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July 1, 2013

Re: Subcommittee on Health, Employment, Labor, and Pensions
H.R. 2346, "Secret Ballot Protection Act," and H.R. 2347, "Representation Fairness
Restoration Act" (Hearing held on June 26, 2013).

Hon. David P. Roe
U.S. House Committee on Education and the Workforce
2181 Rayburn House Office Building
Washington, D.C. 20515

Hon. Robert E. Andrews
U.S. House Committee on Education and the Workforce
2181 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressmen Roe and Andrews:

Thank you for the opportunity to appear on June 26, 2013 before the Subcommittee on Health, Employment, Labor, and Pensions to discuss H.R. 2346, "Secret Ballot Protection Act," and H.R. 2347, "Representation Fairness Restoration Act."

At the hearing, Congressman Andrews asked that the hearing record remain open so that I could provide evidence to substantiate my claim that most employers that enter into so-called "neutrality and card check" agreements do so as a result of union threats, coercion, browbeating and destructive "corporate campaigns" designed to sully the company's reputation and make it more difficult or expensive for it to operate.

In response to Congressman Andrews' inquiry, I hereby submit the pertinent section of SEIU's manual for conducting "corporate campaigns." This is SEIU's own document, and its authenticity is not in doubt. I believe that the answer to Congressman Andrews' questions are self-evident from this SEIU document. I also ask that this letter and the attachment be added to the Congressional Record along with my prior statement.

Please feel free to call upon me with any additional questions or concerns.

Sincerely,

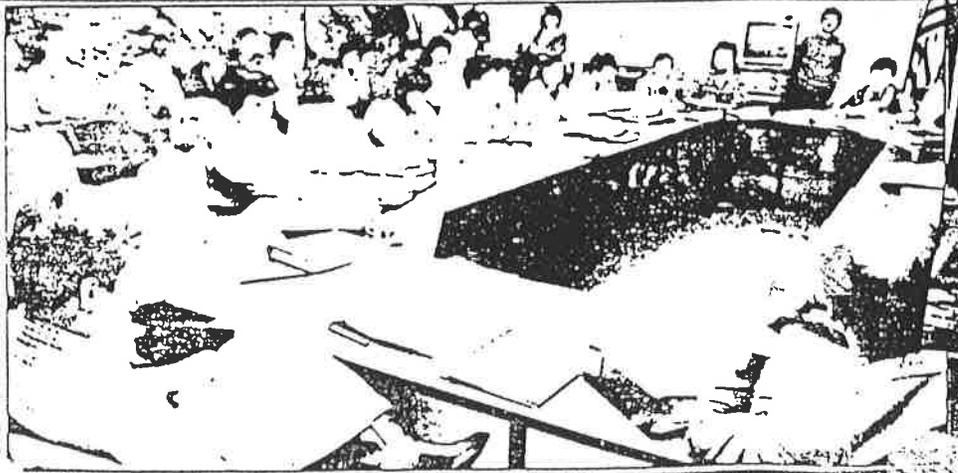
Glenn M. Taubman
Staff Attorney

Enclosure

Contract Campaign Manual



**Service Employees
International Union
AEL-CIO, CLC**



A Message From The President

Winning good contracts is one of the most important ways that we as a union fight for justice for working people.

We can be proud of our record in bargaining—but in order to build on that record we must be constantly improving our tactics.

In recent years, employers in both the public and private sectors have become more sophisticated in their attempts to hold down pay and benefits and to keep workers from having a say in their jobs. We, too, must learn from our successes and our failures if we are to meet management on an even footing.

That's why SEIU has made a major commitment to provide training and staff assistance to help our locals conduct effective contract campaigns.

This manual is an important part of that effort. It is a tool for training members in all major aspects of a contract campaign. It is also a handy reference for local leaders as a contract campaign moves forward.

As this manual explains, our union has found in recent years that rank-and-file involvement, careful planning, innovative tactics, and gradual escalation are key ingredients in winning good contracts.

As you apply those approaches to your next contract campaign, I encourage you to call on International union staff for advice and assistance. Working as a team, we can continue to build a stronger, more effective union.



Sincerely,

A handwritten signature in cursive script that reads "John J. Sweeney". The signature is written in dark ink and is positioned above the printed name.

John Sweeney
International President

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Pressuring The Employer

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Pressuring The Employer

It's not enough to be right. You need might as well.

Union proposals will usually cost the employer money or reduce management's flexibility and control over the work force—and that means the employer generally will resist unless you create meaningful *pressure* to reach agreement.

When many people think of union pressure, they think of strikes—and strikes are one form of pressure which may become necessary in some contract campaigns. But many other kinds of pressure are possible as well. For example:

- **Worksite activities**, such as surveys, petition campaigns, and demonstrations can show management that workers will not be satisfied and productive without a fair settlement.
- **Job actions**, such as refusing to do more than the bare minimum required by the contract or engaging in short work stoppages or on-again, off-again "rolling strikes," can demonstrate workers' willingness to take stronger action if necessary.
- **Outside pressure** can involve jeopardizing relationships between the employer and lenders, investors, stockholders, customers, clients, patients, tenants, politicians, or others on whom the employer depends for funds.
- **Legal and regulatory pressure** can threaten the employer with costly action by government agencies or the courts.
- **Community action and use of the news media** can damage an employer's

public image and ties with community leaders and organizations.

In planning ways to pressure the employer, consider the following:

- **Assume that pressure tactics will be necessary, and start planning for them well in advance.** It may be tempting to wait to see if you can reach an acceptable settlement without going to all the trouble of developing possible pressure tactics. Unfortunately, by then time will be on management's side because most pressure tactics take considerable time to organize effectively.

When management sees that you are preparing to apply pressure it becomes less likely that you will have to use those tactics, while failure to prepare invites management to test the union's strength.

- **Your choice of tactics must be determined by a clear analysis of the employer's weaknesses.** It is easy to confuse *activity for activity's sake* with a genuine *strategy*. For each activity, you should be able to clearly explain how it is expected to lead to increased pressure on the employer.

- **Learn from the union's experience with pressure tactics used against this employer in the past.** Make sure that the discussion includes both those who helped devise those tactics and those who may feel freer to be more critical.

Make the discussion as specific as possible. For example, if someone says, "Well, we tried that but it didn't work" or "We couldn't do that because the membership wouldn't support us", discuss *why* that was so.

• No tactic is always successful or always unsuccessful; it depends on the particular employer and situation. Depending on the situation, for example, a strike may be the only way to win a good contract or a sure way to destroy the union. To some employers, media coverage is very important; to others, it makes little difference.

• Workers often give strongest support to actions they developed. Staff can make useful suggestions, but if workers themselves are not fully committed to a proposed action, it will fail.

• The threat of action often has more psychological effect on management officials than the action itself because they don't know exactly what the impact will be.

• It often takes a combination of tactics to win. It is rare that you can find the single, perfect tactic that will bring management to its knees

More often, you have to put pressure in many ways so that the total cost of your campaign to the employer begins to outweigh the benefits of rejecting your proposals.



Escalating Pressure Tactics

How do you get workers to take action to pressure the employer? And how do you apply pressure in a way that will make management more willing to negotiate?

The key is “escalation”—implementing tactics one step at a time. In the area of on-the-job actions, for example, you can start with something mild like days when all workers wear the same color clothing, move to a one-minute moment of solidarity, then to a work-to-rule campaign where everyone does only the bare minimum required by the existing contract, and finally to some form of work stoppage if needed.

Step-by-step escalation has a number of benefits.

- **It builds members’ confidence and commitment.** At the beginning of the campaign, many members may not believe that they have the power to take on management or that other workers

or community allies will stand by them if they do.

By escalating tactics, you don’t ask them to make a leap of faith all at once. Instead, you start with an activity that is relatively easy to organize and has little risk—but that shows workers that organized action is possible.

Once workers have taken part in one campaign activity, many will begin to see the campaign and the union as their own. If management responds to, say, a petition or rally by refusing to negotiate reasonably, workers will begin to see this as an insult to *them* rather than a response to “the union.” Filled with increased confidence and emotional commitment, they will be ready to try the next step.

- **It keeps the blame for increased confrontation on management, where it belongs.** Members, the news media, and allies in the community can see that each new tactic was adopted only when management failed to respond to milder demonstrations of workers’ determination.

- **It gives management incentive to settle.** If management officials feel that you are determined to provoke the maximum possible confrontation no matter what, then they may have no reason to negotiate seriously. If they feel that you already have used your most powerful weapons, they may sit back and test your staying power.

If, on the other hand, you successfully carry out a series of stronger and stronger actions, management knows it can avoid further pressure but only by offering to compromise.

Rallies build confidence and prepare workers for stronger actions, if needed.



A Step At A Time: One Local's Story

Until 1983, most state welfare workers in Pennsylvania who belong to SEIU Local 668 believed that their union had little power in contract negotiations.

Local members had struck in 1975, and the general feeling afterward was that the strike had failed. The local was not the largest state workers' union, and social service workers were not in a position to shut down state government by themselves.

For the 1983 negotiations, the local conducted a contract campaign designed to gradually build members' confidence and willingness to take stronger action. Activities were designed to make workers believe in each other as well as to send a message to management. Examples include . . .

- Days on which workers all wore special buttons, T-shirts, or armbands.
- Discussions held at the same time on the same bargaining issue in offices throughout the state.
- Press conferences held at the same time at locations around the state.
- A campaign to send postcards to the key management official.
- A coordinated effort to leaflet every appearance by the governor in the state.

Bulletins distributed by the local included photos of activities and clippings from the news media from all parts of the state so that workers could

see what other members were doing.

After the 1983 settlement was reached without a strike, the local planned a campaign for the 1985 negotiations which built on workers' growing sense of solidarity. When management came to the bargaining table demanding severe concessions, the local responded with tactics to increase members' feeling of power, including . . .

- A statewide "Stress Day" with local news conferences and membership meetings to announce the results of a union-sponsored, professional survey linking poor working conditions to high rates of stress-related illnesses.
- A Father's Day rally two weeks before contract expiration, in which workers presented a huge greeting card at the governor's mansion. The rally included workers from all the unions participating in a coalition called State Workers United for Fairness. Each union's members wore a different color shirt so that workers could see the broad range of support.
- A media campaign which included a half-hour TV show featuring members of the coalition unions talking about the bargaining issues.

When the contract expired with management still pushing many of its proposed takeaways, workers went on strike. It had taken two years of build-up, but local members had reached the point where they believed that they could stand up as a group to demand a fair contract.

Evaluating Possible Tactics

1. What purposes will this tactic serve?

- **Costing the employer money.** Can you threaten to or actually . . .

- Reduce productivity?
- Increase costs?
- Affect a private company's relationship with sources of income, such as customers, clients, investors, or lenders?
- Affect a public employer's relationship with legislators or top government executives such as the governor or mayor?
- Create bad publicity which would, in turn, affect the relationships described above?
- Cause the courts or regulatory agencies to enforce laws or regulations the employer has failed to obey?
- Directly affect the careers or other interests of individual management officials?

- **Building solidarity among workers or between your members and potential allies.** Will the tactic . . .

- Make the campaign more visible?
- Increase group spirit?
- Increase workers' sense of their own power?
- Show workers that they have the support of allies, and draw those allies into making a stronger commitment to the campaign?

- **Making daily life difficult for management.** Will the tactic . . .

- Distract management officials from other work they need to do?

- Embarrass them in front of their superiors, associates, families, neighbors, or friends in the community?

Be clear about the purpose(s) of an activity so members will have appropriate expectations. For example, it might be appropriate to hold a rally to increase membership solidarity, knowing that it wouldn't have much effect on that particular employer. But if you give members the impression that this rally is really going to shake up management and they find that it doesn't, they may become demoralized.

2. Will the tactic be fun for members to carry out?

Of course, most tactics involve hard work, but if a lighter side is built in, members will look forward to each new activity.

3. Will the tactic surprise management?

A tactic which catches management off guard has an effect both because of the action itself and because of the surprise factor.

4. Does it target people in management who control the decisions?

Particularly in the public sector, different officials in management—from politicians like governors or mayors to career labor relations negotiators—may have different long-term interests and career concerns. You have to figure out who really holds the power and tailor your tactics to affect them.



Props and costumes make a demonstration more fun as well as more effective in communicating workers' concerns.

5. How long will it take before the pressure would be felt?

Compare the lead time you have to the time a tactic would take to become effective.

For example, a strategy to discourage customers from dealing with your employer might only be taken seriously by management officials if they knew you had enough time to organize community support.

6. Will the tactic teach members new skills and build the union?

Union leaders must look at not just one campaign but at workers' long-term goals as well.

If potential tactics will involve members in doing research, taking collective

action at work, reaching out to other allies in the labor movement and the community, pressuring politicians, and similar activities, then the union will be stronger and better prepared for the next contract campaign and other battles.

A tactic which depends primarily on a handful of lawyers, lobbyists, communications consultants, or other professionals may help pressure the employer in the short run but not build membership solidarity and skills.

7. What will the tactic cost in terms of money, staff time, and volunteer efforts?

Do you have the necessary resources? If not, are there other unions or community groups that also would want to contribute?

8. Could the tactic backfire?

For example, could it turn a potential long-term ally in the community against you? Or could it be used by management to pit one group of workers against another?

If so, that may not be a reason to drop the tactic but rather to be careful in the way you set up your campaign to use it.

For instance, let's say you are considering a work-to-rule campaign which would include refusing voluntary overtime, but you have in the unit some workers who depend on the extra income. If you don't prepare carefully, you may find the work force split, with some refusing overtime, some not, and workers fighting each other instead of uniting to win a good contract from the employer. In this case, you would first have to get members together to discuss the possible tactic, why it is necessary

and worthwhile, and how to minimize the financial impact on workers.

9. Would the tactic expose workers to job loss or other discipline or the union to legal liability?

If so, that possibility should be thoroughly discussed by workers, union leaders, and attorneys ahead of time.

On the one hand, everyone should realize the risks they may be taking.

On the other hand, people must weigh the possible benefits and judge how likely it is that the employer will actually use discipline or take legal action.

For further discussion of legal considerations and how to get and use advice from attorneys, see "How To Work With Lawyers."

Worksite Activities

The following are examples of types of activity to consider.

Worksite communications

As described in Part 2 of this manual, these include one-on-one contacts, worksite meetings, and distribution of leaflets and surveys.

These activities not only communicate information but also help show management that the membership is involved and committed.

Demonstrations of solidarity

This includes any activity which shows the membership is prepared to take organized action.

It could be a large rally or demonstration, a petition on a bargaining issue or other workplace problem, or on a particular day having members all wear union pins, buttons, stickers, or the same color clothing.

It also could involve informational picketing at the employer's offices or other location where it would be possible to draw public attention. Informational picketing means displaying signs and distributing literature which expose the employer's behavior without asking employees to stop work or customers to withhold their business.

(Before conducting informational picketing, check with a union attorney, particularly in cases involving health care institutions.)

Contract enforcement

A contract campaign can be a good time for members to file grievances over every possible contract violation.



Days on which workers all wear union T-shirts or the same color clothing help build solidarity.

This tactic reminds the employer of the difference between labor peace and the kind of labor trouble that can develop if a fair contract settlement can't be reached.

It also reminds members of the importance of their contract rights.

Organizing a contract enforcement effort may require a special meeting/training session for stewards to prepare them to make sure each worker is contacted either in person or through a phone tree.

Each worker should be provided with a short leaflet which explains the purpose of the contract enforcement effort and the sections of the contract which management is most likely to violate.

Where possible, large numbers of members affected by a problem can go together to present a mass grievance, further demonstrating solidarity to both management and the members themselves.

Mini-campaigns on workplace issues

Some locals prefer to pressure the employer on workplace issues without relying on the formal grievance procedure. They feel that in the midst of a contract campaign the grievance procedure can involve too much delay and too much emphasis on officials who are removed from the worksite. They also are concerned about piling up a backlog of formal grievances which could re-

main after a contract settlement and distract the local from efforts to implement the new agreement.

Instead of using the grievance procedure to pressure the employer, you could organize a mini-campaign which might include the following:

- **Identify a workplace problem** to be solved. Ideally, you would start with an issue which reinforces the union's bargaining proposals, is of concern to a large number of workers, and has a clear solution which is winnable.
- **Conduct a survey** in order to document the problem and educate workers about the issue and your efforts to do something about it.
- **Involve the affected workers, stewards, and committees in developing union proposals** for a solution.
- **Circulate a petition** summarizing the survey results and promoting the union's proposed solution.
- **Organize protest actions** in an escalating pattern, starting with symbolic protests like button days and building toward mass meetings or refusal to do certain tasks until the problem is solved.
- **Claim victory** if the employer agrees to a solution. If the employer refuses on grounds that workers have no right to the proposed change under the current contract, point to the refusal when organizing support for the union negotiating team.

Mini-Campaign On Health Issue Builds Bargaining Strength

At the All-American Gourmet frozen dinner factory in Atlanta, Ga., workers who wanted a union contract contacted SEIU Local 579.

Soon, workers began to pressure the employer on workplace issues. For example, a delegation of more than a dozen workers went to the manager's office to complain that double-duty assignments that took them from the hot kitchen to the ice-cold processing line were making many of them ill.

When the company gave in on that issue, other workers began using similar tactics to protest their poor working conditions.

These pressure tactics helped build workers' confidence in themselves and the union, and they voted by a large margin for SEIU representation.

Then, management refused to negotiate a contract. Instead, management lawyers used legal maneuvering to delay certification of the union by the NLRB.

Workers prepared to hold demonstrations at supermarkets, urging consumers not to buy All-American Gourmet products because of rat droppings in the food and other problems discovered by workers and documented in U.S. Department of Agriculture inspection records.

Knowing that the workers were well enough organized to carry out their threat, management agreed to drop its stalling tactics by not appealing decisions by an NLRB administrative law judge.

Working to rule

In many cases, the most powerful worksite tactic is for members to do only what they are required to do by the

union contract and no more. In some worksites, this means that workers . . .

- **Refuse voluntary overtime or optional assignments** as temporary supervisors.

- **Follow supervisors' instructions to the letter**, even when those instructions are wrong or the supervisor has mistakenly left out key steps.

- **Do not make any suggestions** or take it upon themselves to solve problems that come up. They wait until the supervisor tells them what to do.

- **Insist on strictly following all of the employer's rules.** For example, let's say that to please its insurance company the employer has posted safety rules which say that "no employee shall lift excessive loads."

Workers may now decide to strictly enforce this rule, insisting on being provided with lifting devices or having other workers pulled off their jobs to help with excessive lifting.

- **Report every equipment problem and insist that it be taken care of** before work can proceed.

- **Stop talking to supervisory personnel** except when it would be a clear act of insubordination not to respond to a question or directive. Workers cut off such contacts with supervisors as engaging in small talk on the job, sharing rides to work, or eating together during breaks.

(In large public employee settings where some immediate supervisors might be sympathetic to union goals, an alternative might be to invite them to

Workers Refuse Overtime, Threaten Strike

Workers at 15 Hillhaven nursing homes in California wanted pay increases and common expiration dates for their contracts, but management wouldn't agree.

When these members of SEIU Local 250 threatened a strike, they backed up the threat by refusing to work overtime at some locations. This work-to-rule action caused staffing problems for management and proved that workers would join together to sacrifice to achieve their bargaining goals.

Along with other tactics, the overtime refusal helped convince management to agree to settle without a strike.

participate in union rallies, fundraising drives, and petition campaigns.)

- **Refuse to participate in employer-sponsored social events, charity campaigns, awards dinners, or other activities** which are designed to make the employer look good and are not part of workers' jobs.

In some cases, workers have chosen to attend these activities but to bring along leaflets, large buttons with contract campaign slogans, or other items which focus attention on union members' concerns instead of the employer's public relations goals.

Work-to-rule tactics obviously require careful preparation, training, and consultation with union attorneys. Workers must understand the difference between doing the bare minimum that is required, which is legal, and a work slowdown or refusal to follow directions, which generally is not.

Since most people like to feel that they do their job well, many workers will be uncomfortable working to rule unless they have thoroughly discussed

with others the need for it as a way to win better treatment and working conditions.

Some workers may say such tactics are "unprofessional" or "disloyal" to customers, clients, or patients. It may

help to point out that what is really unprofessional or disloyal to members of the public is to accept poor working conditions, low morale, and shoddy service or products.

Like other tactics, working to rule is best done by large numbers of people so that the employer cannot easily single out one or two for discipline.

Job actions

In most cases, a number of stronger pressure tactics are possible short of a full-scale strike.

For example, workers might stop work for a brief "unity break"—a minute, five minutes, an hour—which is calculated to be long enough to prove a point to management and the members themselves but short enough not to provoke employer retaliation.

Workers also may find that many of



Actions like unity breaks (above) or sit-ins (right) demonstrate membership solidarity. By proving that workers can organize united actions, these tactics may make an employer decide to settle in order to avoid a strike.



them need to use personal days off at the same time, or that work is disrupted because entire departments are too sick to report for duty.

Work-ins

In several campaigns, SEIU members have tried the opposite of a strike or work-to-rule campaign. They have confounded the employer by refusing to stop work in order to draw attention to workplace issues.

Working without a contract

Some locals have discovered a tactical opportunity in cases where a strike would not be an effective tactic and there either has never been a first contract or the old contract has expired.

If no contract is in effect, workers are not obligated to use a formal grievance procedure to complain about problems (unless they are public sector workers covered by a civil service grievance procedure). Yet if workers are legally represented by a union, management has a legal obligation to negotiate with the workers over working conditions.

Workers covered by the National Labor Relations Act have the right to engage in "concerted activity"—action by or on behalf of two or more workers—to improve working conditions.

Therefore, when a problem comes up concerning working conditions, workers may decide to go as a group to

Work-Ins Surprise Employer, Attract Media

In Denver, building owners responded to an effort by janitors to win a union contract with building service contractors by replacing union contractors with non-union firms and attempting to put the janitors out of a job.

The janitors reported for work anyway and had themselves arrested for conducting a "clean-in." They gained great publicity and made the building owners look ridiculous.

In Oregon, state social service workers drew attention to their highly stressful workloads by refusing to leave their offices at the end of the day and conducting appointments with clients until late in the evening.

Television coverage showed the dedicated workers trying to keep up with their work, while management weakly tried to explain why workloads were so huge.

talk to top management. If management refuses to meet and threatens to fire them, the workers return to their jobs and the union files an unfair labor practice charge for refusal to bargain.

The next time someone has a problem, the same procedure is followed, with the result that much of workers' time is spent going to, attending, and returning from meetings with management.

Of course, management could decide to respond by resolving the problem, which will be new proof of workers' collective power.

Workers planning to engage in concerted activities should consult a union attorney first, as the way the activities are carried out may make a difference in whether workers are legally protected.

Organizing Successful Rallies And Demonstrations

By giving workers an active role, demonstrations like this "Hands Across The County Building" action are more likely to attract participants than rallies in which people simply listen to speeches.

Well-organized rallies can be one way to pressure the employer by demonstrating worker solidarity and support from allies and by attracting public attention. Rallies also can boost group spirit by letting workers see proof of their strength in numbers.

However, rallies which are poorly attended and poorly run can be worse for morale than no action at all.

- Don't assume that people will come just because you gave them printed

material advertising the event. Instead, organize a network of on-the-job contact or a phone tree to remind each worker.

- Involve members in making banners, signs, or other props ahead of time. Keep the message simple and in large enough type to read at a distance and to show up well in photographs or on TV.

- Consider balloons with slogans printed on them as a way to make the event seem more spirited.

- Give people an opportunity to play an active role by singing, chanting, or marching. Otherwise, instead of feeling pumped up people may feel like they've watched someone else's rally on TV.

- Arrange for musicians to lead the crowd in singing before and after the speeches and, if appropriate, once or twice between speeches.

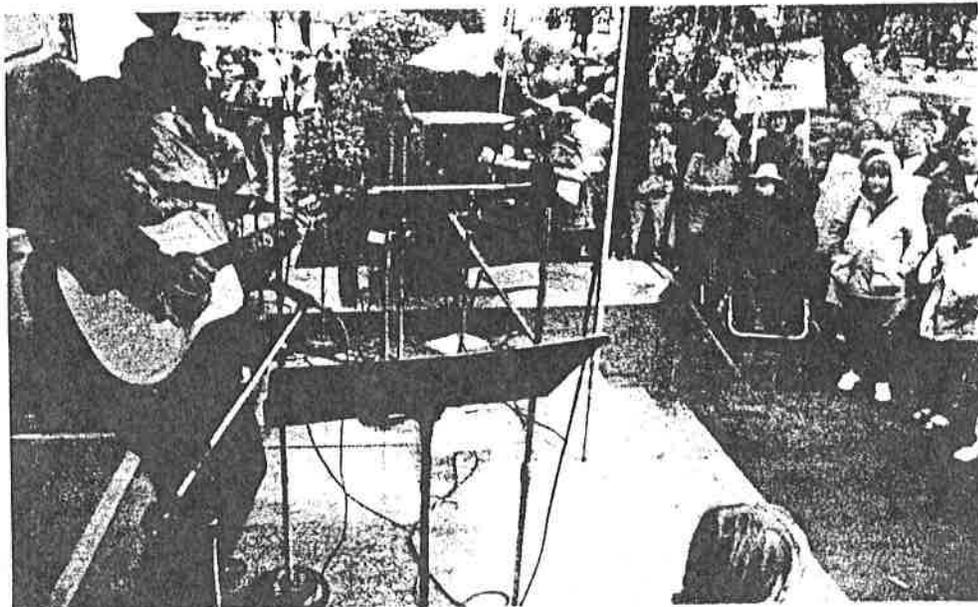
- Get some members and staff to brainstorm ideas for chants ahead of time.

- When possible, incorporate a short march into the event.

- Include among the speakers members of the unit and, if appropriate, members' spouses—all of whom can talk from the heart about what the campaign means to them.

- Negotiate with speakers ahead of time about what they are going to say and how long they have to say it. For example, if politicians are going to speak, get their agreement that they will use the time to clearly endorse the union's position. Send a message to all





Sing-alongs, skits, and humor can liven up a rally.

the speakers by interrupting the first speaker who runs over the prearranged time limit.

- **Consider using humor to make some of the points that might otherwise be buried in serious speeches.** For example, you could ask one of the members to dress up as the top management official and give a "speech" that parodies management's positions.
- **Talk to local police well in advance** about permits you may need.
- **For a big rally, train marshals to keep order** and help anyone who becomes ill or lost. Provide arm bands to identify the marshals.
- **Test the sound system** enough in advance that you can get other equipment to the scene if something is not working properly.
- **Make sure someone calls each media outlet and invites the appro-**

priate reporter to attend. Offer to have a member meet the reporter at a particular time and place and stay with the reporter throughout the event to provide any necessary help such as identifying workers to interview or explaining something one of the speakers said.

- **Arrange to have photographs taken** by a professional or by an experienced volunteer with 35mm equipment. For people who didn't attend, pictures will show better than words what the event was like. Generally, you will use black-and-white photos in newsletters and leaflets, so have the pictures taken that way to begin with. Volunteers also may be available to videotape the event in case you need to put together a video about the campaign for members or the community.
- **End the rally with a clear statement of what the next step is** and how people can get involved.

Group Spirit For A Song

Music can liven up many worksite activities.

- Try making up new words for familiar tunes.
- Pass out word sheets like the samples shown below.
- See if any worker or family member plays the guitar or other instrument. They may be too shy to volunteer that information, so you have to ask.

1985 Negotiations Support Committee

I'VE BEEN WORKING FOR THE COUNTY (Tune: "I've been working on the railroad")

I've been working for the County
Now my contract's due
I've been working for the County
And I've got news for you.

We hear that things aren't moving
Little progress made
We want things to start improving
For we're great at our trade.

County won't you move,
County won't you move,
County won't you move
some dough, some dough.

County won't you move,
County won't you move,
We're workers, not your foe.

Someone better go tell Sally
Someone better say we need relief
Someone better go ask Sal-ly...
"Sally, where's the beef?"

Fee, Fi, Fiddley, I, O,
We don't believe there ain't
no dough
Fee, Fi, Fiddley, I, O ...
Bargain fair and we won't go!

THE 12 DAYS OF BARGAINING

On the first day of bargaining, the County
gave to me,

1st	One half a percent
2nd	Fewer holidays
3rd	No travel time
4th	One year probation
5th	No Realignments
6th	Bad grievance language
7th	Fewer differentials
8th	No more comp time
9th	Less retiree health pay
10th	No unpaid leave
11th	No reallocations
12th	Less ed reimbursement

*Often the best way
to get workers to sing is
to give them song
sheets with new words
to familiar tunes.*



Lockouts Instead Of Strikes

In some situations, worksite activities such as working to rule and job actions can lead an employer to lock out workers who otherwise would have to go on strike.

If an employer finds that, because of union tactics, productivity is down, costs are up, yet workers are still drawing full pay, it may decide to lock out the workers and try to bring in replacements.

Possible advantages to workers of a lockout compared to a strike include . . .

- It's easier to get unemployment benefits and food stamps.
- Media coverage and public opinion are likely to be more favorable.
- You don't have to be as concerned about those workers who might not support a strike, since it is now *management* which is telling them not to come to work. (Of course, you will have to do a good job of organizing and one-on-one communication to keep these workers from blaming the union for forcing the lockout.)

To win a lockout, you need the same



Blame for a lockout should be placed squarely on management.

ingredients as to win a strike: enough pressure through picketing and community support to keep the employer from operating normally with replacement workers, plus other, broader tactics to put economic pressure on management.

Outside Pressure

Pressure at the worksite is often not enough to win a good contract. In many campaigns, workers must find other employer weaknesses and union strengths.

- An employer may depend on lenders, investors, customers, clients, tenants, patients, or government agencies to provide funds. The most effective outside pressure tactics are often those which could put that flow of funds in jeopardy.
- Individual owners and management

officials typically value their time, reputations, and privacy. Tactics which distract them from their primary duties and draw public attention to their activities may help pressure them to reach a fair settlement.

Outside pressure tactics obviously depend on the type of employer you are dealing with. The following are some examples to stimulate your thinking.

Lenders/investors

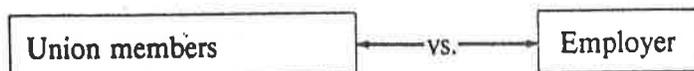
A private company generally depends on money it raises from banks, insurance companies, stockholders, or other wealthy investors to pay off old debts, buy new equipment, expand its advertising and marketing efforts, acquire other businesses, or other purposes.

If those lenders/investors decide that because of your dispute it is not worth their while to help finance the employer, the employer may have increased incentive to settle.

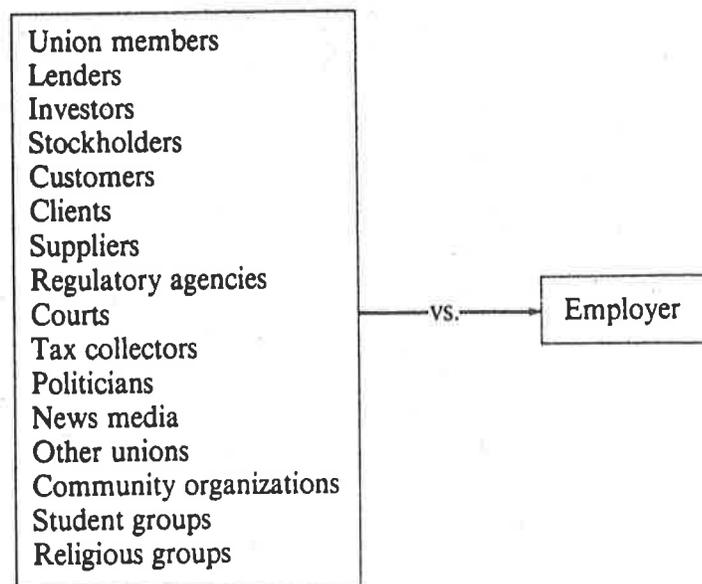
Sometimes this can be done by showing the financial backers that your dispute with the employer is leading to a strike or other action which will be bad for business and therefore bad for investors. However, investors often will support a management strategy to defeat the union now in order to make higher profits later.

Therefore, you may have to investigate lenders or investors to see if you might have disputes over *their* practices. For example, a bank which helps finance the employer might find that you have decided to investigate the loan department's practice of discriminating against women or minority communities.

Outside pressure means that, instead of this . . .



. . . you try to create this . . .



Workers Spotlight Bank Connection

When the A.W. Schlesinger nursing home in Beaumont, Tex., demanded concessions from members of SEIU Local 706, the union focused attention on First City National Bank of Beaumont, which provided the nursing home with some of its financing. The business ties between the two institutions were so tight that three of the same people sat on the boards of directors of both.

Workers leafleted bank customers and demonstrated at its branch offices, urging depositors to tell the bank that they did not approve of mistreatment of low-paid nursing home workers.

Customers/clients

You may be able to threaten the relationship between a company or agency and the customers, clients, tenants, or patients it depends on for income.

In some cases, you may be able to persuade customers not to do business with the employer because the employer is not being fair to workers. Often, however, not enough customers will care about workplace injustice. Therefore, it is often necessary to show how *they* are affected by employer practices—how prices or taxes are higher, products or services are of lower quality, or public health or safety are threatened.

Suppliers

The employer may depend on certain suppliers who in turn expect the

Appeals to customers should show how they are also affected by management policies.

**BE CAREFUL
ABOUT WHERE
YOU SLEEP
IN NEW ORLEANS.**

The 1100-room New Orleans Hyatt Regency is part of an enormously profitable real estate development that was built in downtown New Orleans in the late 1970s. The hotel hosts about 50 major conventions each year, along with over 650,000 guests, and is known as one of the most profitable members of the nationwide Hyatt chain. The hotel's gross revenues run between \$20 and \$30 million each year and it regularly boasts one of the highest occupancy rates in the city.

The New Orleans Hyatt includes among its owners the Prudential Life Insurance Company, the Pritzker family in Chicago, and several real estate investors. The Pritzkers also own the Hyatt Hotel Corporation, a separate company which operates hotels in the Hyatt chain, including the New Orleans Hyatt.

The comparison on this page shows just how well-off the New Orleans Hyatt Regency really is when compared with other significant Hyatt properties across the country:

**AT THE HYATT
REGENCY
NEW ORLEANS,
You pay TOP DOLLAR
for a room . . .**

**But workers
are paid
BOTTOM DOLLAR.**

	ROOM RATES	PORTERS	HOUSEKEEPERS
HYATT REGENCY NEW ORLEANS	\$92-116	\$4.03	\$3.95
Hyatt Regency Dallas	83-135	4.11	3.78
Hyatt Regency Minneapolis	91-99	4.54	4.56
Hyatt Cherry Hill (Philadelphia)	79-92	4.49	4.29
Hyatt Pittsburgh	85-105	4.49	4.19
Hyatt Regency Kansas City	85-115	4.19	3.86
Hyatt Regency Buffalo	65-80	4.49	4.29
Hyatt Regency Long Beach	84-104	4.11	3.71
Hyatt Regency O'Hare (Chicago)	85-105	4.24	4.16

Union Members Show Customers Their Common Interests

Answering service workers in Boston who were forced to go on strike kept calling the switchboard to demand a fair settlement. With the phone lines jammed, customers became aware of the dispute and of the inconvenience caused by not having the regular operators on the job.

employer to maintain a steady flow of orders. The supplier might put pressure on the employer to settle with the union if a long dispute would cost the supplier money or force it to look to other customers to buy its supplies.

In addition, the supplier might feel that the union will now begin investigating the way *it* does business.

Merger or acquisition partners

The employer may be trying to acquire, be acquired by, or merge with other companies. The union might get involved in that process by . . .

- Bringing information to the attention of any regulatory agencies which have to approve the merger or acquisition.
- Providing information to the merger partner about labor-management disputes, management practices, or problems the employer faces.

• Negotiating with the employer over improvements and guarantees workers will require before making agreements that would insure that the merger or acquisition could go forward.

