

Trends in Organizing Activity: Card Check and Neutrality Agreements

By Alice Winkler

It should come as no surprise that in an ongoing effort to combat the declining union membership rate, the organized labor movement is being forced to reinvent itself by developing new strategies and tactics to increase its membership. The unionized workforce in the United States has fallen from approximately 20.1% in 1983 to only 12% in 2006, a figure that is down a ½ of a percentage point from the size of the unionized workforce in 2005.¹ Union membership for government workers was most recently tallied to be 36.2%, while union membership in the private sector was only 7.4%.² In hard numbers, unions lost 326,000 members in 2006, and there are only 15.4 million unionized employees in the United States.³

Not surprisingly key labor organizations are dedicating huge amounts of money to organizing activity. The AFL-CIO has created a \$22.5 million “strategic organizing fund,” and the Change to Win Coalition has committed to spending \$750 million annually for organizing activity, while the United Auto Workers will be transferring \$50 million out of its strike fund for this purpose.⁴ Similarly, the American Federation of State, County and Municipal Employees imposed a \$3

¹ United States Bureau of Labor Statistics, Union Members Summary, January 25, 2007. Note that 1983 is the first year for which the Bureau of Labor Statistics maintains union membership data.

² Id.

³ Id.

⁴ Clifton, *Unions Hold California in a Headlock*, The Telegraph, November 15, 2006 <http://www.macon.com/mld/macon/business/16013443.htm>.

per member dues increase in an effort to increase its organizing and political activity budget by \$35 million and the Laborers' International Union has increased its dues by 25 cents per hour in order to raise a projected \$104 million dollars for organizing activity, effectively tripling its support for regional organizing campaigns.⁵

Card Check and Neutrality Agreements

But beyond throwing money at the problem, the organized labor movement has committed itself to utilizing strategic tactics that support organizing activity at the regional and grassroots level. Over the course of the past ten years, it has increasingly turned to the utilization of card check and neutrality agreements to run organizing campaigns that are more likely to succeed.

Card check agreements are contractual arrangements between a union and employer where the employer agrees to recognize the union on the basis of a majority count of authorization cards submitted by employees rather than a traditional NLRB run secret ballot election. Generally, card check agreements are negotiated hand-in-hand with neutrality agreements whereby employers agree to refrain from taking a position on union certification during the course of an organizing campaign.

⁵ Id.

The reasons for the trend towards the use of card check agreements are complicated. There is a perception among labor organizations that traditional NLRB secret ballot elections hinder their organizing efforts. They complain that the rules for these elections are overly technical, utilizing strict voting criteria, subject to a lengthy hearing and appeal process and are ultimately more time consuming and costly than card check certifications. Advocates of organized labor also argue that a typical organizing campaign subjects employees to extensive intimidation by management, and that card checks as an alternative are more flexible voting tools, requiring the employee to simply fill out a card indicating his or her preference for the existence of a worksite union.

Labor advocates further assert that neutrality agreements level an unequal playing field in the workplace where management typically has the upper hand in influencing employees against unionization. They maintain that when employers agree to be neutral, organizers can focus on getting their message across to the employees rather than engaging in a heated battle with management. They also argue that ultimately, neutrality agreements benefit employers who can expect less disruption to the workplace and avoid costly expenditures in opposing organizing activity if they agree to remain neutral during an organizing campaign.

Alternatively, opponents argue that card check agreements strip employees of the confidentiality protections inherent in an NLRB run secret ballot election, subjecting them to blatant voting intimidation by coworkers and union

organizers. They assert that employees who sign authorization cards often do not have a clear understanding of the implications of their decisions, and are easily cajoled to sign them with promises of prizes and bonuses. Ironically card check agreements are viewed by some employer advocates as inherently undemocratic in that they open the door to coworker intimidation by doing away with the secret ballot election.

Similarly, these advocates maintain that neutrality agreements do a disservice to employees by depriving them of valuable knowledge that they need in order to make a reasoned decision on whether a union would best serve their interests. In this respect, opponents view neutrality agreements as depriving employers of their statutory right under the National Labor Relations Act (“NLRA”) to communicate with their employees.⁶ While it can be argued that this right may be limited via negotiation, opponents to the utilization of neutrality agreements maintain that the end result is the absurd limitation of an employer’s ability to effectively relay information to its own workforce.

Benefits to Organized Labor

There is no question however, that a strategy of utilizing card check and neutrality agreements has been more successful in promoting union certifications than traditional organizing campaigns that culminate in a secret ballot election. Unions won 56.8% of all NLRB representation elections in fiscal year 2005.⁷

⁶ 29 U.S.C. Section 158(c).

⁷ NLRB Annual Report (2005) at 16.

