁸ On the other hand, for decades the Board has approved and enforced provisions in collective bargaining agreements whereby the employer agrees both to recognize the union at subsequently acquired facilities and to extend the contract’s provisions to employees at such facilities upon the union’s presentation of authorization cards evidenc-

¹⁷¹ *Id.* at 733.

¹⁷² *Id.* at 737.

¹⁷³ *Int’l Ladies’ Garment Workers’ Union AFL-CIO*, 366 U.S. at 731–37.

¹⁷⁴ *See, e.g.*, *General Extrusion Co.*, 121 N.L.R.B. 1165, 1167 (1958).

¹⁷⁵ 147 N.L.R.B. 859 (1964), *enforcement denied*, 355 F.2d 854 (2d Cir. 1966). The Second Circuit denied enforcement of the Board’s order on procedural grounds, opining that the Board’s use of adjudication, rather than rulemaking, to “brand[] as ‘unfair’ conduct stamped ‘fair’ at the time a party acted” was improper. *Majestic Weaving*, 355 F.2d at 860 (2d Cir. 1966). The court’s view concerning the need to employ rulemaking was subsequently undermined by the Supreme Court’s decision in *NLRB v. Bell Aerospace*, 416 U.S. 267, 290 (1974).

¹⁷⁶ *Majestic Weaving*, 147 N.L.R.B. at 860.

¹⁷⁷ 86 N.L.R.B. 38 (1949).

¹⁷⁸ *Majestic Weaving*, 147 N.L.R.B. at 860 n. 3

ing its selection by a majority of the employees as their exclusive bargaining representative.¹⁷⁹ Although most employers actively oppose unionization, there is no legal requirement for this opposition. Nor is there a legal requirement that they prohibit union organizers from their property. Indeed, cooperation during the organizing drive may legitimately prove to be beneficial for both parties. Yet, employer conduct favoring a union may interfere with employee free choice with respect to whether they will choose to be represented by the favored union, by another union, or by no union. Issues concerning employer “cooperation” with a union seeking to organize its workforce are resolved on a case-by-case basis. The Seventh Circuit has catalogued the factors:

In determining whether management-labor cooperation has crossed over from permissible co-operation to unlawful coercion, courts consider a confluence of factors, with no one factor being dispositive. This non-exclusive list of factors includes whether the employer solicited contact with the union; the rank and position of the company’s solicitor; whether the employer silently acquiesced in the union’s drive for membership; whether the employer shepherded its employees to meetings with a prospective union; whether management was present at meetings between its employees and a prospective union; whether the signing of union authorization cards was coerced; and whether the employer quickly recognized the assisted union after the employees signed authorization cards yet exhibited prejudice against another union selected by the employees.¹⁸⁰

Discriminatory treatment favoring an employer’s preferred union, coupled with discharging employees for supporting the disfavored union or for refusing to sign cards for the favored union, clearly violates section 8(a)(2) of the Act.¹⁸¹ So too does a supervisor’s direction to employees to sign cards for the favored union¹⁸² and granting access to the favored union while denying access to its rival.¹⁸³ Not all section 8(a)(2) violations are so blatant. Violations have been found where a manager, after intro-

¹⁷⁹ See, e.g., *Houston Div. of the Kroger Co.*, 219 N.L.R.B. 388, 388–89 (1975). In *Shaw’s Supermarkets*, the Board indicated its intention to revisit the acquired facilities cases. 343 N.L.R.B. 963, 963 (2004). The intervening election of President Obama and his appointment of new members to the NLRB, however, makes it unlikely that the doctrine will now be revisited.

¹⁸⁰ *NLRB v. Midwestern Personnel Servs., Inc.*, 322 F.3d 969, 977–78 (7th Cir. 2003).

¹⁸¹ See *NLRB v. Link-Belt Co.*, 311 U.S. 584, 584, 597–98 (1941); see also *Midwestern Mining & Reclamation, Inc.*, 277 N.L.R.B. 221, 255 (1985) (holding that favorable conduct toward the employer’s preferred union coupled with unlawful conduct toward the disfavored union violated § 8(a)(2)).

¹⁸² See *Dairyland USA Corp.*, 347 N.L.R.B. 310, 310 (2006).

¹⁸³ See *NLRB v. Vernitron Elec. Components, Inc.*, 548 F.2d 24, 26 (1st Cir. 1977); *Duane Reade, Inc.*, 338 N.L.R.B. 943, 944 (2003).

ducing a union representative, remained in the room while the employees signed, or chose not to sign, authorization cards;¹⁸⁴ and where a manager introduced an employee he had reason to know supported a rival union to an organizer from the favored union and indicated the employer's preference for the favored union.¹⁸⁵

Even a disclaimer that the choice of representative is up to the employee may be insufficient to avoid a section 8(a)(2) violation. In *NLRB v. Keller Ladders Southern, Inc.*,¹⁸⁶ a manager solicited two employees to assist a union organizer in collecting authorization cards.¹⁸⁷ The selected employees and organizer, with the manager's permission, called a meeting of employees during a coffee break.¹⁸⁸ The manager introduced the organizer, stated that he knew a union would eventually want to organize the employees and that he would not resist unionization, but the employees could do whatever they wanted.¹⁸⁹ He then left the room.¹⁹⁰ The court, relying on the employer's designation of two employees to solicit their coworkers to sign cards without the coworkers' knowledge of the designation, found a section 8(a)(2) violation.¹⁹¹

On the other hand, the Board has approved employer conduct which generally may be thought of as assisting a union in an organizing drive. A leading case is *Coamo Knitting Mills, Inc.*¹⁹² In *Coamo*, a meeting took place on company property and, for a few employees, on company time.¹⁹³ At the meeting, a manager introduced a union representative who addressed the employees and distributed authorization cards.¹⁹⁴ Another manager was present for the card distribution and signings but was not in a position to see which employees, if any, signed cards and which declined.¹⁹⁵ The Board, relying on the manager's inability to observe which employees signed cards and on evidence that management made no attempt to find out which employees attended the meeting, held that there was no section 8(a)(2) violation.¹⁹⁶

¹⁸⁴ See *North Hills Office Servs.*, 342 N.L.R.B. 437, 445 (2004).