For example, the employer would need union agreement to make changes in pension and benefit plans in order to mesh the plans with those provided by a merger partner.



Will Equitable Spend a Penny for Justice in Denver?

EQUITABLE LIFE ASSURANCE:

Generates a surplus of \$1,000 every 60 seconds.*
 Life insurance giant controlling \$91 billion in assets
 One of Denver's largest office building landlords.

JANITORS IN EQUITABLE BUILDINGS:

- Suffered a 4yds reduction in real income since 1982, now earn only \$80.00 per week.
- No benefits, no health insurance.
- Public assistance often needed for survival.

Equitable Denver janitors only want to be restored to 1982 pay levels.

The cost: a penny per square foot of office space each month.

We are the janitors who work hard, cleaning and scrubbing your office.

Since 1982, our pay has been cut, our benefits taken away. In four-hour shifts, we now clean the equivalent of 13 houses every night—for what amounts to \$1.31 per house.

You often must target the real source of money behind the employer—in this case, the insurance company/landlord which hired the contractors who employed the janitors.

Legal/Regulatory Pressure

Employers are required to obey a variety of laws and government regulations.

Many employers also need permits, licenses, low-interest public financing, or other government action in order to operate.

By investigating violations of employers' legal obligations, you may find useful evidence to support your bargaining demands.

Moreover, even if the violations are completely unrelated to bargaining issues, your investigations may give management added incentive to improve its relationship with you. Management officials may find that, because union members have started looking for employer abuses, the employer now is facing . . .

- Extra expense to meet regulatory requirements or qualify for necessary permits or licenses.
- Costly delays in operations while those requirements are met.
- Fines or other penalties for violating legal obligations.
- Damage to the employer's public image, which could jeopardize political or community support, which in turn could mean less business or public funding.

Some violations are easy to prove and get action on because they involve practices union members know about. In other cases, legal and regulatory strategies take a long time and involve considerable expense for specialized attorneys and other experts.

Violations fall into two basic categories:

those which involve failure to treat workers as required by law and those which involve failure to meet obligations to customers, clients, patients, stockholders, or general public health and safety.

Violations of federal, state, and local laws protecting workers usually can be investigated using readily available union expertise. SEIU staff usually can help find someone in the area or from the International union to help investigate possible violations involving . . .

- Safety and health hazards on the job.
- Discrimination on the basis of race, gender, age, ethnic origin, or sexual preference.
- Failure to pay overtime or minimum wage as required by federal, state, or local fair labor standards laws.
- Subcontracting of public employees' work in violation of state or local charters, codes, or constitutions.

Violations affecting the broader community might involve . . .

- Failure to provide enough staffing or cutting corners in other ways that threaten public safety.
- Evasion of taxes on property or income.
- Failure to live up to commitments made when obtaining low-interest public financing such as industrial revenue bonds.
- Failure of hospitals to meet obligations under federal Hill-Burton legislation to provide care to patients who cannot afford it.

- Failure of nursing homes to meet patient care standards or to make changes in their facilities to accommodate handicapped patients as required under federal anti-discrimination regulations.
- Environmental hazards such as toxic waste dumping or exposed asbestos in office buildings.
- Failure to disclose information to the public as required by laws or regulations.

Investigating legal/regulatory problems

- Find out which federal, state, or local agencies enforce standards the employer must meet. The SEIU Research Department can help.
- Make a request for copies of that agency's files for any cases involving this employer. (Even if the agency can legally withhold some of the reports in the file, the documents you do obtain will give valuable clues on what cases to investigate further.)
- Ask for copies of the regulations which would apply to this employer.
- If workers at the regulatory agency are unionized, meet with their union leadership and ask for help understanding the requirements the employer must obey.
- Look for citizens' groups which have sued the employer, claiming violations of legal obligations to consumers, clients, or the general public.

One way to find such groups is to look at the records of any hearings held

by government agencies which enforce laws the employer must obey. Some of the groups which testified may be ones you should be getting to know better.

Meet with them to find out what their concerns are. If their goals match yours, maybe you can help them by publicizing, endorsing, and perhaps even financially supporting some of their activities, and they can help you by sharing their research and speaking out publicly to show that more community people than just union members are concerned.

Organizing on legal/regulatory issues

Bringing pressure by raising regulatory or legal issues, like other possible pressure tactics, requires *organizing*. Without citizen pressure, enforcement agencies often are friendlier to the employers they are supposed to regulate than to workers and the community. Even if some officials are willing to take action against an employer, without outside pressure the process may take too long to be of value. Therefore, even if you have documented violations by the employer, you generally can't simply present the evidence to the enforcement agency and wait for results.

Possible tactics to use instead of or in addition to filing charges in court or with regulatory agencies include the following . . .

- **Approach the employer.** Your approach might be something like this: "We have documented X, Y, and Z violations. Normally we would be willing to work directly with you to get

these corrected, without having to involve outside agencies, the community, or the news media. But right now our members are so concerned that you are not going to agree to a fair contract settlement that they may not be in a mood to do it that way. We wanted to bring this to your attention, and give you a chance to respond.”

Caution: If this kind of approach helps the employer decide to settle your contract dispute, be sure that you offer only to give the employer a chance to eliminate legal and regulatory violations without charges having to be filed or without publicity—as opposed to offering to ignore the violations entirely. For the union to know about violations and not insist that they be corrected is not only a violation of our moral obligations to members and the community, but may in some cases make the union liable to legal charges itself. For example, a union that fails to demand employer action on discrimination or health and safety hazards that the union knows about may be sued for failing to meet its “duty of fair representation.”

• **Give information to the news media.** If approaching the employer is not successful, well-documented information about employer violations may be of interest to reporters.

In some situations, you will want to make clear to the reporter that you want the union to get credit for having provided the information. In other cases, you may want to give a reporter the information with the condition that the source will not be disclosed as long as

you are sure the employer will realize where the story came from.

• **File grievances.** Employer violations of the law can often be grieved as violations of the contract. Sometimes processing a grievance may be faster and more likely to result in a fair decision than pursuing charges through a regulatory agency or the courts.

Public, Private Employers Targeted For Legal/Regulatory Pressure

In Pittsburgh, SEIU Local 29 and the International union hit Mellon Bank with a series of legal charges when the financial giant helped set up a new non-union cleaning company at two of its largest office buildings.

The new contractor hired many of the same janitors but slashed their pay, hours, and benefits.

While union members organized community pressure on the bank and the union sponsored a media campaign, union lawyers charged Mellon with violating laws on antitrust, age discrimination, and worker rights under the NLRB.

When it became clear that union tactics would succeed, Mellon agreed to a new contract and \$850,000 back pay.

In California, SEIU Local 715 wanted to negotiate pay equity increases for city workers in Palo Alto. Discrimination charges filed by the union with the Equal Employment Opportunity Commission (EEOC), coupled with a campaign for community support, helped persuade the city that it would be better to resolve the issue at the bargaining table.

In the nationwide Beverly Enterprises campaign, SEIU and the United Food and Commercial Workers discovered that a key part of the company's business plan for growth was to buy existing nursing homes—which required approval by state regulatory agencies. The unions presented evidence to those agencies in Michigan and Georgia, successfully urging that company plans be rejected.

In Massachusetts and Ohio, the union was able to defeat company proposals for public Industrial Development Revenue Bond financing.

• **Apply worksite pressure.** Many of the tactics discussed earlier, such as petitions or work-to-rule campaigns, can focus on employer violations as the issue.

• **Apply political pressure.** Employer violations of laws or regulations may provide politicians—even those who do not want to openly enter the debate over your contract dispute—with a

good issue on which to hold hearings, make speeches, or send angry letters to management.

• **Ask for community support.** Community organizations also may be able to help take the lead in challenging employer violations—particularly in cases where you can show that the violations affect other community residents and not just your members.

Political/Legislative Pressure

Political pressure may be used in two ways.

First, you may be able to draw politicians into the public debate on negotiating issues.

Second, you can show management officials that, if they don't bargain fairly, union members will be more inclined to push for legislative action on other issues that would affect management. For example, management may find

that angry union members and their allies are preparing to mobilize for changes in the way employers are taxed, awarded public funds, or required to provide service.

In a public sector campaign, the most useful politicians to involve obviously are those who oversee the negotiators you are dealing with. In a private sector campaign, key politicians would be those who play an important role in

Politicians Feel The Heat, Help Union

In Anaheim, Calif., members of SEIU Local 786 were faced with a job classification study which recommended freezing wages for about 600 city workers.

The five-member city council was deadlocked on the issue, with two members on each side and one seat vacant.

Locals of SEIU and other unions in the area joined together to help elect an anti-freeze candidate to the open position. At its first meeting after the election, the council voted not to freeze wages and fired the anti-union city manager who had promoted the plan.

In Washington, D.C., SEIU's Justice for Janitors campaign issued a study showing that major office building owners were using a city appeal system to gain huge cutbacks in their property taxes.

The report, which was featured on the front page of the *Washington Post*, showed that reduced corporate taxes threatened city services and shifted the tax burden to other D.C. residents.

As a result, politicians in the city began to feel increased pressure to support the janitors campaign, more churches and community groups became the union's political allies, and building owners became more aware of the political price they would pay if janitors' demands for justice were not met.

When the tax bills were sent out for the following year, the number of special deals for office building owners was substantially reduced.



Let Them Know Why You Deserve EVERY OTHER WEEKEND OFF

The County Says:

"No, you can't have every other weekend off because it will cost us more money for floaters to cover weekend shifts."



We Say:

"While it will cost a little more for weekend floaters, there are very good reasons why they should find the money."

Let The County Know Why You're Worth It Send a Letter to the Board of Supervisors

We want every LVN, RN, Nursing Assistant, Respiratory Therapist and Housekeeping Worker to write a letter to the Board of Supervisors, to let them know why you need and deserve to have every other weekend off. They need to know that everyone supports this idea.

In your letter you should mention things like:

- It's only fair! Highland workers already get it. Why not Fairmont?
- How your present work schedule keeps you from spending time at home with your family. Mention specific child care problems that could be eased with an every other weekend off schedule.
- Private hospitals have it. Some people won't take a job at Fairmont because of the schedule - which worsens the County's ability to recruit nurses during a nursing shortage.
- Mention anyone you know who left Fairmont because of the bad schedule.

See other side for supervisors' addresses and sample letter → →

SEIU Local 250
2417 Mariner Square Loop, #125
Alameda, CA 94501
865-6645



SEIU Local 616
337 17th Street, #204
Oakland, CA 94612
452-2366

Even sympathetic politicians need to know that members are organized to use pressure to support their demands.

writing or enforcing laws and regulations that apply to that employer or in providing public subsidies, grants, tax credits, or other funding.

Mobilizing political pressure generally requires organizing union members and allies to take action. Even politicians who are sympathetic usually need to be *pressured* into introducing legislation, holding hearings, speaking at rallies, or making public appeals for a fair

settlement. Some pressure tactics may include . . .

- **Mass lobbying.** Large numbers of members, their families, and other allies can crowd into the buildings where politicians have their offices to make their views known. The visit should be orderly, but if there are more people than can fit into the politician's office, so much the better.

A few rank-and-file spokespeople—not just top union officials or staff—should be chosen ahead of time to express the group's feelings. Through applause after they speak and by carrying signs, others can show they support those who have spoken for them.

The politician may be presented something as a symbol of workers' concerns—a tool of the workers' trade, a copy of a report backing up the union proposals, or a humorous gimmick that makes fun of management's position.

- **Demonstrations/rallies** held near the job site, with politicians invited to speak, or near where the politicians have offices. (For tips on organizing rallies, see page 3-14.)

- **Petition campaigns** aimed at politicians or aimed at the employer with copies presented to politicians to show workers' concern.

- **Active use of the news media** as described elsewhere in this part of the manual.

- **Incorporating the political/legislative issue into the ongoing community outreach program.**

Pressure On Individual Officials

One way to encourage management decisionmakers to be more reasonable is to make life more difficult for them as individuals.

This kind of strategy is most effective if you can identify the key individuals with the power to bring about a settlement. These might include top executives, negotiators, labor relations directors, stockholders, or members of the board of directors.

Pressure on these individuals can take several forms.

Disruption

Key management officials may find that they or their staffs are unable to do their normal work because they must spend so much time responding to the union campaign.

Tactics such as mass visits or sit-ins in management offices or large numbers of phone calls protesting management practices can help make top officials long for labor peace.

Publicity in the community

Many top management officials care about their image as individuals in the community and among business associates. They may not want publicity about their involvement in controversial policies or activities.

If they have built a good reputation through involvement in community service or religious organizations, for example, both they and those groups may find it potentially embarrassing to be linked to racism, sexism, exploitation of immigrants, or proposals that would take money out of the community for

the benefit of distant stockholders.

Leafleting outside meetings where they are speaking, their homes, or events sponsored by community organizations they are tied to are some ways to make sure their friends, neighbors, and associates are aware of the controversy.

Investigations of individual managers

It may be a violation of blackmail and extortion laws to threaten management officials with release of "dirt" about them if they don't settle a contract. But there is no law against union members who are angry at their employer deciding to uncover and publicize factual information about individual managers.

Managers usually argue in negotiations that employees must work harder, be more responsible, and help cut costs, and that there is no need for new worker rights to protect against management abuses.

With those claims as background, it can be interesting to investigate individuals on management's side in such areas as . . .

- **Abuse of employer funds.** If they know you are looking for it, your own members and other sympathetic employees may be able to provide this information.
- **Involvement in lawsuits,** as shown in records on civil, divorce, and criminal cases kept at local courthouses.
- **Membership in clubs that discriminate** against women or minorities.

Local newspapers or social directories available at public libraries may provide leads.

- **Ties to other businesses which have been involved in controversies,** as shown in public records on property ownership, partnerships, and incorporators of businesses.

- **Controversial activities in past jobs.** The employer might provide an interested reporter or student with resumes for particular officials. Do offi-

cial's claims about their backgrounds hold up to investigation? Why did they leave previous jobs?

- **Links with politicians.** Federal, state, and local election agencies usually have information on campaign contributions. Are certain management officials involved with unpopular politicians? Have management officials given money to politicians and received favors in the form of grants, tax breaks, or contracts?

Workers' Role In Researching An Employer's Pressure Points

The advantages of involving workers in research which were discussed in Part 1 of the manual are particularly true of research on employer pressure points.

An important research technique is to interview workers and family members about employer practices and individual management officials. Often, workers know more useful information than they realize. An experienced SEIU leader, assisted by members who are being trained to do research, should ask workers questions like the following:

- Has anything happened at the work-site that management would not want customers, government agencies, or upper management to know?
- What outside businesses or other activities are management personnel involved in?
- What tensions are there between particular managers?
- What local controversies have the employer or particular managers been involved in?
- Have there been disputes between the employer and customers or suppliers?
- Has the employer been visited by inspectors from government agencies or insurance companies?

Workers being interviewed on subjects like these should be encouraged to report any leads they may have, even if what they have heard is only rumor. Clearly, no information should be circulated by the union unless it has been investigated and proven. But often that investigation will show that there is at

least a grain of truth in many rumors.

In addition to helping to interview other workers and family members, volunteer researchers can help staff by talking to . . .

- Disgruntled supervisors or workers who are not represented by SEIU—while being careful not to say anything that shouldn't get back to management.
- Friendly attorneys in the community who may know about an employer's legal problems or have inside information about management plans or personnel.
- Friendly public officials, such as tax assessors, health and safety inspectors, or members of the city or county legislative body.
- Friendly journalists who may have investigated the employer in the past and who may know more than has been published or broadcast.

Using Research By Students

College students who come from union families or are interested in getting experience as interns with the union may be able to help research an employer's plans. Often, employers will talk more openly with a young person who appears to be easy to impress and not involved with the union.

Of course, some employers have discovered this research method as well, so carefully check out anyone who approaches the union offering to help.

Strikes

A strike, like any other pressure tactic, should be used only when you have done the necessary planning and analysis to insure that it has a good chance of working.

In many situations, you have a number of obstacles to overcome in planning a successful strike.

- The employer may be a large private company with many other operations to provide financial resources needed to withstand a strike.
- High unemployment in the area may make finding strikebreakers easier.
- New technology in the workplace may make it easier for management personnel to keep operations running.
- Courts probably will be quick to

issue injunctions against mass picketing and most strikes by public employees.

- Public opinion often can be turned against “greedy” union workers who are disrupting service to customers or the general public.

These obstacles don’t necessarily mean that “unions can’t win strikes anymore,” however. Many SEIU locals have won strikes in recent years—in some cases by using innovative ways of striking—and others have won good contract settlements in part by threatening effective strike action.

In addition to the general principles about pressure tactics discussed at the beginning of this part of the manual, the following may be helpful in planning a strike.

SEIU locals have won strikes in recent years through good organization and innovative tactics.



Strike Planning

1. Make sure workers understand that they made the decision to strike. Using the two-way communications tools discussed in Part 2 of the manual, make sure that workers understand that they determined the bargaining goals, have chosen and tried less drastic pressure tactics, and now are in control of the strike decision.

Locals often take a strike authorization vote before a strike becomes necessary. The vote involves the membership at an early stage in considering the strike alternative and sends a message to management about the consequences of not reaching a settlement. While the union leadership could call a strike later based on the authorization vote, many locals go back to the members for a specific strike vote to demonstrate further that the members are the ones choosing to take action.

Depending on the unit, you may take a strike vote at a meeting, where it is easier to build unity and to answer questions. But there also are advantages to conducting the strike vote at convenient polling times and places near the work-site or even by mail. Management will try to describe the strike as being called by "the union," local officers, "a small group of hotheads," or the International union. Going the extra mile to make sure everyone feels they had the chance to vote may help insure that this charge doesn't ring true.

Steps to get a higher turnout also will give you a better picture of your true level of support.

Another way to emphasize workers' role in the strike decision is to avoid statements to members or the public



WHY SHOULD I STRIKE?

I'm tired of flooding to wards that I know nothing about!
I'm tired of covering for the loss of nursing attendants and bedwashers!
I'm tired of covering for the loss of clerical help!
I'm tired of covering for the loss of housekeepers!
I'm tired of working harder and getting 22% less than the private sector!
I'm tired of giving my patients less than Quality Patient Care!

BUT...SHOULD I STRIKE?

YES. We've tried informing County Citizens through media campaigns!
YES. We've tried reasoning with the County Board of Supervisors!
YES. We've tried the postcard campaign!
YES. We've tried international pickets and noon time rallies!
YES. We've tried the blue-sheet campaign to address critical understaffing!
YES. We've tried sick-outs and worksite actions!
YES. We've tried pulling pressure on middle management to give us a fair raise!
YES. We've tried to negotiate with the County for a Quality Contract!

YES. We've tried everything else... What else can we do?

We are QUALITY NURSES and we demand a QUALITY CONTRACT for QUALITY PATIENT CARE!

that say that "such-and-such SEIU official has announced that a strike will begin at midnight on Monday." Instead, say that "a strike called by the members of SEIU Local X will begin at midnight Monday."

2. Build up to a strike through gradual escalation, as discussed earlier in this part of the manual.

It's easy for the most active union leaders to have an inaccurate picture of the willingness of other union members to take action—to mistakenly say either that the membership is ready to strike or that the membership isn't ready for anything.

Instead of using a strike to test membership determination, see how ready members are to take action by trying less risky tactics first.

Escalating tactics building up to a strike also put added pressure on management to settle. For example, workers

If workers have been personally involved in less drastic pressure tactics and have seen management fail to negotiate seriously, they are more likely to be ready to take the next step.

in one local posted a strike countdown calendar on the union bulletin board, marking off each day as contract expiration approached, and held weekly strike benefit fundraisers. These activities made the strike threat increasingly real to supervisors and higher management officials.

3. Consider a variety of tactics to keep the employer off balance (but be sure to consult with union attorneys first). For example, SEIU members have had success in some situations with “rolling strikes” in which workers at different locations of the same employer went on strike at different times. Operations are disrupted yet the employer cannot plan for replacements and workers lose little income.

A rolling strike also allows you to strike first at locations where your support is strongest and build momentum for action at other places.

In “selective strikes,” certain operations of an employer are targeted because strike action there would cause the most disruption. Other workers continue to work and to provide financial support to the selective strikers.

Where members have been enjoined by a court from mass picketing, family members or community supporters to whom the injunction did not apply sometimes have conducted picketing of their own.

Some workers also choose to engage in civil disobedience, such as occupying their workplace or the offices of management officials until a fair settlement is reached.

Innovative tactics require advance

consultation with legal counsel so that everyone understands the possible consequences and the degree of support the union can and cannot provide.

4. Give proper notice as required by the National Labor Relations Act and your contract. If the employer is a healthcare institution, meet the legal requirement to give 10 days’ advance notice of a strike or picketing. (*See Part 4 of the manual for details on notice requirements.*)

5. Plan in advance what else you need to do besides striking. It can be disastrous to launch a strike, decide after a few weeks that it isn’t going to bring management to its knees, and then start looking for other ways to pressure the employer.

A strike should be viewed as only one of a combination of tactics. Planning should be done from the start on the other tactics discussed in this part of the manual, including other kinds of economic pressure, community outreach, legal and regulatory pressure, and political and legislative strategies.

6. Choose your timing carefully. If you must strike, the timing should be dictated not by management but by what is best for union members.

Pick a time when there will be the least strain on workers (not during December’s holiday season, for example) and when the employer will be most vulnerable. For instance, you might want to strike . . .

- Building services companies when they are about to renew their contracts with building owners.

- Healthcare facilities when they are about to be inspected for certification or in the early fall when patients seek medical care they postponed during the summer.
- Educational institutions at the beginning of terms when they are enrolling students.
- Retail sales companies during the holiday shopping season.
- Public employers when key politicians are up for re-election.

Timing for future strikes should be considered when settling on the expiration date of a new contract. If the expiration date you have now is not favorable, consider extending the agreement or working without a contract until a better time to strike.

7. Encourage workers to plan how to make themselves as hard to replace as possible. For example, if workers have created their own procedures or devices for getting the job done, there is no reason why they have to leave them behind. In institutions and offices where records are kept on computer, supervisors and other replacement personnel may find it difficult if files and codes are understood only by the regular work force.

8. Prepare workers for employer tactics during a strike. Tell them in advance that . . .

- The employer will probably try to test workers to see how long they are willing to strike. If management feels that workers are expecting to strike only for a few days, it will wait that long and watch for signs of low morale.

Therefore, **union leaders and members should not launch a strike unless they are prepared to stick with it for a long period.** In many cases, management will not reach a settlement until it is convinced that union members will not cave in anytime soon.

- The employer will probably try to provoke picket line incidents in order to obtain an injunction against violence or “mass picketing” by large numbers of strikers. Strikers should strongly discourage strikebreakers from crossing, but should not allow themselves to be goaded into actions—such as destruction of property or threats of violence—that will make it easier for the employer to get an injunction.

Workers should assume that employers will be able to obtain an injunction, and plan a response ahead of time. What will be the cost to the strike of obeying the injunction and making it easier for the employer to continue operations? What will be the cost of disobeying the injunction and facing very large fines and even jail terms?

- They may lose not only pay but benefits such as health coverage, vacation, and sick leave. (You should research this to find out what the employer can legally cut off. Look at the actual contract and benefit plan language.)
- The employer may try to replace strikers. If the strike is legally determined to be an “economic strike” over contract demands rather than an “unfair labor practice strike” over the employer’s refusal to bargain in good faith, the employer could make any replacements permanent. This would mean that strik-

ers would not have to be rehired until vacancies became available.

- The employer may attempt to directly communicate with workers through letters or contacts by supervisors. These communications may in-

clude a distorted explanation of the bargaining positions of management and the union and may include threats and promises to workers.

- Since union members who cross authorized picket lines are in violation

The Law On Replacing Strikers

Whenever possible, strikes should be called to protest unfair labor practices (ULPs) rather than to support demands for higher pay and benefits. Under the National Labor Relations Act . . .

- **Workers who strike over unfair labor practices** which the union can prove to the NLRB—such as refusal to bargain in good faith—have a right to get their jobs back from replacements when the strike ends. The employer must lay off or fire replacements if necessary to make room for returning strikers.

- **Workers who strike for a better contract** (economic strikers) must be reinstated if their jobs were not taken by permanent replacements—for example, if the company hired a strikebreaking firm to supply temporary labor.

An employer does not have to make room for economic strikers by firing permanent replacements, but when openings become available, the company must hire the strikers unless they have found comparable jobs elsewhere or there is some strong business reason why they can't be hired.

The employer does not have to rehire any strikers who take part in illegal activity or strike misconduct, such as intimidation and coercion of workers attempting to cross a picket line. The NLRB has even allowed employers to refuse to rehire strikers who made serious *verbal* threats to other workers.

Because workers conducting an unfair labor practice strike have more rights than economic

strikers, the union must be very clear at every step about the reason a strike is being called.

- Officials speaking at union meetings where a possible strike is discussed must make clear that ULPs are the strike cause.

- The strike resolution adopted by union members should say that, "Whereas (*employer*) has engaged in unfair labor practices, the members of SEIU Local _____ hereby call a strike, to continue until such time as management stops engaging in unfair labor practices and negotiates in good faith with our union . . ."

- Picket signs should say, "(*Employer*) Unfair To Organized Labor."

- All printed materials, such as newsletters, leaflets, and posters, should identify ULPs as the reason for the strike.

A strike can start out as an economic strike and then be converted to an unfair labor practice strike if the NLRB upholds ULP charges against management. But **workers should never base campaign strategy on the assumption that ULP charges will be upheld**, since the NLRB often rejects charges that seem crystal clear to the union. The fact that union members call their strike an unfair labor practice strike does not make it one in the eyes of the law; only the NLRB can do that.

(*More information on how to identify and document employer unfair labor practices is contained in Part 4 of the manual.*)

of their duties as members, the employer will encourage workers to resign from the union in order to avoid possible fines by the union.

Sometimes union leaders feel that they shouldn't prepare workers for employer tactics because such talk might scare people. But SEIU locals have found that workers are less likely to panic when the employer's counterattack begins if they know what to expect.

9. Have a plan for what it will take at the bargaining table to settle the strike, as discussed in Part 4 of the manual.

10. Set policy in advance on union-provided legal representation for strikers. For example . . .

- Will it cover members only or members' families and supporters invited to take part in picketing or other actions?
- Will it cover unauthorized actions?
- Will the union arrange bond? To what limit, if any?

11. Encourage workers to learn what they can about the employer's specific strikebreaking plans, including . . .

- Professional firms that may be used.
- Strategy for recruiting strikebreakers.
- Plans to stockpile supplies or finished products.
- Plans to transfer struck work to other locations.
- Instructions to supervisors for operating during a strike.

This information can be gathered from workers in a position to know, management officials, members of other

unions, and suppliers.

If strikebreakers may be used, check to see whether your state has any laws requiring employers to give notice before using strikebreakers, prohibiting bringing strikebreakers across state lines, or imposing any other restrictions or requirements on the use of strikebreakers.

12. Obtain official strike sanction from the International union and from the AFL-CIO central labor council. Approval by the International is required under the SEIU constitution, and sanction by the labor council means that other unions in the area must respect your picket lines as permitted by law.

Contact the SEIU Field Services Department if you don't have the appropriate form for requesting strike sanction from the International.

13. Send delegations or have members phone to let employment agencies know not to refer anyone to the employer during a strike.

14. Make plans to collect dues directly from workers. It is in workers' interest to keep the union as strong as possible during a strike. If a few members need to postpone payment until the strike is over, their request can be handled through the mutual support committee.

Note: Your dues collection plan should be ready as soon as the contract expires in case management claims you have reached impasse and imposes its final offer, including taking away dues check-off.

Mutual Support Committee

The Mutual Support Committee (or Hardship Committee, Survival Committee, or Financial Support Committee) coordinates efforts to . . .

- **Organize workers well in advance to save money in case of a strike.**

Sample Mutual Support Policy

Benefits

1. No funds will be available until two weeks after last paychecks are received. (Exceptions, if any, must be approved by the Mutual Support Steering Committee.)
2. To receive any funds, must be a member and must be fulfilling all strike duties as shown by records of picketing or committee work.
3. Must have exhausted all other resources.
 - Public benefits.
 - Community resources.
 - Bank accounts.
 - Credit cards.
 - Stocks or bonds.
 - Other job or business.
 - Friends and relatives.
4. Priorities:
 - Two people from household on strike.
 - Sole support of family.
 - Families with most dependents and smallest paychecks.
5. Maximum benefit: \$_____ per week.

Administration

1. Only the Local Executive Board has authority to decide overall policy.
2. Only the Mutual Support Committee has the authority to decide benefits in individual cases. Decisions must be made by no fewer than _____ members of the committee.
3. The Mutual Support Committee will provide a specific accounting for all spending to the Local Executive Board at least once per week.
4. All information provided by individual members shall be kept strictly confidential by the Mutual Support Committee.

Workers should be told that strike benefits will not make up for all of their lost income and they will need financial savings of their own. Point out that if the employer knows people are saving, a strike will be less likely.

If the local does not have a defense fund, it should establish one. Establish guidelines for contributions and benefits ahead of time so there is no confusion during a strike.

- **Meet with management to figure out how strikers will receive paychecks they may be due for pre-strike work.** Be prepared to take quick legal action if the employer attempts to delay those payments or to insist that workers come in for some propaganda along with the paycheck.
- **Contact local businesses, banks, and credit unions about allowing late payments in the event of a strike.** By doing this *before* a strike begins, you can both put pressure on management and explain to the community the issues and your efforts to resolve them without a strike.
- **Identify needy families from the unit who will need special assistance, and find volunteers to help them.** As the saying goes, a chain is only as strong as its weakest link. If some members cannot afford to stay on strike, that becomes everyone's problem.
- **Prepare a guide for workers on how to obtain public benefits, surplus food, or support they or their families are entitled to.** SEIU staff or the local AFL-CIO central labor council can help you obtain that information.

Picket Committee

This committee must carry out the following duties or make sure that other committees are set up to do so:

- **Setting up a schedule for picketers.**

Factors to take into account include the following:

- Sharing the burden fairly.
- Taking individuals' family responsibilities into account to the extent possible.

- Using natural social groupings (people who know each other and work together, for example) so picket line duty will be more comfortable and pleasant. (On the other hand, picket duty can be an opportunity to make workers from one department or work area more familiar with the concerns of workers from other areas.)

- Mixing more experienced and less experienced union members to insure

Sample Strike Duty Survey

In order to win our strike, every member must take part in picket duty.

This survey will help your picket committee make the best use of your skills and interests and make your picket duty assignment as convenient as possible.

Please return it to _____ by _____

Your name _____ Work location _____

Normal hours of work from _____ to _____

Home mailing address _____

Home phone number _____

Tell what times you prefer for picket duty:

1st choice (Check one) Days Evenings Nights

2nd choice (Check one) Days Evenings Nights

Can you help with the following?

Driving (delivering food, supplies, and newsletters)

Supplying a truck or van for that purpose

Doing office work

Child care in your home in another location

Other ways you would like to help _____

Other members of my family can help on: (days and hours) _____

that individuals who can provide leadership are always present.

- **Choosing picket captains** to be in charge of each picket line at all times. Picket captains should be respected, experienced union leaders. Choosing them provides a good opportunity to show each subgroup in the unit that their participation is valued.

Picket captains must be given total authority to remove picketers who engage in improper conduct. At the same time, worker complaints about picket captains should be investigated and resolved quickly before morale is affected.

Picketers should be told to pick a captain if for some reason their designated captain is not there.

Picket captains should report to strike headquarters by phone or in person after every picketing shift. (See *check-list*.)

- **Training workers who will be picketing.** A brief training session should cover the schedule, guidelines for conduct on the line, and the need to refer reporters or any other visitors to workers designated for that purpose.

Special training should be held for picket captains to stress their responsibility to maintain order and report on incidents, attendance, and suggestions or questions from workers.

- **Making sure that supplies such as signs and food are at the right location at the right time.**

- **Identifying nearby restrooms and pay phones** so picketers don't have to enter struck buildings for either pur-



pose. In some cases, a rented portable toilet facility may be necessary.

- **Organizing cooperative child care and transportation** as needed.

- **Planning for picket line activities.** For example, a basic list of chants should be prepared which will be fun to say and will express workers' feelings about strike issues.

If workers think about picket line chants ahead of time, they are more likely to develop some that will be fun to say.

Chant Sheet

We work hard and that's O.K.
But in exchange we want FAIR PAY

Hey...hey...Ho...ho
RN staffing's got to grow

They say CUT-BACK... We say FIGHT BACK

2.....4.....6.....8
Make the County NEGOTIATE

We're gonna BEAT...BACK...the County attack
We're gonna BEAT BACK the County attack

We're fired-up, CAN'T take it no more
We're fired-up, WON'T take it no more

Nurses UNITED.... will never be defeated

I don't know but I've been told
The County don't like it when we won't fold
(The County don't like it when we get bold)
(The County can shove it, we won't be sold)

PATIENT CARE that's our goal
For less than that we won't be sold

Checklist for Daily Phone Reports By Picket Captains To Strike Headquarters

- How many pickets appeared?
- Did any workers or replacements cross the line? If so, how many? Who?
- Did news reporters, management officials, or unidentified outsiders visit or observe the picketing?
- What questions should be answered or topics covered in strike bulletins?
- What factors are strengthening or weakening worker morale? If morale is low, what should be done?
- Which workers, if any, need special attention from the Hardship/Mutual Support Committee because of financial problems or family difficulties?
- Are any supplies needed?

Someone should be prepared to teach picketers simple labor songs that fit the situation. Often, the best way to come up with songs is to take popular songs everyone will know and write new lyrics. Try to identify a worker, family member, or union supporter who could come to the picket line with a guitar.

- **Keeping accurate records on who fulfills their picket duty.** Locals normally make picket duty a requirement for receiving strike benefits, and that rule cannot be enforced without accurate records.

In addition, failure to show up for duty as reflected in the records may signal either a lack of support for the strike or personal problems (such as lack of child care or transportation) that should be dealt with.

- **Establishing communication with law enforcement officials.** Attempting to get to know them probably won't help if the employer demands action against picketers, but it might at least mean that you get some advance warning of police plans.

- **Making sure the picket line always includes a camera** and someone trained to use it in case you need independent evidence of incidents or employer tactics.

If you want to publish photos of workers taken at the picket line, be sure to obtain their permission.

(Management also has the right to photograph or videotape picket line incidents, but it is an unfair labor practice for management to take pictures of legal, peaceful picketing.)

Picketing separate entrances or "gates"

If the employer sets up a separate entrance for workers, suppliers, or customers of a neutral employer (for example, a construction subcontractor at a hospital), the NLRB says you cannot picket those other "gates."

The only way to get around this

requirement legally is if the other gates are "tainted" because you catch your employer using them for its workers, suppliers, customers or other people the gates were not intended for. Photographs are the best evidence.

Sample Format For Weekly Picketing Reports

Location _____

Covering Monday _____ through Sunday _____

Shift: from _____ to _____

Picket captain _____

How many people working? _____

Who are they?

Name	Date	Time Started	Time Finished
------	------	--------------	---------------

Problems at picket line? _____

Suggestions? _____

Supplies needed? _____

Pickers:

Name	Home phone	Mon	Tues	Wed	Thurs	Fri	Sat	Sun
------	------------	-----	------	-----	-------	-----	-----	-----

(Use additional sheets if necessary)

Please turn in to strike headquarters by Friday at 6 p.m. Thanks!

Sample Rules For Picketing

Picketing is an important activity. By picketing, we protect our jobs, build our own unity, and send a message to management and the community.

Misconduct on the picket line by a few individuals could cause us to be hit with court injunctions and could damage our image in the community.

Please observe the following rules. The picket captain has the authority to enforce these rules, and to remove anyone who does not follow them.

