Keeping Neutrality Agreements Neutral

By Joseph A. Barker

Although "neutrality agreements" are not a new phenomena, labor organizations are becoming more proactive in seeking employer participation in such agreements as part of the unions' efforts to establish themselves as the exclusive collective bargaining representatives of employees. As the name suggests, generally such an agreement involves an employer's commitment to remain neutral during the union's organizing campaign by neither encouraging nor discouraging membership in the union. If the union thereafter achieves support from a majority of employees, usually in the form of signed membership cards, most neutrality agreements provide for voluntary recognition of the union by the employer after a card check.

For years, the National Labor Relations Board has served as the impartial arbiter of questions concerning representation raised by a union seeking to represent an employer's employees. That continues to be the case in the vast majority of situations because employers traditionally oppose union-organizing activities. In addition, many employers will not voluntarily recognize the union unless the legitimacy of the union's majority status can be validated by a Board-conducted election.

A relative constant throughout the years has been that unions that use the Board's representational processes win representation elections about half the time. This figure is usually reflective of either (1) the union's inability to convince the majority of the employees in a potential bargaining unit of the merits of unionization (because the union needs to submit a showing of interest among only 30 percent of the employees to file a representation petition), or (2) the employer's successful campaign against the union during the election process and erosion of the union's initial majority support.

In the opinion of many unions, neutrality agreements circumvent the delay and uncertainty perceived as inherent in the Board's representation process for employers wishing to evade the union's organizational objective. The negotiation of neutrality agreements with employers has resulted in a predictably higher success rate for unions in gaining recognition. Indeed, it is estimated that in almost 90 percent of the cases where a neutrality/card check agreement is in place, the union has gone on to become the bargaining representative.[1]

For many unions, however, neutrality agreements are of limited utility. They can usually be negotiated only with a small percentage of large nationwide employers that either already have a collective bargaining relationship with the union or, for economic or philosophical reasons, are otherwise predisposed not to oppose unionization. Furthermore, the greater chance for success in organizing employees and the avoidance of delay offered by neutrality agreements is being undermined by recent legal challenges from anti-union employees and groups such as the National Right to Work Legal Defense Foundation. The paucity of case law dealing with the extent to which neutrality agreements may attempt to smooth the way for organizing makes them ripe for protracted litigation.

Consequently, even when unions and employers are parties to a neutrality agreement, they may nevertheless find themselves in front of the Board as part of the unfair labor practice process, defending against charges that they have gone too far in their efforts to foster union representation. Parties that have crossed the bounds of permissible cooperation will have their neutrality agreements deemed unlawful, and any resulting recognition of the union as the bargaining representative will be voided.

Why Employers Participate in Neutrality Agreements

The reasons why an employer may be willing to compromise its right to oppose unionization are myriad, and may range from a desire to (1) resolve ongoing litigation resulting from union-organizing efforts, (2) enlist the union to support its regulatory objectives, or (3) take advantage of business opportunities available only to unionized employers. In other circumstances, an employer and union in an existing, mutually beneficial, collective-bargaining relationship may wish to expand that relationship to existing or future unorganized facilities.

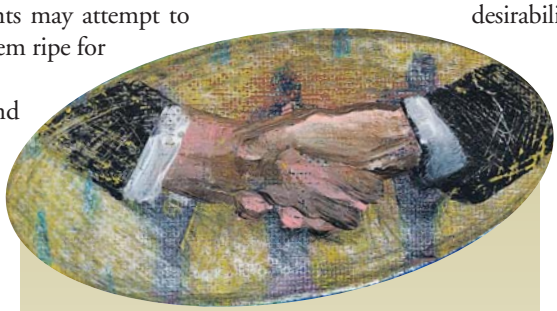
In Michigan, automotive suppliers to the Big Three and the United Automobile Workers (UAW) have been the most recent progenitors of neutrality agreements, as many neutrality agreements arose following the UAW's negotiation of a "good corporate citizen" policy with automotive manufacturers. That policy included a requirement that the manufacturers send letters to their suppliers urging them to provide their employees with wages and benefits competitive within the industry, and emphasizing that automotive manufacturers do not discourage the employees of its suppliers from joining unions.[2] Challengers contend that the letters are nothing more than a coded statement that if suppliers do not "grease the skids" for unionization, they will lose business from automobile manufacturers.