However, according to Stewart Acuff, Organizing Director for the National AFL-CIO, unions are successful 80% of the time in card check elections.⁸ Of the three million workers reported as newly organized by the AFL-CIO between 1998 and 2003, less than twenty percent were added through the formal NLRB election process.⁹

Although card check elections and neutrality agreements can exist independently, they are most effective when utilized together. One study found that union success rates hovered around the 45% mark when only a neutrality agreement was in effect, climbed to 62.5% with only a card check agreement in place, and rose to 78% when a card check agreement in conjunction with a neutrality agreement had been implemented.¹⁰

Political Activity

The matter is squarely on the table in Washington with competing bills being progressed through Congress. The Employee Free Choice Act (S. 1925 and H.R. 3619) seeks to allow unions to implement card check elections at will and in all likelihood, if passed, will herald the end of the traditional NLRB supervised secret ballot election. Alternatively, the Secret Ballot Protection Act (H.R. 43434) seeks to amend the NLRA and eliminate a union's ability to

⁸ Sostek, *Unions Yes or No? As State AFL-CIO Convention Comes to Pittsburgh, Unions, Employers Push for Changes to Voting Procedures*, Pittsburgh Post Gazette, April 4, 2006, at A7

⁹ Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa Law Review 815, at 828 (2005).

¹⁰ Eaton and Kriesky, *Union Organizing Under Neutrality & Card Check Agreements*, 55 New York State School of Industrial and Labor Relations, Industrial and Labor Relations Review 42, at pp 51-52 (October 2001).

circumvent the NLRB election procedure completely, making it an unfair labor practice to recognize a union that has not been certified in an NLRB election.

At the state level, California Government Code, Sections 16645 –16649, prohibiting employers from using state funding to promote or impede organizing activity on their properties was upheld by the Ninth Circuit in a finding that it was not preempted by the NLRA.¹¹ In New York, a similar statute, Labor Law 211-a, is currently making its way through the appeals process. Although it was initially found to be preempted by the NLRA in District Court,¹² on appeal it has since been reversed and remanded in order to resolve a variety of factual issues regarding the application of the relevant preemption doctrines.¹³

Benefits to Management

Notwithstanding legislative efforts, the current tone of organizing activity is imbedded with the utilization of card check and neutrality agreements. There are a variety of reasons why management might consider executing a card check and neutrality agreement. In some situations, an employer may be motivated to buy industrial peace and strengthen an existing relationship with a union that already represents employees in some parts of its company. Alternatively, it may be in management's interest to execute a neutrality agreement in exchange for a union's support on a key business initiative. There is no question that the

¹¹ Chamber of Commerce v Lockyer, (463 F 3rd 1076 (9th Cir. 2006)(en banc).

¹² Healthcare Ass'n of New York State, Inc. v Pataki, 388 F. Supp 2d 6 (N.D.N.Y. 2005).

¹³ Healthcare Association of New York et. al. v. George Pataki et. al. Docket No. 05-2570-cv. (2nd Cir. 12/06).

execution of a neutrality agreement eliminates the employer's need to wage a costly and disruptive campaign to maintain a union free workplace.

One of the more positive examples of the implementation of a neutrality agreement can be found in the relationship between Cingular Wireless, the largest wireless telecommunications carrier in the country, and the Communications Workers of America (CWA). Rather than fight the CWA's organizing activity, Cingular agreed to execute a neutrality agreement in order to develop a solid ongoing partnership with the CWA.¹⁴ As a result, the CWA has organized approximately 18,000 Cingular employees, and endorsed Cingular's acquisition of AT&T Wireless.¹⁵ In addition, Cingular has been adopted as the carrier of choice for unions and union friendly companies.¹⁶ Similarly, when the SEIU negotiates with nursing homes that are amenable to neutrality agreements, it often utilizes its political power to assist them in getting government funding.¹⁷

Once the conversation is initiated, employers can negotiate the language of a particular neutrality agreement on their own terms. For example, in a card check agreement with Verizon, the CWA agreed that a 55% majority would be necessary for the union to win representation rights, and ultimately did not achieve certification.¹⁸ Neutrality agreements may contain provisions that govern

¹⁴ Richtell, *In Wireless World, Cingular Bucks the Antiunion Trend*, New York Times Final, February 21, 2006, at 1.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Kirkland, *Andy Stern: The New Face of Labor*, Fortune, October 16, 2006, at 122.

¹⁸ Reice and Berner, *Unions favor card check recognition in organizing; But the NLRB may rule, or Congress may legislate, to restrict this strategy. Seeking new members; Voluntary recognition;*

a union's access to employees, regulate union and employer behavior during the course of the campaign, and provide for a dispute resolution procedure in the event the campaign does not run smoothly.