- Report to the picket captain when you arrive and when you leave. Records will be kept of all picket duty performed.
- Be on time. If each group of pickets arrives on time, then everyone will be able to leave on time as well.
- Don't leave your post until the next group is there to relieve you.
- You may be asked to change location or shift depending on our needs. Please cooperate. These requests are made to keep our lines as strong as possible.
- Talk to people who cross the line and try to convince them to support the strike. Think about what would convince you if you were in their shoes.
- Refer any strangers, media people, employer representatives or police to the picket captain, even if they appear friendly. Statements made by uninformed pickets may be used against the union in court or in the news media.
- Report any unusual incidents to the picket captain, who in turn makes reports to strike headquarters.
- If rumors threaten to disrupt the picket line, ask the picket captain to check them out with strike headquarters.
- Wear comfortable clothing and shoes, and be prepared for the weather.
- Rotate rest periods so the line is always strong.
- Do not enter the struck facility for any reason.
- There will be no drugs, no alcohol, no weapons, and no violence on the picket line.
- Don't litter or lounge in front of the building. Plastic trash bags will be available. We want members of the community to respect us for what we stand for and the way we conduct ourselves.
- In an emergency, call the following number: _____

The Law Against Targeting A 'Secondary' Employer

According to the U.S. Supreme Court, a union with a dispute with one, "primary" employer can boycott or leaflet customers of another, "secondary" company. However, the union cannot conduct coercive picketing designed to physically discourage customers. This may be interpreted to mean no marching, chanting, or carrying of signs.

A union can engage in normal picketing or boycott activity . . .

- If the secondary employer is handling "struck work" that wouldn't have been farmed out if it weren't for

the strike against the primary employer.

- If the two employers are so closely allied that they have common ownership and control over operations and labor relations policy.

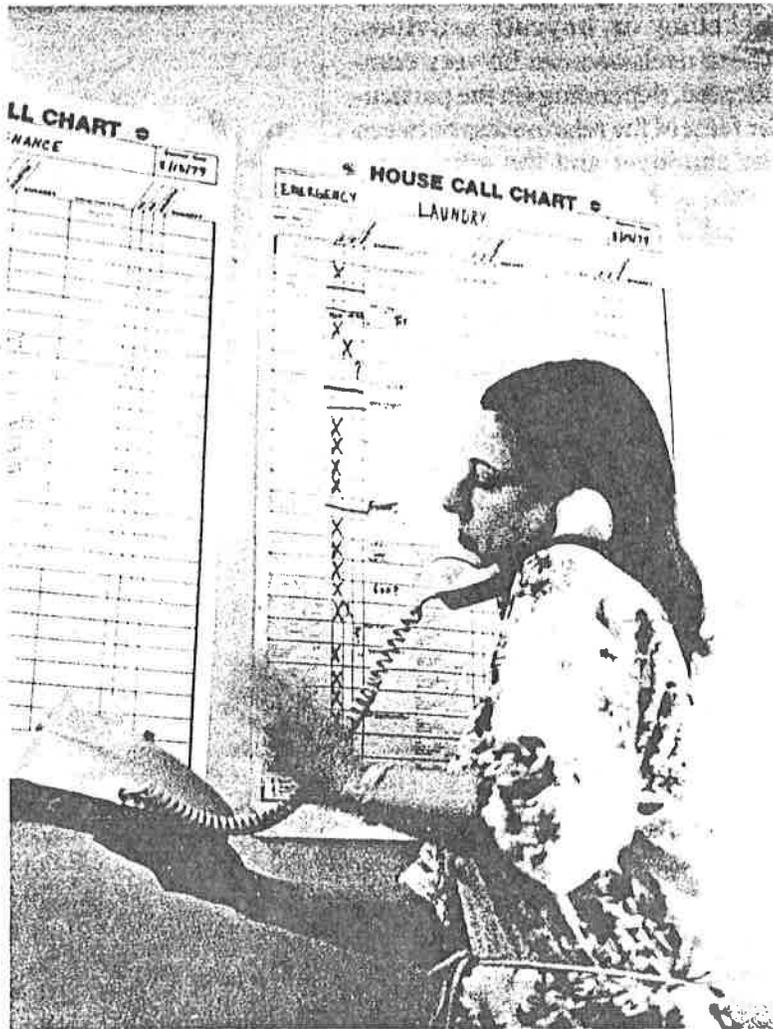
Consult experienced organizers and attorneys when facing decisions about potential secondary picketing or boycott activities. These decisions can be very complicated, depending on the particular facts of the relationship between the employer and the other company.

Keeping A Strike Strong

- **Maintain a system for contacting each striker by phone or in person** as if you were in an organizing drive. Home visits or a phone tree often are the only reliable way to prevent the spread of rumors and to discover problems or doubts individual members may have.

Weekends are the most important time to renew contact with each worker, since most people who decide to cross the line do so on Mondays.

Targeted home visits and phone calls can be as important in a strike as in any organizing situation.



- **Publish daily strike bulletins.** Daily one-page bulletins help you control rumors, answer questions, and keep workers from losing sight of the larger effort the picketing fits into.

Bulletins may include cartoons or jokes about management, examples of ways that members are helping to keep the strike strong, and information about progress in negotiations, bargaining issues, support received from other organizations, and the need for volunteers for particular tasks. The color of the paper should be changed each day.

- **Arrange frequent picket line visits by union leaders.** Even if there is no progress to report, negotiating committee members, officers, and contract campaign committee leaders must take turns visiting the picket lines to boost workers' morale, answer questions, and stay in touch with what workers are thinking.

If leaders don't join the picketing, workers feeling the stress of being on strike may take out their frustrations on their leadership: "Wonder what they're doing anyway? You don't see *them* walking around out here in the rain . . ."

- **Publicize a phone number workers can call for the latest information** so they don't have to rely on rumors.

- **Use the strike as an opportunity to provide union education for members and their families.** For example, a strike may be an occasion when they have the time and interest to learn how to produce leaflets or to speak to community groups, attend workshops on

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Strong Lines, Good Spirit



Posing on the line...

The last day of picketing! And what a success! Local 250 members came out in droves to stand up for our rights. They' they' for the Health Care Team and the 'Get to Get'. We have a right to a strong Union and we will fight to defend our health insurance and job here everyday of the strike.

Monitoring Patient Care

We are concerned about the effect of the strike on the operation of the hospital and on the quality of patient care the hospital is able to provide. Although the Affiliated Hospital's attorney, Karen Henry, continued to claim that "no patients would suffer," we are actively seeking the effects of the strike. There appear to be patients concerned with the possibility of elective patients wandering through the streets, potentially dangerous to themselves and others. Elective surgery cancelled. The patients will become more frequent, the more more frequent and the less more often.

Health Services Hearing

Francis Wainor, the President of the SF Board of Supervisors has called a hearing to assess the impact of the Local 250 strike and the upcoming strike by CNA in the Admitted and SCLU Local 250 in SF General Hospital. The hearing is scheduled for Friday, JULY 20 at 10:00 am at City Hall and the hearing will be conducted by the Human Services Committee: Supervisor Carol Ruth Silver (Chair), Supervisor Doris Wainor and Supervisor Thomas Hovan '77.

Patient Care Hotline

Please call the PATIENT CARE HOTLINE - 441-2821 to relay any information about patient care issues and unsafe conditions within the hospital. Surveys are being distributed inside and outside the hospital to document patient concerns by our hospital co-workers (staff) and patients (family). Please help us to collect information for the hearing by encouraging people to fill these out.

On The Line

Frequent strike bulletins help build momentum and respond to management tactics.

pay equity or health and safety, or take part in extra stewards' training.

- Use entertainment to educate and keep up spirits. You could show labor-

related films and videos or arrange concerts by local musicians. Invite members of other unions and the general public as a way to build community support and raise money.

Sundays are a good time to hold such events in order to build momentum for the following week and keep workers from deciding to cross the line.

- Don't automatically assume you can't reach the replacement workers, especially if they are not professional strikebreakers. Sometimes replacements are not aware of the issues involved, and a peaceful, reasonable conversation at their home or near the job site may affect their views.

If not, stronger tactics such as picketing their homes may discourage them from strikebreaking.

Other activities which relate to strike activity—such as use of the news media and ways to generate community support—are described later in this part of this manual.

Ending A Strike

Just as *escalation* is needed to build workers up to the point where they will strike or take part in other strong contract campaign actions, *de-escalation* is needed to prepare workers psychologically for a settlement.

- Having been pushed by management into drastic action involving loss of income and a spirit of confrontation, some workers will be too angry to welcome a compromise with management—and could turn on union leaders for “selling out” no matter what the tentative agreement provides.
- If the union has used a rolling strike or selective strike, different groups of workers may be in different frames of mind. Those who have been on strike may have a more negative attitude toward a settlement because they are afraid the agreement will not be worthy of the sacrifice they have made, or they may be more eager than other workers to get the strike over. Those who have not been on strike may be eager to get their turn before a settlement is reached,

or because they didn't strike they may have less emotional commitment to continuing the struggle.

Ways to handle a settlement are discussed in Part 4 of this manual. Key points to emphasize about settling in an emotionally charged strike situation include . . .

- **Prepare workers for a settlement and start getting everyone on the same wavelength.** Some locals start sending the membership signals as soon as they realize an agreement is likely. They report every sign of movement and give workers time to get used to the idea that the strike may be over.
- **Don't formally reach agreement until you have had a chance to let your key worksite leaders know that a settlement may be near.** Often, workers who might otherwise have been pleased with the terms of a settlement become angered because they first hear that there is a settlement from the news media or from management officials.

How To Work With Lawyers

Most of the pressure tactics described in this part of the manual should be discussed with legal counsel during the planning stages. Employers may claim that union members are violating laws on secondary boycott, libel, slander, or extortion.

Lawyers may be able to advise you on . . .

- The risk to members of arrest, fines, or disciplinary action.
- The risk to members' dues money due to potential lawsuits or fines against the union.
- Ways to design campaign tactics to minimize the risks.

At the same time, keep in mind that the laws are written primarily to protect employers, and that our union might never have been established in the first place if our founders had not used tactics which violated those laws.

Union members sometimes must act in the tradition of Dr. Martin Luther King and Mohatma Gandhi and disobey laws which are used to enforce injustice against working people.

The job of lawyers is not to make the decisions about when and how to obey the laws. Their job is to tell you what the laws are and how they are likely to be interpreted by the courts.

Using that advice, union members and their elected leaders must then weigh the risks and benefits of potential actions. Workers often have a complicated judgment to make because they can lose *either* by engaging in unwise illegal acts or by not doing what it takes to win a fair contract.

In evaluating the possibility of legal

or disciplinary action by an employer, you should discuss not only the question of *could* the employer win but *would* the employer take action in the first place. In many situations, **employers may have strong incentives not to take legal action against workers or their union.**

For example . . .

- Disciplining workers sometimes may strengthen the determination of other workers, hurt employee morale and productivity, or cause major staffing problems for the employer.

For example, if a hundred workers stop work for five minutes as a show of solidarity, they might be in violation of their contract, but that doesn't automatically mean that it will be in the employer's interest to fire them and have to find replacements. The employer might have the legal right to dock them for the missed work time, but management would have to consider whether that would further unite the workers and cause significant extra paperwork.

- Legal action, no matter who initiates it, may expose an employer to the process of "discovery," which means that the union has the legal right to subpoena employer documents and witnesses in order to prepare its case. The employer may feel that revealing inside information through that process is too risky.

- Lawsuits also may mean more publicity, which the employer may not want.

- Certain acts which might technically be illegal might be seen by the public,

news media, customers, or other potential worker allies as justifiable and not something the employer should be challenging.

For example, let's say workers obtain inside information showing that the employer has polluted the environment or cheated on its taxes. Revealing that information might technically expose workers to charges of possessing stolen documents, but that doesn't necessarily mean that the employer would consider it smart to bring charges.

- Even if workers or the union might be found guilty, you have to consider what the penalty is likely to be. If a civil lawsuit might be involved, what damages could the employer actually prove and collect?

Giving lawyers the facts

Regardless of what course of action you think you want to take, give your attorney all information that could possibly be relevant before he or she gives you advice. While you don't always have to follow that advice, you do want the most informed, honest analysis you can get. You don't want a lawyer merely to tell you what you seem to want to hear, nor do you want to influence the advice by withholding key information.

Planning what lawyers say to others

In most cases, it is not a good idea to have attorneys meet with members or committees without a prior discussion between union leaders and the attorneys regarding the issue at hand. Bring-

ing a lawyer cold into a meeting of the membership or the negotiating committee can mean that the lawyer may . . .

- Only hear *some* of the facts from those at the meeting.
- Feel pressured to give advice without doing the necessary research and analysis.
- Give advice which, intentionally or not, sways people toward a decision they would not have reached in a more structured, better prepared discussion.

This is not to say that members or committees don't have a right to know what legal advice the union has received; they do. It is also not to say that lawyers should be asked to give advice publicly which is contrary to their best professional judgment; they should not. But union leaders and attorneys do need the chance to discuss that legal advice first and plan how it will be presented.

Similarly, any occasions for attorneys to speak at the negotiating table should be planned in advance. While in general union leaders should speak for themselves, there may be times when it would be psychologically useful to have an attorney make a particular point. Union leaders, not the attorney, should determine when those times are. If the attorney feels that a legal issue needs to be discussed among the union negotiators, he or she can pass a note to the chief negotiator suggesting a caucus.

If a management negotiator says to a union attorney, "What is your legal opinion on this issue?", the attorney should be instructed to say, "That is something I will discuss with my client if I am asked to do so."

Not *relying* on legal action

SEIU locals have become increasingly aware in recent years that we can rarely win against employers by relying primarily on legal strategies such as filing charges with the National Labor Relations Board.

Even if we win when we file unfair labor practice charges, for example, the penalty usually is that the employer is asked not to violate the law anymore—and even that ruling may take months or years to obtain.

Here again, you have to work with attorneys to realistically discuss not just what the law says on paper but how it is likely to be enforced and how long that process is likely to take.

In general, workers should be told from the beginning that, while legal charges do need to be filed and documented, workers' own activities are the heart of the campaign and they cannot rely on lawyers to win for them.

Evaluating lawyers

The best way to evaluate lawyers is to consult others who have worked with them in the past.

Did they prove to be committed to the labor movement, so that they had a personal interest in helping the union

figure out how to achieve its goals?

Did they clearly explain in simple language the choices and possibilities, and leave it to the union to decide what action to take?

Were their cost estimates accurate?

Were they available when they were needed?

Was work that should be done by experienced attorneys in fact done by them, or was it handed off to less experienced lawyers to save the firm money?

Do they have experience with the particular legal questions on which you need advice? For example, do they have the expertise you need on immigration law or on enforcing fair labor standards rights for overtime pay?

Have they given advice based on the interests of the client and not their own self interest? For example, do past clients feel they were advised to embark on a long, complicated legal road in part because it would mean a lot of paid work for the lawyers?

Or, in contrast, did a lawyer on a fixed retainer or staff salary give cautious advice perhaps because of a desire to avoid the potential workload a client's proposed strategy might involve?

If you need help finding the right lawyer, the International Legal Department may be able to help.

Community Action

Often, an SEIU local is not strong enough by itself to take on the employer and needs allies in the community.

Allies can provide . . .

- Information.
- Money.
- People to take part in actions.
- Moral support.
- Publicity.
- Political pressure.
- Influence with the employer or its sources of funds.

Each local should have an ongoing community action program which identifies potential allies and builds ties to those groups or community leaders. If potential allies believe you are only interested in working with them when you are facing a crisis, you may not get much help.

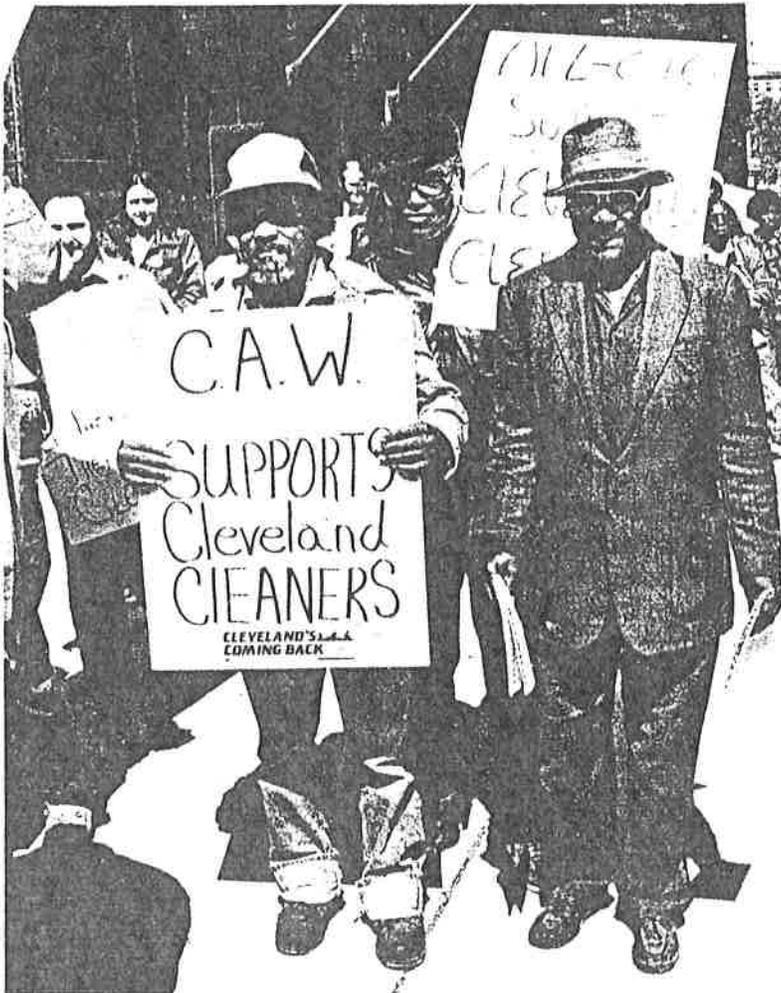
If, on the other hand, you have proven to be a reliable friend, ready to contribute what you can to community causes in terms of money, volunteers, use of a union hall, or statements of support, you will get more enthusiastic help when you need it.

To start, SEIU locals should be active in the AFL-CIO central labor council in their area. Taking part in council activities can be a good way to meet other unionists and establish ties that will prove useful later.

1. Information

Other organizations in the community may already have disputes with the employer and may already have done research and organizing you can take advantage of. For example . . .

- **Other unions** which have problems with the same employer.
- **Renters' organizations** which may be able to share information and strategies in dealing with a building service company.
- **Groups of students, people who receive government benefits, or other "consumers" of public services** who may be organizing to demand improved services or benefits.
- **Patients' rights groups** which may



be able to join forces in pressuring healthcare institutions.

- **Environmental organizations** which may already know about problems the employer has with pollution or permits.

- **Consumer groups** which may have complaints about a company's practices affecting price, quality, or other issues.

- **Organizations of women, minorities, poor people,** or others who may be challenging employer practices involving discrimination.

- **Religious groups** which may be concerned about the employer's mistreatment of communities in the U.S. or in other countries.

- **Senior citizens** who are particularly sensitive to employer practices which mean higher prices, taxes, or fees.

- **Professional associations** of doctors, nurses, social workers, or lawyers whose work or professional standards are affected by the employer's policies.

- **Civic groups** such as the League of Women Voters who may feel that employer practices are not in the community's interest.

2. Money

- **Joint funding.** If you find allies who want to join in pressuring an employer on one or more issues, they may be willing to help finance a joint campaign.

- **Emergency aid.** In addition to boosting strike funds or helping to finance other contract campaign activities, donations from allies are helpful for building morale.



Religious leaders can add inspiration and credibility to the campaign.

You are far more likely to get fundraising help if your local contributes money or volunteers when unions and community groups in your area have difficult battles on issues most important to them.

One effective emergency aid tactic is an "adopt a striker" program. Other organizations can be asked to link groups of their members with striking families who need food, clothing, and moral support.

3. People to take part in actions

Other unions or community groups may be able to beef up demonstrations or rallies by supplying demonstrators

Sample Community Action Membership Survey

One way that we can win a good contract is to organize support from people in the community.

The most effective way is to contact people and organizations our members already know.

Please take a few minutes to answer these questions and return this survey to your bargaining support team member.

1. List any community organizations in which you or your family are active (such as churches, PTA, ethnic clubs, political advocacy groups, senior citizen or service organizations, etc.)

Organization	Your role (member, volunteer, officer?)
--------------	---

_____	_____
_____	_____

2. Do you know other people in the community who would be good to contact? (reporters, other unions, politicians, community leaders, celebrities)

Name and organization	Telephone (if known)
-----------------------	----------------------

_____	_____
_____	_____
_____	_____

3. Would you be willing to help contact one or more of the people or organizations you have listed to explain our goals and ask for support? (A bargaining support team member could do this with you.)

Organization to contact	Contact person(s)	Telephone (if known)
-------------------------	-------------------	----------------------

_____	_____	_____
_____	_____	_____

4. Your name _____

Address _____

Telephone (w) _____ (h) _____

Work schedule _____ Best time to reach _____

who are not afraid of losing their jobs, are used to confronting authorities, or have more convenient schedules.

4. A boost for morale

Often, workers feel less isolated and powerless when they see labor and community allies supporting their cause.

5. Publicity

Other organizations may have relationships with reporters which can be helpful in generating news coverage.

In addition, organizations can help you tell your story to their members through such means as . . .

- **Speakers' bureaus.** By arranging for workers to speak at meetings or rallies of other organizations, you can give your members valuable experience while building support and stronger ties between your groups. Make sure that you regularly invite other unions and community groups to send members to speak at your meetings as well.

- **Articles in organizational newsletters.** You can provide interviews with your members for newsletters of other unions and community groups. Again, you will get a better response if you have made it a practice to use space in your own publications from time to time to publicize the activities of other groups.

6. Political pressure

In a particular community, other organizations may have more political clout with public officials.

7. Influence on the employer or its sources of funds

The employer may depend directly on one of your allies for business, contributions, endorsements, or other support.

Working with allies

In evaluating allies, you must consider . . .

- Are they viewed as a group with clout by the employer? By the community? Are they seen as a reliable, responsible organization?
- Are their goals and attitudes compatible with those of your union's members?
- Can a smooth working relationship based on communication and trust be developed, or are they too likely to go off in their own direction?

If you find that you do have common interests, all allies should make clear from the start what the terms of the alliance are. If you are talking to a group about a campaign against an employer on a common issue, that group needs to know what you will do if you settle your contract dispute. If you are not committed to continuing on the other issue once you have a new contract, your allies should know that ahead of time.

Similarly, you should agree on how decisions will be made, who will speak for the alliance, who will be responsible for funding joint activities, and other issues.

Throughout a contract campaign,

you should use briefings or newsletters to keep potential allies informed about your goals and activities.

- If people have met your members face to face and discussed your campaign, they feel more of a personal commitment to help.
- Most leaders of other organizations will appreciate being kept informed so they can answer questions about your

situation that may be raised by their members.

- If people know what you are doing, they may be able to give you suggestions or offer to help.

Remember to keep presentations or educational materials brief, to tie your struggle into the concerns of the target audience, and to let your members do the talking.

Allies Join Forces With SEIU

In Cleveland, part-time workers at Cuyahoga Community College asked for community support to protest the college's refusal to negotiate a first SEIU contract.

Local labor leaders helped the workers pressure the County Commissioners who appointed a majority of the college's board members. They also reminded the college president that in the past they had negotiated management-funded training programs to be conducted at the college and had



Workers demonstrating at meetings of the Cuyahoga Community College board organized community pressure as well.

organized voter support for increased tax income for the school. A union which held conferences at the school threatened to cancel its next one.

In Kansas City and in northern California, SEIU members who work for Health Maintenance Organizations have appealed to other unions to help pressure the employer during bargaining.

In both cases, union-related health and welfare funds were major customers of the HMO. In Kansas City, the central labor council contacted management and helped bring about a settlement. In the Kaiser strike involving SEIU Local 250 in California, 100 unions wrote letters to management and about 30 funds withheld premium payments totaling about \$10 million per month.

At a number of Beverly nursing homes, workers were able to involve community residents in drives to collect blankets and food for the patients.

At a time when the union was trying to get government agencies to deny the company licenses because of inadequate care, these drives showed that union members were not the only ones concerned about mistreatment of nursing home patients.

Other Unions Dealing With The Same Employer

In addition to coordinating strategy with unions bargaining at the same time (see Part 2), you should work for the support of other unions which deal with the same employer but bargain at different times.

What can you tell them about how your fight affects their future battles? Can you assure them that your members would help them if needed in the future?

Talk realistically with them about what they might do. Could they contribute money, volunteers, and people to take part in actions? Could they apply worksite pressure, such as a work-to-rule campaign?

If you are forced to strike, could they legally honor those picket lines? They should determine their rights only after talking to legal counsel, but in general the National Labor Relations Board says that . . .

- Employees can honor a legal picket line by other workers.
- Management can permanently replace—but not fire—workers who observe a picket line by economic strikers, and cannot permanently replace workers honoring an unfair labor practice strike.
- A no-strike clause in a union contract does not mean that workers give up their legal right to observe other workers' picket lines unless the clause specifically says so.
- The law does not give workers the

right to refuse to cross a picket line out of fear for their safety, although they may have language in a union contract which does.

Even if other workers have the legal right to honor your picket lines, would their members be willing to do so? If so, could you provide those workers with emergency economic assistance?

If there are unresolved differences between your two unions over the way each of you dealt with the employer in past rounds of bargaining, conflict of interest involving jurisdiction, or natural divisions along lines of race, gender, or type of job (white-collar vs. blue-collar, for instance), try to bring those problems out in the open and show each group that those divisions will only benefit management if allowed to continue.

Another Union's Work-To-Rule Campaign Helps Janitors

When SEIU members went on strike against a building service contractor at a Brown and Williamson tobacco factory in Macon, Ga., management brought in replacements for the striking janitors.

The unionized production workers, however, refused to do anything they weren't absolutely required to do to make it possible for the replacement janitors to do their jobs.

Without the cooperation of the factory workers, the replacements had a hard time keeping track of supplies, coping with spills, and moving efficiently through the plant.

Management quickly agreed to settle the strike and to reinstate 12 fired workers with back pay.

Using The Media

Use of the media can put pressure on the employer and support all of the other tactics discussed in this part of the manual. For example, media coverage and advertising can help to . . .

- **Maintain morale among your members** as they take part in worksite activities, job actions, and/or strikes. It helps them to have their families, friends, and neighbors seeing their activities in a favorable light through the media. It also makes them feel that their activities are seen as important by the outside world.

- **Give customers, clients, investors, and others in the community reasons to cut off economic ties with the employer.** Media attention can convince the community of the justice of your cause, or can make businesses or individuals feel that they don't want to be involved with the employer while it is getting such bad publicity.

- **Encourage politicians and regulatory agencies to take actions that support your campaign or to at least stay neutral.** They may be influenced by knowing what the voters are learning from the media.

- **Encourage members of other unions and community groups to get involved in strike support activities.** They are more likely to help if they are frequently reminded through the media of your struggle.

- **Make individual managers nervous about the effect bad publicity may have on their careers and reputations.** If they see that you have the ability to use the media successfully, they may

worry that you will be able to publicize unfavorable information about their activities.

Successful use of the media also is important to counteract management's propaganda. Management will be using the media to portray the union as a greedy, outside institution which doesn't care about the community and is making trouble for its own purposes.

Communicating three key messages

To support other pressure tactics and counteract management's propaganda, your media efforts must get across three basic messages:

1. What we are asking for is fair.

Some ways to show that may include . . .

- **We are productive.**

- Vivid descriptions of our workloads (such as what it is like to work in a hospital emergency room).

- Figures that compare productivity to past years, or other similar units elsewhere.

- Figures that compare number of workers accomplishing X amount of work today vs. more workers accomplishing same or less work at some point in the past.

- **We aren't compensated fairly.**

- Salary survey showing workers are underpaid compared to other people in society who do similar jobs or com-

pared to workers who do the same job in other parts of the industry, region, or nation.

2. Management can afford what we are asking.

- Figures on size or increase in profits for private employer.
- Analysis of revenue and budget for public employer.
- Point out that the employer (if a private company) has refused to “open the books,” which it would be legally required to do if it were claiming it could not afford our proposals.
- Figures that show tiny percentage impact of our proposals on overall costs.
- Make point that better pay or working conditions might save money because of increased efficiency or reduced turnover.

3. What we want is also good for the community.

- Our proposals would mean better service or a better product (for example, by increasing staffing, reducing turnover, or improving training) or could reduce costs (such as by limiting contracting out).
- When workers are paid better, more money goes to local businesses and is paid in local taxes, supporting jobs and



Special costumes can help workers draw attention to their cause. Here, janitors protest arrests during previous demonstrations.

prosperity for everyone. Similarly, take-aways hurt the local economy—particularly when the money goes instead to stockholders outside the area.

- We’re trying to settle without a strike because a strike would be costly to the community as well as to workers and the employer.

Research sources listed in Part 1 of this manual can provide most of the information you need. SEIU International union staff also can give you advice on where to look and how to analyze and present the facts you find.

Organizing Your Media Campaign

Who will coordinate the effort?

You will need a media committee to coordinate outreach to the media and any paid advertising you decide to do. That committee should be provided training by SEIU staff and members who have experience in successful media relations, using the SEIU Practical Press Guide and this manual.

The committee should meet with the negotiating committee and bargaining support committee or representatives of those committees to discuss . . .

- Issues the union will be raising and how to explain to the media why your proposals are fair and in the community interest.
- Issues management will raise and how to get to the media first with your side of those issues.
- Pressure tactics that may be used and how media work can support them.
- The likely timetable for each step of the campaign.
- Themes and slogans that express your issues (see Part 1 of the manual).

The committee also should meet with local officers and staff to find out what funds, if any, are available for advertising.

Who will actually talk to reporters?

Reporters need someone to call for information, help lining up interviews, and quotes on short notice concerning the latest developments in negotiations.

Meanwhile, you want to make sure that the union is speaking with one voice and not giving out inaccurate or contradictory information or opinions.

People you designate to talk to the media must be . . .

- **Available to talk.** If the local president or negotiating committee chairperson are going to be in meetings a lot of the time, reporters who often work on tight deadlines will become frustrated because they can't get quotes from the union when they need them.
- **Informed about the latest developments.** Your spokesperson must be told of each new campaign development as soon as it happens—even if he or she is instructed not to give the news to the media yet. If reporters feel that they are not getting accurate or up-to-date information, they will either rely more on management's version or start going around your system to talk to individuals in the union who may not be properly prepared.
- **Someone who gives the union the right image.** To many reporters, "the union" will be the individual they talk to regularly. If you use a member instead of a staff person, and if you choose someone who is typical of workers in the unit in terms of gender and race/ethnic background, you will reinforce the idea that "the members are the union." If you choose someone who is reasonable and likeable, you make the reporters' job more pleasant and counteract stereotypes about union "militants."

Let Members Do The Talking

Members should be trained to handle contacts with the media in order to leave the correct impression that “the union” is its members and not a self-interested institution. This means . . .

- At rallies, community meetings, and other events, have members speak. The natural result will be media accounts of the event that focus more on members’ concerns.
- At news conferences and in news releases, feature members giving examples or personal stories to support the main points you are making.
- Continually offer to put reporters in touch with members to interview regarding personal experiences related to bargaining issues.

Of course, to make sure this approach doesn’t backfire you have to prepare those members to communicate a clear, consistent message. Encourage them to . . .

- Work with union leaders to develop a sheet of talking points which lists the major themes and facts the union needs to communicate. Workers should be trained to stick to those points rather than being drawn into a discussion of issues that are not union priorities.
- Stick to stories that show why the union’s bargaining positions are right—and avoid personal gripes, such as complaints about a particular supervisor, that are not relevant or will confuse the issue.



When workers are featured in media coverage, everyone is reminded that they are the union.



Members who talk to the media will be most effective if they are trained first.

- Review the union's arguments for why its proposals are fair and how they are in the public interest. Show how those arguments apply where they work.

Ways to train members to talk to the media include . . .

- Talk to them individually when arranging for them to be interviewed.
- Hold one or more training sessions at which interested members can role play talking to the media about bargaining issues. Ask members hostile questions, and give them practice developing answers which bring discussion back to the union's positive themes.
- In newsletters or leaflets describe for

members the media campaign you are undertaking, including its basic messages and where, if at all, you will be advertising.

One simple technique is to distribute or post copies of favorable newspaper articles or reduced, leaflet-sized versions of newspaper ads. By distributing this information, you make it more likely that members will . . .

- Not be surprised by questions from neighbors or friends who have seen or heard the union's message.
- Reinforce the message when they talk to others in the community.
- Feel a sense of pride and get a boost in morale.

Researching Media Outlets

Members of the media committee should compile or update a list of media outlets in the area, including mailing address, phone number, and name of reporter(s) likely to cover the contract campaign.

This information can be compiled by . . .

- Using the local telephone directory.
- Asking other unions or friendly organizations which already have lists.
- Checking listings of TV and radio programming in local newspapers.
- Visiting a large newsstand to see what local publications they sell.
- Checking with a public library to see if there is a commercially published local media guide.

The committee should ask each newspaper, station, and magazine for an advertiser's packet. The packet will give

you information not only about the cost for advertising but also about who and how big the audience is.

Rate information also should be obtained from billboard companies and bus companies if appropriate.

Committee members should develop a profile of each reporter you will be dealing with. This can be done by reviewing articles reporters have written about the union or other subjects, asking other unions or community groups what their experiences have been in dealing with particular reporters, and arranging get-acquainted background briefings with individual reporters. The more you know about reporters' experiences, personal background, biases, and work habits, the more you will be able to help them do their job and to shape your message to their way of looking at things.

Educating The Media About The Campaign

One key to improving media coverage is to *get an early start*. If you can get to know reporters and their bosses and explain your issues *before* they swallow management's propaganda, it is more likely that they will keep an open mind throughout the campaign.

• **Prepare a media packet** well in advance of the start of negotiations. Normally you would include factsheets on the following subjects . . .

□ Background on the union and its members, including who you represent, what jobs they do and how they serve the community, and how they control union decision-making through democratic processes from deciding bargaining proposals through contract ratification.

□ The history of relations between the union and this employer, emphasizing how reasonable the union has been in its proposals and efforts to reach settlements without strikes, and, if appropriate, how unreasonable management has been.

□ A clear explanation of the union's proposals, supported by the evidence discussed earlier on 1) why the union's proposals are fair and affordable while management's are unreasonable and unnecessary and 2) how the union's proposals and efforts to avoid a strike are good for the community, while management is acting against the public interest.

Ideally, the media packet should be delivered by hand at the briefings discussed below. If that is not possible, it

can be mailed to the top news executive of each media outlet.

• **Meet with top news executives** of each newspaper, magazine, and radio or TV station.

At newspapers, this often can be accomplished by a meeting with the "editorial board," which may include the editor of the paper, his or her assistants, editors of sections of the paper, and staff who write the paper's editorials.

At TV and radio stations, top officials may include a general manager, program manager, news director, and public affairs director—although at some stations one individual does several of these jobs.

These meetings give you a chance to explain the background of negotiations to the people who will be shaping news coverage, to ask that they support you in their editorials, and to request the chance to appear on talk shows or write guest columns.

Members of your media committee should be trained to do the talking at these meetings (see "*Let The Members Do The Talking*") and should plan who will explain particular union positions, who will link union concerns to community concerns, and so on.

Committee members must be prepared for the possibility that media managers may be hostile to unions. Instead of getting into an argument, committee members should stick to explaining union positions and asking that the paper or station give their audience fair, balanced coverage.

Helping Reporters Do Their Job

- **Meet well in advance with reporters who will be covering the campaign.** If they were not included in meetings you held with news executives, they will need their own media packet and their own chance to get acquainted with the issues and your members.

At least for the major media outlets, give reporters the chance to be briefed on campaign background individually rather than in a group. They are under pressure to compete with other media outlets, and will feel more comfortable with an individual briefing where they get to ask their own questions and not have to share the answers with other reporters.

- **Give reporters the facts so they don't have to hunt for them.** The easier you make their job, the better coverage you are likely to get.

