V. VOLUNTARY RECOGNITION: AN INNOVATION IN LABOR-MANAGEMENT COOPERATION?

Contractual Approaches to Labor Organizing: Supplanting the Election Paradigm?

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Introduction

For more than fifty years, elections supervised by the National Labor Relations Board (NLRB) have functioned as the dominant explanatory structure or paradigm for the free exercise of employee choice under the National Labor Relations Act (NLRA). Since the mid-1990s, however, organized labor has been mounting a serious challenge to the election paradigm as a preferred approach in determining whether employees wish to be represented by a union. A central component of this challenge is unions' success in negotiating agreements that provide for employers to remain neutral during an upcoming organizing campaign. Most neutrality agreements specify that the employer will recognize the union and participate in collective bargaining if a majority of its employees sign valid authorization cards.

As a factual matter, NLRB elections are no longer the dominant mechanism for determining whether employees prefer union representation. Indeed, while union organizing activity has increased markedly in the past ten years, the annual number of NLRB representation elections has declined to its lowest level since the 1940s. Of three million workers reported as newly

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organized by the AFL-CIO in the six years from 1998 and 2003, fewer than one-fifth were added through the formerly preeminent NLRB elections process.

The development of alternative contractually based approaches signals a recognition that assumptions about the basic fairness of NLRB elections are now widely viewed as unrealistic. Participants on both sides understand that NLRB-supervised election campaigns regularly feature employers' exercise of their lawful yet disproportionate authority to help shape results, as well as employers' use of their power to affect outcomes unlawfully but with relative impunity. The aspirational model of open and fair union representation elections cannot be squared with the reality of a regulatory regime that allows, if not encourages, employers to exert inordinate pressure on employee choice. Accordingly, debate over the legal and public policy implications of neutrality agreements and card check recognition offers a chance to reexamine basic approaches to self-determination under the NLRA.

The Rise of Neutrality Agreements

Neutrality agreements began to appear in the late 1970s, but have become more frequent since the late 1990s. Agreements cover employees in both the service and manufacturing sectors. Labor organizations that regularly rely on neutrality provisions include SEIU, UAW, UNITE-HERE, and CWA. An important study published in 2001 reported that in addition to an explicit employer commitment to neutrality, two-thirds of the agreements provide for card check recognition, two-thirds also grant union access to the employer's physical property (thereby contracting around judicially developed access restrictions), four-fifths impose certain limits on union behavior (notably commitments not to attack management during the campaign), and more than nine-tenths call for arbitration or some other form of private dispute resolution to address disagreements over contractual meaning (Eaton and Kriesky 2001).

Organizing campaigns featuring neutrality and card check have been notably successful. They have ended with union recognition 78 percent of the time, compared with recent election win rates of 42 percent in units of 100–499 and 37 percent in units larger than 500. Numerous organizing victories that feature neutrality plus card check have involved units of more than 500 workers, and some unions may be targeting larger units for their new approach. It is important to note that the rate of achieving a first contract following recognition approached 100 percent in the 200 successful campaigns monitored by Eaton and Kriesky; that level of achievement far exceeds the roughly 60 percent success rate associated with first contracts following NLRB election victories by unions.

In light of these relative track records, it is not hard to understand why unions would prefer to organize through neutrality and card check. Neutrality agreements allow unions to avoid certain well-documented adverse effects associated with NLRB elections. Specifically, they enable unions to sidestep the intimidating consequences of employers' antiunion speech and conduct, and to minimize the eviscerating impact of lengthy litigation-related delay.

More intriguing is what motivates employers to negotiate neutrality and card check provisions that make it easier for their employees to become organized and pursue a collective bargaining relationship. Many employers refer to the costs imposed for not reaching such an agreement—economic losses associated with a work stoppage, picketing, or handbilling that deters customers from patronizing their business, or the withholding of financial support or investment by a third party amenable to union influence.

Employers also have described a range of business-related benefits they expect to realize. Some neutrality agreements offer an edge in attracting new business, by including union commitments to advocate that their members purchase the products or services the employers are providing. Other agreements give rise to union-management partnerships that can effectively extract benefits from government—through joint efforts to pass or defeat legislation, or to secure favorable regulatory results or judicial settlements. Employers also have determined in certain instances that neutrality agreements enhance their ability to attract qualified workers or to promote larger labor relations goals. In short, employers' decision to enter neutrality agreements—like their decision to resist unions—is at root a matter of business judgment.