The League of Voluntary Hospitals and Homes of New York and the SEIU, Local 1199 have agreed to "*Organizing Rules of Conduct*" whereby Local 1199 conceded card check elections and agreed not to deter employees from attending voluntary meetings run by management. In exchange, the League agreed that employers would not hold mandatory group meetings or initiate one-on-one conversations with employees regarding matters of representation, and were to refrain from advising employees from voting against the union.¹⁹ These rules also contain an arbitration procedure in the event a dispute regarding their application during an organizing campaign.²⁰ Neutrality agreements negotiated by the CWA, United Auto Workers, and United Steel Workers of America throughout the country have standard language prohibiting employers from helping or hindering the unions' organizing effort, but allowing them to communicate facts to employees, limited in some cases to responses to inquiries.²¹

On a grander scale, the SEIU regularly negotiates "triggers" in situations where it is attempting to organize entire industries or regions that historically

Card check recognition; Advantages for employers; Recent NLRB ruling, The National Law Journal, January 10, 2005 at 17; Richtell, *supra*.

¹⁹ Collective Bargaining Agreement dated May 7, 2004 between 1199 SEIU and the League of Voluntary Hospitals and Homes of New York, *Union Organizing Rights*, (Attachment A) at pp. 141-151.

²⁰ *Id* at pp. 146-148.

²¹ Eaton and Kriesky, *supra*. at 47.

have not been unionized. In order to obtain neutrality agreements from individual employers in a sector that is predominantly non union and who would be at a competitive disadvantage if faced with the prospect of collective bargaining, the SEIU implements a “trigger” in its neutrality agreements whereby it will not engage the employer in collective bargaining until a set percentage of the industry has been successfully organized. Using this mechanism the SEIU was able to organize 6,000 janitors in New Jersey in a five year period, subsequently raising their pay from minimum wage to \$11 per hour, and has formed a historic local with 5,300 janitors in Houston, Texas.²²

Corporate Campaigns

In circumstances where employers have not been agreeable to executing card check and neutrality agreements, unions have resorted to the use of the “corporate campaign” to achieve their goals.²³ Corporate campaigns are well strategized comprehensive efforts by unions to utilize all available tools at their disposal including political, legal and community pressure to compel management to comply with their demands. Tactics that are used vary from negative publicity to political pressure, interference with capital projects, the pursuit of shareholder resolutions, the initiation of regulatory roadblocks and more. They are increasingly being utilized in the health care industry, a sector that has no prospects for being outsourced abroad and is currently in the throws of bitter organizational activity. In the ten years between 1990 and 2000, NLRB

²² Kirkland, *supra*.

²³ The utilization of corporate campaigns is not limited to organizational activity. They have been used to influence corporate activity in a variety of social awareness campaigns i.e. the campaign against Nike to refrain from using child labor.

elections in this sector increased by approximately 48% while the overall number of elections dropped by 6%.²⁴

In one corporate campaign, the SEIU worked with community groups, local clergy and activists in New Haven, Connecticut to stop Yale-New Haven hospital from building a \$430 million dollar Cancer center. Its strategy involved arguing that the hospital had not addressed environmental impact concerns effectively, and filing a class action lawsuit against the hospital on behalf of former uninsured patients, claiming they had been denied free medical care, charged exorbitant fees and wrongfully pursued by bill collectors.²⁵ Ultimately the corporate campaign was stopped by an agreement whereby the hospital agreed to neutrality and made a commitment to invest extensively in the community and the SEIU abandoned its demand for a card check election.²⁶

In another corporate campaign against Sutter Healthcare in Sacramento, California, when management balked at signing a master contract with the SEIU for all its hospitals, the SEIU initiated a campaign which consisted in part of using its political influence to initiate audits by the California Public Employee

²⁴ Roberts, *Keeping Unions at Bay*, Trustee, February 1, 2004, at 20.

²⁵ Id.

²⁶ See Bass, *A "Win-Win-Win" Deal Struck on Cancer Center*, New Haven Independent, March 22, 2006,

http://www.newhavenindependent.org/HealthCare/archives/2006/03/deal_struck_on.html. To date, although it seemed as though the dispute between the SEIU and Yale New Haven Hospital had been settled with this breakthrough agreement, allegations that the hospital was in violation of it were upheld in a decision by Arbitrator Margaret Kern on December 13, 2006, and the union election originally scheduled for December 20 and 21 was postponed. See Paul Bass, *Union Election Off, Arbitrator Says Hospital Broke Law*, New Haven Independent, December 13, 2006, http://www.newhavenindependent.org/archives/2006/12/union_election.php