¹⁸⁵ See *Windsor Place Corp.*, 276 N.L.R.B. 445, 449 (1985).

¹⁸⁶ 405 F.2d 663 (5th Cir. 1968).

¹⁸⁷ *Id.* at 666.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Keller Ladders Southern, Inc.*, 405 F.2d at 666.

¹⁹¹ *Id.* at 667.

¹⁹² 150 N.L.R.B. 579 (1964).

¹⁹³ *Id.* at 581.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Coamo*, 150 N.L.R.B. at 581–82.

The Board's approach has not been unanimous. In *Longchamps, Inc.*,¹⁹⁷ the Board found no section 8(a)(2) violation when, shortly after hiring its workforce in anticipation of the opening of its new restaurant, the employer called an employee meeting to introduce supervisors and explain customer service and operating policies.¹⁹⁸ At the end of the meeting, the restaurant manager introduced two union representatives, turned the meeting over to them, and, with the supervisors, left the room.¹⁹⁹ The union representatives solicited the employees to sign authorization cards.²⁰⁰ At another point, the manager or a supervisor directed four kitchen employees to leave their work stations and go to the dining room where union representatives met them and solicited them to sign cards.²⁰¹ The Board found no section 8(a)(2) violation, but then Chairman Edward Miller dissented, challenging the fine lines the Board had drawn between lawful cooperation and illegal coercion:

It is difficult to see much practical difference, so far as the effect on employees is concerned, between direct supervisory solicitation of authorization cards and company blessed solicitation by a union organizer on company time and property of such signatures, especially in an atmosphere where the employer, by word ordered, indicates that he approves of and supports the efforts of the organizer and thereafter grants voluntary recognition on the basis of signatures thus obtained.²⁰²

Section 8(c) of the NLRA provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."²⁰³

The statutory guarantee of free speech has itself led to some fine line drawing.²⁰⁴ Whereas an employer directive to sign an authorization card violates section 8(a)(2),²⁰⁵ in *Coamo*, the Board found the following speech lawful because it contained no promise of benefit or threat of reprisal:

¹⁹⁷205 N.L.R.B. 1025 (1973).

¹⁹⁸*Id.* at 1026.

¹⁹⁹*Id.* at 1029.

²⁰⁰*Id.*

²⁰¹*Id.* at 1026 (Miller, Chairman, dissenting).

²⁰²*Longchamp, Inc.*, 205 N.L.R.B. at 1027.

²⁰³29 U.S.C. § 158(c) (2006).

²⁰⁴*See, e.g.*, *Tecumseh Corrugated Box Co.*, 333 N.L.R.B. 1, 7 (2001).

²⁰⁵*See Dairyland USA Corp.*, 347 N.L.R.B. 310, 310 (2006).

There are a number of benefits to us all from the merger—steadier employment and greater availability of capital for new equipment. There are also certain obligations. One of these is the requirement that we sign a contract with the [ILGWU] if you want the Union. Our parent company, Bobbie Brooks, has had contractual dealings with this Union for twenty-three years. During this time, it has grown from a few thousand dollars to a company with sales of seventy-five million—so the Union could not have been too much of a handicap. Seriously, the ILGWU has shown itself to be a responsible and intelligent Union, and we anticipate no problems if we deal with them.

During the next few days, representatives of the Union will be in Coamo to solicit your membership. Although you are under no compulsion, we urge you to join. The Company will negotiate a contract with the Union, which we believe will be mutually beneficial.²⁰⁶

In essence, the fine line drawing with respect to employer pro-union speech is no different than the fine line drawing that takes place with respect to employer anti-union speech. In each case, statements which convey the same substantive message may fall on one or the other side of the line depending on how they are worded and the context in which they are uttered.²⁰⁷

2. *Worker Representative Independence*

In *NLRB v. Newport News Shipbuilding & Dry Dock Co.*,²⁰⁸ the employer had an employee representation plan which, in its most recent form, provided for an Employee Representative Committee composed entirely of employees elected by their peers.²⁰⁹ But the plan provided that any amendments to it could be disapproved by the employer within fifteen days.²¹⁰ The employer's ability to veto changes in the representation plan was sufficient for the Court to declare the plan an illegal employer-dominated labor organization. The Court reasoned, "The plan may not be amended if the company disapproves the amendment. Such control of the form and structure of an employee organization deprives the employees of the complete freedom of action guaranteed to them by the Act, and justifies an order such as was here entered."²¹¹

To the Court, the key defect in the plan was the absence of employee independence due to the employer's retention of the

²⁰⁶ *Coamo*, 150 N.L.R.B. at 581, 595.

²⁰⁷ See generally 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 136–52 (John E. Higgins, Jr. et al. eds., 5th ed. 2006).

²⁰⁸ 308 U.S. 241 (1939).

²⁰⁹ *Id.* at 246–47.

²¹⁰ *Id.* at 247.

²¹¹ *Id.* at 249.

right to veto changes in plan structure. That the employer had never exercised its veto power to interfere with plan structure was immaterial—the power alone was sufficient to condemn the arrangement.²¹²

The requirement of bargaining representative independence also restricts the role that supervisors and managers who remain members of the union may play in the union's affairs. In its landmark decision in *Nassau & Suffolk County Contractors Association*,²¹³ the Board held that for managers who remain members of the union but are not in a bargaining unit represented by the union to vote in union elections

is plainly a form of interference with the administration of a labor organization. It may not be unlawful for company executives and high-ranking supervisors to retain the union membership they acquired as rank-and-file employees as job insurance in the event they should revert to ordinary employee status, but that does not make it lawful for them to participate in elections to determine who is to administer the affairs of the union.²¹⁴

The Board allowed first line supervisors who were also members of the bargaining unit to participate in union meetings and elections.²¹⁵ The Board, however, held that the employer interfered in the administration of the union, in violation of section 8(a)(2), by acquiescing in the supervisors' participation on the union's bargaining team.²¹⁶ The Board reasoned:

Despite the large measure of control exercised over master mechanics by the Union, the mechanics remain in part agents of their employers with a resulting divided loyalty and interests. . . . *Employees have the right to be represented in collective-bargaining negotiations by individuals who have a single-minded loyalty to their interests.* Conversely, an employer is under a duty to refrain from any action which will interfere with that employee right and place him even in slight degree on both sides of the bargaining table.²¹⁷

The requirement of bargaining representative independence is critical to the overall scheme of the NLRA. Although some have

²¹² *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 at 251 ("In applying the statutory test of independence it is immaterial that the plan had in fact not engendered, or indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental rather than fundamental and with good motives.")