- **Before an interview or in planning a statement for a news release or news conference, develop a catchy way of expressing your main messages so reporters can come away with the good, short quotes they need.**

- **If you want a reporter to cover a particular event such as a rally or community meeting, call to invite him or her.** The news release you sent may have been lost in the mail or may not have stood out from other notices received.

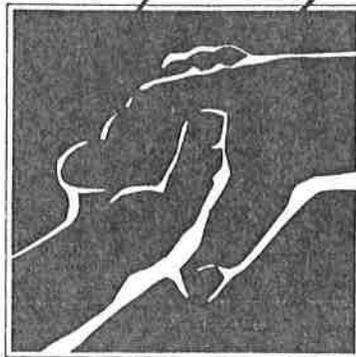
Tell the reporter that you can provide a member to conduct a briefing before the event, line up interviews, and stay with the reporter during the event to answer questions.

- **Ask reporters about schedules that are most convenient for them.** For example, scheduling a news conference for late in the afternoon may be convenient for your members but may come at a time when most reporters must have already completed their stories or are hard at work finishing their reports for the day. Reporters who have to cover evening events may not appreciate being asked to attend an early morning briefing session.

- **Don't lie and don't guess.** Even if you get reporters to use inaccurate information once, eventually they will find out and be angry that you put them in an embarrassing position. If you don't know an answer, find out and get back to them.

- **Don't assume that any statement is truly "off the record."** A reporter's

In Unity, Strength



PRESS PACKET

Alameda County Negotiations
1987

A media packet with detailed background information makes it easier for reporters to quickly understand the union point of view.

first loyalty is to "getting a story," not to your campaign. If you don't want to see a particular fact in print or on the air, don't give it to the media in the first place.



Reporters are workers, too. If they make mistakes, try to calmly point out the errors.

- **Don't be upset that reporters report what the other side has to say. That's their job.**

- **Don't assume reporters understand anything about the labor movement, the jargon you use, your local's history, the work your members do, or the background of your negotiations. Constantly offer to explain the basics.**

- **If you are dissatisfied with the fairness or accuracy of coverage, try to make an appointment with the reporter at which a group of members can calmly explain their concerns. If you can't get a meeting, explain your concerns on the phone.**

Don't take a hostile approach or cut off contact with the reporter; that only hurts your chances of getting better coverage in the future.

If talking to the reporter doesn't work, try approaching his or her editor. Again, take a small group of members along if possible, provided they are trained to stress the issues and not attack the paper's staff.

Creating News

Events

For the most part, getting free news coverage depends on creating “news-worthy” events—events that can be *shown visually*, that are *unusual* in some way, that involve *action* by large numbers of people, or that involve *well-known public figures*.

Examples of events that may get media attention include . . .

- **A rally or demonstration** at the offices or homes of management officials.
- **A public debate** between union members and management. If management refuses to show up, then either leave an empty chair as a visual symbol or have one of your members parody what management officials would have said if they had come.
- **A public forum** at which experts

discuss some of the underlying issues you are bargaining over—such as stress, health and safety, or pay equity.

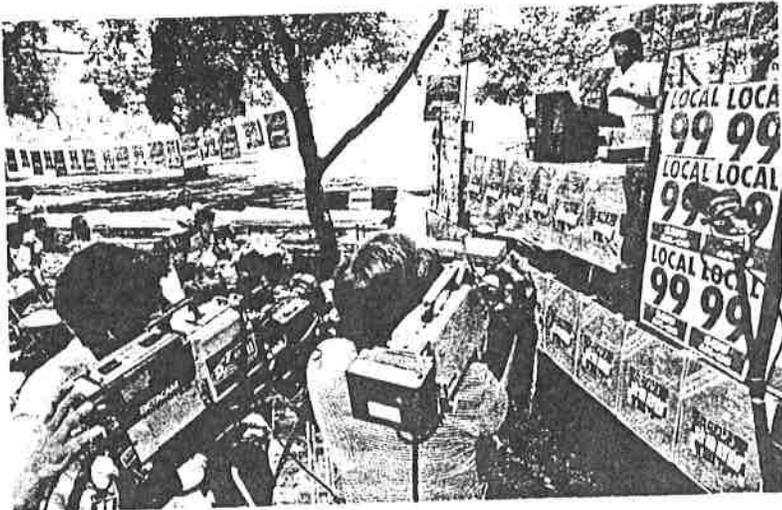
- **A candlelight vigil or parade.**
- **Events directly tied to particular bargaining issues.** For example, members bargaining for child care services might hold a “stroll-in” at which they would march with their small children.
- **Events tied to times of the year.** For example, you could give a mock giant turkey to a top management official at Thanksgiving or sponsor a hunt for justice in the worksite at Easter.

News conferences

A news conference allows you to reach many reporters at the same time. It also may create a feeling among reporters that “something important” is being announced and if they don’t cover



Media events such as this arrest of the Easter bunny can be tied to times of the year.



News conferences should be used only if you have important news to announce.

it someone else will.

However, calling a news conference also can backfire if reporters and their editors decide that what you have to say is not newsworthy. A poorly attended news conference demoralizes members and staff and makes those reporters who did come think twice about covering your events in the future.

Therefore, call news conferences only when you have genuine news. Examples might be . . .

- A major change at the negotiating table.
- Release of a major survey that supports your demands on health and safety, stress, contracting out, patient care, pay equity, or other bargaining issues.
- Unveiling significant new information about management practices.

To be safer still, try to include as part of the news conference one or more celebrities. For example, a news conference on a new pay equity study might

include leaders of local women's organizations or even a local TV personality who could briefly endorse the comparable worth concept. Or a major church leader might serve as master of ceremonies for the news conference.

Alert reporters to a coming news conference as far in advance as possible, and give them an idea of why it will be newsworthy.

As discussed earlier, have members do as much of the talking as possible. To make reporters' job easier, provide a media packet with . . .

- Factsheets giving background about the union, the jobs members do, and the issues in bargaining.
- Written statements or quotes from union members and elected leaders.
- Past news coverage that you liked (reporters are likely to be influenced by the way the story has been covered before).

News releases

When a news conference is not warranted but you have information to convey to a large number of reporters at once, send a news release which provides the facts, quotes from members, and a heading and first ("lead") paragraph that show why the story is interesting. (See "Comparing Good and Bad News Releases.")

Be sure to get your releases to wire services, such as Associated Press and United Press International, which provide news to other media outlets.

Smaller media outlets without large staffs—particularly radio stations and

weekly newspapers—may use a news release almost the way you wrote it, so write it with that possibility in mind.

Radio feeds

Many radio stations will work into their news reports short statements by union leaders that you tape and play for them over the phone. An electronics supply store can show you the jacks and cords you will need so you can playback from your tape recorder directly over the phone line.

As part of the media committee's survey of media outlets, they should find out which stations take taped "feeds" and who the contact person would be at each interested station. Members of the committee can then take responsibility for getting the right equipment, making the tape when the union has something significant to say, and calling the stations to offer the feed to them.

Stations are most likely to take statements from a news conference they couldn't send a reporter to or from a union leader announcing a major development in negotiations. They are most likely to actually use the statement if it contains a clever or unusual quote that sums up what the union has to say. Overblown, predictable rhetoric is least likely to be used.

In addition to the taped statement, you must provide stations with the same facts that would go into a news release so they know what to say before and after the statement you have provided. Instead of reading that information to a reporter at the station, try recording that too as an introduction to

the statement. That will save both of you time since you are playing the statement over the phone anyway, and the reporter always can ask more questions if necessary.

In other words, you might tape the following:

[Media committee member's voice as introduction]

Two hundred county employees today picketed the home of John Doe, chairman of the county board of supervisors. The members of Service Employees Local Union X were protesting the board's refusal to negotiate seriously on a package of "Work and Family" proposals put forward by union members in talks on a new contract covering county workers. Union members are asking for a county-sponsored child care program, parental leave rights, and more flexible work schedules. Local X President Jane Smith made the following statement . . .

[Local president's voice]

"We're picketing John Doe's home to point out that other families in this county should be considered just as important as the families of county leaders. Our Work and Family proposals are not only cost effective and would meet the needs of county workers' families, but they would mean better, more reliable services for all families in this county because they would cut down on county workers missing work and experienced people having to leave to take other jobs."

Comparing Good And Bad News Releases

Local 1234
Service Employees International Union
First Street
Unionville, USA 12345

FOR IMMEDIATE RELEASE

For further information:
Jane Smith (100) 555-1212 (SEIU)
or (100) 666-0000 (home)

Negotiations Over Staffing Will Affect Patient Care At ABC Hospital, Study Shows

Community residents who use ABC Hospital have a major stake in the outcome of the current contract negotiations between ABC management and Service Employees Local X, according to a new study of staffing levels and patient care at the hospital.

"You can't cut corners with people's lives," said Local X President Jane Doe in releasing the study. "People in this community deserve health care they can trust—and that's what we're asking management to provide."

The study, conducted by Professor Jim Jones of City University, compared the number of nurses in each department of the hospital five years ago with the number today. Professor Jones found that, on the average, departments have 15 percent fewer nurses now, with some departments as much as 25 percent shortstaffed.

Jones then surveyed nurses on the impact of short staffing. He found that 93 percent of nurses with five or more years experience say that the quality of care has decreased because of reduced staffing.

Examples they provided included the following:

- Longer waiting periods in the emergency room.
- Longer waits before checking on the health status of patients.
- Less time to answer questions or provide information for patients' families.

Marilyn Alvarez, a nurse at the hospital for 12 years and a member of the nurses' elected negotiating committee, said the nurses' proposals to management would require increased staffing and improved training and would attract more nurses to ABC by offering more competitive pay and benefits. So far, however, management has refused to agree to action to deal with the nursing shortage.

"This study proves that we have a patient care problem but that it can be solved," Alvarez said. "The hospital had its largest budget surplus in history last year, so the money is there. We hope the community will help us convince management to start solving the nursing shortage now."

Statement by SEIU Local X President Jane Doe

It is time for ABC Hospital management to stop its blatant delaying tactics and meet its legal obligation to bargain in good faith with our union. Management's latest proposals do not include pay improvements, any significant increase in benefits, or guarantees of increased staffing levels. Their proposals are a slap in the face to our nurses who work so hard to provide quality patient care.

▲ **Bad Release**

◀ **Good Release**

Using Free Time And Space

Each media outlet provides some free time or space you should try to use during your campaign.

Talk shows

Your media committee should find out which radio or TV stations have talk shows on which union leaders could appear. Often, those appearances have to be arranged well in advance.

In talking with staff at the station, don't emphasize that you want a chance to make your case on the air. Instead, point out how a show with SEIU leaders as guests would be interesting for listeners. Also, promise to publicize that show among your members.

If union leaders are going to be on the show, role play the likely questions and answers, using the principles already discussed in this part of the manual.

Also prepare union members and their families and friends to call in with good questions.

Union members can also use free air time on talk shows *whenever* there are guests whose topic could somehow be related to bargaining issues. ("Listening to this discussion of the changing role of women in our society makes me think of the situation where I work. I'm a member of Service Employees Local Y and we're in negotiations with _____ and we're facing . . .")

Guest editorials or "op-ed" pieces

Newspapers and TV and radio stations sometimes allow community leaders to present guest editorials or, in newspapers, write opinion pieces on the

page opposite the editorial page ("op-ed" page). Here again, your pitch in asking for that opportunity is not that you have a right to give your views but that the audience will be interested in this important subject.

Sometimes time or space is provided for the specific purpose of responding to an editorial the station or newspaper has presented. But even if you are given time or space for that reason, don't feel that you have to respond to every point the editorial made. After all, many in the audience don't remember the original editorial anyway. For the most part, use the opportunity to make the points you want to make.

Letters to the editor

Some newspapers receive far more letters than they can publish. To take advantage of the free space, you have to take steps to make it more likely that letters giving the union viewpoint will be among those chosen.

- Monitor the letters page to see whether the paper seems to prefer letters from "average citizens" or from heads of organizations or prominent community leaders. Then decide whether to submit letters signed by local union officers or by rank-and-file members.
- Include some simple, dramatic facts and not just emotional rhetoric.
- Keep letters short so editors will be more likely to have room for them and less likely to cut out key parts of your message.
- Relate letters to articles or other letters the newspaper has published. Edi-

tors like to have dialogue in their paper: "Your recent article on the decline in our local economy really hit home. I'm a member of Service Employees Local X, and we're now in negotiations on a new contract with _____ . Jobs and prosperity in this area would be threatened further if management gets what they are asking for. For example . . ."

Cable television

Many cable stations are hungry for free or low-cost material to broadcast. They also have a legal obligation to broadcast some programs on public interest issues, although they have control over which programs to use.

The International's Education Department may be able to help you obtain films or videos on subjects related to your bargaining issues. You could then provide those to cable stations for free. Suggest that they show all or part of the film or video and then host a panel discussion with local people, including a representative of your local union.

Community publications

Weekly newspapers, alternative publications, church newsletters, and ethnic papers or magazines in other languages are other media outlets which are often looking for articles and photographs to fill their pages.

Paid Advertising

Paid advertising can help boost membership morale and communicate a clear, unedited message as part of a strategy to pressure the employer. Many Americans are used to getting information from advertising, and view the fact that the union is sponsoring ads as proof that the union's campaign is legitimate.

However, advertising also can be a knee-jerk reaction when union leaders feel the need to "do something" to show strength.

Because advertising can be expensive, you should always be clear about why you are doing it. Real strength comes from the employer seeing that you have a winning strategy. Advertising that just makes everyone feel good for a day or two while draining your treasury may actually make you seem weaker, not stronger, in the employer's eyes.

When possible, ads should feature members and show readers how their interests and workers' interests coincide.



Ashley Duster, Blood Bank Supervisor, state Health Department

IN THIS BANK, YOU'RE MY ONLY INTEREST.

It's your life.

Bank on it, Ed.

As the blood bank supervisor at the Roswell Park Memorial Institute in Buffalo, I hold the lifelines of cancer patients in my hands every day.

My state job is important.

I make sure patients receive the blood they need during their stay at Roswell Park, a state-operated hospital with hundreds of employees like me who are on the cutting edge of cancer research and patient care.

It's a job I love, and one I take seriously.

I'm one of the 57,000 members of the Public Employees Federation, the union representing state employees in professional, scientific and technical jobs.

We represent state employees who are working in labs to find a cure for cancer, caring for the state's mentally ill and developmentally disabled and cleaning up the state's polluted air and water.

Everyone in the 3,200 different job titles PEF represents works hard to keep New York State a good place to live and work.

PEF is negotiating a new contract with New York State.

We want our fair share. We're worth it.



New York State Public Employees Federation AFL-CIO

Questions you should ask include the following . . .

- **Are we taking out ads primarily in order to reach our own membership?** If so, why? To strengthen workers' pride in their cause? To reinforce themes we are communicating at the worksite?

Are there other ways to reach them (discussed earlier in the manual) that cost less, are more sure to reach each person, and provide more opportunity for members to ask questions and give feedback?

- **Are we trying to reach customers, clients, investors, suppliers, or others in the community?** If so, is this part of an organized strategy that includes other ways of organizing support for the campaign?

Are we sure there isn't a way to get a mailing list or phone list of the specific people we want to reach or to distribute the information to them in person?

Assuming that paid advertising is needed to pressure the employer, observe the principles outlined earlier in this part of the manual, such as highlighting the community interest, not merely justice for workers, and letting members do the talking. Subjects for ads also were listed earlier in the discussion of arguments you can use to bolster your case.

For newspaper ads, resist the temptation to fill the space with a long essay answering every charge the employer has ever made. Think about what the average, uninformed member of the public really will care about and absorb.

For radio spots, have your target

audience firmly in mind when you choose which stations and at what times to air your spots.

Billboards and signs on subways or buses can communicate a very simple theme and reinforce other advertising such as radio spots. Passers-by often have so little time to read the message, however, that you should not expect to educate anyone on the issues through those media.

Locals bargaining for tens of thousands of workers at a time have some-

times bought radio time in order to conduct special call-in programs. Members from a large geographical area can phone in their questions, get answers from union leaders, and listen to the views and concerns of other members.

Writing and producing effective ads requires training and experience. If you want members of your media committee to learn how, arrange for them to work along side SEIU staff or consultants. Too much is at stake for them to learn by trial and error.

Sample Radio Spot

Announcer: Members of Local 250 of the Service Employees Union are still on strike at Kaiser hospitals and clinics in Northern California and union members want you to know why.

Member #1: Well, I would say to Kaiser plan members to remember that we are striking for you also. We voted to go on strike because we feel that our patient care is being compromised.

Member #2: Because of their concern of profits, Kaiser's patient care is really falling downhill.

Member #3: They're making profits hand-over-fist; they're the most profitable HMO around. The first thing that I'd like the Kaiser plan members to do is to make sure that, if there's something wrong with them or they're sick, is to make sure that they go in and see the doctors.

Member #4: We want patients to cross the picket line because the more patients that go in to be seen the harder it's going to be on people that they have staffing.

Member #5: We want people to cross the picket line.

Announcer: If you want to help the striking Kaiser workers—don't take no for an answer. Demand from Kaiser the services you have paid for and deserve. The members of Local 250 of the Service Employees Union will applaud you as you cross the picket line.

Radio spots in which members speak for themselves are often more interesting and more credible.

Exhibit 1

GLENN M. TAUBMAN

Education: State University of New York at Stony Brook (B.A., Political Science, 1977); Emory University School of Law (J.D. with Distinction, Order of the Coif, 1980); Georgetown University Law Center, Washington, D.C. (LL.M, Labor Law, 1985).

Employment History: 1980-81: Staff Attorney to the Judges of the United States District Court for the Middle District of Florida; 1981-82: Law clerk to the Hon. Warren L. Jones, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, in Jacksonville, Florida; 1982-Present: Staff attorney with the National Right to Work Legal Defense Foundation, Springfield, Virginia.

Relevant Practice Experience: Trial and appellate litigation on behalf of individual employees only, exclusively in the areas of labor and constitutional law.

Representative cases: Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987), further proceedings, 917 F.2d 927 (1990); NLRB v. OPEIU Local 2, 292 NLRB 117 (1988), enforced, 902 F.2d 1164 (4th Cir. 1990); California Saw & Knife Works, 320 NLRB 224 (1995), petitions for review denied in part sub nom., IAM v. NLRB, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom., Strang v. NLRB, 525 U.S. 813 (1998); Penrod v. NLRB, 203 F.3d 41 (D.C. Cir. 2000); Albertson's/Max Food Warehouse, 329 NLRB 410 (1999); UFCW Local 951 (Meijer. Inc.), 329 NLRB 730 (1999), review granted sub nom., UFCW Local 1036 v. NLRB, 249 F.3d 1115 (9th Cir.), rehearing en banc granted, 265 F.3d 1079 (2001), opinion after rehearing, 307 F.3d 760, cert. denied, Mulder v. NLRB, 537 U.S. 1024 (2002); Lamons Gasket Co., 357 NLRB No. 72 (Aug.

26, 2011); Dana Corp., 351 NLRB 434 (2007); L-3 Communications. Inc., 355 NLRB No. 174 (Aug. 27, 2010).

Bar Admissions: Georgia; New York; District of Columbia; United States Supreme Court and numerous federal courts.

Publications: Union Discipline and Employee Rights, Lab. L. J., (Dec. 1998); Neutrality Agreements and the Destruction of Employees' Section 7 Rights, ENGAGE, May 2005.

Exhibit 2

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 30, 2007

TO : Willie L. Clark, Regional Director
Region 11

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Rescare, Inc. 518-4001-5000
Case 11-CA-21422 518-4040-0100
518-4040-0100
SEIU Local District 1199 536-2548
Case 11-CB-3727 712-5042-3380
339-2525
920-0150
440-3375

These cases were submitted for advice on several issues. We concluded that: 1) the Employer did not violate Section 8(a)(2) by entering into a neutrality agreement (EPA) providing that newly-organized employees will, upon recognition, be merged into the parties' existing state-wide bargaining unit and subject to the state-wide collective-bargaining agreement; 2) the Union did not violate Section 8(b)(1)(A) by refusing its new unit members' requests for a copy of the EPA; 3) union organizers' statements to two employees that authorization cards were only for the purpose of getting more information invalidated those cards; 4) the Union did not violate Section 8(b)(1)(A) by mistakenly announcing to employees that it had attained majority status, then promptly retracting the announcement; 5) the Employer and the Union lawfully placed newly organized bargaining employees in a state-wide bargaining unit rather than a single facility unit; 6) the Employer lawfully refused to withdraw recognition from the Union based on an employee petition received after the arbitrator's certification of a card majority; and 7) the International Union is not liable for the conduct of the Local Union.

FACTS

Rescare, Inc. (the Employer) is a national human services company, employing about 40,000 people nationwide. The Employer operates facilities that provide support to mentally retarded and developmentally disabled individuals who are unable to live independently. The Employer and SEIU Local 1199 (the Union) have been parties to a series

of collective-bargaining agreements covering approximately 1300 employees in certain Employer facilities in Ohio and West Virginia. In 2001, negotiations on a successor agreement were unsuccessful. The Union struck and conducted a corporate-wide campaign against the Employer. In fall 2003, the parties resolved their dispute and executed successor state-wide collective-bargaining agreements in Ohio and West Virginia (expiring September and October 2006, respectively). The collective-bargaining agreements covered the terms and conditions of employment for bargaining units that existed at the time the respective agreements were executed. Units organized after the collective-bargaining agreements took effect negotiated their own separate agreements.

In May 2006,¹ prior to negotiations for successor agreements, the parties began meeting to discuss the development of a less acrimonious relationship. Among other things, the Union broached the concept of a neutrality agreement and the Employer broached an end to the Union's negative corporate campaigns. The parties did not exchange or discuss specific proposals or conduct negotiations toward a collective-bargaining agreement. On June 30, the parties executed the "Organizing, Neutrality and Election Procedure Agreement" (EPA). The EPA applied to all present and future Employer operations in Ohio and West Virginia providing services to the mentally retarded, developmentally disabled, or other similarly situated consumers. The EPA provided that upon recognition, "units organized will be merged into the respective state-wide collective bargaining units for Ohio and West Virginia, and the terms of the collective bargaining agreements for the respective states will thereafter govern the terms and conditions of employment for the newly organized employees." It also provided that if the parties failed to reach successor collective-bargaining agreements in Ohio and West Virginia, the EPA would be void.

The EPA stated that the Employer would remain neutral regarding employees' decision whether to choose union representation. It also established procedures for the organizing process, including the grouping of counties into

¹ Herein all dates are 2006 unless otherwise indicated.

organizing zones and an organizing timetable by zones.² The EPA also established guidelines for the parties' conduct during the Union's organizing efforts. It provided, inter alia, that during the life of the EPA neither the Employer nor the Union would engage in personal attacks or derogatory comments concerning the mission, motivation, leadership, character or representatives of the other; that neither party would seek to involve external organizations such as the media, legislators, regulators, or providers in matters of concern regarding the other without first giving notice of the specific concern and attempting to resolve the matter directly with the other party; and that before filing a complaint with an outside agency against the other, the parties would raise the concern with each other in a sincere attempt to resolve the matter.

In July, the parties met to negotiate state-wide successor agreements for Ohio and West Virginia. In August, the parties reached tentative agreement on both contracts and in October, they executed the agreements. The "Union Recognition" sections contained the EPA language, set out above, providing that any newly recognized units within the state organized pursuant to the EPA would be merged into the state-wide bargaining unit, and that the state collective-bargaining agreement would apply to those employees.

In September, the Union began its organizing campaign. On November 29, pursuant to the arbitrator's certification of majority, the Employer recognized the Union as the exclusive representative for Mercer County employees and absorbed them into the state-wide bargaining unit.

ACTION

1. The Employer did not violate Section 8(a)(2) by entering into a neutrality agreement providing that newly-organized employees will, upon recognition, be merged into the parties' existing state-wide unit subject to the state-wide collective-bargaining agreement

Parties in an existing bargaining relationship may lawfully bargain about subjects that apply to employees

² The initial EPA provided for an election process requiring a 55 percent showing of interest that was an alternative to a formal Board election. On August 31, the parties modified the EPA to also permit a card check procedure requiring a 60 percent showing of interest.

outside the unit if the subject is a mandatory subject of bargaining for the unit employees.³ In "each case the question is not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the 'terms and conditions' of their employment."⁴ The Board applies this principle to the negotiation of after-acquired clauses, "whereby the employer agrees to recognize the union as the representative of, and apply the collective-bargaining agreement to, employees in [facilities] acquired after the execution of the contract."⁵

Where an after-acquired clause applies to employees who would become part of the existing unit upon a showing of majority, the clause is deemed to "vitally affect" the terms of employment of the existing unit and thus be a mandatory subject.⁶ Thus, in Houston Div. of Kroger Co., the employer violated Section 8(a)(5) by breaching a contract clause that would have added additional stores to the bargaining unit and applied the contract to those stores if the union obtained a showing of majority status at those facilities.⁷

³ See Allied Chemical Workers v. Pittsburgh Plate Glass Company, 404 U.S. 157, 178-179 (1971).

⁴ Id. at 179.

⁵ See Pall Biomedical Products Corp., 331 NLRB 1674, 1675 (2000), enf. den. on other grounds 275 F.3d 116 (D.C. Cir. 2002).

⁶ Pall Biomedical Products Corp., 331 NLRB at 1676; Houston Division of Kroger Co., 219 NLRB 388, 389 (1975). See generally Allied Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. at 179; Local 24 of Intern. Broth. Of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. Oliver, 358 U.S. 283, 294 (1959).

⁷ The Board interpreted the clause as a waiver of the employer's right to demand an election. 219 NLRB at 388-89. See also Raley's, 336 NLRB 374 (2001) (employer waived right to insist on election when it signed an after-acquired clause requiring employer to recognize all employees working within a certain geographical area as "an appropriate unit" upon proof of majority). Compare Supervalu, Inc., 351 NLRB No. 41, slip op. at (September 2007) (employer did not violate Section 8(a)(5) by refusing majority card check recognition at three new stores despite the parties' "additional stores" clause, where the new employees would not become part of the same unit and the General Counsel did not introduce evidence to support a

The after-acquired clause need not be included in the parties' collective-bargaining agreement so long as it vitally affects the terms and conditions of the existing employees. In Pall Biomedical Products Corp., for example, the Board held that a letter of agreement that extended recognition (but did not apply the entire contract) to new units in the same geographic area "vitally affect[ed]" existing employees because the agreement protected against the erosion of the existing unit's terms and conditions of employment and addressed employee concerns that work would be transferred out of the bargaining unit.⁸ Thus, the employer violated 8(a)(5) by repudiating the letter of agreement.

In the instant case, the EPA provided that newly organized employees would become part of the existing state-wide unit covered by the state-wide collective-bargaining agreement upon a showing of the Union's majority status. Accordingly, applying Kroger, the application-of-contract clause was a mandatory subject of bargaining for existing unit employees and the Employer did not violate Section 8(a)(2) by entering into the EPA with the Union.⁹

2. The Union did not violate Section 8(b)(1)(A) by refusing to provide the EPA to organized employees

finding that the "additional stores" clause vitally affected the terms and conditions of the existing employees).

⁸ 331 NLRB at 1676-1677.

⁹ The conduct that the General Counsel deemed unlawful in Dana Corp., (JD-24-05, 2005 WL 857114 (2005)), is not present here. In Dana Corp., an employer and a union negotiated a free-standing letter of agreement that, in addition to neutrality provisions, included numerous substantive terms of employment that generally limited the gains that the employees might realize at the bargaining table should a majority of them sign authorization cards. The agreement was not a product of collective-bargaining at any of the recognized facilities, did not bear any relationship to bargaining in any of those units, and thus could not "vitally affect" those employees' terms and conditions of employment. The General Counsel and other parties have filed exceptions to the ALJ's conclusion that the letter of agreement was lawful and the matter is currently pending before the Board.

Soon after the Employer had recognized the Union as the employees' exclusive bargaining representative, two Mercer County employees sent a letter to the Union requesting a copy of the EPA. By letter of December 23, the Union denied the employees' request, asserting that the EPA was a binding, legal document that the parties had agreed would not be disclosed to the general membership, to management, or to the public.

A union's duty of fair representation includes the obligation to provide employees with requested information pertaining to matters affecting their employment.¹⁰ Employees are entitled to that information so that they can ascertain their rights and determine whether they have been fairly treated in regard to their terms and conditions of employment.¹¹ Thus, the Board has required unions to provide such information as copies of the parties' collective bargaining agreements,¹² grievance forms related to an employee's grievance settlement,¹³ job referral

¹⁰ See Branch 529, National Assn. of Letter Carriers, 319 NLRB 879, 881-882 (1995) (union breached its duty of fair representation by refusing to provide employee copies of her grievance forms); Branch 47, National Assn. of Letter Carriers, 330 NLRB 667, 668 (2000).

¹¹ Branch 47, National Assn. of Letter Carriers, 330 NLRB at 668 (employee could not know whether he would file a grievance or an unfair labor practice charge until he had reviewed the overtime list and determined whether he had been incorrectly charged with overtime hours or been treated disparately); Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency), 260 NLRB 419, 420 (1982) (employee could not know whether he was entitled to medical expense reimbursements until he reviewed the health and welfare plan).

¹² Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency), 260 NLRB at 420 (the opportunity to examine the agreement is necessary for an employee "to understand his rights under [the contract] and . . . to determine the quality of his representation under them"). See also Vanguard Tours, Inc., 300 NLRB 250, 265 (1990) (union violated Section 8(b)(1)(A) when union steward withheld the collective-bargaining agreement from two bargaining unit employees).

¹³ Branch 529, National Assn. of Letter Carriers, above, 319 NLRB at 882.

information in the operation of an exclusive hiring hall,¹⁴ copies of the union's health and welfare plan,¹⁵ and a union steward's list of employee overtime hours used to monitor the employer's distribution of overtime work.¹⁶ By contrast, a union has no duty to provide to employees information that does not pertain to matters affecting employment.¹⁷

In the instant situation, we conclude that the Union was not obligated to provide the EPA to unit employees because the EPA does not establish any of the Mercer County employees' terms and conditions of employment, and thus, ipso facto, the EPA contains no information that employees need to ascertain their rights or determine whether they have been fairly treated in regard to their employment. Most significantly, the collective-bargaining agreement is clear on its face that the terms and conditions for existing and newly organized employees are governed by the collective-bargaining agreement and not the EPA. Specifically, the contract provides that "any new [u]nits within the state organized pursuant to the Organizing, Neutrality and Election Procedure Agreement shall, upon recognition of the Union pursuant thereto, be merged into the bargaining unit for the state, and that *the terms and*

¹⁴ Intl. Brotherhood of Boilermakers, Local 197, 318 NLRB 205, 205 (1995) (union's duty of fair representation includes an obligation to provide access to job referral lists to allow an individual to determine whether his referral rights are being protected).

¹⁵ Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency), 260 NLRB at 420.

¹⁶ Branch 47, National Assn. of Letter Carriers, above, 330 NLRB at 668.

¹⁷ See International Union of Operating Engineers, Local 12 (Nevada Contractors Association), 344 NLRB No. 131, slip op. at 1, 5-6 (2005) (union only required to turn over hiring hall information that was relevant to ascertaining whether hiring hall dispatchers were treating employee fairly); APWU Local 434, ALJD, 28-CB-5599, 2002 WL 506338 (NLRB Div. of Judges), slip op. at 6 (Mar 29, 2002) (union did not unlawfully refuse to provide name, address and telephone number of union's national business agent, where information was not needed for employee to pursue his substantive rights).

conditions set forth herein shall henceforth apply to such employees."¹⁸ (emphasis added).

Further, a careful examination of the EPA itself reveals that it contains no terms and conditions of employment beyond those provided in the collective-bargaining agreement. Thus, the EPA contains an application-of-contract clause (providing that upon recognition, new facilities would be merged into the state-wide units and that the terms of the contracts for the respective states would apply); a neutrality agreement (providing that the Employer would remain neutral regarding employees' decision whether to choose union representation); procedures for the organizing process (such as the grouping of counties into organizing zones); and parameters for the parties' conduct during the Union's organizing campaign (such as that the parties will attempt to resolve disputes internally before contacting or filing complaints with outside entities). Accordingly, inasmuch as the EPA contains no information pertaining to matters affecting employees' terms and conditions of employment, the Union was not obligated to provide a copy of the EPA to newly organized employees.¹⁹

3. Union organizers' statements to two employees that authorization cards were solely for the purpose of getting more information invalidated those cards

In Gissel, the Board held that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.²⁰

¹⁸ Compare National Hockey League Player's Association, Advice Memorandum 2-CB-20453, dated June 30, 2006, p. 15. (union violated duty of fair representation when it failed to provide its members with copies of "confidential side letters" that were explicitly incorporated into the collective-bargaining agreement and that contained revenue information relevant to determining employees' salary caps).

¹⁹ In investigating cases regarding a union's duty to make neutrality agreements available upon request to unit employees, the Regions should carefully evaluate the content of the agreement to ascertain whether it contains information relevant to employees' terms and conditions of employment.

²⁰ NLRB v. Gissel Packing Co., 395 U.S. 575, 606 (1969). Although Gissel assessed the validity of signed cards in

Thus, when dealing with single-purpose cards that unambiguously authorize union representation, union solicitors' representations to the effect that signatures are needed to get information or to get an election do not negate the written language of the card because they do not amount to a direction to the signer that the "only" purpose of the card is the one stated by the solicitor and not the one on the card.²¹ By contrast, union solicitors' representations to the effect that the "only" purpose of the card is to obtain more information or get an election negate the written language on the card because they amount to a direction to the signer to disregard the written language.²²

In the instant case, in obtaining authorization card signatures, a union solicitor told an employee that the card was "just to get more information," and told another employee that signing the card did not mean that she was joining the Union but that it was "only to get more information."²³ Applying the above principles, we conclude that the Union's representations to these employees to the effect that the only purpose of the cards was to obtain information negated the written language and invalidated their cards.²⁴

order to determine whether to authorize an interim bargaining order, the Board applies the same Gissel standard to determine the validity of signed cards used to obtain voluntary recognition. See Kroehler Mfg. Co., 243 NLRB 172, 184 (1979).

²¹ Action Auto Stores, Inc., 298 NLRB 875, 881 (1990), citing Montgomery Ward & Co., 288 NLRB 126, 128 (1988).

²² See Montgomery Ward & Co., 288 NLRB at 162-163, 166 (statements that cards were only for the purpose of getting information about the union or only for the purpose of obtaining an election invalidated the cards because the solicitor represented that the employees could ignore the language on the face of the card or that the cards were for a purpose other than indicated by the language).

²³ We agree with the Region that the card signed by employee Hearn was valid because the solicitor never told her that the purpose of the card was solely to obtain more information.

²⁴ After discounting the two invalidated cards, the EPA's requisite 60% of employees chose unionization.

4. The Union did not violate Section 8(b)(1)(A) by mistakenly announcing to employees that it had attained majority status, then promptly retracting the announcement

A union violates Section 8(b)(1)(A) when it provides misinformation to employees that tends to coerce them in their decision regarding whether to choose union representation.²⁵ With respect to the signing of membership applications, the coercive potential of misinformation suggesting that a majority had already signed cards would be the tendency to persuade employees that not signing a membership card would be futile.²⁶

In the instant case, on November 7, after the Union had begun organizing the Mercer County employees, it inadvertently sent the employees a premature "welcome" packet indicating that a majority of employees had selected the Union. On November 14, upon realizing its mistake, the Union sent the employees a letter rescinding that "welcome" and informing them that they still had not reached majority status. Although three employees signed cards during that one week interval, the Union never sent those cards to the arbitrator.

Applying the above principles, we conclude that the Union's welcome packet did not violate Section 8(b)(1)(A) because the Union immediately informed employees that they had not reached majority status, the mistake had no effect on computation of the Union's majority, and there is no evidence that the misinformation tended to coerce employees in their decision regarding whether to choose union representation.