Retirement System that resulted in 13 Sutter hospitals being cut from Blue Shield of California.²⁷ Additionally, it disseminated reports that Sutter had overcharged the uninsured, pressured the state to revoke Sutter's tax exempt status, contacted donors to dissuade them from contributing money to Sutter hospitals, and attempted to prevent Sutter from completing a bond issue to raise money for capital improvements.²⁸

In response to extreme union tactics, some companies have turned to the courts. Note that in situations where an employer files a lawsuit against an employee during an organizing campaign, the employer may be found to have committed an unfair labor practice if the lawsuit is without a reasonable basis in law or fact.²⁹ However, this past summer Sutter Healthcare was awarded a \$17.3 million dollar judgment in connection with a libel lawsuit against UNITE HERE.³⁰ The union had mailed post cards to potential maternity ward patients alleging that the laundry service utilized by the hospital did not properly clean linens.³¹ If the award is upheld on appeal, it may have devastating financial consequences for the union.

²⁷ Haugh, *The New Union Strategy: Turning the Community Against You*, Hospitals & Health Networks, May 1, 2006, at 32.

²⁸ *Id.*

²⁹ Bill Johnson's Restaurant v. NLRB, 461 U.S. 731 (1983) (the filing of a non meritorious civil action constitutes bad faith and an unfair labor practice.)

³⁰ Sutter v UNITE HERE, Cal. Super. Ct., S-CV-13978 (Placer Co. Calif., Super. Ct. 7/21/06)

³¹ Interestingly, the union did not take this action to pressure Sutter Health in its own dealings with UNITE HERE, but was attempting to influence Sutter's janitorial vender, with whom it was engaged in a labor dispute.

In another lawsuit, *Pichler v. UNITE HERE*,³² a group of Cintas employees alleged that their privacy rights were violated when the union found their home addresses by tracing the license plates on cars in the company parking lot. The information gathered enabled the union to progress its corporate campaign by visiting the employees in their homes and researching the basis for initiating a variety of legal actions against Cintas including EEOC charges, OSHA violations, NLRB charges, etc. The lawsuit by the employees, funded by Cintas, complained of the violation of the Drivers Privacy Protection Act of 1994 (“DPPA”), which prohibits the disclosure of personal information gleaned from motor vehicle records. In granting the employees’ motion for summary judgment, the union’s contention that the organizing activity came within an exception in the DPPA for the gathering of information in connection with litigation was rejected on the ground that the exception applies to investigations related to existing litigations rather than investigations in contemplation of the initiation of lawsuits.³³

Challenge to the Recognition Bar Doctrine in Voluntary Recognitions

But what is by far the most serious outstanding issue with which organizational activity under card check agreements is being challenged today is the potential holding in a case that is currently before the NLRB; *Dana Corp and Metaldyne Corp.*³⁴ Much to the disappointment of proponents of the utilization of card check elections, the NLRB has agreed to consolidate and review these two

³² *Pichler v UNITE HERE*, E.D. PA 04-2841, 8/30/06

³³ Statutory damages under the DPPA are a minimum of \$2,500 per claimant. In this case, the court stayed the payment of damages to all but the named Plaintiffs pending the outcome of the appeal. The class may encompass upwards of 2,000 individuals.

³⁴ *Dana and Metaldyne Corporation*, 341 NLRB No. 150 (June 7, 2004)

cases where employees at two separate sites filed a decertification petition weeks after their employers voluntarily recognized the UAW at each facility via card check elections. In agreeing to hear the case, the NLRB chose not to apply the long-standing recognition bar doctrine, which precludes a challenge to a union's status for a reasonable time after it has been initially recognized in order to give it an opportunity to establish itself. The majority ruled that the increased utilization of recognition agreements versus the "superiority of Board supervised secret ballot elections"³⁵ warrants a more critical review of the circumstances underlying each of these cases.

Conclusion

Consequently, it is clear that the strategies being utilized by the labor movement to turnaround declining unionization statistics, albeit successful, are under attack by employers and receiving unwanted attention from the NLRB. The extent to which card check and neutrality agreements continue to be a viable tool for organizational activity will be dependant upon a variety of factors. While they can certainly be legislated out of existence depending on the mood in Congress, the current Congressional demographics make this outcome unlikely. More importantly, if legislation has no negative impact on the use of these types of organizing tools, union organizers will have to be increasingly careful in the tactics they utilize to achieve these agreements in order to withstand judicial scrutiny and avoid further penalties by the courts. In any event, the NLRB's decision in the Dana and Metaldyne case will determine the lasting impact that a

³⁵ Id.

successful card check campaign will have once a voluntary recognition has occurred.

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This article was published in the Spring 2007 edition of the New York State Bar Association's *L&E Newsletter*.

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