²¹³ 118 N.L.R.B. 174 (1957).

²¹⁴ *Id.* at 184.

²¹⁵ *Id.* at 186–87.

²¹⁶ *Id.* at 187.

²¹⁷ *Id.*

argued that the NLRA was a piece of radical legislation which has been undermined by the Board and the courts,²¹⁸ when viewed in its historical context, the statute was really quite conservative. The NLRA came out of the Great Depression and was part of a broader scheme to more equitably distribute wealth and income, thereby spurring demand for goods and services and inoculating the economy against another depression. Thus, section 1 of the NLRA declares, *inter alia*:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry...²¹⁹

In pursuing the goal of more equitable wage rates and working conditions, Congress faced a choice. It could have opted for more radical intervention with the government dictating specific terms and conditions of employment. Instead, through the NLRA, it took the more conservative approach of providing workers with a mechanism of self-organization to equalize bargaining power and then leaving the setting of specific terms of employment to private negotiation and self-ordering.²²⁰ Worker representation independence of the employer is crucial to the legislative scheme of equalizing bargaining power and private ordering.²²¹ Professor Kohler has eloquently explained why:

Absent the economic strength self-association provides individual employees, the employer typically is free, both *de facto* and *de jure*, either to promulgate and administer the terms governing the employment relationship unilaterally, or to do so only with such employee participation as it chooses to allow, and within the limits that it singly establishes. Hence, employee organization into self-controlled, autonomous groups through the exercise of their basic associational rights is central to the collective bargaining scheme: it is through this association that workers are afforded the means to voice and protect

²¹⁸ See, e.g., ELLEN DANNIN, *TAKING BACK THE WORKERS' LAW* (2006); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 265 (1978).

²¹⁹ 29 U.S.C. § 151 (2006).

²²⁰ See Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 514 (1986).

²²¹ *Id.*

their own interests and, thereby, to achieve effective participation in the ordering, i.e., the private lawmaking process.²²²

A number of circuit courts of appeals decisions, however, have shifted the focus from the employer's authority to control the labor organization to whether it has actually exercised that authority to dominate the entity.²²³ As then-Board Member Raudabaugh observed in his concurring opinion in *Electromation, Inc.*,²²⁴ most of these decisions fail to even cite, much less discuss the precedential authority of *Newport News*.²²⁵

Most troubling is the Sixth Circuit's decision in *Homemaker Shops*.²²⁶ At issue was a representation committee comprised of one representative elected by secret ballot from each of the employer's stores.²²⁷ Representatives served one-year terms.²²⁸ The committee structure and election procedures were contained in the collective bargaining agreement.²²⁹ Consequently, employer consent was necessary to change them, and the employer twice vetoed proposed changes in the terms of office and electoral system.²³⁰

The employer's authority over the committee's structure, terms of office, and system for electing representatives would seem to place the Homemaker system squarely under the control of

²²²*Id.* Professor Gely has provided a further reason for the requirement of independence. Rafael Gely, *Whose Team Are You On? My Team or My TEAM?*, 49 RUTGERS L. REV. 323 (1997). He has observed that participation in labor organizations that cooperate with management requires substantial investment by employees in firm specific human capital. *Id.* at 376. Cooperative efforts also require investments from the employer. *Id.* at 377–78. The employees' expected return on investment is increased employee voice while the employer's expected return on investment is increased productivity and competitiveness. *Id.* at 378–79. Professor Gely has suggested that a point can arise where the employer has recouped its investment and has an incentive to cheat on the implicit contract by eliminating employee voice, something the employer can do if it controls the labor organization. *Id.* at 381–82. Ensuring that the labor organization operates beyond the control of the employer thus protects employees who would otherwise be vulnerable to such employer strategic behavior. *Id.* at 391.

²²³*See, e.g.*, NLRB v. Homemaker Shops, Inc., 724 F.2d 535, 545 (6th Cir. 1984); NLRB v. Northeastern Univ., 601 F.2d 1208, 1215 (1st Cir. 1979); Hertzka & Knowles v. NLRB, 503 F.2d 625, 630 (9th Cir. 1974); Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165, 167–68 (7th Cir. 1955); *but see* *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1167 (7th Cir. 1994) (relying on *Newport News*).

²²⁴309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994). *Electromation* had the earmarkings of a major NLRB decision on the legality of employee participation plans under section 8(a)(2). The Board heard the case en banc and invited and received amicus briefs from all interested organizations. *Id.* at 990 n.2. In the end, however, the decision broke no new ground as the "action committees" at issue in the case turned out to be nothing more than garden variety employer dominated labor organizations.

²²⁵309 N.L.R.B. at 1010 n.27 (1998) (Raudabaugh, Member, concurring).

²²⁶*Homemaker Shops, Inc.*, 724 F.2d at 535.

²²⁷*Id.* at 538.

²²⁸*Id.*

²²⁹*Id.*

²³⁰*Id.* at 539.

Newport News. The Sixth Circuit, however, would not allow a Supreme Court decision directly on point to deter it from giving its blessing to a representation plan it liked. Citing a student law review note for authority, the court characterized *Newport News* as providing “a rigid rule... [that] runs contrary to more recent trends—the decline of the notorious ‘company unions,’ the change in public policy from nurturing the nascent labor movement to regulating and limiting management and labor excesses alike, and the change in employee attitudes to employer-employee relations.”²³¹ The court then chose simply to ignore the Supreme Court precedent.