²⁵ See, e.g., Monfort of Colorado, 256 NLRB 612, 613 (1981) (union violated Section 8(b)(1)(A) where organizers' statements to employees misleadingly indicated that the union was already their bargaining agent and led them to believe that signing a card was a mere formality). Compare Montgomery Ward, above, 288 NLRB at 129 (misrepresentations inflating the number of other employees who had already signed cards did not invalidate the cards where they were unaccompanied by coercive statements and did not amount to a union scheme to misrepresent union support).

²⁶ See UFCW 1099, 9-CB-9524, Advice Memorandum dated 1997 (no 8(b)(1)(A) violation where no coercion was found and there was conflicting evidence as to the importance of the misinformation in employees' decision to authorize the union).

5. The Employer and the Union lawfully placed newly organized employees in a state-wide bargaining unit rather than a single facility unit

The Board does not apply a single-facility presumption when parties to an existing multi-facility collective-bargaining agreement agree to absorb newly organized facilities into that multi-facility bargaining unit.²⁷ In the instant case, the Union and the Employer are parties to an existing multi-facility collective-bargaining agreement and have mutually agreed to absorb the newly organized facilities into that multi-facility bargaining unit. Accordingly, no single-unit presumption exists and the parties lawfully placed the newly organized employees into the state-wide bargaining unit.

6. The Employer lawfully refused to withdraw recognition based on an employee petition received after the arbitrator's certification of a card majority

A union enjoys an irrebuttable presumption of continuing majority status for one year after it is certified.²⁸ Where an employer extends voluntary recognition to a union, a comparable presumption of majority status arises and continues for a reasonable period of time.²⁹ The irrebuttable presumption of continuing majority status also attaches for the duration of a collective-bargaining agreement.³⁰ Thus, in Parkwood

²⁷ See Kroger Co., 219 NLRB at 389 (employer waived right to insist on election where it agreed to include employees in existing multi-facility unit pending majority support); Raleys, 336 NLRB at 374 (same).

²⁸ Brooks v. NLRB, 348 U.S. 96, 104 (1954).

²⁹ In Dana, however, the Board reversed its recognition-bar doctrine pertaining to voluntary recognition and held that an employer's voluntary recognition of a labor organization does not bar a decertification petition that is filed within 45 days of the notice of recognition. However, the Board also held (slip op. at 14) that it would apply the revised recognition-bar requirements prospectively only, to voluntary recognitions that postdate the Dana decision. In any event, Dana only removed the bar to an election (i.e., QCR can be raised), and did not change the presumption of majority status.

³⁰ El Torito-La Fiesta Rests. V. NLRB, 929 F.2d 490, 492 (9th Cir. 1991); Tinton Falls Conva. Ctr., 301 NLRB 937, 939-940 (1991).

Development Center, Inc., the conclusive presumption of majority status during the life of a collective-bargaining agreement barred an employer from withdrawing recognition from the Union before expiration of the contract, notwithstanding evidence of a loss of majority.³¹

In the instant case, the Employer recognized the Union as the exclusive bargaining representative of the Mercer County employees based on a November 29 arbitral certification of card majority. On about December 21, the Employer received a petition signed by 77 Mercer County employees seeking to withdraw recognition from the Union. Applying the above principles, we conclude that on November 29, an irrebuttable presumption of majority status attached to the Union, based both on the Employer's extension of voluntary recognition to the Union, and on the absorption of the Mercer County employees into the state-wide collective-bargaining agreement. Accordingly, the Union's irrebuttable presumption of majority status precluded reliance on the subsequent petition to withdraw recognition.

7. The International Union is not liable for the conduct of the Local Union

As discussed above, we have concluded that there is no merit to the allegations that the Local Union engaged in unlawful Section 8(b)(1)(A) conduct (i.e., by refusing to provide the EPA to organized employees, by mistakenly announcing that it had attained majority status, or by placing newly organized employees in a state-wide bargaining unit). Thus, there was no unlawful conduct for which the International Union could be liable. In any event, the International Union is not the 9(a) representative of those unit members, was not a party to the negotiations regarding the EPA or the state-wide collective-bargaining agreements, and did not participate in, authorize, or ratify the Union's conduct. Accordingly, the International could not be liable for the Union's actions.

³¹ 347 NLRB No. 95, slip op. at 6, fn. 9 (August 2006). See also Auciello Iron Works v. NLRB, 517 U.S. 718 (1996) (a union's acceptance of an employer's outstanding contract offer precludes the employer from raising a good faith doubt of the union's majority status based on events occurring after the acceptance. Thus, the employer's good-faith doubt based on subsequent events is not available to defend a refusal to execute a valid agreement or a withdrawal of recognition).

B.J.K.

Exhibit 3

A Moral/Contractual Approach to Labor Law Reform

ZEV J. EIGEN* AND DAVID SHERWYN**

When laws cease to operate as intended, legislators and scholars tend to propose new laws to replace or amend them. This Article posits an alternative: offering regulated parties the opportunity to contractually bind themselves to behave ethically. The perfect test case for this proposal is labor law, because (1) labor law has not been amended for decades, (2) proposals to amend it have failed for political reasons and are focused on union election win rates and less on the election process itself, (3) it is an area of law already statutorily regulating parties' reciprocal contractual obligations, and (4) moral means of self-regulation derived from contract are more likely to be effective when parties have ongoing relationships like those between management and labor organizations. The Article explains how the current law and proposed amendments fail because they focus on fairness as a function of union win rates, and then outlines a plan to leverage strong moral contractual obligations and related norms of behavior to create as fair a process as possible for employees to vote unions up or down.

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INTRODUCTION

A formidable body of literature and a growing set of empirical research confirm that people obey the law for a host of reasons independent from a positivist rationale of obeying for the sake of obeying.¹ Rationales offered include instrumental,² social/relational,³ and

1. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006); Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1 (1985); see also PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* (1998).

2. See, e.g., Richard A. Posner, *Let Us Never Blame a Contract-Breaker*, 107 MICH. L. REV. 1349,

moral.⁴ Recent research on contractual obedience suggests that morally framing an obligation to perform as contractually obligated yields greater likelihood and magnitude of performing an undesirable task as compared to framing the request to obey the same contract in terms of a legal threat.⁵ While extralegal effects like this are well recognized and, in some instances, may be more powerful than law by itself as a means of affecting behavior,⁶ to the Authors' knowledge, they are not incorporated into plans for legal reform. That is, if tort law is *broken*, legislators and scholars most often suggest revising tort laws, not crafting nonlegal incentive structures like relational, social, or moral constraints that operate independently from the law or in conjunction therewith. We suggest doing just that as a means of reforming labor law. Specifically, we propose incorporating a set of *moral*⁷ principles embodied in a *contract* to which union and management would both be incentivized to agree, which would make the process of certifying unions as agents of collective bargaining significantly fair and would result in a less costly administrative system.

Labor law is the perfect test case for such a proposal. Labor law involves state regulation of a tripartite relationship among labor

1349–61 (2009) (presenting an instrumental view of contracts); Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 635 (2010) (describing the economic prediction of human behavior as one in which an individual will breach a contract if breaching yields an extra dollar earned); see also Simeon Djankov et al., *Courts*, 118 Q.J. ECON. 453, 454–57 (2003) (examining the cost of evicting tenants as a function of whether a judicial system is based on civil law or common law).

3. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473–74 (1998) (using sociological and social-psychological literature to explain behavioral economics in law); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61–62 (1963) (finding that parties in the automobile industry rely more heavily and often on relational grounds for enforcing contracts than on legal sanctions contained therein). See generally Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 PERSONALITY & SOC. PSYCHOL. REV. 323 (1997).

4. See generally Zev J. Eigen, *When and Why Individuals Obey Form-Adhesive Contracts: Experimental Evidence of Consent, Compliance, Promise and Performance*, 41 J. LEGAL STUD. (forthcoming 2012), available at <http://ssrn.com/abstract=1640245>; Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?*, 100 GEO. L.J. 5 (2011); Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405 (2009).

5. Eigen, *supra* note 4 (manuscript at 23).

6. *Id.*

7. We use the term “moral” throughout this Article loosely. As noted by others, there is lack of convergence among scholars on what is meant by “morals,” “ethics,” or “values” broadly. See, e.g., Steven Hitlin & Jane Allyn Piliavin, *Values: Reviving a Dormant Concept*, 30 ANN. REV. SOC. 359, 360 (2004). For the purposes of this Article, it is unnecessary to distinguish among the various conceptualizations and operationalizations of the term. We mean simply to refer to the set of constraints on behavior derivative from one’s sense of obligation based on communal norms of acceptable behavior; ideals about desirable characteristics, states, or actions; or evaluative beliefs on how to orient ourselves in contemporary life. Short of picking an unnecessary etymological fight for which the Authors are woefully unprepared, we use this term as a synthetic catch-all of definitions.

organizations, employers, and employees. The interrelationship among these actors may be legally constrained, but ultimately, most of the means of enforcement already lie in nonlegal, quasi-legal, and informal mechanisms, perhaps more so than in many other areas of law.⁸ By comparison, a dispute about how much federal income tax one owes will be resolved directly between the state and the individual, with the tax code as the legal standard indisputably relied upon by all. Unions and employers routinely rely heavily on their ongoing relationships to resolve legally valenced disputes (like employment discrimination) informally, leveraging the power of the parties' ongoing relationship to fashion remedies all can accept.⁹ Labor law, therefore, has a built-in, preexisting basis for nonlegal compliance that heavily leverages the parties' collective set of norms of behavior, reciprocity, morality, fairness, and justice. Additionally, labor law is ultimately a means of facilitating parties' self-regulation via *contract*. Contract is deeply rooted in morality, social constraints, and norms of fairness and reciprocity, such that proposing extralegal ways of self-policing them may be *more* effective than purely legal means. These two factors make labor law an ideal space in which to test the Authors' extralegal reform hypotheses.

Before suggesting this reform, it is necessary to explain why such (perhaps) seemingly drastic reform is necessary. To do so, this Article asks two questions: Are the rights to be represented by a union and to collectively bargain with employers over wages, hours, and terms and conditions of employment worth saving, and, if they are, what is the best way to go about saving them? Considering the shocking lack of change to labor law since the passage of the National Labor Relations Act ("NLRA")¹⁰ in 1935 relative to the steadfast and voluminous changes to other laws regulating the workplace passed since that time,¹¹ labor law reform is considered by many to be long overdue.¹² However, labor law reform has been a failed promise under the previous two Democratic administrations, and likely will be under the current one as well.

8. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1532 (2002); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 181 (1996).

9. See David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 418 (1990).

10. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2010)).

11. Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 584-93 (1992).

12. See, e.g., WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 9 (1993); Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 828 (1996); Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 374 n.8 (2001); Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 97 (1993).

President Carter proposed sweeping reform, including shortening the time for union elections, standardizing the rules for defining bargaining units, and increasing the penalties against employers who violate the law.¹³ Carter's proposed reform lost on the Senate floor.¹⁴ President Clinton proposed prohibiting employers from permanently replacing striking employees.¹⁵ This proposed reform ended with the midterm elections of 1994.¹⁶ President Obama announced plans for the most aggressive labor law reform of the three presidents: the Employee Free Choice Act ("EFCA").¹⁷ Under EFCA, an employer would have to recognize a union as the exclusive agent of the employees for collective bargaining over terms and conditions of employment if the union

13. Labor Reform Act of 1977, S. 1883, 95th Congress (1977). The following is an excerpt from a July 18, 1977, speech President Carter made to Congress:

An election on union representation should be held within a fixed, brief period of time after a request for an election is filed with the Board. This period should be as short as is administratively feasible. The Board, however, should be allowed some additional time to deal with complex cases.

The Board should be instructed to establish clear rules defining appropriate bargaining units. This change would not only help to streamline the time-consuming, case-by-case procedures now in effect, but would also allow labor and management to rely more fully on individual Board decisions.

....

When employers are found to have refused to bargain for a first contract, the Board should be able to order them to compensate workers for the wages that were lost during the period of unfair delay. . . .

The Board should be authorized to award double back-pay without mitigation to workers who were illegally discharged before the initial contract. This flat-rate formula would simplify the present time-consuming back-pay process and would more fully compensate employees for the real cost of a lost job.

The Board should be authorized to prohibit a firm from obtaining Federal contracts for a period of three years, if the firm is found to have willfully and repeatedly violated NLRB orders. Such a debarment should be limited to cases of serious violations and should not affect existing contracts. . . .

. . . . The Board should also be required to seek preliminary injunctions against certain unfair labor practices which interfere seriously with employee rights, such as unlawful discharges.

James Earl Carter, President of the U.S., Labor Law Reform Message to the Congress Transmitting Proposed Legislation (July 18, 1977), available at <http://www.presidency.ucsb.edu/ws/?pid=7821>.

14. On June 22, 1978, Senate Bill 1883 (renumbered S. 2467), was recommitted to the Senate Human Resources Committee and did not reemerge. 124 Cong. Rec. 18,393-400 (1978).

15. Cesar Chavez Workplace Fairness Act, H.R. 5, 103d Cong. (1993). The bill was passed in the House of Representatives but died in the Senate.

16. In a last-ditch effort to effectuate some form of labor reform, President Clinton instituted an Executive Order prohibiting government contracts with employers who permanently replaced striking workers. Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (Mar. 8, 1995). The Executive Order was overturned by the D.C. Circuit on the grounds that it was preempted by the NLRA, which guarantees employers the right to replace striking workers. *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1339 (D.C. Cir. 1996).

17. Employee Free Choice Act of 2009, S. 560, 111th Cong.

presented the employer with “authorization cards” signed by employees stating that they want the union to represent them.¹⁸ Essentially, this authorization-card method for obtaining recognition would supplant the secret-ballot election whereby unions petition the National Labor Relations Board (“NLRB”)¹⁹ asking that the unit of employees they seek to represent vote for or against the union some thirty or more days following the petition, typically after both the employer and the union campaign for their votes.²⁰ Under EFCA, the penalties for violations of the NLRA and related statutes would triple,²¹ and parties that did not reach a first contract within 120 days would be forced to submit their proposals to interest arbitration.²² Like with President Clinton, the midterm elections of President Obama’s first term have, for all intents and purposes, terminated the possibility of legislative labor law reform, especially as sweeping as EFCA promised to be.²³ Labor law reform under President Obama, however, is not dead. Instead, the Obama administration’s NLRB²⁴ has the power and, seemingly, the desire, to promulgate rules and hand down decisions that could satisfy organized labor’s most pressing goal: increasing union membership by making it easier to organize.

It is understandable why labor seeks to increase union density in the U.S. At its height in the mid-1950s, organized labor represented about 35% of the U.S. workforce.²⁵ That percentage has declined steadily since that time, to 11.9%.²⁶ In the private sector today, only 6.9% of the

18. *Id.* § 2.

19. The NLRB was established by the National Labor Relations Act of 1935, 29 U.S.C. § 153 (2010). The NLRB is made up of five members appointed by the President for staggered five-year terms. *Id.* § 153(a).

20. S. 560 § 2(a).

21. *Id.* § 4(b)(1).

22. *Id.* § 3. Interest arbitration, traditionally used in the public sector, would result in an arbitrator deciding the wages, hours, and terms and conditions of employment for private-sector employees and employers.

23. The Democrats lost their majority in the House in 2010 and now are not close to the sixty votes needed in the Senate.

24. Traditionally, the NLRB consists of three members of the President’s party and two members of the party not in power. WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR* 54 (2000). When President Bush left office, the NLRB had only two members. Currently, there are four members, three of whom are Democrats. See *Board Members Since 1935*, NLRB, <http://www.nlr.gov/who-we-are/board/board-members-1935> (last visited Feb. 14, 2012).

25. PAUL OSTERMAN ET AL., *WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET* 46 (2001).

26. Barry T. Hirsch & David A. Macpherson, *Union Membership, Coverage, Density, and Employment Among All Wage and Salary Workers, 1973–2010*, UNIONSTATS.COM, <http://www.unionstats.com> (follow “html” hyperlink located below “All Wage & Salary Workers”) (last visited Feb. 14, 2012); see also *News Release, Union Members—2011*, BUREAU LAB. STAT. (Jan. 27, 2012), <http://www.bls.gov/news.release/pdf/union2.pdf> (reporting an 11.8% union membership rate in the U.S. in 2011).

workforce is unionized²⁷—the approximate level just before the New Deal.²⁸ What is unclear is whether labor law reform aimed at increasing union density is good for the U.S. economy, good for employees, good for employers and their customers, and whether employees ultimately want to unionize. Union leaders often answer these questions swiftly and definitively. According to organized labor, unionization benefits employees, customers, and the U.S. economy, and therefore should be encouraged whether employers like it or not.²⁹ With regard to employee choice, organized labor contends that nearly all employees want to be unionized (or at least would want to be organized once the benefits of unionization are explained), and only reject unions in secret-ballot elections because the organizing system unfairly favors employers by allowing companies to get away with coercing and intimidating employees.³⁰ Underlying these claims are some assumptions about the continued need for and utility of unionism in contemporary workplaces in the U.S. This Article evaluates these critical assumptions, addresses the most recent labor law reform attempt embodied in EFCA, and explains how an alternative reform approach endorsed by the Authors relies less on normative assumptions about whether unions should regain their dominance or should be allowed to continue to wither, and more on an essential underlying feature of modern liberal democratic theory: the right to freely elect one's representatives or to remain free from representation. The proposed reform also departs from pure reliance on legal amendments, shifting to reliance on unions' and employers' joint and symbiotic reciprocity and collective moral obligation as a means of leveraging enforcement that theoretically could result in a greater likelihood of election results that closer accord the ultimate preferences of employees and in lower administrative costs of enforcement.

27. Hirsch & Macpherson, *supra* note 26 (follow "html" hyperlink located below "Private Sector").

28. OSTERMAN, *supra* note 25, at 46.

29. See, e.g., *Unions Are Good for Business, Productivity and the Economy*, AFL-CIO, <http://www.aflcio.org/joinaunion/why/uniondifference/uniondiff8.cfm> (last visited Feb. 14, 2012); see also HARLEY SHAIKEN, CTR. FOR AM. PROGRESS, *THE HIGH ROAD TO A COMPETITIVE ECONOMY: A LABOR LAW STRATEGY* (2004) (arguing that unionization benefits the economy and productivity, and advocating for card-check authorization against elections).

30. See, e.g., Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 546–600 (1993) (advocating against employer free speech in union elections and arguing that the existing process is wildly biased in favor of employers); Rafael Gomez & Morley Gunderson, *The Experience Good Model of Trade Union Membership*, in *THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION* 92, 108 (Phanindra V. Wunnava ed., 2004) (concluding that the benefits of unions are opaque to nonunion members); *Interactive Map: Unions Are Good for Workers and the Economy in Every State*, CTR. FOR AM. PROGRESS ACTION FUND (Feb. 15, 2009), http://www.americanprogressaction.org/issues/2009/02/unions_workers.html [hereinafter *Union Map*].

Part I reviews research on the effects of unionization on employees and employers to address the question of whether a primary goal of national policy should be to abolish unions, champion their resurrection, or perpetuate the status quo. We conclude that existing scholarship does not support either abolishing or championing unionization, but that the status quo deserves to be revisited because the focus of advocates for reforming the current system is on win rates, and not sufficiently on employee choice. Part II then sets out a fair system maximizing employee free choice to unionize or not. Fairness ought not be defined exclusively by results, as in a distributive-justice-focused approach in which a high union win rate equals a fair system and a low union win rate equals an unfair system. Instead, we posit that a fair system is one that maximizes employees' opportunities to make fully informed choices free of coercion or intimidation—embodying a procedural-justice focused approach. Part III analyzes the current systems in use and being proposed and finds that neither the status quo nor proposals by legislators or the NLRB satisfy our conceptualization of procedural-justice focused fairness. Part IV outlines a system that does satisfy our standard of fairness by capitalizing on extralegal behavioral norms derived in part from the long-standing moral principle of “living up to one’s word.” This would result in a system with greater self-regulation by the parties, lower administrative costs, and greater opportunity for employees to exercise their rights to vote for their representatives or to vote not to be represented in the workplace based on more complete information, free from coercion and intimidation. We conclude by discussing the implications of adopting the proposal advanced, and opportunities for extending it to other areas of law.

I. ARE EMPLOYEES AND EMPLOYERS BETTER OR WORSE OFF WHEN ORGANIZED?

Unions may be assessed by how they impact the U.S. economy, employees, employers, and customers or recipients of the goods and services provided by organized workplaces. The ultimate question of whether the U.S. economy is better off with greater union density is complex and beyond the scope of this Article. Organized labor, industrial-relations theorists, and some academics, however, believe that unions are a net positive for the economy and that greater union density correlates linearly with improved economic prosperity.³¹ According to

31. See generally Bruce E. Kaufman, *John R. Commons and the Wisconsin School on Industrial Relations Strategy and Policy*, 57 *INDUS. & LAB. REL. REV.* 3, 5–7 (2003) (discussing the early views of John R. Commons, a prominent institutionalist in the industrial-relations scholarship tradition, who came to believe that trade unions could improve the conditions of laboring people by using the “device of the common rule” and collective bargaining to “stabilize labor markets and equalize bargaining power, while also using methods of collective voice to replace industrial autocracy with industrial

organized labor, unions consistently provide higher wages and greater job security.³² This in turn “primes the consumption pump” and increases demand for goods and services.³³ Increased demand requires employers to increase supplies of goods and services, which creates jobs (and therefore decreases unemployment) and increases GDP.³⁴ To support this contention, labor points to the 1950s as a time of unprecedented and subsequently unmatched growth in unionization, union density, parity between rich and poor, and economic prosperity. This argument has appeal, but may be too simplistic. In the 1950s there was no real threat of foreign competition to U.S. employers, particularly those in heavily unionized workplaces.³⁵ Europe and Japan were slowly recovering from the devastation of World War II, and the rest of today’s current and rising powers were still developing. Moreover, 1950s transportation and information systems obviously impeded foreign competition.³⁶ Finally, the U.S. had seemingly unlimited natural resources. Thus, while it makes sense to credit unions with increasing wages, reducing the gap between rich and poor, and increasing consumers’ purchasing power, one could argue that high costs of unionization forced U.S. manufacturers to produce their goods outside of the U.S. and, thus, instead of being a solution to America’s economic woes, unionization was the cause. The positive union effect might have been short-term and conditional on historical context. Regardless of whether unionization is a reason for some of America’s trade and economic woes, it seems naïve to argue that the solution to America’s struggles in this global economy, where the U.S. has exported the vast majority of its manufacturing to reduce costs, is to increase wages through unionization. On the other hand, the argument that the gap between rich and poor depletes the middle class and reduces GDP because capital remains with the wealthy instead of being dispersed to those who will put the money back into the economy is very appealing.

There is ample academic literature devoted to whether employees are better off when unionized. The general conclusion is that employees are better compensated but less satisfied.³⁷ An early empirical examination of the impacts of unionization in the workplace begins with

democracy”).

32. See David Madland & Karla Walter, *Unions Are Good for the American Economy*, CTR. FOR AM. PROGRESS ACTION FUND (Feb. 18, 2009), http://www.americanprogressaction.org/issues/2009/02/efca_factsheets.html; see also *Union Map*, *supra* note 30.

33. See Madland & Walter, *supra* note 32.

34. *Id.*

35. See, e.g., William G. Shepherd, *Causes of Increased Competition in the U.S. Economy, 1939-1980*, 64 *REV. ECON. & STAT.* 613, 620-22 & tbl.4 (1982).

36. Michael E. Porter, *Competition in Global Industries: A Conceptual Framework*, in *COMPETITION IN GLOBAL INDUSTRIES* 15, 42-45 (Michael E. Porter ed., 1986).

37. RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 20-21 (1984).

the observation that "unions alter nearly every . . . measurable aspect of the operation of workplaces."³⁸ This study has been credited as the first to stimulate scholarly interest in how unions affect factors beyond wages, including satisfaction, productivity, business profitability, investment, and the economy.³⁹ Labor-relations scholars have since endeavored to uncover unionism's effects on these various aspects.

While unionization results in an increase in wages,⁴⁰ it does not come with a concomitant increase in productivity, and therefore the increased salary expense reduces employer profit.⁴¹ For example, a 2004 study of thirteen years of operating, financial, and employment data for major airlines found union-imposed wage increases correlated with decreased employee productivity, decreased airplane productivity, and overall decreased operating margins.⁴² Interestingly, the study found that the "quality of labor relations" was a significant control variable.⁴³ Sandra Black and Lisa Lynch confirm this dimension.⁴⁴ In their analysis of a national survey of businesses, they found that firms with traditional labor-management relations had significantly lower productivity than did nonunion firms.⁴⁵ However, when controlling for the presence of certain employee-empowering practices (for example, total quality management and profit sharing), the impact of unionization on productivity dwindled to statistical insignificance.⁴⁶ Similarly, Harry Holzer analyzed a 1982

38. *Id.* at 19.

39. See James T. Bennett & Bruce E. Kaufman, *What Do Unions Do?: A Twenty-Year Perspective*, 25 J. LAB. RES. 339, 339 (2004); Barry T. Hirsch, *What Do Unions Do for Economic Performance?*, 25 J. LAB. RES. 415, 415 (2004).

40. That unionization increases wages is generally accepted among scholars. See FREEMAN & MEDOFF, *supra* note 37, at 20 (finding that unionization results in increased wages and fringe benefits); David G. Blanchflower & Alex Bryson, *What Effect Do Unions Have on Wages Now and Would Freeman and Medoff Be Surprised?*, 25 J. LAB. RES. 383, 406-07 (2004) (finding that unionization does not increase wages as much as it did in the 1970s but that the wage premium is substantial).

41. See John T. Addison & Barry T. Hirsch, *Union Effects on Productivity, Profits, and Growth: Has the Long Run Arrived?*, 7 J. LAB. ECON. 72, 92 (1989) (reviewing several studies and concluding that, on average, unionization is associated with decreased productivity); Hirsch, *supra* note 39, at 430-31 (reconciling a number of studies and concluding that unionization does not increase productivity, and thus that the increased wages may result in decreased profitability); cf. John T. Addison, *The Determinants of Firm Performance: Unions, Works Councils, and Employee Involvement/High-Performance Work Practices*, 52 SCOT. J. POL. ECON. 406, 416 (2005) (finding the small positive effect of unionization on productivity unable to compensate for the increased wage expense). *But see* Christos Doucouliagos & Patrice Laroche, *What Do Unions Do to Productivity? A Meta-Analysis*, 42 INDUS. REL. 650, 682 (2003) (reporting results of a meta-regression analysis that found a neutral or positive effect of unionization on productivity, especially in manufacturing).

42. Jody Hoffer Gittell et al., *Mutual Gains or Zero-Sum? Labor Relations and Firm Performance in the Airline Industry*, 57 INDUS. & LAB. REL. REV. 163, 174-77 & 1bl.3 (2004).

43. *Id.*

44. Sandra E. Black & Lisa M. Lynch, *How to Compete: The Impact of Workplace Practices and Information Technology on Productivity*, 83 REV. ECON. & STAT. 434, 444 (2001).

45. *Id.*

46. *Id.* at 440-41.

survey of firms, finding the negative effect of wage increases on profit was greater if a union imposed the wage increase than if the firm itself imposed the increase.⁴⁷

Despite higher wages, union workers tend to report lower job satisfaction than nonunion workers. Richard Freeman and James Medoff synthesized a broad range of research and concluded that, while unionization results in higher wages and fringe benefits, it also correlates with decreased employee satisfaction, especially with respect to working conditions and relationships with management.⁴⁸ Similarly, a 1983 national survey found that unionized workers reported higher satisfaction with pay than did nonunion workers, but lower satisfaction with respect to work duties, coworkers, supervisors, and promotions, leading to lower global satisfaction ratings.⁴⁹

Scholars have posed a number of theories to explain this apparent paradox, including that: (1) “unions galvanize worker discontent in order to make a strong case in negotiations with management”;⁵⁰ (2) the grievance and negotiation experience primes employees to perceive negative conditions more saliently;⁵¹ (3) dissatisfied union workers continue working under conditions where their nonunion counterparts would quit, thereby self-selecting out of the dataset⁵² (the “exit-voice”

47. Harry J. Holzer, *Wages, Employer Costs, and Employee Performance in the Firm*, 43 *INDUS. & LAB. REL. REV. (SPECIAL ISSUE)* 147, 161–163 (1990). Empirical studies have uncovered manifold other disadvantages that employers suffer as a result of unionization. See, e.g., FREEMAN & MEDOFF, *supra* note 37, at 21 (less overall flexibility in business operations); Addison & Hirsch, *supra* note 41, at 99 (reduced investment in physical capital and research and development); David J. Flanagan & Satish P. Deshpande, *Top Management's Perceptions of Changes in HRM Practices After Union Elections in Small Firms: Implications for Building Competitive Advantage*, 34 *J. SMALL BUS. MGMT.* 23, 29–33 & tbl.4 (1996) (reduced ability to implement “innovative” human-resource policies, such as merit-based promotion and compensation and internal recruiting); Hirsch, *supra* note 39, at 436 (reduced investment in physical capital and research and development).

48. FREEMAN & MEDOFF, *supra* note 37, at 21.

49. Chris J. Berger et al., *Effects of Unions on Job Satisfaction: The Role of Work-Related Values and Perceived Rewards*, 32 *ORG. BEHAV. & HUM. PERFORMANCE* 289, 304, 308, 310, 314 (1983); see also Tove Helland Hammer & Ariel Avgar, *The Impact of Unions on Job Satisfaction, Organizational Commitment, and Turnover*, 26 *J. LAB. RES.* 241, 257 (2005) (synthesizing job-satisfaction research and concluding that the negative impact on satisfaction is explained by dissatisfaction with job quality, supervision, and the labor-management relations climate); Charles A. Odewahn & M.M. Petty, *A Comparison of Levels of Job Satisfaction, Role Stress, and Personal Competence Between Union Members and Nonmembers*, 23 *ACAD. MGMT. J.* 150, 153 (1980) (finding that union workers report significantly lower satisfaction with work and pay than do nonmembers). But see Luis R. Gomez-Mejia & David B. Balkan, *Faculty Satisfaction with Pay and Other Job Dimensions Under Union and Nonunion Conditions*, 27 *ACAD. MGMT. J.* 591, 600 (1984) (finding that union faculty had higher pay satisfaction, and finding no relationship between unionism and other aspects of satisfaction).

50. FREEMAN & MEDOFF, *supra* note 37, at 21.

51. George J. Borjas, *Job Satisfaction, Wages, and Unions*, 14 *J. HUM. RESOURCES* 21, 38 (1979); Hammer & Avgar, *supra* note 49, at 242–43.

52. Borjas, *supra* note 51; see also Joni Hersch & Joe A. Stone, *Is Union Job Dissatisfaction Real?*, 25 *J. HUM. RESOURCES* 736, 750 (1990) (reporting empirical results consistent with the exit-voice hypothesis).

hypothesis⁵³); (4) poor labor-management relations drive dissatisfaction;⁵⁴ (5) union members seek out union jobs because these employees have higher aspirations and expectations;⁵⁵ and (6) unions organize where working conditions are worse to begin with.⁵⁶ Nonetheless, no single theory has garnered a consensus.

In addition to the firm-based research cited above, anecdotal evidence supports the argument that unionized businesses are less profitable than are nonunion firms in the same sector. An example of such anecdotal evidence is found in the hotel industry. Hotel owners and operators believe that their union properties are less profitable than their nonunion properties.⁵⁷ Industry experts claim that union work rules (regarding job duties and working hours) and health and welfare obligations will make an organized hotel less profitable than a nonunion hotel even if the latter has higher wages.⁵⁸ Indeed, one hotel evaluator stated that in evaluating a property for sale, unionization will, depending on the contract and the union, result in a 10% to 20% decrease in value.⁵⁹ Another real estate investor stated that because of increased costs, the

53. ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970). Hirschman defined voice as the decision to complain about a perceived deterioration of a condition or set of conditions experienced at an organization. *Id.* at 4. He regarded voice as somewhat mutually exclusive to "exit" (the decision to remove oneself from the offending condition). *Id.* He theorized, somewhat tautologically perhaps, that the likelihood of voice increases with the degree of "loyalty" to the organization. *Id.* at 78. It should be noted that voice can be conceptualized as a form of complaining about work conditions, or it can be characterized by participation in a pluralist, democratic process. The latter is the view taken by institutionalists, see John R. Commons, *American Shoemakers, 1648-1895: A Sketch of Industrial Evolution*, 24 Q.J. ECON. 39 (1909), and industrial relations scholars, see JOHN W. BUDD, *EMPLOYMENT WITH A HUMAN FACE: BALANCING EFFICIENCY, EQUITY, AND VOICE* (2004); H.A. Clegg, *Pluralism in Industrial Relations*, 13 BRIT. J. INDUS. REL. 309 (1975).

54. Keith A. Bender & Peter J. Sloane, *Job Satisfaction, Trade Unions, and Exit-Voice Revisited*, 51 INDUS. & LAB. REL. REV. 222, 231-32 & 161s.3 & 4, 235 (1998); cf. James W. Carillon & Robert I. Sulton, *The Relationship Between Union Effectiveness and the Quality of Members' Worklife*, 3 J. OCCUPATIONAL BEHAV. 171, 178 (1982) (studying public schoolteachers and finding a positive effect on job satisfaction when the union excelled in five areas: economic bargaining, member protection, working-conditions bargaining, involving members in decisions, and improving relations with coworkers).

55. See Alex Bryson et al., *Does Union Membership Really Reduce Job Satisfaction?*, 42 BRIT. J. INDUS. REL. 439, 452 (2004) (studying unionized employees in the U.K.); Hammer & Avgar, *supra* note 49, at 258-59.

56. Borjas, *supra* note 51, at 28.

57. In November of 2008 Professor Sherwyn, who was serving as the academic director of the Center for Hospitality Research, hosted a real estate finance roundtable at the law offices of Proskauer Rose in New York City. The Roundtable featured hotel owners, operators, bankers, consultants, deal makers, and professors. The consensus of the group was that unionized hotels would provide lower returns than would nonunion hotels and that unionization could be a deal breaker in many situations. See Ctr. for Hosp. Res., Cornell Univ. Sch. of Hotel Admin., Real Estate Finance Roundtable (Nov. 10, 2008).

58. *Id.*

59. *Id.*

unionization status of a hotel will determine whether or not a company will purchase a property.⁶⁰ Hotel operators contend that the inefficiencies caused by union work rules discourage investors from investing in properties because they will not provide an adequate return, causing a reduction in those willing to build, own, or operate hotels.⁶¹ The logical extension of this argument is that such investor decisions will not only reduce jobs in the hotel industry, but that related industries such as construction, food service, airlines, recreation, and retail will all suffer as well.

While unions contest the argument that union hotels are less profitable than nonunion properties,⁶² they also ask, “so what?” Union advocates argue that exchanging profits for higher wages, increased job security, employee voice, and all other union benefits is a positive trade.⁶³ Indeed, union advocates can compare the wages and benefits in unionized cities like New York and Las Vegas to, for example, Dallas and Atlanta and show that in unionized hotels, housekeepers and banquet waiters lead middle-class and, sometimes, upper-middle-class lives.⁶⁴ Alternatively, employer advocates may point to the fact that nonunion hotels in Chicago and San Francisco pay higher wages than their unionized counterparts.⁶⁵ Unionists argue that it is the threat of unionization that causes the high wages and that the free-rider problem should be eliminated, not perpetuated.⁶⁶

Despite the assertions from those on both sides of the debate that the U.S. would be better off were it to favor either labor or capital, there is no clear answer to this question and, thus, neither the parties’ opinions nor their lobbying dollars should define national policy on this matter. Instead, we argue that the focus should be on the microdata. The evidence, however, is mixed. Employees are better off, but less satisfied,

60. Paul Wagner, an attorney with Stokes, Roberts, & Wagner, was hired by a major real estate developer to examine whether the developer could open a nonunion hotel in a city with a neutrality agreement. Wagner reports that the developer stated that he could not afford to open the hotel if it were unionized. Interview with Paul Wagner, Attorney, Stokes, Roberts & Wagner, in Ithaca, N.Y. (Aug. 21, 2010).