Types of Neutrality Agreements

In its simplest form, a neutrality agreement merely provides that during a labor organization's effort to organize its employees, the employer either agrees not to actively oppose the union's efforts, or it commits to refrain from taking a position for or against the union during the organizing campaign. If asked by its employees, the employer merely responds that it does not object to the union's organizing efforts. In theory, this leaves it to the employees to decide the desirability of representation.

However, variations from this theme abound. For example, some neutrality agreements may reserve the employer's right to engage in campaigning during the organizing process, but only to the extent of emphasizing its own virtues as a company rather than disparaging the union as an institution. Other times, the employer may be restricted from any activity besides truthfully responding to misrepresentations by the union. Reciprocally, the union may commit itself to abstain from attacking the company or management during its organizing efforts, or from engaging in publicity picketing.[3]

Ultimately, neutrality agreements normally envision voluntary recognition of the union if it either submits union authorization cards signed by a majority of employees to the employer for a card check, or receives a majority of votes as part of a secret ballot election conducted by a third party.



Fast Facts:

Neutrality agreements generally commit an employer to remain neutral during a union's efforts to organize the employer's workforce.

Despite the utility of neutrality agreements in circumventing the delay and uncertainty inherent in establishing a bargaining relationship through the NLRB's representation processes, parties may find the agreements subject to unfair labor practice charges.

The negotiation of conditional terms and conditions of employment as part of a neutrality agreement may violate the prohibition against premature recognition of a labor organization.

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In their simplest forms, these types of neutrality agreements have been held to be enforceable in federal court under Section 301 of the Labor Management Relations Act.[4] They have also been held to be a waiver of a union's right to file a representation petition with the Board.[5] The Board has accepted basic neutrality agreements as permissible organizing tools for unions to use.[6] Indeed, they are considered to be consistent with the Board's policy of promoting voluntary union recognition and bargaining between employers and unions as a means of furthering harmony and stability in labor-management relations.[7] The Board has not considered neutrality agreements in their simplest forms to establish a collective-bargaining relationship or a binding collective-bargaining agreement that might run afoul of the prohibitions of 8(a)(2) of the National Labor Relations Act.[8]

Access by the Union

As neutrality agreements drift further away from their most basic form, however, more legal complications may arise. Some agreements additionally provide for access to the employer's facilities by union organizers during the campaign, and may even allow the union to address employees at a meeting called by their employer. Other provisions may allow for the union to receive a list of the names of the employer's employees, along with addresses and telephone numbers, to facilitate the union's dissemination of its campaign materials.

While Section 8(a)(2) forbids employers from "interfering with the formation" of a labor organization or contributing "other support to it," the Board considers the totality of the employer's conduct in deciding whether such cooperation is acceptable.[9] A certain amount of employer cooperation with the efforts of a union to organize is lawful. The amount of employer cooperation that crosses the line and becomes unlawful "support" is not susceptible to precise measure. Instead, the Board believes each case must stand or fall on its own particular facts.[10]

This lack of precision obviously presents risks for employers participating in such agreements. The Board generally finds that an employer may go so far as to require employees to attend meetings with the union on its premises, pay employees while attending these meetings, have management present for the meetings, and bespeak of the benefits that will result from unionization before turning the meeting over to union officials.[11]

However, such cooperation may also be considered an improper inhibition to employee free choice in selecting a bargaining representative if (1) the employer does not re-emphasize its professed neutrality, (2) the parties do not temper their conduct by delaying the union's recognition for a reasonable period before a card check, or (3) the asserted majority status is not independently verified by a third party or a secret ballot election.[12]

Problems are likely to surface where management overtly or implicitly participates in the signing of union authorization cards by employees, either by accompanying union representatives around the plant while they solicit cards, or by being present at meetings between the union and employees to observe the signing of authorization cards.[13] Also, an employer must evenhandedly provide similar access to a rival union seeking to represent its employees, and not discriminatorily deny employees who oppose the union similar opportunities to publicize their message.[14]