In his *Electromation* concurrence, Member Raudabaugh offered an alternative analysis to undermine the authority of *Newport News*.²³² He opined that the 1947 Taft-Hartley Act amendments to the NLRA impliedly overruled *Newport News*.²³³ In Member Raudabaugh’s opinion, the Taft-Hartley Act undermined what he considered the adversarial approach to section 8(a)(2) by shifting government’s position from promoting collective bargaining to neutrality, protecting employee choice, and encouraging peaceful resolution of workplace disputes over adversarial strife.²³⁴

Member Raudabaugh’s view misreads the Taft-Hartley amendments. It is significant that the Taft-Hartley Act did not amend section 8(a)(2). It did represent a congressional backlash against organized labor premised on the view that labor had become too powerful.²³⁵ Its remedy of adding union unfair labor practices and an employee right to refrain from concerted activities was designed not to do away with requirements of representative independence for participation in privately ordering the workplace, but to rebalance the power of labor and management to ensure the continued working of that private ordering.²³⁶ Indeed, the deepest recession since the Great Depression has again raised the question of whether the balance need be adjusted one more time. Debate over the proposed Employee Free Choice Act has recently focused on whether the decline in union density has eroded labor standards to the point where worker purchasing power no longer

²³¹ *Homemaker Shops, Inc.*, 724 F.2d at 547 n.12.

²³² *Electromation, Inc.*, 309 N.L.R.B. 990, 1011–12 (1992).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See KENNETH G. DAU-SCHMIDT ET AL., *LABOR LAW IN THE CONTEMPORARY WORKPLACE* 66–67 (2009).

²³⁶ *Id.* at 68–69.

provides an inoculation against economic turmoil.²³⁷ In any event, it is not surprising that, without attributing it to Member Raudabaugh by name, the Seventh Circuit, in enforcing the Board's order in *Electromation*, rejected his Taft-Hartley Act analysis.²³⁸

The current state of the law concerning a requirement that an employee representative be truly independent of the employer can only be described as confused. As seen in the next section, how that confusion is resolved affects the legality of certain provisions of the FFA under American law.

3. *The FFA and Section 8(a)(2)*

As characterized by CAW economist Jim Stanford, the FFA represents a "corporatist type of strategy" to representing workers.²³⁹ Under the FFA, the CAW commits to serving as a check and balance within the Magna human resources system.²⁴⁰ The FFA clearly takes as a given Magna's existing policies which encourage worker identification with their local plants and management. Because of this, the FFA has been criticized for undermining worker solidarity. Regardless of the merits of such criticism, the embarkation on a corporatist approach to representing workers would not per se violate section 8(a)(2). Section 8(a)(2) mandates only that the labor organization representing the workers be independent from the employer; it does not mandate adversarial labor relations. Indeed, inferring a mandate of an adversarial struggle would be inconsistent with the private ordering that is at the heart of the NLR approach to establishing terms and conditions of employment. Unlike some in-house committees which are financially dependent on the employer who provides meeting space, supplies, and clerical support and allows committees to meet on employer time, the CAW has an independent financial base and its own professional staff and expertise.

In exchange for opting into the Magna corporatist system, the CAW received some significant advantages that it would not have had if it relied on established law in organizing. These advantages include access to a list of employees at a targeted facility, the ability to meet with employees on the employer's property for one week during non-working time in non-working areas, and the

²³⁷ See Alec MacGillis, *Labor Union Bill Raises Broader Capitalism Issues: Economic Downturn Intensifies Rhetoric of Workers, Business*, WASH. POST, Mar. 15, 2009, at A2.

²³⁸ *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1168–69 (7th Cir. 1994).

²³⁹ See Stanford, *supra* note 108.

²⁴⁰ FFA, *supra* note 1, at 3–4.

joint meeting with management and the employees just prior to the election at which union and employer representatives present their commitment to working together toward the facility's growth and success and their commitment to the FFA and the national collective bargaining agreement.²⁴¹ Cases such as *Coamo Knitting Mills* establish that these advantages fall on the cooperation side of the line between cooperation and coercion.²⁴² Indeed, the granting of access would appear to be an exercise of fundamental employer property rights. Just as an employer has a right to exclude nonemployee union organizers from its property,²⁴³ it has a right to invite them onto its property. In either case, the right may not be exercised in a manner that discriminates on the basis of section 7-protected activity, but there are no reports that other unions or employees opposed to unionization have sought similar access from Magna.

The content of the joint presentation to the employees at the meeting conducted on employer time just prior to the election would also appear to be lawful. As previously discussed, section 8(c) requires drawing a fine line between lawful, albeit pro-union, employer speech and unlawful coercion.²⁴⁴ The statements as set forth in the FFA would appear to fall on the lawful side of the line.

One of the most controversial aspects of the FFA is its waiver of the right to strike and substitution of arbitration to resolve bargaining impasses. Regardless of one's views on the desirability of interest arbitration,²⁴⁵ an agreement to substitute arbitration for economic warfare does not leave the union at the mercy of the employer. The union retains bargaining leverage, and CAW economist Stanford argues that it gained increased leverage.²⁴⁶ In any event, unions enjoy broad discretion in deciding how best to represent employees in collective bargaining, and a decision to substitute arbitration for strikes and strike threats certainly falls within that wide range of reasonableness where courts defer to union decision-making.²⁴⁷

²⁴¹ See *supra* note 49 and accompanying text.

²⁴² See *Coamo*, 150 N.L.R.B. 579, 581–82 (1964).

²⁴³ See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 541 (1992); *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105, 113–14 (1956).

²⁴⁴ See *supra* notes 204–07 and accompanying text.

²⁴⁵ Elsewhere, I have criticized interest arbitration. See Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313, 330–35 (1993).

²⁴⁶ See *supra* note 114 and accompanying text.

²⁴⁷ See, e.g., *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 81 (1991); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 342 (1953).