61. See Real Estate Finance Roundtable, *supra* note 57.

62. In a 2006 speech at Cornell University’s School of Industrial and Labor Relations, Workers United president Bruce Raynor stated that union hotels are more profitable and provide better service than nonunion properties. Raynor admitted he had no data to support this statement. Bruce Raynor, President, Workers United, Address at Cornell Univ. Sch. of Indus. & Labor Rel. (Oct. 26, 2006).

63. *Id.*

64. *Id.*

65. At the Tenth Annual Labor and Employment Roundtable sponsored by Cornell’s Schools of Hotel Administration, Industrial & Labor Relations, and Law, hotel negotiators stated that many nonunion hotels in Chicago and San Francisco pay higher wages than do union properties. See Cornell Univ. Sch. of Hotel Adm., Labor & Employment Roundtable (May 15, 2011).

66. See Raynor, *supra* note 62; see also Ozkan Eren, *Does Membership Pay Off for Covered Workers? A Distributional Analysis of the Free Rider Problem*, 62 INDUS. & LAB. REL. REV. 367, 367–68 (2009).

when unionized. Unionized employers enjoy lower profits than nonunion firms. Without evidence to support either side's macro position, we should not enact labor law reform whose sole purpose is to either enhance or reduce union influence. Instead, we contend that national policy regarding union organizing should be to ensure that the system is fair. Below, we define what we believe to be fair and then analyze (1) the current system, (2) labor's preferred system (neutrality agreements with card check or EFCA), and (3) the latest proposed fix to the problem—short elections. After explaining why these systems fail to meet our definition of fairness, we introduce the moral principles of union organizing embodied in a contractual arrangement between management and labor and explain why this system should be enacted.

II. WHAT IS FAIR?

Commentators, scholars, legislators, and advocates seem to habitually overweigh the *results* of systems (such as adjudication outcomes or election results) to determine the fairness of systems being evaluated. For example, there is substantial literature comparing the results of discrimination cases resolved in litigation with those resolved in arbitration.⁶⁷ One underlying theme of this work is that systems are fair if they have comparable results.⁶⁸ Alternatively, according to some, there is a positive relationship between plaintiff victories and fairness.⁶⁹ Similarly, there are those who point to the results of union-organizing drives and elections and make conclusions about the fairness of the process by looking at the results.⁷⁰ The system is fair, according to some, if the union wins the majority of elections and is unfair when the union win rate drops. In fact, we contend that, standing alone, the results of an

67. See, e.g., David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1567–78, 1586–91 (2005) (reviewing prior empirical research and presenting the results of a case study finding arbitration faster and more efficient than litigation); Frederick L. Sullivan, *Accepting Evolution in Workplace Justice: The Need for Congress to Mandate Arbitration*, 26 W. NEW ENG. L. REV. 281, 308–12 (2004); see also Curtis Brown, *Cost-Effective, Fast and Fair: What the Empirical Data Indicate About ADR*, METRO. CORP. COUNSEL, Nov. 2004, at 56, 70 (summarizing several empirical studies comparing litigation with arbitration); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44, 48 & 1bl.1; Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 824 (2003); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46 (1998).

68. See, e.g., Sullivan, *supra* note 67, at 309 (asserting that arbitration is fair to plaintiffs because they are more successful in arbitration than in litigation).

69. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1262–63 (2009) (arguing that the empirical evidence tends to suggest that mandatory arbitration is unfair, as measured by aggregate pro-plaintiff dispositions).

70. Kate Bronfenbrenner & Tom Juravich, *The Impact of Employer Opposition on Union Certification Win Rates: A Private/Public Sector Comparison* (Econ. Policy Inst., Working Paper No. 113, 1994), available at <http://digitalcommons.ilr.cornell.edu/articles/19/>.

adjudication system or a union-representation election do not reveal anything about fairness, regardless of how many cases are analyzed.

An analogy illustrates our point. Assume one of the Authors of this Article, a middle-aged professor who was once an average high school basketball player on a bad high school team, is set to play ten games of one-on-one basketball. The rules are as follows: games to eleven, one point for each basket, the scorer keeps possession of the ball, and players call their own fouls. The professor loses all ten games 11–0. An argument that the rules of the games played were unfair based solely on the observed outcomes is flawed because it does not account for the identity of the professor's opponent. If it turns out that the opponent is Michael Jordan (regarded as one of the greatest players ever to play the game professionally), claims that the games were "unfair" are undoubtedly spurious at worst and grossly incomplete at best. Conversely, if Professors Sherwyn and Eigen were to play ten games and the rules were such that Eigen had to adhere to the regular rules of basketball, but Sherwyn got to shoot on a basket that was eight feet off the ground (two feet closer to the ground than a regulation basketball rim), did not have to dribble the ball, and was allowed to foul Eigen, we would hopefully agree that the rules were unfair, regardless of the results. Outcomes alone do not define fairness, nor should they automatically lead one to assume unfair rules or cheating.⁷¹

The fairness correlation between rules and outcomes can be assessed only if we have determinative information prior to the time that we invoke the system. In sports, we would need to know the abilities of the teams. If the teams are equal, then a fair system would result in each team winning about half the games. In discrimination claims, we would need to know if the employer violated the law. Thus, if plaintiffs who go to trial in discrimination cases were in fact discriminated against 90% of the time, a fair system should generate approximately a 90% employee win rate. If plaintiffs were discriminated against only 10% of the time, we should expect to see a 10% win rate. With respect to discrimination, because the trial determines liability, we cannot judge the fairness of the system merely by analyzing results. Put another way, the so-called "base

71. Interestingly, if instead of Sherwyn versus Eigen in the second hypothetical set of games, it were again Sherwyn versus Michael Jordan, and Sherwyn received the benefit not being bound by the standard rules, one might argue for a different view of the fairness of the system. If one expects the players to be unequal in terms of resources available, one would be more likely to perceive unbalanced rules as leveling a playing field and, hence, as more fair. In the employment setting, one might perceive employers as possessing more resources and information and, hence, if the rules of litigation applied to employers the same way as employees, one would expect outcomes to disproportionately favor employers. Ironically, attempts made to level the litigation playing field by giving employees greater access to adjudication on the merits via arbitration are sometimes perceived as a creating a less fair system than litigation.

rate fallacy⁷² underlies our complaint about fairness here. Without information on the reference category's base rate (how much employers discriminate in our example above), there is insufficient information on which to base a decision on fairness. This often does not stop people from making incorrect assumptions or backing into assumptions, as described above.⁷³

Union advocates often argue that in union elections we do in fact know employees' desires prior to the election system. As explained below, to petition for an election, unions need 30%,⁷⁴ but often get over 60%, of employees to sign cards saying they wish to be represented by the union.⁷⁵ Because unions almost always have enough support to win an election before the campaign begins, they contend that the system is unfair because despite such support, unions lose anywhere from 28% to 69% of elections each year.⁷⁶ In fact, according to a recent study of 22,382 organizing drives occurring between 1994 and 2004 that filed an election petition, secret-ballot elections were held in only 14,615 (65%).⁷⁷ Of those 14,615 elections, unions won 8155, or 56%.⁷⁸

However, many employees sign authorization cards not because they want a union, but because they are willing to vote for or against a union in a secret-ballot election.⁷⁹ This might be due to the low perceived cost of saying yes to such a process, or it might be due to employees not wanting to be a hold out if other employees want to vote. It might reflect employees' respect for the American ideal of the democratic process of voting for one's representative, even if employees sign cards planning to vote against the union. It might be due to lawful (or unlawful) pressure exerted by union organizers on employees. Moreover, the signing of cards represents the culmination of the union's unilateral attempt to organize the employees. During the card-signing time the employees hear only one side of the story. By the time of the election, employees have heard both sides and may make a more *informed* decision. Is it possible that employers intimidate and otherwise unfairly influence

72. Jonathan J. Koehler, *The Base Rate Fallacy Reconsidered: Descriptive, Normative, and Methodological Challenges*, 19 BEHAV. & BRAIN SCI. 1, 1 (1996) (using an example of a coach on an Olympic basketball team trying to decide between two players to make a final attempt at shooting the game-winning basket, to illustrate the author's point on base-rate fallacy).

73. *Id.*

74. 29 U.S.C. § 159(e)(1) (2010).

75. See Andrew W. Martin, *The Institutional Logic of Union Organizing and the Effectiveness of Social Movement Repertoires*, 113 AM. J. SOC. 1067, 1072 (2008) (contending that many unions will not file for a certification election until a majority of workers sign authorization cards).

76. See *id.* at 1089 tbl.7, 1096 fig.A-2.

77. John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004*, 62 INDUS. & LAB. REL. REV. 3, 6 tbl.1 (2009).

78. *Id.*

79. See *Terrible Tactics*, SEIU EXPOSED, <http://www.seiuxposed.com/tactics.cfm> (last visited Feb. 14, 2012).

employees? Of course. On the other hand, the drop in union support could be the result of more complete information. For example, few would argue that an election for political office was unfair if the following occurred: the voters were introduced to one candidate, were inundated with positive information about the candidate, overwhelmingly signed a petition approving the candidate's ability to run for office, and then voted for a second candidate who came onto the scene four weeks before the election and told a better story than the first candidate.

Union losses could also reflect significant change in American taste for organized labor and collective rights and voice in the workplace. For example, from the 1940s through the 1970s, the height of the private-sector union movement, pro-union messages abounded in popular culture. Anecdotally, but for purposes of illustration and comparison, Woody Guthrie sang about joining unions,⁸⁰ textile workers had little kids singing "look for the union label,"⁸¹ and Sally Field won the Academy Award in 1979 for her role as employee and union organizer Norma Rae.⁸² Even *On the Waterfront*, a 1954 Academy Award-winning film⁸³ that portrayed unions in less than positive terms, concluded with employees getting their union back and running it on the "up and up."⁸⁴ Today, in contrast, unions are the entities that cost us the World Series in 1994,⁸⁵ have parents and education advocates *Waiting for "Superman"* to break union power,⁸⁶ and are being blamed for driving states into near bankruptcy.⁸⁷ Accordingly, a 2009 Gallup poll indicated a sharp decline in Americans' approval of labor unions—48% approve, down from 59% the year before.⁸⁸ A corresponding poll in 2010 reported a 52% approval rating.⁸⁹ For comparison, in 1936 and 1957, the approval ratings were 72% and 75%, respectively.⁹⁰

80. WOODY GUTHRIE, *Union Maid*, on *HARD TRAVELIN': THE ASCH RECORDINGS*, VOL. 3 (Smithsonian Folkways Recordings 1999); WOODY GUTHRIE, *Union Burying Ground*, on *STRUGGLE* (Smithsonian Folkways Recordings 1990).

81. See *Look for the Union Label Commercial* (1981).

82. See *Oscar Legacy: The 52nd Academy Awards*, ACAD. MOTION PICTURE ARTS & SCI., <http://www.oscars.org/awards/academyawards/legacy/ceremony/52nd.html> (last visited Feb. 14, 2012).

83. See *Oscar Legacy: The 27th Academy Awards*, ACAD. MOTION PICTURE ARTS & SCI., <http://www.oscars.org/awards/academyawards/legacy/ceremony/27th.html> (last visited Feb. 14, 2012).

84. *ON THE WATERFRONT* (Columbia Pictures 1954).

85. See *Year in Review: 1994 National League*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/yearly/yr1994n.shtml> (last visited Feb. 14, 2012);

86. *WAITING FOR "SUPERMAN"* (Electric Kinney Films 2010).

87. See, e.g., *Can You Blame Unions for Golden State's Fiscal Problems?*, FOX BUS. (Oct. 27, 2011), <http://video.foxbusiness.com/v/1243118545001/can-you-blame-unions-for-golden-states-fiscal-problems/>.

88. Lydia Saad, *Labor Unions See Sharp Slide in U.S. Public Support*, GALLUP (Sept. 3, 2009), <http://www.gallup.com/poll/122744/Labor-Unions-Sharp-Slide-Public-Support.aspx>.

89. Jeffrey M. Jones, *U.S. Approval of Labor Unions Remains near Record Low*, GALLUP (Aug. 12, 2010), <http://www.gallup.com/poll/142007/Americans-Approval-Labor-Unions-Remains-Near-Record-Low.aspx>.

90. *Id.*

In Wisconsin, Governor Scott Walker introduced a “Budget Repair” bill on February 11, 2011, that directly targets unions.⁹¹ As of the writing of this Article, several other states, including Tennessee, Ohio, and Nevada, are expected to follow suit.⁹² Four states’ attorneys general have announced their intention to “vigorously defend” state constitutional provisions mandating secret-ballot elections.⁹³ On February 1, 2012, the Indiana Senate voted 28–22 to pass a right-to-work bill, making Indiana the twenty-third state in the nation with such a law,⁹⁴ and legislators in Michigan (long known as the strongest of union states) are contemplating a proposal that would make that state the nation’s twenty-fourth right-to-work state.⁹⁵

Do employees want to be represented by unions? Are Americans now more anti-union than we were in the Fifties? Does full information lead to greater unionization or to union losses? Do unions fail to organize because employers intimidate employees? Because there are simply too many uncontrollable factors to judge, we contend that election *results* simply do not provide evidence of whether or not the system itself is *fair*. Accordingly, it is time to change the paradigm on how we judge fairness.

We contend that a fair system will result in employees believing that they had enough information to make an informed decision, that they were respected, and that they were not intimidated, threatened or coerced. Such a system would be fair regardless of whether unions win or lose the majority of elections held. Below, we examine the current and proposed systems to see if they are fair under our new standard. We also

91. See *Governor Walker Introduces Budget Repair*, SCOTTWALKER.ORG (Feb. 11, 2011), <http://www.scottwalker.org/news/2011/02/governor-walker-introduces-budget-repair>.

92. *Republicans Challenging Unions in State Capitols*, ABCNEWS.COM (Feb. 18, 2011), <http://abcnews.go.com/US/wireStory?id=12946800>.

93. Letter from Alan Wilson, S.C. Att’y Gen., et al., to Lafe E. Solomon, Acting Gen. Counsel, NLRB (Jan. 27, 2011), available at http://nlrb.gov/sites/default/files/documents/234/ag4_letter_to_nlrbc_1-27-2011.pdf; see also Lawrence E. Dube, *Four States Defend Secret Ballot Laws, as GOP Senators Back Them with New Bill*, Daily Lab. Rep. (BNA) No. 18, at AA-1 (Jan. 27, 2011).

94. Susan Guyett, *Indiana Becomes 23rd “Right-to-Work” State*, REUTERS, Feb. 1, 2012, available at <http://www.reuters.com/article/2012/02/01/us-unions-indiana-righttowork-idUSTRE81018920120201>.

95. See H.R. 6348, 95th Leg., Reg. Sess. (Mich. 2010). For the twenty-two other right-to-work states’ laws, see ARIZ. CONST. art. XXV; ARK. CONST. amend. XXXIV; FLA. CONST. art. 1, § 6; KAN. CONST. art. XV, § 12; MISS. CONST. art. VII, § 198-A; NEB. CONST. art. XV, § 13; OKLA. CONST. art. XXIII, § 1A; S.D. CONST. art. VI, § 2; ALA. CODE § 25-7-30 (2011); GA. CODE ANN. § 34-6-21 (2010); IDAHO CODE ANN. § 44-2003 (2011); IOWA CODE §§ 731.1–8 (2011); LA. REV. STAT. ANN. § 23:981 (2011); NEV. REV. STAT. §§ 613.130, 613.230, 613.250 (2011); N.C. GEN. STAT. § 95-80 (2011); N.D. CENT. CODE § 34-01-14 (2011); S.C. CODE ANN. § 41-7-10 (2011); TENN. CODE ANN. § 50-1-201 (2011); TEX. LAB. CODE ANN. § 101.301 (2011); UTAH CODE ANN. §§ 34-34-1 to -17 (2011); VA. CODE ANN. §§ 40.1-58 to -69 (2011); WYO. STAT. ANN. §§ 27-7-108 to -115 (2011). New Hampshire’s recent right-to-work proposal, H.R. 474-FN, 2011 Leg. (N.H. 2011), was vetoed by the governor. See *Governor Lynch’s Veto Message Regarding HB 474*, N.H. OFF. GOVERNOR (May 11, 2011), <http://www.governor.nh.gov/media/news/2011/05/11/11-veto-hb474.htm>.

analyze the current and proposed systems to see if they would solve the problems they wish to resolve and would produce desired results.

III. THE TRADITIONAL SYSTEM FOR UNION ORGANIZING AND ATTEMPTS TO REFORM IT

The union-organizing process begins in one of several ways. Sometimes, dissatisfied employees seek out a union.⁹⁶ Other times, unions initiate discussions with employees.⁹⁷ In fact, organizers may enter an employer's property and hand out authorization cards or set up picket lines at the entrances and exits to the property.⁹⁸ Unions may use current employees to "sell" the union to coworkers.⁹⁹ Finally, unions sometimes send their members to apply for jobs with nonunion employers the unions wish to organize.¹⁰⁰ Regardless of how the organizing begins, the union must soon meet with a number of employees to see if there is interest in organizing.

A. NLRB RULES FOR ORGANIZING AND SECRET-BALLOT ELECTIONS

The NLRA sets forth the laws regulating this form of employee organization.¹⁰¹ Under those rules, before any labor organization can be certified as the exclusive bargaining representative for any group of employees, the employees in that group, called a bargaining unit, vote for or against union representation in a secret-ballot election monitored by the NLRB.¹⁰² In most cases, the NLRB seeks to schedule such an election approximately six to eight weeks after the union initiates the process by filing a representation petition.¹⁰³ This time period may be extended if the

96. Employees often seek out unions because of perceived failures in one or more of five key areas: lack of recognition, weak management, poor communication, substandard working conditions, and noncompetitive wages and benefits. See MARTIN JAY LEVITT, *CONFESSIONS OF A UNION BUSTER* 49 (1993).

97. *Labor Union Organizing in the United States Workplace*, HRHERO.COM, <http://www.hrhero.com/topics/union.html> (last visited Feb. 14, 2012).

98. See, e.g., *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 240-42 (6th Cir. 1995) (enforcing a NLRB order finding that an employer unlawfully interfered with its employees' section 7 rights where the employer excluded union representatives from distributing union literature on state-owned property outside the employer's place of business).

99. See *Labor Union Organizing*, *supra* note 97.

100. The applicants' reason for seeking employment is to organize the *real* employees. This method, referred to as "salting," was the subject of a Supreme Court case in which the Court held that an employer cannot refuse to hire a "salt" simply because the real reason the employee seeks employment with the company is to organize it. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 96-98 (1995).

101. 29 U.S.C. §§ 151-69 (2010).

102. *Id.* § 159(e)(1).

103. See *Customer Service Standards: Representation Cases*, NLRB, <https://www.nlr.gov/customer-service-standards#representation> (last visited Feb. 14, 2012). In 2010, the median time period between filing the petition and the initial election was thirty-eight days, and 95.1% of all initial elections occurred within fifty-six days of the filing. Memorandum GC-11-03 from Lafe E. Solomon,

employer contests the bargaining unit or if other issues arise.¹⁰⁴ In a recent study of 22,382 organizing drives from 1999–2004, the average case that went to election did so in forty-one days, and 95% of elections were held within seventy-five days of filing.¹⁰⁵ It is during this time period, often referred to quite appropriately as the “campaign period,” that employers and unions try to persuade the voting employees. Unionists argue that more time translates into more opportunities for management to threaten, intimidate, and coerce employees into voting against the union.¹⁰⁶ Others posit that more time in the campaign period translates into a greater likelihood that employees will render informed decisions on voting day.¹⁰⁷ Regardless of which is correct, it is clear that delay helps management.¹⁰⁸ In fact, there is evidence to suggest that even a one-day delay can affect the election in the employer’s favor.¹⁰⁹

Under the NLRB’s rules, a union may request the secret-ballot election only if a minimum of 30% of the employees in an appropriate bargaining unit have signed authorization cards.¹¹⁰ As a practical matter, however, most national unions will not file a petition unless *at least* 60% of the employees have signed cards.¹¹¹ To prevail in the election, the union needs a simple majority of those who actually vote, not a majority of those who would be represented in the bargaining unit.¹¹² Thus, if fifty

Gen. Counsel, NLRB, to Employees of the Office of the Gen. Counsel 5 (Jan. 10, 2011), *available at* <http://mynlrb.nlrh.gov/link/document.aspx/09031d4580434379>.

104. GORDON LAFER, AM. RIGHTS AT WORK, FREE AND FAIR? HOW LABOR LAW FAILS U.S. DEMOCRATIC ELECTION STANDARDS 22 (2005).

105. Ferguson, *supra* note 77, at 10 n.9.

106. JOHN LOGAN ET AL., U.C. BERKELEY CTR. FOR LABOR RESEARCH. & EDUC., NEW DATA: NLRB PROCESS FAILS TO ENSURE A FAIR VOTE 2–4 (2011).

107. See Richard Epstein, *The Case Against the Employee Free Choice Act* 25–26 (Univ. of Chi. Law Sch. Inst. for Law & Econ., Working Paper No. 452, 2009).

108. See Ferguson, *supra* note 77, at 14 (noting the negative impact of delay on union election win rates). See generally Myron Roomkin & Richard N. Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 1981 U. ILL. L. REV. 75 (presenting a model of election outcomes that includes delay as a significant predictor).

109. See Ferguson, *supra* note 77, at 14.

110. 29 U.S.C. § 159(e)(1) (2010).

111. Telephone Interview with Richard W. Hurd, Professor of Indus. & Lab. Rel., Cornell Univ. (June 28, 2001); accord Jack Fiorito, *Union Organizing in the United States*, in UNION ORGANIZING: CAMPAIGNING FOR TRADE UNION RECOGNITION 191, 200 (Gregor Gall ed., 2003); Martin, *supra* note 75, at 1072 (contending that many unions will not file for a certification election until a majority of workers sign authorization cards). Frankly, this is a conservative estimate based on conversations the Authors have had with union officials over the past seven years. Some assert that the percentage of employees the union considers supporters (based on authorization card signatures) is between 75% and 90%.

112. The relevant provision reads: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit” 29 U.S.C. § 159(a). Although this language seems to require a majority of all employees in a bargaining unit, it has been interpreted to require only a majority of those employees who vote. *Marlin-Rockwell Corp. v. NLRB*, 116 F.2d 586, 588 (2d Cir. 1941).

employees are in the proposed bargaining unit but only twenty-one vote, the union needs only eleven votes to win. Employers win in the event of a tie.¹¹³

B. NLRB RULES REGARDING CAMPAIGNING BEFORE ELECTIONS AND ARGUMENTS ABOUT THE EFFECTS OF THE RULES ON THE PROCESS

The current rules state that during the campaign period, employers may not threaten,¹¹⁴ interrogate,¹¹⁵ make promises to,¹¹⁶ or engage in surveillance of employees.¹¹⁷ In addition, employers may not solicit grievances¹¹⁸ or confer benefits.¹¹⁹ If the employer violates these rules, the NLRB may either order the election to be rerun or issue a bargaining order.¹²⁰

Under the law, employers may, however, engage in numerous campaign activities to convince employees to vote against the union. During the campaign period, employers provide employees with the management perspective of employees' rights and the consequences of voting in favor of the union.¹²¹ To get their message across, employers can

113. *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 884 (D.C. Cir. 1988).

114. *See* 29 U.S.C. § 158(c) (2010); *NLRB v. St. Francis Healthcare Ctr.*, 212 F.3d 945, 962 (6th Cir. 2000) (finding that the employer unlawfully interfered with a representation election by threatening to close the facility if the union were elected).

115. *See Tamper, Inc.*, 207 N.L.R.B. 907, 938 (1973) (finding an unfair labor practice where the employer coercively interrogated its employees about their union sympathies).

116. *See NLRB v. Wis-Pak Foods, Inc.*, 125 F.3d 518, 522–23 (7th Cir. 1997) (finding that a promise to increase wages constituted an unlawful promise of benefit); *Gen. Elec. Co. v. NLRB*, 117 F.3d 627, 637 (D.C. Cir. 1997) (finding that a promise of a postelection gift constituted an unlawful promise of benefit).

117. *See Cal. Acrylic Indus., Inc.*, 322 N.L.R.B. 41, 63 (1996) (finding that the employer violated the Act where it videotaped meetings between employees and union representatives).

118. *See NLRB v. V & S Schuler Eng'g, Inc.*, 309 F.3d 362, 371 (6th Cir. 2002) (finding that the employer violated the Act by soliciting grievances when he had not done so before, creating a "compelling inference that he is implicitly promising to correct those inequities . . . mak[ing] union representation unnecessary" (quoting *Orbit Lightspeed Courier Sys.*, 323 N.L.R.B. 380, 393 (1997))).

119. *Wis-Pak*, 125 F.3d at 522, 524–25 (finding that favorable changes to overtime and attendance policies constituted an unlawful grant of benefits).

120. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969) (upholding the NLRB's power to order the employer to bargain with the union where the employer's unfair labor practices are so severe that ordering a new election is not an adequate remedy, and where the union can demonstrate previous majority support). A bargaining order is an NLRB mandate requiring a company to "cease and desist from their unfair labor practices, to offer reinstatement and back pay to the employees who had been discriminatorily discharged, to bargain with the union on request, and to post the appropriate notices." *Id.* at 614.

121. As long as informing employees of the consequences does not rise to the level of a threat. 29 U.S.C. § 158(c) (2010). Employers typically raise some or all of the following issues, based in part on advice from counsel and from their unique circumstances, industry, and employee demographics: whether unions may "guarantee" increased pay, benefits, or anything else; how collective bargaining really works; what happens when strikes are called or picketing is conducted; what it costs to be a union member in terms of dues and initiation fees; where that money goes, how it is used, and by whom; whether the union's leaders are trustworthy and capable; the employer's record of

and will require all employees to attend so-called “captive audience” speeches,¹²² will send letters home,¹²³ and will spend significant time and money on communicating their message, often employing law firms and consulting firms that specialize in crafting anti-union campaign strategies.¹²⁴ Management may mandate attendance at their meetings.¹²⁵ Unions may not hold captive-audience speeches¹²⁶ and, in fact, have no right to come onto an employer’s property.¹²⁷ Unions are, however, entitled to a list of eligible employees¹²⁸ and, unlike employers, no rule prohibits unions from making promises, interrogating employees, or soliciting grievances.¹²⁹ Both sides may lie to employees but may not provide the employees with forgeries intended to deceive.¹³⁰

responsiveness to employee issues; the fact that employees will be paying someone to do what they may have been able to do (represent themselves) for free; whether the organizing drive has actually been beneficial in the sense that it has called attention to problems that need to be addressed whether the union is there or not; and whether the employer should make management changes (because an organizing drive seems to have been triggered by a perceived lack of leadership). See Arch Stokes, Robert L. Murphy, Paul E. Wagner & David S. Sherwyn, *How Unions Organize New Hotels Without an Employee Ballot: Neutrality Agreements*, 42 CORNELL HOSPITALITY Q. 86 (2001).

122. See KATE BRONFENBRENNER, UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING 73 (bl.8 (2000) (finding that, of four hundred union campaigns studied, 92% included captive-audience meetings).

123. *Id.* However, in-person visits by management to employees’ homes are per se prohibited. See Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948). The union, on the other hand, may make home visits, as long as those visits are not threatening or coercive. Cf. *Simo v. Union of Needletrades*, 322 F.3d 602, 620–21 (9th Cir. 2003) (discussing Supreme Court and NLRB cases suggesting that union home visits are permissible).

124. See Kate Bronfenbrenner et al., *Introduction*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 1, 4 (Kate Bronfenbrenner et al. eds., 1998).

125. See *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 406 (1953); see also Estlund, *supra* note 8, at 1536–37.

126. See *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 364 (1958) (stating, of captive-audience speeches, that unions are not “entitled to use a medium of communication simply because the employer is using it”); see also *Livingston Shirt Corp.*, 107 N.L.R.B. at 406.

127. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992); see also *Republic Aviation Corp. v. NLRB*, 342 U.S. 793, 803 n.10 (1945) (finding rules against solicitation during work hours presumptively valid); cf. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1955) (creating an exception to the rule that an employer may bar nonemployee union members from the employer’s property when the location of the employees’ workplace and homes make reasonable nontrespassory efforts ineffective); *Supervalu Holdings, Inc.*, 347 N.L.R.B. 425, 425 (2006) (finding a no-distribution rule invalid because it was enforced discriminatorily against union activity); *Dillon Cos.*, 340 N.L.R.B. 1260, 1260 (2003) (finding unlawful a no-solicitation rule that was previously unenforced but resurrected at the beginning of the union’s campaign).

128. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239–40 (1966) (establishing the disclosure requirement); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969) (affirming the *Excelsior* rule).

129. *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311, 1311 (1977); *Shirlington Supermarket, Inc.*, 106 N.L.R.B. 666, 667 (1953). *But see Stericycle, Inc.*, 37 N.L.R.B. No. 61, 2010-2011 NLRB Dec. ¶ 15,471 (Aug. 23, 2011) (holding that a union could not initiate litigation during the critical period).

130. See *Midland Nat’l Life Ins. Co.*, 263 N.L.R.B. 127, 133 (1982) (“[W]e will no longer probe into the truth or falsity of the parties’ campaign statements, and . . . we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is.”); see also

Employers could argue that the ability to interact socially with employees provides unions with a level playing field (at worst), and a significant advantage (at best). Not surprisingly, unions often hold a very different view of campaigns. Union advocates contend that the reason for labor's failure to organize, and the consequential drop in union density, is that the rules of organizing unfairly favor employers.¹³¹ The assumption is that employers intimidate employees and either violate the law with impunity because there is no real enforcement, or act within the law because objectionable and effective conduct is not unlawful, but should be. Indeed, union advocates claim that during most campaigns, employers illegally threaten, intimidate, and terminate employees who favor the union.¹³² According to a 2005 report by the University of Illinois at Chicago's Center for Urban Economic Development, when faced with organizing drives, 30% of employers fire pro-union workers, 49% threaten to close a worksite if the union prevails, and 51% coerce workers into opposing unions with bribery or favoritism.¹³³ Unions point to the numerous unfair-labor-practice charges filed against employers, to evidence suggesting a connection between meritorious unfair-labor-practice charges filed and a lower likelihood of union election victories,¹³⁴ and to anecdotal evidence of outrageous employer behavior, and contend that because unions lose numerous elections, the system is unfair.

Others advance the related theory that employers pose stronger resistance to unions by pressing on the weak spots in the law and that the law has responded inadequately.¹³⁵ According to Paul Weiler:

[T]he employer . . . will be tempted to utilize a variety of measures designed to make collective bargaining unpalatable to its employees: a vigorous campaign against the union in which management regularly raises the spectre of strikes and job losses, and adds credibility to the

Metro. Life Ins. Co., 266 N.L.R.B. 507, 507-08 (1983); Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209, 209 (2008).

131. See William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560, 570-71 (1983) (concluding that employers' captive-audience speeches have statistically significant effects on voting in union-certification elections).

132. *Id.*; see Bronfenbrenner, *supra* note 122, at 73 tbl.8.

133. CHIRAG MEHTA & NIK THEODORE, AM. RIGHTS AT WORK, UNDERMINING THE RIGHT TO ORGANIZE: EMPLOYER BEHAVIOR DURING UNION REPRESENTATION CAMPAIGNS 5, 9 (2005); accord Bronfenbrenner, *supra* note 122, at 73 tbl.8 (reporting similarly staggering statistics, including that, of employers in 400 union campaigns, 34% used bribes or special favors, 48% made unlawful promises of improvement, and 25% discharged union activists); Bronfenbrenner et al., *supra* note 124, at 1, 4-5.

134. See Ferguson, *supra* note 77, at 15 tbl.6 (finding that meritorious unfair labor practice charges filed by unions against employers had a statistically significant impact on the likelihood of unions winning elections, reducing the success rate by 52%).

135. PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 111 (1990).

threats through selective discriminatory action against key union supporters. If the union wins the election nonetheless, the employer will simply carry on its resistance at the next stage by stonewalling at the bargaining table, forcing the union members out on strike, and hiring permanent replacements to fill their jobs¹³⁶

Weiler cites as evidence the increase of discriminatory discharges and bad faith bargaining during the period of decline in union density.¹³⁷ Craver contends that employers engage in tactics during organizing drives that chill employees from voicing pro-union opinions and regularly hire labor consultants to strategize the anti-unionization campaign.¹³⁸ They openly encourage dissatisfied union workers to file decertification petitions, contributing to the jump from 300 decertification elections in the 1960s to 900 in the early 1980s.¹³⁹ Given the choice, companies will prefer to invest in their nonunion plants rather than their union plants (which explains the growth of production plants in the Sunbelt—where workers are less supportive of labor organizations).¹⁴⁰ Similarly, Richard Freeman and Morris Kleiner analyzed employer and organizer surveys and concluded that employers' brazen opposition to unionization contributed to union decline.¹⁴¹ They based this conclusion on the finding that supervisor opposition to unionization was the most significant determinant of representation-election outcomes.¹⁴²

Other scholars argue that fundamental macroeconomic changes, like globalization, do much to explain the decline.¹⁴³ Kate Bronfenbrenner advances a combined theory of increased capital mobility and increased employer opposition.¹⁴⁴ She explains that employers have greater ability and willingness to close plants and outsource those activities, or to threaten to do so.¹⁴⁵ Between this and

136. *Id.* (footnote omitted).

137. *Id.* at 112.

138. CHARLES A. CRAVER, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 49 (1993).

139. *Id.* at 50.

140. *Id.*

141. Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 INDUS. & LAB. REL. REV. 351, 364 (1990).

142. *Id.* at 361. Interestingly, Freeman and Kleiner also found that the use of unfair campaign tactics by employers is positively correlated with the odds that the union will win, in seeming contradiction to the assertions of some union advocates. *Id.*; accord Julius G. Getman, *Explaining the Fall of the Labor Movement*, 41 ST. LOUIS UNIV. L.J. 575, 582 (1997) (acknowledging that his own research uncovered no relationship between employer success and illegal tactics). This finding is also at odds with recent findings by John-Paul Ferguson that nonmeritorious unfair-labor-practice charges had little impact on election results as compared to meritorious ones, which significantly decreased the odds that unions would win. Ferguson, *supra* note 77, at 18.

143. Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CUM-KENT L. REV. 3, 6 (1993) (attributing the decline in part to the rise of competitive product markets).

144. Bronfenbrenner, *supra* note 122, at 53.

145. *Id.*

other employer anti-union tactics, employers are extremely effective at avoiding unionization.¹⁴⁶

Employers and some scholars argue that unions have nothing left to sell to employees¹⁴⁷ because traditional labor-management relations simply do not serve employees' interests¹⁴⁸ and unions are perceived as less trustworthy due to their inability to carry through on promises made.¹⁴⁹ Others attribute the drop in union density to internal union weaknesses.¹⁵⁰

We contend that organized labor has failed to adapt with the times, and part of this failure is due to unions' failure to connect to a new generation of workers. Younger workers may aspire less to be lifetime employees with great benefits and job security and more to be like management, independent contractors, entrepreneurs, inventors, or someone who attains celebrity status and avoids *work* for the rest of her life. Others have argued that *collective* employment rights have been eclipsed by the staggering enactment of legislation protecting *individual* employee rights.¹⁵¹ Some point to shifts in the U.S. economy, in particular that it is moving towards an "enterprise based" system of industrial relations in private industry in which unions negotiate with single firms instead of with corporations or industries.¹⁵² Such shifts preclude the kind

146. *Id.*

147. According to management-side labor lawyers, one of the key strategies in this regard is to examine what the union is selling and to explain to the employees that the costs outweigh the benefits. One problem for the unions, according to some, is that organized labor does not always have much to sell. For example, one lawyer discussed a union-organizing drive in which the union represented to employees that it would demand that the employer implement the union's health insurance plan if it were elected. The union extolled the fact that it would insist that the employer pay 100% of the cost of the plan, as opposed to their current plan under which the employees paid a portion of the cost. The employer held a meeting in which it compared the two plans side-by-side. While the union plan did not feature any up-front costs, the coverage was clearly so inferior that the employees concluded that they were better off with the employer plan and voted against the union. Employers contend that this insurance issue is a typical example of the current state of union organizing: at first, the union pitch sounds great, but after close examination the employees do not want to buy what the union is selling. Employers could argue that this is one reason why companies are able to defeat unions in elections.

148. RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 56 (1999) (finding a desire among employees for an organization run "jointly" by both labor and management).

149. *See supra* note 147.

150. Bronfenbrenner et al. suggested that unions focused too little effort on recruitment during the 1970s and 1980s and failed to adapt their organizing strategies to new challenges. Bronfenbrenner et al., *supra* note 124, at 5-6. Julius Getman agrees that unions' failure to adapt their thinking contributed to the demise, and points to other internal weaknesses: internal politics, inability to coordinate with other locals, corruption, and a divide between leadership and rank-and-file employees. *See* Getman, *supra* note 142, at 583-93.

151. Michael J. Piore & Sean Safford, *Changing Regimes of Workplace Governance, Shifting Axes of Social Mobilization, and the Challenge to Industrial Relations Theory*, 45 *INDUS. REL.* 319, 301-04 (2006).

152. Ronald W. Schatz, *From Commons to Dunlop: Rethinking the Field and Theory of Industrial Relations*, in *INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE* 87, 88 (Nelson Lichtenstein & Howell John Harris eds., 1993).

of industrial democracy and industrial stability based on unionism that industrial-relations theorists and union advocates have contemplated.¹⁵³ Still others mark the advent of enlightened human-resource policies as explaining labor's inability to organize and the drop in union density.¹⁵⁴ In fact, management often contends that simply informing employees of the "truth" will allow them to prevail.¹⁵⁵ Therefore, employers argue that the system is fair because the lack of union density reflects the will of the people. These theories are consistent with the staggering decline in public support for unions.¹⁵⁶ Unionists argue that the statistics prove that the system is unfair.¹⁵⁷ We contend that the system is unfair not because of the results, but because of the process.¹⁵⁸

Like the Sherwyn-versus-Eigen hypothetical one-on-one basketball game described above, the current system has two different sets of rules for the two sides. Employers have the advantage of access to employees. Captive-audience meetings and other impromptu conversations allow employers to get their respective messages across. Unions have the advantage of being able to make promises, visit employees' homes, and party with the employees. Employers have the inherent power advantage, while unions often have a head start in the race to the election. There are some rules that apply to both sides. Both sides can lie to the employees, trash the other side, and pressure the employees to vote one way or the other.¹⁵⁹ The result is that at the end of the campaign, the employees feel like the rope in a tug of war. The employees likely have little, if any, ability to gauge the accuracy of the information received; they often fear reprisals for voting for either side, and they likely feel like pawns in the age-old labor-versus-capital dispute where

153. *Id.*

154. Jack Fiorito & Cheryl L. Maranto, *The Contemporary Decline of Union Strength*, CONTEMP. POL'Y ISSUES, Oct. 1987, at 12, 16-17.

155. Surveys of union organizers and employees who have been through NLRB election campaigns seem to confirm this trend, at least indirectly. See, e.g., *Workers Weigh in on Alleged Coercion During Card Check Campaign and NLRB Elections*, AM. RIGHTS AT WORK (Mar. 21, 2006) <http://www.americanrightsatwork.org/press-center/2006-press-releases/workers-weigh-in-on-alleged-coercion-during-card-check-campaigns-and-nlr-elections-20060320-239-345-345.html>.

156. See *supra* notes 88-90 and accompanying text.

157. There are those who go beyond the statistics and make a normative assessment of the NLRA, arguing that it is biased in favor of employers. However, these analyses tend to omit or undervalue the advantages the Act accords unions and to emphasize the advantages accorded employers. See, e.g., Getman, *supra* note 142, at 578-84.

158. Others, a rare minority by our account of the current state of this relevant scholarship, have suggested that systemic factors potentially account for a greater percentage of variation in win rates and union density than do the other factors described above. See Ferguson, *supra* note 77, at 18; Chris Riddell, *Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998*, 57 INDUS. & LAB. REL. REV. 493, 495 (2004).

159. Note well that all of this can be done without engaging in, for example, threats, interrogation, or recording campaign activity—tactics that neither management nor the union can employ. See *supra* notes 114-17 and accompanying text.

their desires are subordinated to the desires of two large entities each claiming to care about employee well-being more than the other: Management swears that it learned a lesson from the experience and vows to change, while the union swears that no change management might implement would remain intact without the perpetual threat of organization attainable only by certifying the union as the employees' representative.¹⁶⁰

C. CARD-CHECK NEUTRALITY AGREEMENTS AND THE EMPLOYEE FREE CHOICE ACT

Perhaps the most discussed means of reforming the broken, outdated means of selecting workplace labor organization representation is card-check neutrality. This was most recently embodied, in part, in the proposed Employee Free Choice Act.¹⁶¹ The logic behind EFCA focuses (incorrectly in our view) on results, not process, and in the end, would attenuate perhaps the most critical component of the process's fairness—employees' right to freely choose their representative or to choose not to be represented at all. With respect to neutrality agreements, five questions must be addressed: (1) what are they, (2) what effect do they have on unionization, (3) why do employers sign them, (4) what is their legal status, and (5) do they result in a fair system under our newly described criteria. We address the first four questions in this Part, and the fairness question in Part IV.

1. What Are Neutrality Agreements?

Although neutrality agreements come in several forms, the common denominator for all of them is that employers agree to remain neutral with regard to the union's attempt to organize the workforce.¹⁶² Some agreements simply state that the employer will remain neutral but contain no specific provisions, while other agreements are more detailed.¹⁶³ For example, Hotel Employees and Restaurant Employees

¹⁶⁰. LEVITT, *supra* note 96, at 89.

¹⁶¹. Employee Free Choice Act of 2009, S. 560, 111th Congress (2009). As discussed above, EFCA provides for recognition based on card checks, *see supra* text accompanying notes 17–18, but does not require employer neutrality.

¹⁶². While most agreements contain a definition of neutrality, the definitions vary widely. Most Communication Workers of America, United Auto Workers, and United Steelworkers of America agreements define neutrality as “neither helping nor hindering” the union's organizing effort, yet still allow employers to communicate facts to the employees. *See* Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 47 (2001). A different approach is apparent from the Hotel and Restaurant Employees Union agreements that prohibit the employer from communicating any opposition to the union. *Id.* Less typical definitions provide that management will make an affirmative statement to their employees that it welcomes their choice of a representative. *Id.*

¹⁶³. Agreements may state that the employer will not attack or demean the union; the employer

Union agreements stated that employers would not “communicate opposition” to the union’s efforts.¹⁶⁴

Neutrality agreements commonly give the union access to employees in the form of a list of their names and addresses (and, sometimes, telephone numbers), as well as permission to come onto company property during work hours for the purpose of collecting authorization cards.¹⁶⁵ This differs from the guidelines established by the NLRB and the courts, under which an employer has no obligation to provide the union with such sweeping access to its employees, and may actually be prohibited from doing so.¹⁶⁶

Finally, most neutrality agreements include a “card check” provision, which requires the employer to recognize the union if a majority of the bargaining-unit employees sign authorization cards.¹⁶⁷ Under a card-check agreement, the employees do not vote for the union in a secret-ballot election monitored by the NLRB.¹⁶⁸ Instead, the employer recognizes the union if it presents the company with the requisite number of signed authorization cards, at which point the neutrality agreement is no longer needed and expires.¹⁶⁹

2. *What Effect Do Neutrality Agreements Have on Unionization?*

Neutrality agreements radically change the landscape of union organizing. With the aid of such agreements, unions in one study prevailed in 78% of the situations in which they attempted to organize, compared to only a 46% success rate in contested elections.¹⁷⁰ The difference between 46% and 78% actually *understates* the effect of the neutrality agreement, in part because the sampled populations for the two figures are different. Elections only occur when the union can show that 30% of the employees have signed authorization cards.¹⁷¹ As stated above, however, in almost every situation where a union goes to election,

will not refer to the union as a third party; the parties will strive to create a campaign free of fear, hostility, and coercion; the parties will campaign in a positive manner; the parties will keep their statements pro-company or pro-union; and the employer will not state that it is corporate policy to avoid unionization. *See id.*

164. *Id.*

165. Arch Stokes, Robert L. Murphy, Paul E. Wagner & David S. Sherwyn, *Neutrality Agreements: How Unions Organize New Hotels Without an Employee Ballot*, CORNELL HOTEL & REST. ADMIN. Q., Oct.–Nov. 2001, at 86, 89.

166. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534 (1992).

167. Eaton & Kriesky, *supra* note 162, at 47 tbl.1 (finding that 73% of neutrality agreements studied had card-check language).

168. Stokes et al., *supra* note 165, at 86.

169. *Id.*

170. Eaton & Kriesky, *supra* note 162, at 52 & tbl.3; *see also* Riddell, *supra* note 158, at 509 (finding a union success-rate difference of approximately 19% in British Columbia attributable to card-check procedures as compared to mandatory-voting procedures).

171. *See supra* note 110 and accompanying text.

it has more than 50% of the employees sign cards.¹⁷² Thus, the sampled population in the 46% win figure includes only companies where it is likely that at least 60% of the employees signed cards. Companies where the union could not get at least 51% of the employees to sign cards did not go to election and never became part of that figure. Conversely, the sampled population in the neutrality side of the study includes all employers who signed such agreements. Those employers whose employees had no interest represent the 22% of companies that remained nonunion. In other words, it is likely that 100% of the companies that went to election would have been unionized under a neutrality with card check, and the 22% of those under card-check agreements would never have gone to election. The net effect is quite simple. Assuming there is enough employee interest to warrant an election in the first place, the company's chances of becoming unionized are less than 50% under the NLRB's election procedures and nearly guaranteed under a neutrality agreement with a card-check provision.

It follows that employers wishing to remain nonunion or to give their employees an opportunity to exercise their right to choose their elected representative by secret ballot should refuse to sign a neutrality agreement. This begs the question of why an employer would ever accede to a neutrality agreement.

3. *Why Do Employers Sign Neutrality Agreements?*

The question "why do employers sign neutrality agreements?" is perplexing to the casual observer. The answer is fairly simple. Employers sign neutrality agreements because they have to or because it makes business sense. There are two reasons why employers have to sign neutrality agreements. First, local governments may require neutrality agreements. For example, San Francisco enacted a labor-peace ordinance that required neutrality to get a building permit or to do business at the airport or other city-owned property.¹⁷³ Other cities have had similar such requirements.¹⁷⁴ Historically, there has been little public opposition to such requirements and even fewer legal challenges.

Second, employers who are parties to certain collective-bargaining agreements must agree to a neutrality agreement. For example, the collective-bargaining agreements covering the hotel employers' associations in New York City and Chicago contain neutrality agreements.¹⁷⁵ Because the major brands and operators are all parties to

172. See *supra* note 111 and accompanying text.

173. See MICHAEL REICH ET AL., INST. INDUS. REL., LIVING WAGES AND ECONOMIC PERFORMANCE: THE SAN FRANCISCO AIRPORT MODEL, at 7 (2003).

174. For example, there is a similar ordinance in Los Angeles County. See L.A. CNTY., CAL., ADMIN. CODE § 2.201.050 (2011).

175. These agreements are on file with the Authors.

these agreements, any new owner who wishes to use an established operator or brand must agree to neutrality.

Of course, the next question is why the brands and operators agreed to neutrality. While it is difficult to state with authority why employers agreed to something so long ago, one can make some logical assumptions. Neutrality is a huge gain for the union, and unions should and do give up other demands in exchange for neutrality. An owner who does not plan on owning another hotel has no disincentive and, in fact, has an incentive to force the other brands and operators to sign neutrality agreements. During negotiations, the union's willingness to trade wage increases, for example, for neutrality has an immediate positive effect on current owners. In addition, it has a long-term positive effect. Now, if a brand opens a competing hotel, the unionized owner knows the new hotel likely will be union and, thus, the playing field will be level.¹⁷⁶

Other times, neutrality simply makes business sense. For example, SBC Communications, a telephone company, and the Communications Workers of America entered into an agreement in which the parties executed neutrality agreements that included card checks for all current SBC employees and those employed by all firms acquired by SBC in the future.¹⁷⁷ SBC accepted the neutrality agreement in exchange for the union's promise to lobby on the company's behalf regarding antitrust complications arising out of present and future mergers and acquisitions.¹⁷⁸ Put simply, the company was willing, for all intents and purposes, to accept that all of its present and future employees would have one union as their exclusive representative in exchange for the union's lobbying assistance. While it may have been a good deal for the

176. See MORRIS A. HOROWITZ, *THE NEW YORK HOTEL INDUSTRY: A LABOR RELATIONS STUDY* 30 (1960) ("It was unquestionably becoming clear to the Hotel Association [of New York City], at this point, that with the growing strength of the unions, it was only a matter of time before a significant number of hotels would settle with any of the various unions in the field. If this happened, different hotels would deal with different unions on different terms, and . . . it would be most impractical to have different wage scales among competitive hotels. . . . [A] uniform union structure in all the hotels would be economically advantageous to the hotels . . .").

177. Eaton & Kriesky, *supra* note 163, at 44; Harry C. Katz et al., *The Revitalization of the CWA: Integrating Collective Bargaining, Political Action, and Organizing*, 56 *INDUS. & LAB. REL. REV.* 573, 586-87 (2003).

178. Katz et al., *supra* note 177, at 587; see also Interview with Harry C. Katz, Dean and Professor of Collective Bargaining, Cornell Univ. Sch. of Indus. & Lab. Rel., in Ithaca, N.Y. (July 23, 2001); *CWA Tells FCC: Bell Atlantic-GTE, SBC-Ameritech Mergers Will Boost Competition and Benefit All Consumers*, *COMM. WORKERS OF AM.* (Dec. 13, 1998), http://www.cwa-union.org/news/entry/cwa_tells_fcc_bell_atlantic-gte_sbc-ameritech_mergers_will_boost_competitio (illustrating the antitrust lobbying the CWA performed on behalf of SBC); *Justice Dept. Approves SBC-Ameritech Deal*, *COMM. WORKERS OF AM.* (Apr. 1, 1999), http://www.cwa-union.org/news/entry/justice_dept_approves_sbc-ameritech_deal (same).

employer, and it certainly was a great deal for the union, the employees were deprived of information and choice.

4. *What Is the Legal Status of Neutrality Agreements?*

In assessing the legality of neutrality one needs to distinguish between that required by government and that entered into by private employers. The former may be unlawful; the latter is not.

a. *Government-Mandated Neutrality*

The legality of government-mandated neutrality suffered its first serious blow in 2001 when Judge Vaughn Walker of the District Court for the Northern District of California granted a preliminary injunction that prevented the San Francisco International Airport from enforcing its labor-peace and card-check rules against an employer who operated at the airport.¹⁷⁹ The court held that the airport's labor-peace rule was unenforceable because it likely conflicted with the so-called preemption principle of the NLRA,¹⁸⁰ which prohibits state and local regulation of activities that the NLRA "protects, prohibits, or arguably protects or prohibits."¹⁸¹ Accordingly, a city, state, or local statute, regulation, or ordinance that conflicts or interferes with the disposition of issues under the NLRA is unenforceable.¹⁸²

Chamber of Commerce of the United States v. Brown, handed down by the Supreme Court in 2008, further calls the legality of government-mandated neutrality into serious doubt.¹⁸³ In *Brown*, the Court struck down a California statute that prohibited employers who did business with the state from using state funds to "assist, promote, or deter union organizing."¹⁸⁴ Justice John Paul Stevens, writing for a 7-2 majority that reversed the en banc Ninth Circuit, held that the NLRA preempted the state statute, relying on a different but related preemption doctrine from that relied on by Judge Walker.¹⁸⁵ According to the Court, the Labor Management Relations Act (the "Taft-Hartley Act"),¹⁸⁶ a law passed to level the playing field of the pro-union NLRA, manifested a "congressional intent to encourage free debate on issues dividing labor

179. *Aeroground, Inc. v. City of S.F.*, 170 F. Supp. 2d 950, 959 (N.D. Cal. 2001).

180. *Id.* at 955-56 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)).

181. *Wis. Dept. of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986).

182. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959).

183. 554 U.S. 60, 74 (2008).

184. *Id.* at 71-74 (quoting CAL. GOV'T CODE §§ 16645.1-8 (2010)).

185. *Id.* at 76; *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 150-51 (1976) ("[A] regulation by the state is impermissible because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (quoting *Hill v. Florida*, 324 U.S. 538, 542 (1945))).

186. Labor Management Relations Act of 1947 ("Taft-Hartley Act"), Pub. L. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-197 (2010)).

and management.”¹⁸⁷ The Court found both explicit and implicit congressional intent to leave noncoercive employer speech unregulated because it is impermissible to “chill[] one side of ‘the robust debate which has been protected under the NLRA.’”¹⁸⁸

Although labor-peace statutes differ in some respects from the statute at issue in *Brown*,¹⁸⁹ they raise many of the same concerns. The statutes deny employees the “implied . . . underlying right” to information opposing unionization and discourage free debate of labor-management issues by stifling one side of the dialogue.¹⁹⁰ Labor-peace statutes thus embody state policies on organizing—policies that “stand[] as an obstacle” to the policy Congress pronounced on that issue in the Taft-Hartley Act.¹⁹¹

Even more on point is Judge Richard Posner’s decision in *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*.¹⁹² In *Metropolitan Milwaukee*, the Seventh Circuit struck down a Milwaukee ordinance that required certain transportation contractors to negotiate neutrality agreements as a condition to receiving payment from the county.¹⁹³ The ordinance required that these agreements include clauses subjecting labor disputes to binding arbitration, prohibiting employers from holding captive-audience speeches and expressing “false or misleading” information intended to influence an employee’s vote, and requiring the employer to provide the union with an employee contact list and “timely and reasonable access” to the workplace.¹⁹⁴ The court held that a state may regulate labor relations with its contractors only for limited purposes, such as increasing the quality or reducing the cost of the services performed.¹⁹⁵ However, a state may not regulate labor relations to promote a policy it views as superior to that embodied in the NLRA.¹⁹⁶

187. *Brown*, 554 U.S. at 67 (quoting *Linn v. United Plant Guard Workers of Am., Local 1114*, 383 U.S. 53, 62 (1966)).

188. *Id.* at 73 (quoting *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 275 (1974)); see also *Healthcare Ass’n. of N.Y. State, Inc. v. Pataki*, 388 F. Supp. 2d 6, 25 (N.D.N.Y. 2005) (striking down, as preempted by the NLRA, N.Y. LAB. L. § 211-a (McKinney 2004), which prohibited use of state funds to “encourage or discourage union organization”), *rev’d*, 471 F.3d 87, 109 (2d Cir. 2006) (reversing grant of summary judgment based on the presence of fact issues, but accepting the lower court’s determination that the NLRA might preempt the New York statute).

189. For example, the statute at issue in *Brown* arguably was even more pro-union in that it permitted the use of funds toward expenses in connection with allowing union representatives access to the employer’s premises or “[n]egotiating, entering into, or carrying out a voluntary recognition agreement.” CAL. GOV’T CODE § 16647 (2010).

190. 554 U.S. at 68.

191. *Machinists*, 427 U.S. at 150 (quoting *Hill v. Florida*, 324 U.S. 538, 542 (1945)).

192. 431 F.3d 277 (7th Cir. 2005).

193. *Id.* at 277–78.

194. CNTY. OF MILWAUKEE, WIS., CODE GEN. ORDINANCES § 31.02(f) (2000).

195. *Metro. Milwaukee*, 431 F.3d at 277–78.

196. *Id.* at 278–79. The county argued in the alternative that the scheme was not regulation, but

b. *Private Neutrality Agreements*

There are three arguments why private neutrality agreements violate the law: (1) section 302 of the Taft-Hartley Act makes it unlawful for an employer to give or agree to give a “thing of value” to any labor organization and for a labor organization to receive a thing of value from any employer,¹⁹⁷ (2) the Taft-Hartley Act allows employers the right to campaign against the union,¹⁹⁸ and (3) the NLRA prohibits so-called “company unions.”¹⁹⁹ Below we first describe why a private neutrality agreement violates the law. We then describe how the courts and the NLRB have ruled on these issues.

The first question is whether a neutrality agreement itself constitutes a thing of value provided to a labor organization. Courts use a seemingly broad interpretation of “thing of value” in section 302. For instance, in *United States v. Schiffman*, the question before the court was whether the request for a reduced room rate constituted a thing of value and thus violated section 302.²⁰⁰ In that case, a union official who represented a bargaining unit at a Hyatt property in Florida requested that an Atlanta Hyatt provide the official with a room rate that was almost 50% less than Hyatt’s corporate rate.²⁰¹ The court found that the room-rate reduction was a thing of value and that the requested favor violated section 302.²⁰² Similarly, in *United States v. Boffa*, the court found that an employer unlawfully provided a thing of value when it provided a union official with the use of a 1975 Lincoln Continental without charge for a four-month period.²⁰³ This broad definition of “thing of value” in section 302 is consistent with the judicial interpretation of the same term when it is found in other statutes.²⁰⁴ Those holdings suggest

allocation of state funds. However, the court held that express regulation versus the use of the county’s spending power was “a distinction without a difference.” *Id.* at 279 (quoting *Wis. Dep’t of Indus., Labor, & Human Relations v. Gould Inc.*, 475 U.S. 282, 287 (1986)).

197. 29 U.S.C. § 186 (2010).

198. 29 U.S.C. § 156(c) (2010).

199. *Id.* § 158(a)(2).

200. 552 F.2d 1124, 1125 (5th Cir. 1977).

201. *Id.*

202. *Id.*

203. 688 F.2d 919, 924, 936 (3d Cir. 1982).

204. See, e.g., *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (holding that 18 U.S.C. § 641, which prohibits embezzling, stealing, purloining, or knowingly converting “any record, voucher, money, or thing of value” of the U.S. or of any department of agency thereof, includes actions involving “intangible” property). Other federal statutes use the phrase “anything of value.” See 18 U.S.C. § 201 (2010) (defining criminal bribery and prohibiting any person from giving or attempting to give “anything of value” to a government official with the intention of influencing their official actions and reciprocally prohibiting any public official from receiving or attempting to solicit anything of value in return for official action); 18 U.S.C. § 666 (2010) (imposing criminal sanctions for soliciting or demanding corruptly for the benefit of any person, or accepting or agreeing to accept “anything of value” from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of

that a similarly broad interpretation would apply to a thing of value under section 302 of the Taft-Hartley Act.

Neutrality agreements almost always require the employer to provide at least four things that have been or logically would be characterized by the courts as things of value under this broad definition of the term: access to the hotel's premises so the union can speak to the employees, a list of employees, a card-check provision, and exclusivity to one union. If any of those are benefits that constitute a thing of value, the typical neutrality agreement would violate section 302 of the Taft-Hartley Act. Indeed, it seems clear that these four items are things of value. As explained above, the value of the card check is significant: it substantially increases the likelihood of union success in an organizing drive.²⁰⁵ Similarly, access to employees, directories, and exclusive dealings²⁰⁶ are not required by the law and seemingly would help the union in its efforts. One would presume that significant help in organizing an employer—the main goal of the union—would constitute a thing of value.²⁰⁷

The second argument that private neutrality agreements violate the law stems from section 7 of the NLRA, which grants employees the right to organize or to refrain from organizing.²⁰⁸ The right to refrain from organizing was added to the NLRA in the Taft-Hartley Act.²⁰⁹ To operationalize this right, Taft-Hartley allows employers and employees to file unfair-labor-practice charges against unions when the unions' conduct interferes with the section 7 rights of employees,²¹⁰ and gives employers the right to exercise free speech with regard to union organizing as long as they do not threaten, make promises to, interrogate, confer benefits on, or solicit grievances from employees.²¹¹ It seems that the purpose of these free-speech guarantees is to allow employees access

value of \$5,000 or more).

205. *See supra* notes 170–72 and accompanying text.

206. Exclusive dealing means that only the union that was a party to the agreement, and not rival unions, would have access and directories.

207. *See supra* notes 173–79 and accompanying text.

208. *See* 29 U.S.C. § 157 (2010) (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .”).

209. Labor Management Relations Act of 1947, Pub. L. 80-101, § 101, 61 Stat. 136, 140 (codified as amended at 29 U.S.C. § 157).

210. *Id.* § 101, 29 U.S.C. § 158(b) (2010). Prior to Taft-Hartley, unfair-labor-practice claims could be filed only against employers. *See* Pub. L. No. 74-198, § 8, 49 Stat. 449, 453 (1935).

211. *Uarco, Inc.*, 216 N.L.R.B. 1, 1–2 (1974) (holding that it is not the solicitation of grievances itself that is coercive and violative of section 8(a)(1), but the promise to correct grievances, and that solicitation of grievances raises a rebuttable inference that the employer is making such a promise); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (“[A]n employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.”).

to information so that they can be fully informed before deciding whether to organize or to refrain from organizing. Consequently, an employer's decision to remain neutral seems to deprive employees of access to information critical of the union and thereby may interfere with employees' right to refrain from unionizing.

Finally, private neutrality agreements may violate section 8(a)(2) of the NLRA, which prohibits employers from assisting unions by giving them financial or other support, a provision that eliminated the so-called company unions of days past.²¹² Like the employers' right to engage in free speech, the purpose of section 8(a)(2) is to preserve the free exercise of employees' section 7 rights. Because collusion between an employer and a union can detrimentally affect employees by interfering with their rights to refrain from organizing, it would seem that a neutrality agreement violates section 8(a)(2).

While there is no case on point, the NLRB's analysis of section 8(a)(2) supports this argument. In reviewing alleged 8(a)(2) violations, the NLRB has noted the Supreme Court's direction that courts need to carefully scrutinize "all factors, often subtle, which restrain an employee's choice and for which the employer may be said to be responsible."²¹³ Under this totality-of-the-circumstances test, the NLRB has found that the following factors may constitute evidence of a violation of section 8(a)(2): the employer's introducing the union to its employees, the employer's permitting the union to solicit employees to sign cards on the employer's property and during work hours, the employer's extending recognition to a union that had not collected valid recognition cards, and the employer's executing a collective-bargaining agreement before the union had demonstrated that it represented an uncoerced majority of employees.²¹⁴ Moreover, the NLRB has found that "signed cards . . . cannot be considered reliable representation of employee sentiments when there is evidence of the employer's assistance to the union."²¹⁵

While allowing a union the use of company time and property is not a per se violation of section 8(a)(2),²¹⁶ that factor in addition to the fact that the employer has chosen which union it will introduce to its employees, along with the other neutrality requirements described

212. See 29 U.S.C. § 158(a)(2) (2010) ("It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .").

213. *Windsor Place Corp.*, 276 N.L.R.B. 445, 448 (1985) (citing *Int'l Ass'n of Machinists Lodge No. 35 v. NLRB*, 311 U.S. 72 (1946)).

214. *Windsor Place Corp.*, 276 N.L.R.B. at 449.

215. *Id.*

216. *Id.* at 448 (citing *Manuela Mfg. Co.*, 143 N.L.R.B. 379 (1963)).

above, compels the conclusion that such agreements violate section 8(a)(2).²¹⁷

Despite the above arguments, the NLRB and the federal courts consistently uphold neutrality agreements. In *Hotel Employees and Restaurant Employees, Local 57 v. Sage Hospitality Resources, LLC*, the Third Circuit addressed the issue of whether a neutrality agreement was a “thing of value.”²¹⁸ In three short paragraphs devoid of any real analysis, the court rejected the thing-of-value argument.²¹⁹ The basis for this rejection was the court’s interpretation of the purposes of the statute and the effect of neutrality agreements.²²⁰ According to the court, the prohibition against providing a thing of value was passed “to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers.”²²¹ This prohibition, the court continued, is limited to bribery, extortion, and other corrupt practices conducted in secret and only addresses agreements to pay, loan, or deliver any money or thing of value.²²² The court then held that a neutrality agreement benefited both parties with efficiencies and cost savings and did not involve the payment, loan, or delivery of anything.²²³

This analysis is woefully lacking in an understanding of the relevant case law and of the nature of labor relations. For example, the reduced hotel room rate in *Schiffman* was neither bribery, nor extortion, nor corruption. Moreover, it did not involve the payment, loan, or delivery of anything. What it did do, rather, was create a situation where the union official may have felt indebted to the employer, arguably hindering his ability to fully represent the employees. We dispute that a savings of \$20 would have such an effect, but the court held it could.²²⁴ On the other hand, a neutrality agreement granting exclusive collective-bargaining rights to one union could result in dues of \$35 to \$50 per month from thousands of employees. Hundreds of thousands of dollars per month seems like a thing of value. Would a union, for example, give up its demands for increases in wages or health and safety measures in exchange for that kind of money and power? Of course it would. In fact, that is exactly what UNITE-HERE did in the summer of 2006 when it

217. Moreover, under a neutrality agreement, employers recognize unions based on signatures that result from employer assistance to the union. Those cards should not be considered reliable and the NLRB should not certify the union.

218. 390 F.3d 206, 218 (3d Cir. 2004).

219. *Id.* at 218–19.

220. *Id.*

221. *Id.* (quoting *Turner v. Local Union No. 302, Int’l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979)).

222. *Id.* at 219.

223. *Id.*

224. *United States v. Schiffman*, 552 F.2d 1124, 1126 (5th Cir. 1977).

threatened an industry-wide strike if employers did not agree to neutrality agreements and reduced demands that would have benefited the current employees in exchange for the ability to organize nonunion hotels.²²⁵ This seems like what section 302 was designed to prevent. The courts, however, do not agree. In fact, the Fourth Circuit²²⁶ and at least two federal district courts²²⁷ followed *Sage Hospitality*. In addition, in *Dana Corporation*, the NLRB followed *Sage Hospitality*, holding that card-check neutrality furthers the NLRA's purpose of promoting labor peace.²²⁸ In other words, an agreement that is provided at the expense of current members' wages, hours, and terms and conditions of employment and that jeopardizes the employees' section 7 right to refrain from joining a union is permissible as long as it furthers labor peace.

We believe that card-check neutrality agreements violate section 302 and the NLRA and therefore should not be enforced. Our belief, however, does not reflect the current state of the law and thus, for the time being, neutrality agreements are alive and well.

D. LEGISLATIVE AND ADJUDICATIVE INITIATIVES

EFCA would have put part of the section 302 issue to rest because it would have mandated employers to recognize unions as the exclusive representative of petitioned-for units of employees on the basis of signed authorization cards from a majority of employees in those units.²²⁹ The midterm elections destroyed any chance of this statute being passed during President Obama's first term. While the passage of EFCA may no longer be viable, its aftereffects remain on both sides of the table. The concept of "free choice" ending the process of secret-ballot elections was an anomaly that not only doomed the statute, but that also resulted in proposed state legislation that would outlaw card checks. In November of 2010, voters in four states—Arizona, South Carolina, South Dakota, and Utah—voted to amend their state constitutions to require secret-ballot elections for union certification.²³⁰ The NLRB has taken the position that these amendments are preempted by the NLRA and thus

225. Richard W. Hurd, *Neutrality Agreements: Innovative, Controversial, and Labor's Hope for the Future*, NEW LAB. FORUM, Spring 2008, at 35, 36–37; David Sherwyn, Zev J. Eigen & Paul Wagner, *The Hotel Industry's Summer of 2006: A Watershed Moment for America's Labor Unions?*, 47 CORNELL HOTEL & REST. ADMIN. Q. 337, 343–45 (2006).

226. See *Adcock v. Freightliner, LLC*, 550 F.3d 369, 376 (4th Cir. 2008).

227. See *United Steel Workers Int'l Union v. Hibbing Joint Venture*, No. 06-4820, 2007 WL 2580546, at *5–6 (D. Minn. Sept. 4, 2007); *Patterson v. Heartland Indus. Partners, LLP*, 428 F. Supp. 2d 714, 724 (N.D. Ohio 2006).

228. 356 N.L.R.B. No. 49, 2010-2011 NLRB Dec. ¶ 15,369 (Dec. 6, 2010).

229. S. 560, 111th Cong., § 2(a)(6) (2009).

230. ARIZ. CONST. art. II, § 37; S.C. CONST. art. II, § 12; S.D. CONST. art. VI, § 28; UTAH CONST. art. IV, § 8(1).

are unenforceable.²³¹ These issues will be played out before the NLRB and ultimately the courts.²³² In addition, as stated above, numerous states are discussing right-to-work legislation.²³³ Currently there are twenty-three right-to-work states.²³⁴

On the other side of the ledger, organized labor is lobbying the NLRB to change its rules and shorten the time between the filing of the petition and the election. Commentators are proposing a time period of twenty, ten, or even five days between the filing of the petition and the election.²³⁵ Labor argues that a shortened time period would allow a secret-ballot election but would curtail management's ability to threaten, intimidate, coerce, promise benefits to, and surveil employees.²³⁶

There are two problems with a shortened-election scheme. First, assuming that a fully informed electorate is desirable, five or ten days simply is not enough time for management to convey its side of the story. Unfortunately, this is a trade-off between interests that likely cannot be reconciled. The second problem, however, hurts both sides. Before holding a union election, several issues must be resolved, the most difficult one being the scope of the bargaining unit. Those advocating for quick elections argue that a "vote now and litigate later" approach will sufficiently address these issues.²³⁷ This play on the classic collective-bargaining mantra, "work now and grieve later," will not work. Currently, management decides whether to contest the bargaining unit before the election.²³⁸ While delay can help management in the election, employers often consent to the proposed unit to avoid the expense of challenging the proposal, the risk of losing the challenge, and the

231. *State Constitutional Amendments Conflict with the NLRA*, NLRB (Jan. 14, 2011), <http://nrlb.gov/sites/default/files/documents/234/statesfactsheet.pdf>.

232. See Letter from Lafe E. Solomon, Gen. Counsel, NLRB, to Tom Horne, Ariz. Att'y Gen. (Jan. 13, 2011), available at http://nrlb.gov/sites/default/files/documents/234/letter_az.pdf (threatening litigation); Letter from Lafe E. Solomon, Gen. Counsel, NLRB, to Alan Wilson, S.C. Att'y Gen. (Jan. 13, 2011), available at http://nrlb.gov/sites/default/files/documents/234/letter_sc.pdf (same); Letter from Lafe E. Solomon, Gen. Counsel, NLRB, to Marty J. Jackley, S.D. Att'y Gen. (Jan. 13, 2011), available at http://nrlb.gov/sites/default/files/documents/234/letter_sd.pdf (same); Letter from Lafe E. Solomon, Gen. Counsel, NLRB, to Mark L. Shurtleff, Utah Att'y Gen. (Jan. 13, 2011), available at http://nrlb.gov/sites/default/files/documents/234/letter_ut.pdf (same).

233. See *supra* note 95 and accompanying text.

234. See *supra* note 95 and accompanying text.

235. See 155 CONG. REC. S3, 636 (daily ed. Mar. 24, 2009) (statement of Sen. Arlen Specter) (proposing a quick-election scheme where the initial election would be held within twenty-one days of the filing of the petition); *Implications of the Employee Free Choice Act*, METRO. CORP. COUNSEL, Sept. 2009, at 12.

236. The NLRB held a hearing on June 18 and 19 to discuss shortening the elections, where professionals and academics opined on the topic. See *Open Meeting on Proposed Election Process Rules*, NLRB, <http://www.nrlb.gov/openmeeting> (last visited Feb. 14, 2012).

237. See *Proposed Election Rule Changes, Hearing Before the NLRB* 358 (July 19, 2011), available at <http://www.nrlb.gov/sites/default/files/documents/525/publicmeeting07-19-11-corrected.pdf> (statement of union-side attorney Joe Paller).