Doctrinal Challenges to Neutrality Agreements

An important aspect of what is distinctive about neutrality and card check is precisely its nonconfrontational character. Whereas the regulated environment of a NLRB election is highly competitive and adversarial, the self-regulated regime under neutrality and card check is predicated on a precommitment to restraint: both labor and management agree to reduce, if not eliminate, their powers to challenge and hence injure the reputation and prospects of their opposite number.

Some management attorneys and business lobbyists, and a few labor relations scholars, have argued that employer agreements to give up certain informational and combative advantages traditionally associated with campaign speech and conduct are inherently suspect under the NLRA. They contend that neutrality agreements are tantamount to contributing unlawful support or assistance in violation of section 8(a)(2) and that those agreements constitute an unlawful waiver of employers' fundamental right to speak out against unionization under section 8(c). Critics also maintain that card signa-

tures are a presumptively unreliable last resort, because employee choice is too readily secured through coercion, misrepresentation, or socially generated peer pressure rather than after sober reflection in the privacy and anonymity of the voting booth.

A common theme to such legal contentions is the assumption that employers and unions are meant to oppose one another as adversaries, at least until the union wins its majority. Implicit in this theme is the notion that the union's legitimacy stems from its having prevailed in a spirited contest for the minds of employees, a contest characterized by the free flow of competing information and arguments. These legal contentions, and their implicit justification, do not survive scrutiny.

Neutrality agreements and card check fit within an exceptional, but always available, doctrinal alternative, which is premised on the idea that employees can make genuinely free choices when management and union decide to modify or forego the traditional NLRB-supervised election campaign. Relevant sections of the NLRA are all consistent with this nonelectoral approach. Section 8(a)(2), which was meant to eliminate in-house labor organizations as a sham form of worker participation, does not restrict the broader aspects of contractual cooperation between management and independent labor organizations. Section 8(c), which guarantees management the opportunity to engage in noncoercive speech, involves an employer right that may be—and often has been—waived on a voluntary, knowing, and intelligent basis. Finally, section 301, which establishes federal jurisdiction over contractual arrangements between management and unions, reflects a baseline congressional understanding that national labor policy is best served when collectively bargained arrangements are deemed binding on both parties. Respect for such contractual arrangements, including employer agreements to recognize a union on proof of majority support secured outside the elections context, has long been a centerpiece of peaceful and stable labor relations.

None of this is meant to suggest that neutrality agreements and card check are automatically permissible in all circumstances. The line between employer-union cooperation (which is encouraged) and employer support constituting undue interference (which is prohibited) remains important and is at times difficult to identify. Similarly, although clearly expressed authorization cards are presumed valid, the presumption can be overcome by proof that signatures were obtained through excessive pressure, deceptive information, or improper benefits. Apart from the basic lawfulness of neutrality and card check, there are challenging questions of implementation that are not addressed here—such as what kind of provisions within neutrality agreements constitute unlawfully premature recognition, whether unions may insist that employers bargain about neutrality, and the impact of NLRA preemption

principles on efforts by state or local governments to promote neutrality in their dealings with employers or contractors.

Nevertheless, what remains distinctive is the growth of this doctrinal exception into a widespread practice. The organizing successes associated with contractually based cooperation should be understood as a serious challenge to the long-established notion that NLRB elections are the best and most accurate method of ascertaining what employees want.

Implications for Employee Free Choice

One could argue that, in light of the fundamental asymmetry of power between employers and unions in a prerecognition context, the election paradigm was conceptually flawed from the start. An employer's power to create and convey a dependent relationship inevitably lends force to its persuasive campaign speech. Even if a union prevails on election day, it holds neither legal nor economic power over its potential constituency of workers, and its relationship to employees must therefore be a relatively contingent one.

Perhaps the election paradigm was more accurate, and normatively satisfying, in the era following World War II, when employers acceded more readily to the possibility of becoming unionized, and analogies between industrial and political democracy reflected in part a societal impulse to celebrate recent national triumphs. Yet, assuming *arguendo* that the restrictions imposed on employers and unions under the election paradigm were at one point defensible in principle, pervasive practical difficulties over the past thirty years have rendered the paradigm inapplicable.

The law regulating union election campaigns has developed since 1970 to exacerbate many of the inherent inequalities between labor and management in the prerecognition setting. NLRB and court decisions have—among other things—seriously restricted union organizer access, endorsed employers' power to "predict" various dire consequences that will accompany unionization, relaxed rules against employer misrepresentation, prohibited the imposition of specific contractual terms even in instances of extreme employer bad faith, diminished the effectiveness of reinstatement and backpay awards, and severely limited the availability of bargaining orders. Moreover, employers in the past three decades have relied heavily on "union avoidance" consultants and advisors to take greater advantage of what the law permits or does not sufficiently deter.