Several aspects of the FFA, however, are problematic under section 8(a)(2). First is the timing of the joint meeting on company time at which union and employer representatives affirm their commitments to the FFA, the national agreement, and working together.²⁴⁸ It occurs just prior to the election.²⁴⁹ In *Peerless Plywood Co.*,²⁵⁰ the NLRB held that a mass presentation on company time within twenty-four hours of a representation election would render the election vulnerable to being invalidated upon the filing of post-election objections.²⁵¹ The Board reasoned that “last-minute speeches by either employers or unions delivered to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect.”²⁵² The Board expressed concern over the last-minute nature of such speeches coupled with their mass psychology.²⁵³ It concluded that mass addresses on company time within twenty-four hours of an election “tend to destroy freedom of choice and establish an atmosphere in which a free election cannot be held.”²⁵⁴

The line between lawful employer cooperation and employer support violative of section 8(a)(2) turns on whether the conduct at issue interferes with employee freedom of choice.²⁵⁵ The joint presentation on company time by union and management representatives just prior to the election poses a more substantial threat to employee free choice than the single party captive audience speech within twenty-four hours of the election. When an employer gives a captive audience speech, it does so in the face of the union’s organized opposition to its position. Although the union does not have a right to respond on company time,²⁵⁶ it will still try to reach as many workers as possible to respond. Where the union and employer make a joint presentation as under the FFA, there is no organized opposition to respond. Making the joint presentation just prior to the election precludes employees from discussing and reflecting on its content and evaluating whether a vote for union recognition is in their interests. The timing of

²⁴⁸ See *supra* note 49 and accompanying text.

²⁴⁹ See *supra* note 49 and accompanying text.

²⁵⁰ 107 N.L.R.B. 427 (1953).

²⁵¹ *Id.* at 429.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 430.

²⁵⁵ *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630 (6th Cir. 1974).

²⁵⁶ See *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 408–09 (1953).

the joint presentation crosses the line from lawful cooperation to interference with employee free choice and thus constitutes unlawful employer support in violation of section 8(a) (2).

A second problematic feature of the FFA is its combining the vote to ratify the national agreement with the vote for recognition in a single ballot.²⁵⁷ In effect, this process amounts to a type of conditional recognition condemned in *Majestic Weaving*.²⁵⁸ The agreement is negotiated before the vote and, thus, before any evidence is obtained that the union has been selected by a majority of the employees. By voting to ratify the agreement, the employees are voting to be represented by the union. In effect, the employer has recognized the union and agreed to terms conditioned on the employees' favorable vote.

One might argue that the FFA is analogous to after-acquired-facilities clauses which the Board has long upheld. Such an analogy would be flawed. Like the terms of the collective bargaining agreements applied to new facilities under after-acquired-facilities clauses, the terms of the CAW-Magna national agreement appear to have been negotiated at arm's length. The CAW already represented employees at three Magna facilities when the terms were negotiated. Yet, the contract covering employees at newly organized facilities is different from the contract covering the facilities that had already been organized. It was negotiated specifically for the facilities that would be organized in the future. Its taking effect anywhere was conditioned on the employees somewhere voting for CAW representation.²⁵⁹ The FFA is much more like conditional recognition than after-acquired-facilities provisions.

The actual election at Windsor Modules demonstrates how such conditional recognition can interfere with employee free choice. The contract granted production workers an immediate \$3.00 per hour raise, retroactive to two months earlier, with further raises of \$0.50 at six months and one year of service.²⁶⁰ It granted skilled trades employees a retroactive payment of \$1000 and raises of \$0.50 per hour at six months of service and one year of service.²⁶¹ The CAW leadership's PowerPoint presentation to

²⁵⁷ FFA *supra* note 1, at 5.

²⁵⁸ See *supra* notes 175–78 and accompanying text.

²⁵⁹ See *supra* Part I.

²⁶⁰ HIGHLIGHTS OF THE CAW/MAGNA WINDSOR MODULES AGREEMENT (Nov. 7, 2007), available at <http://www.caw.ca/assets/pdf/highlightsWindsorModules.pdf>.

²⁶¹ *Id.*

the CAW Council acknowledged the impact of this conditional recognition on the results at Windsor Modules:

Everyone got an immediate \$3 per hour wage increase. Future wage increases are also specified. Plus there will be an *automatic* annual adjustment based on the trend in consumer prices. That's something we don't have at many existing CAW bargaining units. . . . Additional wage increases will also be paid based on plant-level performance.

Those increases are built right into the base wage rate—not paid out as one-time bonuses, as is currently the practice. . . . These are important economic gains. Incremental progress. Progress that will improve the lives of our new members. No wonder they voted 87% for the union.²⁶²

It has long been established, however, that a grant of benefits for the purpose of influencing employees' exercise of the right to self-organization is coercive and illegal.²⁶³ Combining contract ratification and recognition in the same vote has the same effect, and in the United States, would constitute illegal employer support of a labor organization in violation of section 8(a)(2).²⁶⁴

²⁶²CAW FFA PowerPoint, *supra* note 10, at 26.

²⁶³See *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

²⁶⁴Another aspect of the vote may also be problematic under § 8(a)(2). The FFA provides for recognition if a majority of those voting in a private election ratify the national collective bargaining agreement. In *Komatiz Construction*, a private election was held in which a rival union sought to oust an incumbent exclusive bargaining representative. The court held that the rival's getting the votes of a majority of the voters, but not a majority of the bargaining unit, did not allow the employer to voluntarily recognize the rival union. See generally *Komatiz Constr., Inc. v. NLRB*, 458 F.2d 317 (8th Cir. 1972). In *Autodie Int'l Inc.*, UAW Local 2304 was the incumbent exclusive representative of the employees of Autodie Corporation when Autodie Corporation filed for reorganization in bankruptcy. In the reorganization proceeding, Autodie International Corporation purchased the assets of Autodie Corporation and began negotiations with Local 2304. Two hundred of the employer's 348 employees, however, signed a petition stating that they desired that the negotiations proceed with an in-house committee rather than Local 2304 and the employer withdrew recognition from Local 2304. The employer also advised the employees that an in-house committee would be recognized. Thereafter, an election was held to elect three shop committeemen for the Autodie International In-House Shop Committee. Of the 309 employees in the bargaining unit, 139 voted. The top three vote getters received respectively seventy-two, thirty-two and thirty votes. Thirty-one ballots were invalidated because they sought representation by Local 2304 or voted for Local 2304 leaders who declined to be nominated for the shop committee. The employer recognized the In-House Shop Committee and began bargaining with the three top vote getters. The Board affirmed the Administrative Law Judge's recommended decision, which found that the employer violated section 8(a)(2) by recognizing the shop committee. The ALJ concluded that the vote did not establish that a majority of the employees in the bargaining unit desired representation by the shop committee. See *Autodie Int'l Inc. v. Int'l. Union*, 321 N.L.R.B. 688-91 (1996). An Advice Memorandum issued by the NLRB General Counsel on January 4, 2005, reads *Komatiz* and *Autodie* for the proposition that an employer violates § 8(a)(2) if it voluntarily recognizes a union which, in a private election, receives the votes of a majority of the voters but not a majority of the bargaining unit. Whittier Hosp. Med. Ctr. No. 21-CA-36404 (NLRB GC Div of Advice, Jan. 4, 2005).