Pre-Recognition Negotiations

Recent neutrality agreements have evolved to the point where parties have negotiated "conditional" terms and conditions of employment that will serve as guideposts for a fully negotiated collective-bargaining agreement if the union later achieves majority status. These may include such items as a mutual no-strike/no-lockout pledge during the course of bargaining for an initial contract, an agreement to maintain an existing employer-provided benefit without further modification (such as a healthcare or pension plan), or binding arbitration for all unresolved issues during negotiations.[15]

Without a doubt, the negotiation of a collective-bargaining agreement between an employer and a union is unlawful if the union has not already achieved majority support of employees. This remains true even if the union subsequently obtains cards from a majority of employees between the date the agreement was negotiated and the date the contract is signed and the terms of employment actually take effect. Such premature recognition extended to the union conveys a "deceptive cloak of authority," and a union so favored is given a marked advantage in securing the adherence of employees.[16]

Although neutrality agreements that contain generalized descriptions as to what the eventual terms and conditions of employment may look like are clearly something less than a full collective-bargaining agreement, they are still subject to challenge. There is currently no Board law directly dealing with this type of neutrality agreement, and the only case even arguably on point is over 40 years old. In *Majestic Weaving,* the Board believed that by treating a minority union as the bargaining representative, even if only to the extent of discussing conditional contract proposals, an employer abridged the rights of employees by placing an imprimatur of legitimacy on the relationship.[17] However, even the soundness of that decision is not free from debate and is subject to the tides of change that come with different Board panels; to reach its conclusion in *Majestic Weaving,* the Board had to overrule prior Board law on the issue.

Currently, the General Counsel for the NLRB believes *Majestic Weaving* remains good law for evaluating neutrality agreements, as

is evidenced by the recent issuance of a complaint involving Dana Corporation, an automotive supplier, and the UAW. The complaint alleges that the parties have entered into an unlawful agreement that sets forth terms and conditions of employment to be negotiated in a collective bargaining agreement should the UAW obtain majority status as the exclusive bargaining representative of employees at Dana Corporation's plant in St. Johns, Michigan.[18] Part of the remedy in that case requires the voiding of any membership cards collected by the UAW since the agreement was entered into.

While the final outcome of the *Dana* case (and similar cases) is yet to be decided by the Board, it does serve as a pointed reminder that neutrality agreements can go too far in attempting to circumvent the traditional Board representational process. ◆

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The views expressed are those of the author and do not reflect the official policy of the National Labor Relations Board.

Footnotes

1. A. Eaton & J. Kriesky, "Union Organizing Under Neutrality and Card Check Agreements," 55 Ind & Lab Rel Rev 42 (2001).
2. See G. Davies, "Neutrality Agreements: Basic Principles of Enforcement and Available Remedies," 16 Lab Law 215 (2000).
3. R. Hartley, "Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement," 22 Berkeley J Emp & Lab 369 (2001).
4. 29 USCA Sec 185. *Hotel & Restaurant Employees Local 217 v J.P. Morgan Hotel,* 996 F2d 561 (CA 2, 1993).
5. *Verizon Information Systems,* 335 NLRB 558 (2001).
6. *New Otani Hotel & Garden,* 331 NLRB 1078, 1082 (2000).
7. *MGM Grand Hotel,* 329 NLRB 464 (1999).
8. 29 USCA Sec 158.
9. *Kaiser Foundation Hospitals,* 223 NLRB 322 (1976).
10. *Longchamps, Inc,* 205 NLRB 1025 (1973).
11. *Jolog Sportswear,* 128 NLRB 886 (1960), affd 290 F2d 799 (CA 4, 1961).
12. *Vernitron Electrical Components,* 221 NLRB 464 (1975).
13. *Duane Reade, Inc,* 338 NLRB No. 140 (2003).
14. *Steak & Brew,* 213 NLRB 450 (1974).
15. A. Rosenfeld, "Report of the General Counsel," (2004).
16. *International Ladies' Garment Workers' Union v NLRB (Bernhard-Altmann),* 366 US 731 (1961).
17. 147 NLRB 859 (1964).
18. *Dana Corp,* et al., Case 7-CA-46965.