Deterioration of the election paradigm has not been enough to trigger its replacement with something new. Nonetheless, with some 80 percent of new organizing occurring outside the domain of NLRB-supervised elections, the Supreme Court's classic 1970 statement that such elections will continue to be held in the vast majority of cases no longer reflects descriptive reality.

Whether neutrality and card check *should* supplant elections as a normative matter deserves further attention and discussion. For advocates of neutrality, the very existence of a contractual agreement signifies that the employer and union have achieved some preliminary degree of mutual respect. Employees are therefore able to perceive, prior to being canvassed, that their employer is willing to enter into a constructive relationship with a union to set procedural ground rules for ascertaining what they, the employees, really want. That manifestation of the employer's attitude, albeit within a narrow ambit, helps to alleviate the employees' otherwise rational perception that their employer may have a punitive stake in how they exercise their choice.

Opponents of neutrality counter that, if employees are unable to hear the employer's side of the story, they will not be equipped to make a suitably informed and reasoned choice. That contention, however, invites doubt on two separate grounds. One is that the employer already has both the opportunity and motive to present reasons in favor of an individual bargaining regime before a union ever makes an appearance and is likely to have done so over a period of months, if not years. A second is that the optimal time for informed choice about the merits of a particular union's ongoing presence will occur during contract negotiations—when employees must focus on precisely what a collectively bargained workplace would look like.

Apart from their informational concerns, supporters of secret ballot voting worry that too many individuals will sign cards without giving the matter enough thought, or from fear of being criticized by fellow employees. It is not at all clear that workers will succumb so readily to indifference or socially generated peer pressure. Assuming they do, however, a union is unlikely to retain employees' allegiance while negotiating a contract with their employer unless it can persuade them that its bargaining priorities and demands deserve majority support and even a commitment to apply group pressure under the right circumstances.

In short, the neutrality/card check approach challenges the explanatory and prescriptive force of the election paradigm, by displacing the central role of NLRB-supervised elections while remaining committed to the NLRA's underlying goal of protecting employee freedom of choice. The proliferation of neutrality plus card check arrangements thus presents the question of whether the election paradigm should be modified or even abandoned.

This is not the place to formulate detailed alternative options. It is worth noting, though, that several plausible models exist, drawn from comparable legal cultures in which the promotion of collective bargaining is integrated with the recognized importance of protecting employee choice. In Canada, longstanding national and provincial laws recognize signed authorization

cards as legitimate—and indeed preferred—means of determining the will of the majority, with certain safeguards built into the card-signing process. Another established Canadian statutory approach retains elections as the primary employee choice mechanism while compressing the time period—typically to five to seven days—so as to minimize the possibility of employer intimidation or coercion. The Canadian legal system has accepted the principle of limiting employer opportunities to campaign against unionization as consistent with the goal of effectuating meaningful employee free choice.

Recent changes in British law may be moving the recognition process in the same direction. A 1999 British statute allows employers to seek elections, but experience over its first several years of implementation indicates that employers are strongly inclined to sign voluntary agreements if there is majority support for the union. Although the new law includes certain incentives for employers to agree voluntarily to recognition, there also is evidence that British employers have perceived a range of business advantages to unionization as helping to promote a stable and profitable labor relations environment.

In contrast to the Canadian and British experience, there is little likelihood of statutory change in the United States, because of the gridlock that has long characterized congressional relations in this field. Factors that make so many U.S. employers fiercely resistant to unions will continue to fuel strong opposition to any legislative reforms, even as segments of the business community embrace or accede to the contractual approach. It remains for the community of nonlegislative actors to address the shift that is occurring within existing legal boundaries.

There are ample policy-related reasons to encourage a more open and candid discussion. From a practical standpoint, neutrality agreements would seem to promote employee free choice at least as effectively as the faltering election-based regime. In addition, by transforming union-organizing campaigns from bitter and divisive contests to relatively civil and positive exchanges, neutrality and card check arrangements encourage more stable and peaceful labor relations. These arrangements also celebrate voluntary contractual solutions that have long been a favored element of national labor policy. At the very least, it seems likely that neutrality and card check will coexist with NLRB-supervised elections as potentially preeminent descriptive and normative accounts of the employee self-determination process.

Note

A more detailed and elaborate version of this paper, titled "Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms," will appear in the *Iowa Law Review*, Vol. 90 (2005).

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