Finally, we must consider the effect of the FFA on the CAW's independence. We have already seen that the provision for appointment of the EAs, would, if applied in the United States, violate the requirement of Title IV of the LMRDA that local union members elect their officers by direct secret ballot vote.²⁶⁵ The LMRDA's mandate of local union democracy helps ensure that the union will operate independently of the employer in representing the workers. Yet, if the CAW wanted to correct the method of selecting the EAs to comply with the LMRDA, it could not do so without Magna's consent.

The FFA provides:

The parties agree that the fundamental principles set out in this FFA and any supplemental agreements, letters or memoranda (the "Supplements"), shall not be changed through future negotiation, arbitration nor shall such principles be the basis for any labour action. Any changes to the FFA or the Supplements shall only be made through mutual agreement between the parties.²⁶⁶

The FFA specifies that all Magna facilities at which the CAW is recognized form a single amalgamated CAW local.²⁶⁷ It also specifies how the officers of the local will be selected and how the EAs who represent the bargaining unit members at the facility level will be selected, including required qualifications.²⁶⁸ None of these significant matters of internal union governance may be changed without agreement from Magna.²⁶⁹

Such employer control over a union's internal operations would appear to fall squarely within section 8(a)(2)'s prohibition on employer interference with the administration of a labor organization.²⁷⁰ It also falls squarely within the holding of *Newport News* that a union whose changes to internal structure may be vetoed by an employer is an employer-dominated labor organization.²⁷¹

As developed earlier, however, a few circuit courts of appeals have disregarded the precedent established in *Newport News*. These

If the Board were to concur with the advice memorandum, the FFA provision for recognition upon receipt of a vote of the majority of voters rather than a majority of employees in the bargaining unit would be considered illegal.

²⁶⁵ See *supra* notes 151–61 and accompanying text.

²⁶⁶ FFA, *supra* note 1, at 13.

²⁶⁷ *Id.* at 6.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 8.

²⁷⁰ National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (2006).

²⁷¹ *NLRB v. Newport News*, 308 U.S. 241, 250–51 (1939).

courts require a showing of actual domination by the employer to sustain a finding of a section 8(a)(2) violation. Mere possession of the power to dominate is insufficient.²⁷² Under these courts' analyses, the Magna power to veto changes in the internal administration of the amalgamated local would probably be held lawful. It is highly unlikely that a court would find actual domination of the CAW, the largest private sector union in Canada.

The FFA, however, illustrates why the courts that have ignored *Newport News* are mistaken. In defending the local union structure and method of selecting the EAs, CAW leadership has acknowledged that the "indirect election" is uncommon but has urged that it is not unprecedented in Canada.²⁷³ CAW leadership maintains that the EAs will be strong union advocates and points out that the national CAW staff will also service the Magna bargaining units.²⁷⁴ CAW leadership, however, has never defended Magna's retention of the power to veto changes to the union's internal structure and processes; nor could it. No party has ever suggested any legitimate business purpose served by Magna's retention of such power. An agreement which empowers an employer to intrude on the autonomy of the exclusive bargaining representative by having a say in its internal structure and process for selecting its leaders should be supported by a very strong legitimate business purpose for it to be lawful.²⁷⁵

To recap, the combined vision of Title IV of the LMRDA and section 8(a)(2) of the NLRA is one of employees represented by an autonomous labor organization that is independent of employer control, that they have freely chosen as their representative and that they control through direct democratic elections. Against this standard, the FFA fails to measure up. Consequently, were it implemented in the United States, it should be declared unlawful.

²⁷² See *supra* notes 223–31 and accompanying text.

²⁷³ CAW FFA PowerPoint, *supra* note 10, at 19.

²⁷⁴ *Id.* at 16.

²⁷⁵ Some have argued that the requirement of labor organization independence from the employer is anachronistic in light of fundamentally changed global economic circumstances. See, e.g., Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section (8)(a)(2) of the NLRA*, 72 S. CAL. L. REV. 1651, 1653–56 (1999). Such arguments have come close to but not succeeded in changing the law. In 1997, Congress passed the Teamwork for Employees and Managers Act of 1997 (TEAM Act), which would have amended section 8(a)(2) to allow employers to "establish, assist, maintain, or participate" in organizations "in which employees participate . . . to address matters" of mutual interest which do not "have, claim, or seek authority to negotiate or enter into collective bargaining agreements." H.R. 743, 104th Cong. (1997); S. 295, 105th Cong. (1997). President Clinton vetoed the TEAM Act and Congress failed to override his veto. Even the TEAM Act would have continued the requirement of independence for a labor organization that sought to negotiate collective bargaining agreements.

III. Lessons From the FFA Exercise

Although there are no reports of FFA-like agreements adopted in the United States, the use of neutrality and voluntary recognition agreements has become the most favored method of organizing by American unions.²⁷⁶ With increased use has come increased resistance. Conservative Republicans in Congress have introduced legislation that would ban voluntary recognition.²⁷⁷ In 2007, the National Labor Relations Board, populated by appointees of President Bush, overruled more than forty years of precedent that held a voluntary recognition would not bar a petition to decertify the newly-recognized union nor would a contract negotiated by the union bar a representation petition unless the parties first posted a notice advising employees that they have forty-five days to file a decertification petition with the NLRB.²⁷⁸

Neutrality and voluntary recognition agreements in the United States do not implicate Title IV of the LMRDA. The analysis of the FFA under section 8(a) (2) of the NLRA, however, can provide useful insight into the legality of neutrality and voluntary recognition agreements used in the United States. As demonstrated above, the primary concerns of section 8(a) (2) are ensuring bargaining representative independence from the employer and employee free choice.²⁷⁹ Under this standard, most features of neutrality and voluntary recognition agreements are clearly lawful. As discussed in the context of the FFA, employers are free to exercise their property rights by granting unions access to employees on the premises as long as they do not discriminate in doing so.²⁸⁰ Their free speech rights under section 8(c) allow them to make presentations favorable to a union as long as they do not cross the line into active coercion.²⁸¹ And if employers have free speech rights to speak favorably about unions, they certainly have free speech rights to remain silent (i.e. to maintain a stance of neutrality).

An issue pending before the Board is the legality of an agreement establishing a framework for collective bargaining in the

²⁷⁶ See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 847 (2005).

²⁷⁷ Secret Ballot Protection Act, H.R. 4343, 110th Cong. (2004); Secret Ballot Protection Act, S. 2637, 108th Cong. (2004).

²⁷⁸ *Dana Corp. & Metaldyne Corp.*, 351 N.L.R.B. 434, 434–35 (2007). The election of President Obama probably means an end to the Board's assault on voluntary recognition.

²⁷⁹ See *supra* Part II.B.

²⁸⁰ See *supra* note 243 and accompanying text.

²⁸¹ See *supra* notes 202–07 and accompanying text.

event of voluntary recognition.²⁸² The issue arises out of unfair labor practice charges filed against Dana Corporation.²⁸³ The UAW's agreement with Dana provided for employer neutrality and union access to nonworking areas of the plant.²⁸⁴ It provided that in no event would bargaining erode healthcare "solutions and concepts" that were scheduled to be implemented on January 1, 2004, including premium sharing, deductibles, and out of pocket maximums.²⁸⁵ It also committed that any collective bargaining agreement would be of at least four years in duration and that the parties would resort to interest arbitration if they could not reach an agreement.²⁸⁶

The agreement also specified subjects that must be included in any contract, including: flexible compensation, minimum classifications, team-based approaches, and mandatory overtime.²⁸⁷ The agreement divided the Dana facilities into three levels, and further divided level 1 facilities, such as those which manufactured products for General Motors, Ford, and Chrysler, into two phases.²⁸⁸ The UAW agreed that it would initially only organize level 1, phase 1 facilities and would not organize more than seven at one time.²⁸⁹ The agreement created a "national partnership steering committee," with an equal number of members from the union and the company.²⁹⁰ The UAW agreed that it would not organize beyond level 1, phase 1 facilities unless a majority of the steering committee agreed that the overall impact of the collective bargaining agreements had not "materially harmed...financial performance."²⁹¹ If the committee deadlocked, the dispute was to be submitted for third party resolution.²⁹²

After a hearing, an NLRB administrative law judge dismissed the section 8(a)(1) and (2) charges that had been filed against Dana and section 8(b)(1)(A) charges that had been filed against the UAW.²⁹³ He ruled that the NLRB General Counsel's theory that the framework agreement amounted to unlawful recognition

²⁸²Dana Corp., 7-CA-46965 (N.L.R.B. Div. of Judges, Apr. 11, 2005).

²⁸³*Id.* at 2.

²⁸⁴*Id.* at 3-4.

²⁸⁵*Id.* at 4.

²⁸⁶*Id.*

²⁸⁷Dana Corp., 7-CA-46965 (N.L.R.B. Div. of Judges, Apr. 11, 2005).

²⁸⁸*Id.* at 5 n.5.

²⁸⁹*Id.* at 5.

²⁹⁰*Id.*

²⁹¹*Id.*

²⁹²Dana Corp., 7-CA-46965 (N.L.R.B. Div. of Judges, Apr. 11, 2005).

²⁹³*Id.* at 7-10.

of the UAW by Dana at a time when the UAW did not have majority support was not properly pled in the complaint.²⁹⁴ The administrative law judge also considered the merits of the complaint as an alternative basis for dismissal. He concluded that Dana had not recognized the UAW, either expressly or by implication:

There is no evidence that Dana deals with the UAW concerning employee grievances. Importantly, Dana remains free to make changes in terms and conditions of employees without first notifying and on request bargaining with the UAW. This is utterly at odds with the notion that Dana has recognized the UAW. There is no concept of partial recognition in labor law; there is either recognition or there is not. Nor can it be said that the letter of agreement constitutes a collective bargaining agreement from which recognition can be inferred. The letter of agreement does not deal with significant matters such as wages, pensions, grievances and arbitration, vacations, union security, etc.²⁹⁵

The administrative law judge distinguished *Majestic Weaving* on the grounds that *Majestic Weaving* involved conditional recognition, whereas the *Dana* case did not involve recognition at all. In addition, the contract negotiated in *Majestic Weaving* was more complete than the framework agreement in *Dana*.²⁹⁶ Review of the administrative law judge's decision is pending before the Board.

Analysis of the FFA revealed two primary concerns that underlie section 8(a)(2): employee free choice and labor organization independence.²⁹⁷ This same framework can be used to analyze the UAW-Dana and similar framework agreements.

The administrative law judge's analysis of the framework agreement is appropriate but insufficient. The administrative law judge's focus on the framework agreement's vagueness and failure to address most significant subjects of bargaining recognizes that the framework agreement cannot be characterized as a *fait accompli* of recognition that would overcome employees' free choice in deciding whether to sign cards authorizing the UAW to serve as their exclusive bargaining representative. Other aspects of the framework agreement, however, also bear on whether it undermines employee free choice. Significantly, unlike the CAW-Magna Windsor Modules agreement, the UAW-Dana framework agreement does not promise any improvement in wages or benefits to

²⁹⁴ *Id.* at 6–7.

²⁹⁵ *Id.* at 7–8.

²⁹⁶ *Id.* at 8.

²⁹⁷ See *supra* Part II.B.1 (discussing the objective of employee freedom of choice); *supra* Part II.B.2 (discussing the objective of worker representative independence).

employees for opting for UAW representation. It does commit to concepts such as premium sharing, deductibles, and out-of-pocket maximums that have become so common in health insurance that one would expect to find them in any newly organized bargaining unit's contract.²⁹⁸ It also commits vaguely to flexible compensation, team-based approaches, minimum classifications, and mandatory overtime.²⁹⁹ None of these commitments can be said to be promises of benefits. Here too, the framework agreement does not seem to undermine employee freedom of choice.

When the agreement was reached, Dana issued a press release announcing it, but the parties agreed to keep the terms confidential, so the terms were not disclosed.³⁰⁰ The General Counsel argued that the confidentiality agreement communicated to employees that the UAW had a special insider relationship with Dana and implied that Dana had already recognized the union.³⁰¹ The administrative law judge rejected this contention as outside the scope of the complaint.³⁰² The administrative law judge further opined:

Dana and the UAW publicly announced the existence of the letter of agreement even if they did not reveal its precise terms. By now all employees who are interested will know of the specific terms of the letter of agreement. Employees are free [to] make what they will of the letter of agreement in deciding whether or not to support union representation.³⁰³

Availability of information concerning the existence of the agreement and its general terms is important to employees in order to protect employee free choice. In the agreement, the UAW committed to what CAW economist Jim Stanford called a corporatist type approach to collective representation.³⁰⁴ Knowledge of that commitment would be very relevant to an employee's decision to opt for or oppose UAW representation. Employees might prefer representation by a labor organization that takes a more traditional adversarial approach, or they might simply feel that a corporatist representation approach does not add sufficient

²⁹⁸Dana Corp., 7-CA-46965 (N.L.R.B. Div. of Judges, Apr. 11, 2005).

²⁹⁹*Id.* at 5–6.

³⁰⁰Press Release, Dana Corporation, Dana Corporation Announces Settlements with USW and UAW Agreement with Centerbridge Capital Partners on Major Investment in Dana (July 6, 2005), available at http://dana.mediaroom.com/index.php/press_releases/2118?printable.

³⁰¹*Id.*

³⁰²*Id.* at 7.

³⁰³*Id.*

³⁰⁴See *supra* note 118 and accompanying text.

value to justify union dues and other costs. Transparency in such private deals is necessary to preserve employee free choice.

Apart from its impact on employee free choice, the agreement must be evaluated for its impact on bargaining representative independence. Unlike the FFA, the UAW-Dana agreement gives Dana no say in the internal structure of the locals representing Dana employees or in how they select their leadership.³⁰⁵ The agreement commits the UAW to a cooperative, corporatist approach to collective bargaining, but within that general framework, leaves considerable room for negotiation of specific terms. If the employees freely opt for a cooperative, corporatist approach to representation, the UAW's commitment to such an approach would not seem to restrict its independence to the point where the agreement could be characterized as employer interference in the administration of a labor organization. Here too, the key to legality is transparency.

One aspect of the UAW-Dana agreement that the administrative law judge did not rule on was the restrictions it placed on the UAW's organizing.³⁰⁶ Such restrictions do not raise issues of employee free choice as employees have no right to compel an unwilling union to serve as their exclusive representative. They do, however, raise questions of bargaining representative independence.

The UAW-Dana agreement applies only to Dana facilities that supply the "Detroit Three," facilities labeled level 1.³⁰⁷ It does not appear that the agreement bars the UAW from organizing other Dana facilities. It merely means that such organizing would occur without the access and neutrality advantages provided for in the agreement. With respect to level 1 facilities, the agreement precludes the UAW from organizing those categorized as phase 2 facilities unless a joint labor-management committee determines that the overall impact of collective bargaining has not harmed the company's financial performance.³⁰⁸ If the committee deadlocks, the issue is submitted to a neutral third party for resolution.³⁰⁹ As a practical matter, because the union appoints half of the committee members, the union has the power to deadlock the committee

³⁰⁵ Compare FFA *supra* note 1, with UAW-Dana Agreement Press Release *supra* note 301.

³⁰⁶ Dana Corp., 7-CA-46965 (N.L.R.B. Div. of Judges, Apr. 11, 2005).

³⁰⁷ *Id.* at 5 n.3.

³⁰⁸ *Id.* at 5.

³⁰⁹ *Id.*

and force the issue to third party resolution. Thus, restraints on the union's organizing phase 2 facilities are ultimately determined by the third party neutral, not by Dana. In other words, Dana does not have the power to veto the UAW's organizing activity. Under these circumstances, it would not appear that this aspect of the agreement so restricts the union's independence as to render it an unlawful interference in the administration of a labor organization.³¹⁰

Conclusion

The landmark Framework of Fairness Agreement between the CAW and Magna International represents the CAW's response to declining union density in the Canadian private sector. The agreement, however, has generated considerable controversy in Canada because of its substitution of interest arbitration for the right to strike and doing away with traditional trappings of union representation such as traditional grievance procedures and directly elected shop stewards and local officers. In the United States, Title IV of the Labor Management Reporting and Disclosure Act and section 8(a) (2) of the National Labor Relations Act together envision employees represented by labor organizations they have freely chosen, that are independent of their employers and that they control through direct democratic processes. Were the FFA adopted in the United States, it would not measure up to these standards and would likely be found to violate both statutes.

Unions in the United States have come to rely increasingly on private agreements providing for employer neutrality, union access to employees on employer property, and voluntary recognition when organizing employees. Such agreements have been controversial both with respect to the premise that parties can contract out of NLRB representation procedures and with respect

³¹⁰The Dana-UAW agreement is in marked contrast to other agreements reported in the media. For example, it has been reported that the Service Employees International Union has entered into secret agreements with certain employers whereby, in exchange for employer neutrality and card check recognition at some locations, SEIU has promised not to organize employees at other locations. It has been alleged that SEIU abandoned an organizing drive among security guards employed by Allied Barton Security Services at Temple University and the University of Pennsylvania in exchange for the company's agreement to neutrality and card check in Boston, Los Angeles, Washington, and Seattle. See Jane M. Von Bergen, *For Union, Pragmatism vs. Principle: SEIU is Active in 1 Recruiting Drive in Phila., but Abandoned Another*, PHILADELPHIA INQUIRER, May 27, 2008, at B1. Such secret deals that enable an employer to, in effect, veto where a union will organize, do raise substantial issues about labor organization independence and are of questionable legality.

to what unions have agreed to in return for these organizing advantages. Although such agreements are unlikely to implicate the LMRDA, they have been challenged under section 8(a)(2) of the NLRA. The evaluation of the FFA from the standpoint of effect on employee free choice and effect on labor organization independence provides a useful vehicle for analyzing the legality of these private agreements.