238. See Stokes et al., *supra* note 165, at 88.

potential of appearing obstructionist to employees. In contrast, if “vote now and litigate later” were the norm, once management lost, they would have every incentive to litigate. Management lawyers invoking the need for discovery, briefs, open hearing dates, and other litigation instruments could delay certification for months or even years. In effect, “vote now and litigate later” would provide employers with a legitimate excuse to tie up union victories in litigation for years, while under the current scheme employers lose credibility if they engage in such dilatory tactics.

IV. DEVELOPING A NEW SYSTEM FOR UNION ORGANIZING

As stated above, we contend that a fair system would be one in which employees have full information (or as full of an opportunity to obtain complete information as possible) and feel that during the process they were treated with respect and not threatened or intimidated by either side. The current status quo, neutrality agreements, card checks (with or without neutrality), and quick elections all fail to meet our standard. Under current NLRB rules, the sides can lie to each other, employees report being fired and intimidated, and each side uses its respective weapons to defeat the other. Neutrality and quick elections axiomatically expose employees to only one side of the story, and card check is subject to intimidation by unions.²³⁹

It is our belief that some approach the conversation about how to improve the collective labor-representation election system with the preexisting belief that employees should be represented by a union (because that is what is in their best interest, whether employees realize it or not), and some approach the conversation with the view that employees should not be represented by unions (whether employees realize that it is in their best interest or not). Hence, some of the focus is on developing reform that tilts results in one direction or the other. For instance, the normative debate about neutrality reveals much of this paternalistic orientation. Some are willing to sacrifice what we believe to be one of the core tenets of democracy and workplace governance—namely employees’ right to vote for their representative, or vote not to be represented at all—in the name of increasing union win rates, because of the belief that higher union density is better for everyone, including employers and employees, both represented and nonrepresented.

Our mantra is that a system for electing labor organizations needs to be focused on what is best for voting employees, deferring to them to

²³⁹ Some union advocates laugh at the concept of union intimidation. But union organizers make a name for themselves and remain employed if they are successful. It is naïve to assert that a union organizer two cards away from victory would not be more likely to resort to intimidation or other less than desirable means to secure success.

make the decisions that directly affect them before worrying about what is good for the U.S. economy or other employees across town. We therefore endeavored to find or develop a system that would operationalize our core beliefs, which are summarized as follows: (1) unionization will benefit some employees, but will not benefit others; (2) some employees want a union and others do not; (3) employee choice, rather than achieving labor peace regardless of the cost, should drive policy; (4) employees should have full information, or at least the maximum opportunity for exposure to full information; (5) employees should vote in a secret-ballot election; (6) management and unions have corrupted the current NLRA rules so that the goal is to win and not to facilitate employee choice; and (7) a union organizing system will be successful if, regardless of the result, at its conclusion the employees feel they have been respected, fully informed, not intimidated, and are satisfied that they made the choice they wanted to make.

A. THE PRINCIPLES FOR ETHICAL CONDUCT DURING UNION REPRESENTATIONAL CAMPAIGNS

Before developing our own system, we looked to find a proposal or practice that satisfied our goals. There is one. We encourage unions, management, and ultimately Congress to adopt the *Principles for Ethical Conduct During Union Representational Campaigns* (the "Principles") developed by the Institute for Employee Choice.²⁴⁰ However, we raise some significant questions about the way in which the Principles should be implemented. These questions carry important consequences, more broadly than in the labor-management relations context, about the differences between positivistic legal rules and normative, sociomoral, self-imposed constraints as optimal means of enforcement regimes.

The Institute for Employee Choice is the brainchild of Richard Bensinger and Dick Shubert. Bensinger is a long-time union organizer whose resume includes being the first head of organizing for the AFL-CIO, as well as working with UNITE-HERE, the United Auto Workers ("UAW"), and other unions.²⁴¹ Shubert is the former CEO of Bethlehem Steel and former Deputy Secretary of Labor under the Nixon and Ford administrations.²⁴² Both men grew frustrated by the current system and its perverse incentives for both unions and management.²⁴³ Despite coming from opposite sides of a polarized issue, Bensinger and Shubert

240. Richard Bensinger & Dick Shubert, Inst. for Emp. Choice, *Principles for Ethical Conduct During Union Representational Campaigns* (unpublished manuscript) (on file with the Authors).

241. *Institute Directors*, INST. FOR EMP. CHOICE, <http://www.employeechoice.org> (select "About Us") (last visited Feb. 14, 2012).

242. *Id.*

243. Richard Bensinger, Co-Chair, Inst. for Emp. Choice, Lecture at Cornell University (Feb. 13, 2012).

share the core beliefs listed above.²⁴⁴ Their experiences and their beliefs led them to create an institute grounded on two principles: to do what is best for employees and to be governed by ethics – not law.²⁴⁵

The Ethical Principles are as follows:

These principles define ethical conduct for both unions and employers and are based on the premise that employees will make the decision about organizing through a contested secret ballot election.

(1): Truthfulness. The Employer and the Union should be truthful and accurate in their campaigns. Although the law does not regulate honesty, the parties have the ethical obligation to present accurate information to employees. If either side contends that a statement by the other is not accurate and truthful, the Institute for Employee Choice, a joint labor/management entity, will provide an opinion.

(2): No threats, implicit or explicit. Neither the Union nor the Employer should make threats, implicit or explicit, in order to gain votes. A free choice requires that there be no coercion or fear. Under current law, veiled threats are tolerated and there are no meaningful penalties for direct threats. An atmosphere of fear is antithetical to free expression of employee choice.

(3): No promises. Just as threats are not acceptable, neither are promises or bribes. Under the NLRA employers are prohibited but unions are allowed to make promises. Under these principles unions are also forbidden to make promises to gain votes.

(4): It is not fair to imply that the exception is the rule. A common way of distorting the truth is by presenting an unusual situation, and implying that this is the norm. The parties must not use extreme examples to sway opinion. And also should tell the whole story.

(5): Corporate campaigns. If employers agree to these principles, then unions should not undertake “corporate campaign” strategies designed to pressure the employer. These principles presume that both parties reach out to employees to present their case. Corporate campaigns are only ethical when there is an uneven playing field such that employee free choice is not meaningfully present.

(6): Discharges. There should be no discharges, subcontracting of work, or layoffs aimed at discouraging union activity. This is the ultimate coercion, and immediately chills any possible free choice. Employers who terminate a known union supporter or member of the union’s organizing committee should submit the termination to immediate arbitration. Penalties for discharging a union supporter should include quadruple back pay as well as punitive damages to discourage such conduct. The reason that multiple backpay and reinstatement is not a sufficient deterrent is because this behavior has such a drastic chilling [e]ffect on the rest of the workforce. Punitive damages as appropriate are essential to deter such conduct.

²⁴⁴. *Id.*

²⁴⁵. *Id.*

(7): Equal time, equal access, equal posting rights and all meetings are voluntary. The union must have equal access to the electorate including equal time for all meetings conducted as part of the employer's campaign. A series of debates between management and the union is encouraged. The employees should have a right to hear both sides, without any advantage to either side. There should be no one on one meetings about the union between supervisors and employees. The union must be granted equal space to post literature on company property.

(8): Delays. The employer should agree not to engage in delaying tactics. Parties cannot ethically rely on lengthy legal maneuvers to thwart freedom of choice.

(9): No pressure to sign union cards. The union should not pressure employees to sign cards. Peer pressure or coercion to get people to sign union cards is not ethical.

(10): Respect. Neither party should demonize its adversary. An atmosphere of mutual respect is necessary for an ethical climate. Unions have an important role in a democracy. Employers also are entitled to be respected. Neither party should engage in smear tactics.

(11): Stacking the deck. Neither party should attempt to "stack the deck." If employers accept these principles, then the union may not ethically plant undercover union-supporters (salts) into the workplace. Neither can employers seek to hire anti-union personnel in order to gain votes.

(12): The final principle is not a specific ethical guideline, but the Golden Rule—do unto others as you would have them do to unto you. Both employers and unions have an important role to play in a vibrant democracy, and ethical behavior is an end in itself. The Institute for Employee Choice is available to support and commend employers and unions who agree to adhere to these principles²⁴⁶

The substance of the Principles appeals to us for a number of reasons. The obvious reasons are that they provide for elections, full information, and truthfulness, and they prohibit coercion and intimidation. More important, they address the more subtle issues. The NLRA prohibits explicit threats, but any good management lawyer can make sure that the company's implicit threats are lawfully conveyed.²⁴⁷ In addition, we support the Principles because they have one set of rules for both sides. Employees will get equal access to both sides and neither side will be able to exploit the rules to gain an advantage. While employers may bristle at inviting the union onto the premises, the elimination of

246. Bensinger & Shubert, *supra* note 240.

247. For example, compare what an employer cannot lawfully tell its employees ("If you vote for the union there will eventually be a strike, and there will be no wages, no health insurance, and strikers can lose their jobs when the strike is over") with what employers may lawfully tell employees, ("We will bargain in good faith, but will not agree to unreasonable union demands. If the union does not accept our offer its only choice will be to call a strike. The company hopes this does not happen, but if it does, there will be no wages, no health insurance, and strikers can lose their jobs when the strike is over. We hope this does not happen, but it's a real concern if you vote for the union."):

corporate campaigns, which are driven by union intimidation and management's fear of the loss of business, should make an acceptable trade.

In addition to satisfying our goals, the Principles are attractive because they may soon be operationalized. While the Institute has held only one election, the UAW recently announced a plan to operate under the Principles for all new elections.²⁴⁸ The UAW is currently in negotiations with the major multinational car manufacturers to make the Principles the method for all future elections.²⁴⁹

Anecdotal evidence from the one past election showed that the employees who voted did, in fact, believe that they had full information to make a choice free from intimidation.²⁵⁰ The fact that these Principles may be used allows us to make a call for future research. We propose a commissioned study where researchers survey employees who have gone through organizing under the NLRA procedures, neutrality, and the Principles to determine if any system truly satisfies the goals outlined above.

There are, of course, some issues that need to be addressed. The Principles prohibit one-on-one supervisor-employee conversations but do not address union organizers doing the same. We would allow supervisor conversations as long as they otherwise complied with the Principles. We would also allow union organizers to have similar conversations on an employer's property. After the petition is filed, we would prohibit off-site campaigning by either side.

B. ENACTING THE PRINCIPLES

Finally, perhaps the most interesting issue at the heart of this Article is determining the optimal way to maximize the enforceability of the Principles. There are three possible approaches: (1) codify the Principles statutorily and impose legal sanctions for violations, (2) codify the Principles as an optional component part of the law, and provide incentives for unions and employers to agree to them and to comply, or (3) leave the Principles out of the law books, keeping their authority and enforceability entirely derived from extralegal sources. We address each of these options below.

Codifying the Principles into law with legal sanctions in place for noncompliance seems like the mechanism least likely to yield the desired results. This mechanism most closely resembles the current scheme of the

248. *UAW Principles for Fair Union Elections*, UAW (Jan. 3, 2011), <http://www.uaw.org/articles/uaw-principles-fair-union-elections>; see Joan Silvi, *Answering UAW's Call: Doing the Right Thing*, SOLIDARITY MAG. (Jan.–Feb. 2011), <http://www.uaw.org/story/answering-uaw-s-call>.

249. Paul Ingrassia, *The United Auto Workers Test Drive a New Model*, WALL ST. J. ONLINE (Feb. 6, 2011), <http://online.wsj.com/article/SB10001424052748704709304576123822184484398.html>.

250. Telephone Interview with Richard Bensinger, Co-Chair, Inst. for Emp. Choice (Feb. 7, 2011).

NLRA; implementing the Principles this way would do little more than reform a law plagued by inefficient system gaming by piling on more law ready to be equally inefficient and gamed by management and unions seeking to win. As they have done for decades under existing statutory regulation, unions and employers would have their lawyers opine on optimal ways of subverting and circumventing the rules, testing statutory language for interpretive weaknesses (for example, what is a “delay tactic” under the eighth principle—what if something has the effect of causing delay, but is done for some ulterior purpose?). The assumption some could make is that the cost of the sanction to the violator, discounted by the likelihood of being found in violation, is less than or equal to the administrative costs of investigation plus the costs of imposing those sanctions. These costs could be weighed against the benefits of circumventing the Principles. The probability that more employers and unions would make this calculus their primary means of determining whether to adhere to the Principles, and would engage in strategizing ways to subvert the Principles, would be greater under this implementation because neither unions nor employers would have any *choice* in agreeing to the terms. The contractual element of the Principles would be stripped away.

There is substantial theory and some empirical evidence to support the argument we make here that entering into contracts (with the same terms) might make unions and employers more likely to feel bound by the terms of the agreement and to conceive of their obligations to perform the terms of the agreement out of moral or social/normative constraints instead of doing the cost-benefit calculus alone.²⁵¹ We submit that enacting into law what really amounts to a moral obligation to “do the right thing” in union campaigns tethered with sanctions penalizing violations is likely to be as effective as music producers relying on intellectual property rights protection laws to police music pirating. The lessons learned from the Recording Industry Association of America’s difficulties fighting digital music piracy suggest that when moral obligations are framed as legal ones, with the threat of a sanction for failure to comply, less effective enforcement is likely to result.²⁵² In fact, it may be the case that building a fence (in the form of statutes) prompts those perceived as fenced out to conceive of ways of jumping over the fence, and perhaps even implicitly challenges them to do so. The fence

251. Robert J. Bies & Tom R. Tyler, *The “Litigation Mentality” in Organizations: A Test of Alternative Psychological Explanations*, 4 *ORG. SCI.* 352, 352 (1993) (identifying different psychological factors that could explain why employees consider suing their employers); Tyler, *supra* note 1, at 70–73 (suggesting that individuals comply because of their long-term commitment to membership in a society rather than because of their short-term self-interests).

252. See Sudip Bhattacharjee et al., *Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions*, 49 *J. LAW & ECON.* 91, 110 (2006).

shifts the perceived responsibility for the parameters on behavior to lawmakers and diminishes the moral responsibility for violations of the *spirit* of the law.

It seems this is true for treatment of new proposals to amend labor law that do little more than add more laws. For instance, when President Obama was elected and EFCA seemed likely to pass, labor-and-employment law firms responded by releasing memoranda to their clients advising them how to maximize management's existing goals, perpetuating the status quo, and how to challenge the law directly and indirectly.²⁵³ Our claim is further bolstered by recent empirical work demonstrating that a legal threat to enforce a contract purporting to obligate individuals to perform an undesirable task is slightly *less* effective than a naked request to perform the same task.²⁵⁴

We have a more difficult time adjudicating between the second and third proposed enforcement mechanisms than we do rejecting the first. Under the second proposed enforcement regime, employers and labor organizations would still have existing regulation setting the floor for their behavior. For the reasons discussed above, this floor is suboptimal. However, it does enjoy the undeniable advantage of augmented predictability and certainty. This should not be underestimated. If the Principles were codified as optionally available, such that both sides had to jointly register their agreement with the NLRB, creating a public certification thereof, this would create opportunities for increased enforcement through administrative channels. This would cost more, surely. What effect would it have on the parties' behavior? In part, the effect likely would be a function of the kinds of incentives offered for agreement and compliance with the Principles. Two advantages of this enforcement scheme are incentives to agree to the Principles via a centralized agency, and casting a wider net to capture more organizing drives. We propose that the incentive for agreeing to the Principles is being listed in a publicly available database (that lists all petitions filed) as having agreed to the Principles. Employers and unions that agreed would also become eligible for tax incentives and for priority bidding rights on government contracting. Failing to agree would render an employer ineligible for such incentives and government contract work, and the public record would reflect which party or parties refused to sign the agreement. Parties that fully complied with the Principles (as determined by a neutral mediator-arbitrator, as described below, in the

253. See, e.g., ROBERT J. BATTISTA ET AL., LITTLE MENDENSON, P.C., THE EMPLOYEE FREE CHOICE ACT: A CRITICAL ANALYSIS (2008); PETER D. CONRAD ET AL., PROSKAUER ROSE LLP, THE EMPLOYEE FREE CHOICE ACT: ARE YOU A TARGET? (2008); *The EFCA, Organized Labor's Legislative Agenda and Its Impact on Your Business*, FISHER & PHILLIPS LLP (Mar. 10, 2009), <http://www.laborlawyers.com/shownews.aspx?Show=10884&Type=1122#Threat>.

254. Eigen, *supra* note 4 (manuscript at 9).

event charges were filed alleging breach, or where no charges were filed at all) would be listed on the public database as having agreed to *and* complied with the Principles. Employers or unions that breached the agreement would lose their eligibility for tax incentives and government contract bidding, and would be listed on the public site as having agreed to the Principles and then failing to comply with them.

The main advantage of this enforcement scheme is the set of options available to the parties, but this could also be a disadvantage because parties would self-select into or out of an enforcement regime we might prefer to see applied to all employers and unions. In some respects, this sorting could be viewed as a kind of proxy for prioritization for the kinds of workplaces, employment, and labor organizations that would be able to benefit. For instance, entertainment-industry guilds like the Writers' Guild of America, the Screen Actors Guild, and the Directors Guild of America likely would be in the group that would benefit from this kind of incentive scheme, but perhaps not so for entertainment-industry unions that represent "below the line" employees like the Teamsters (representing transportation and casting directors), the International Alliance of Theatrical Stage Employees, or the National Association of Broadcast Employees and Technicians. The first category of labor organizations cares more about its public reputation than does the latter. However, one way this problem could be ameliorated is by requiring unions and employers to complete a form when they submit their response to either agree to be bound by the Principles or not, which essentially would place them in a supply chain. For instance, if the Teamsters represent truck drivers of the Acme Truck Company, a company with a mostly unknown brand name, it might be difficult to discover where that company is in a supply chain. However, if Acme delivered coffee to Starbucks, Acme would be more readily discoverable because of that affiliation, making it and other similarly situated employers and unions more accountable under our proposed system.

While this enforcement scheme seems better than the first one, it still might suffer from the *moral obligation framed as a legal enforcement scheme* problem identified above. Employers and unions will still see a cost-benefit analysis as the primary framing of the question of whether to agree to the Principles in a given election. Nonetheless, in the study cited above, morally framing a *legally valenced contractual obligation* sufficiently motivated parties to conform to the agreed-upon obligation.²⁵⁵ That is, perhaps it is the moral obligation partially connected to obeying the law, not just "living up to one's word," that makes the effects of a moral framing of contract enforceability so powerful in the cited experimental

255. *Id.* at 27.

study. This conforms with other recent empirical research in this area.²⁵⁶ It is therefore unclear whether this enforcement scheme would produce the benefit of the moral framing's powerful self-regulating motivation *and* the benefit of an instrumental framing's motivation. It is also unclear whether this regime is better than the one evaluated next, in which the moral component of the agreement is made independently from a codified legal obligation.

The third possible enforcement regime is perhaps the closest to a pure morally derived authority for enforcement as possible. Under this regime, the law would remain as it is now, and parties would be allowed to agree to the Principles on an ad hoc basis. The incentives to agree would be the same as they are now. This regime likely would result in the fewest number of total elections governed by the Principles, but perhaps also the lowest administrative cost of enforcement. The parties who agreed to the Principles under this regime probably would be the most likely to feel bound by the terms for moral reasons, or would otherwise have agreed because they had intended to behave in accordance with the Principles anyway, or because the employer would not have campaigned at all if indifferent to its workforce being unionized. Enforcement would be grounded in the same moral basis as some contracts are.²⁵⁷ This should not be underestimated. It could be argued that this enforcement regime would do better than the second one *because* the moral obligation is divorced from a legal one. Perhaps where contracts are concerned, the moral obligation, derivative even from the Bible, to live up to one's word²⁵⁸ works in spite of any positivistic power of contract obedience (that the law requires enforcement of valid contracts). Promise and doctrinal contract have clearly intertwined roots,²⁵⁹ but there is little empirical evidence of how parties would interpret a promise like that embodied in the Principles and even less evidence of whether that promise would more likely be self-enforced with or without legal basis and obligation.

256. Feldman & Teichman, *supra* note 4, at 25-27; Wilkinson-Ryan & Baron, *supra* note 4, at 420-23; Yuval Feldman & Tom Tyler, Mandated Justice: The Potential Promise and Possible Pitfalls of Mandating Procedural Justice in the Workplace 2 (June 7, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1133521>.

257. See CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 17 (1981) ("An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function is to give grounds—moral grounds—for another to expect the promised performance. To renege is to abuse a confidence . . . [T]o abuse that confidence now is like . . . lying: the abuse of a shared social institution that is intended to invoke the bonds of trust."). *But see* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 652-59 (1979) (discussing the decline in the acceptance of a moral basis for contractual obligations).

258. "If a man . . . takes an oath to bind himself . . . he shall not violate his word . . ." *Numbers* 30:2 (New Am. Std.).

259. Marion Fourcade & Kieran Healy, *Moral Views of Market Society*, 33 ANN. REV. SOC. 285, 297 (2007).

In sum, it is difficult to determine whether embedding the Principles in the law as an optional, incentivized moral contract would result in less instrumentally minded decisionmaking and more moral-based decisionmaking than would leaving the Principles entirely outside of the law as a pure creature of contract. However, given the significant advantages of casting a wider net with the positive-incentive scheme identified above, especially the public accountability unavailable in the third regime-implementation option,²⁶⁰ we espouse the second option over the third.

C. ENFORCING AGREEMENTS TO BE BOUND BY THE PRINCIPLES

In this Subpart, we address how we envision disputes over violations of the Principles being adjudicated and resolved. The NLRB would assign a mediator to each petitioned bargaining unit in which the parties agree to the Principles. If either side alleged a violation of the Principles *before* the election were held, the mediator would mediate this dispute. If the parties were unable to resolve their dispute through this process, the mediator would render a decision that could take one of four forms. The mediator would be empowered to conduct an arbitration hearing, taking testimony and evidence in the traditional manner. The mediator-arbitrator then would determine whether the alleged offense violated the parties' agreement, and if it did, what remedy to fashion. If the offense by management was so egregious that it poisoned the chances of conducting a fair election, the arbitrator might issue a bargaining order. The bar for such an order should be significantly lower than it is under current NLRB law. That is, the penalty associated with highly egregious violations of the Principles should be high. If the offense by the union was so egregious that it poisoned the chances of conducting a fair election, the arbitrator might rule that no election was to be held and that the union was barred from attempting to organize the employees for up to three years. For nonegregious violations of the Principles by management or the union, or in the event that employees (not privy to the agreement itself) were found to have done something that violated the terms of the agreement, the arbitrator would be empowered to fashion awards as she deemed necessary to facilitate a fair election procedure. This might include, but certainly would not be limited to, requiring management and the union to issue joint statements, or requiring one or the other to issue unilateral statements that ameliorated any tainting effects of conduct found to violate the Principles.

After elections were held, the results would be not be released or publicized in any way for six days. Employers and unions may use this

²⁶⁰ This is because it would be very difficult to ensure that all petitions—even ones in which the union does not propose agreeing to the Principles—would be tracked.

time to determine whether any violations of the Principles occurred and to bring a claim to the mediator. If no claims were lodged, after this time the results of the election would be released and both sides by default would have waived their rights to allege any violations of the Principles or to challenge any of the votes for any reason other than issues relating to interpreting intentions of voters from their ballots. If charges were filed during the six-day period, the mediator would mediate the dispute and, failing successful mediation, arbitrate in the same manner as described above. Again, the mediator-arbitrator would be empowered to issue any manner of award, including issuing a bargaining order for egregious employer violations, or an election bar for up to three years for egregious union violations.

A mediation/arbitration system like this one is likely to work best because it offers informality and flexibility, two important qualities of a dispute-resolution system for resolving claims arising out of a morally valenced contract.²⁶¹ More control over the process should beget more control over the resolution of disputes and should result in more creative integrative solutions than would an adjudicatory process by itself.²⁶² The opportunity for greater ownership over the dispute-resolution process and the ability to exert more influence over the outcomes of disputes should also be held out as a significant incentive for agreeing to the Principles.

There are two primary means of evaluating the effectiveness of our proposed system. First, one would expect to see an increase in the number of elections held as a percentage of petitions filed where the Principles are agreed to as compared to instances where the Principles are not agreed to. This would be a victory in and of itself. Currently, the rate at which elections are held as a proportion of petitions filed is 65% by one estimate.²⁶³ Whether unions withdraw their petitions because of newly discovered information, because events that transpire that lead them to believe that they can no longer win, because the employer commits unfair labor practices that the union believes render victory impossible, or because the costs of victory appear too great, we suspect that where the Principles were agreed to, this rate would go up significantly. This would be considered a victory under the conceptualization of fairness advocated herein because more employee choice would determine the ultimate question of whether employees

261. Roy J. Lewicki & Blair H. Sheppard, *Choosing How to Intervene: Factors Affecting the Use of Process and Outcome Control in Third Party Dispute Resolution*, 6 J. OCCUPATIONAL BEHAV. 49, 63 (1985); see also ANN DOUGLAS, *INDUSTRIAL PEACEMAKING* 3-4 (1962); RICHARD E. WALTON, *INTERPERSONAL PEACEMAKING: CONFRONTATIONS AND THIRD-PARTY CONSULTATION* 117-21 (1969).

262. Corinne Bendersky, *Organizational Dispute Resolution Systems: A Complementarities Model*, 28 ACAD. MGMT. REV. 643, 650-651 (2003).

263. Ferguson, *supra* note 77, at 6 tbl.1.

wish to be represented or not than would other considerations such as union strategy, union expenses, employer strategy, gamesmanship, or other factors that further divorce election results from true employee preferences.²⁶⁴

Second, we expect that employees would perceive the election procedure under the Principles as more fair. Increased perceived procedural fairness likely would lead to greater acceptance of the final outcome and, hence, less industrial strife.²⁶⁵ As mentioned earlier, the UAW has proposed following the Principles.²⁶⁶ Anecdotally, reports indicate improved perceived fairness, but no empirical work has been done to date that shows this to be true.²⁶⁷ Ideally, it would be useful to observe how employees regard the process under the Principles as compared to traditional campaigns pursuant to the NLRA (the current status quo) and as compared to the process when employers sign neutrality agreements. No such study has been done as yet, but such data would be instrumental in evaluating the ultimate effectiveness of the reform proposed herein.

CONCLUSION

The right to collectively organize in the workplace is an important one, even when union density is at such dismal levels. Public reaction to then-recently elected Governor Walker's proposal in Wisconsin to eviscerate collective-bargaining rights for some public-sector unions shows that even if unions are unpopular, Americans seem to believe in the right to vote for or against a union and collectively bargain with employers.²⁶⁸ This core belief in the principle of the right to democratically elect one's representatives—in public office or in the workplace—is at the heart of the conceptualization of fairness espoused herein. We propose aiming for revised procedures that most accord with this American ideal, without regard to election results. The focus should be on making the process as fair and just as possible, independently of the goal of turning around dwindling union-density trends. The law should not simply perform the function of a teeter-totter—pushing win-rates up and then, at some time in the future when union density rises, pushing rates back down. This position should not be confused for a

264. The rate of contracts reached in the data noted in Ferguson, *supra* note 77, is only about 38% of the petitions filed. This rate would hopefully also go up significantly for petitions guided by the Principles as a function of the instances in which unions won elections.

265. E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 224 (1993).

266. Silvi, *supra* note 248.

267. Bensinger, *supra* note 243.

268. See Lydia Sand, *Scaling Back State Programs is Least of Three Fiscal Evils*, GALLUP (Feb. 22, 2011), <http://www.gallup.com/poll/146276/Scaling-Back-State-Programs-Least-Three-Fiscal-Evils.aspx> (finding 61% of Americans would oppose the kind of bill proposed in Wisconsin).

desire to see union rates remain low or to decline further. To the contrary, the Authors recognize that there are serious gains that ought not to be overlooked that come from collective democratic participation by workers.²⁶⁹ However, reforming a system by presuming what employees want because they should want it seems backwards and even counterproductive if the end goal is increasing union density. Perhaps the focus ought to be shifted away from counting union shops and win rates, and towards revising the electoral process for collective representation in the workplace—something that American citizens seem to regard as a sacred component of our democracy.

This does not stop us from wondering what effect the Principles incorporated into law as proposed would have on union density. As noted above, we expect the percentage of elections held as a function of petitions filed to go up, but there could also be a rise in the number of petitions filed. The leverage of the public specter of dishonesty or failure to abide by American principles of letting employees fairly vote up or down on a union could incentivize labor to file more petitions. Increasing the rate of petitions filed could inflate the denominator such that even if win rates remained constant, the win-rate percentage could drop. The question is whether improved procedural fairness will end up reflecting what unionists have told us—that employees really do want to be represented by unions but have been afraid to vote their true desires for fear of retribution. Or, will employers *voluntarily* imposing on themselves procedurally fair conditions signal the opposite of threats of retribution—that the employer is willing to respond reasonably to employee concerns—and *lower* the likelihood of unions winning more elections? An alternative signal to be gleaned from an employer signing on to the Principles is that it took the threat of unionization to make the employer *honest*. Or it could signal that the employer and union are able to agree on things contractually, so maybe employees could envision life under a collective-bargaining agreement as an improvement. Such signals would increase the likelihood of unions winning more elections. Clearly, more empirical research on the UAW's experience with the Principles is warranted, if not urgently needed, in order to increase the chances that this proposal is taken seriously—something that could be critical as a means of reforming labor law without political loggerheads.

A more interesting question is whether the Principles are applicable to other areas of employment and, ultimately, other areas of law. We believe that in the employment context, the adoption of a Principles-like standard could lead to a more efficient and humane work environment beneficial to employers, employees, taxpayers, and an overburdened

²⁶⁹ See, e.g., Clegg, *supra* note 53, at 311; John R. Commons, *Institutional Economics*, 26 AM. ECON. REV. 237, 247 (1936).

judicial system. Perhaps the only ones who would not benefit would be labor and employment lawyers.

An examination of the nonunionized private sector reveals that the law alone incentivizes management to behave in ways that are risk averse because the floor of behavior the law creates makes exceeding the minimum inadvisable. In fact, there are situations in which enlightened human-resource procedures exceed the law's protections, but they put the employer at risk for legal action and are therefore discouraged or avoided in spite of their clear benefits. For example, in sexual-harassment law, employment policies that make it easier for employees to report harassment (such as 1-800 reporting numbers) *increase* the likelihood of employer exposure to liability.²⁷⁰ Some wage-and-hour laws prohibit employees and employers from agreeing to things that might be mutually beneficial without being exploitive, such as longer work days in exchange for time off, tip pooling, and modifying exempt and nonexempt statuses.²⁷¹ There are situations in which both employees and employers would like to create their own work rules but are prohibited by law from doing so.²⁷² We contend that employers who agree to the Principles should be able to enter into contracts with the employees that benefit all concerned. Thus, instead of enforcing laws drafted with the most unethical employers in mind, why not let ethical employers establish contracts with employees that are fair and benefit both?

In the 1930s, labor and management were enemies. Each side thought it needed weapons to ensure peace. Today, the enemy is neither labor nor management. Instead, increased global competition, diminishing natural resources, environmental concerns, and sustaining a high standard of living are what both labor and capital must battle. Perhaps the Authors are overly optimistic, but one way to win this battle may be to have the former enemies stop trying to manipulate the law, and instead be guided by ethics, in order to compete with their real rivals. The hope is that affording parties the opportunity to succeed in this way will create an avenue to test whether we are overly optimistic. The costs of finding out are low, and the rewards could be significant.

270. David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 *FORDHAM L. REV.* 1265, 1294 (2001) (arguing that providing reporting mechanisms makes employees more likely to report harassment, making it harder for employers to satisfy their duty of care).

271. See 29 U.S.C. § 213 (2010).

272. *Id.*

Exhibit 4

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 20, 2012

Decided May 28, 2013

No. 11-1314

TENNECO AUTOMOTIVE, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

LOCAL 660, INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA, UAW,
INTERVENOR

Consolidated with 11-1353

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Gregory J. Utken argued the cause for petitioner. With
him on the briefs was *Brian R. Garrison*.

Glenn M. Taubman was on the brief for *amicus curiae* Lonnie Tremain in support of petitioner.

Greg P. Lauro, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were *John H. Ferguson*, Associate General Counsel, *Linda Dreeben*, Deputy Associate General Counsel, *Jill A. Griffin*, Supervisory Attorney, and *Jeffrey Burritt*, Attorney.

Stephen A. Yokich argued the cause and filed the brief for intervenor. *Barbara J. Hillman* entered an appearance.

Before: ROGERS and TATEL, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge EDWARDS*.

EDWARDS, *Senior Circuit Judge*: This case arises from a protracted labor dispute between Tenneco Automotive, Inc. (“Tenneco” or “Company”) and Local 660, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW (“Union”). Tenneco designs, manufactures, and sells automotive products. From 1945 until December 4, 2006, Tenneco recognized the Union as the exclusive bargaining agent for a unit of production and maintenance employees at the Company’s Grass Lake, Michigan facility. In 2004, Union and Company representatives pursued negotiations in an effort to reach a new collective bargaining agreement to replace the one that expired on May 12, 2004. Negotiations failed, however, and the Union called a strike on April 26, 2005. Tenneco continued operations by hiring permanent replacements, using employees who decided not to participate in the strike, and contracting out work to another employer.

Relations between the parties soured during the strike and a number of incidents arose that brought the parties before the

National Labor Relations Board (“NLRB” or “Board”). The Union filed unfair labor practice charges with the Board on February 1 and 15, 2006. On February 10, 2006, some bargaining unit employees filed a decertification petition with the Board. That petition was held in abeyance pending resolution of the Union’s unfair labor practice charges. However, on December 4, 2006, a substantial majority of the unit employees presented another petition for decertification to the Company. Based on this second decertification petition, Tenneco gave notice that it would no longer recognize the Union as the employees’ bargaining agent.

In the matter before the Board, the NLRB’s General Counsel sought to prove that Tenneco had committed multiple violations of Section 8 of the National Labor Relations Act (“Act”), 29 U.S.C. § 158, including, *inter alia*: Section 8(a)(1) for directing employees not to say or do anything that could “evoke a response” from other employees; Sections 8(a)(1) and (3) for disciplining employee Joseph Helton because of his pro-Union Activities; and Sections 8(a)(1) and (5) for refusing to provide the Union with information regarding the possible installation of video cameras in the workplace, unilaterally promulgating a rule requiring supervisory approval prior to the posting of signs, letters, or printed material at the Company’s facility, and withdrawing recognition of the Union. The Administrative Law Judge (“ALJ”) found that some of Tenneco’s challenged conduct violated the Act, but rejected many of the claims advanced by the NLRB’s General Counsel. *See Tenneco Auto., Inc.*, 2008 WL 1786082 (Apr. 16, 2008). Most significantly, the ALJ concluded the employees’ disaffection with the Union was not attributable to Tenneco’s unfair labor practices and, therefore, the Company’s withdrawal of recognition was lawful as of December 4, 2006. *Id.* (citing *Master Slack Corp.*, 271 N.L.R.B. 78 (1984)). The General Counsel and the Union filed exceptions to the ALJ’s findings, and the Board ruled for

the Union on all unfair labor practice charges. With regard to the withdrawal of recognition, the Board held “that certain of the[] unfair labor practices tainted the [employees’] petition [for decertification], and that the withdrawal of recognition was therefore unlawful.” *Tenneco Auto., Inc.*, 357 N.L.R.B. No. 84, 2011 WL 4590190, at *9 (Aug. 26, 2011). Tenneco now petitions this court for review, and the Board cross-petitions for enforcement of its order.

We grant Tenneco’s petition for review with respect to the charge relating to the Company’s withdrawal of recognition. On the record before the court, there is no substantial evidence that the Company’s unfair labor practices “significantly contribute[d]” to the employees’ petition for decertification. *See Williams Enters., Inc. v. NLRB*, 956 F.2d 1226, 1234 (D.C. Cir. 1992). However, with respect to the remaining disputed unfair labor practice charges, we grant the Board’s cross-application for enforcement. Although the Company has raised vigorous challenges to the Board’s holdings, we find substantial evidence to support the Board’s determinations that Tenneco’s conduct violated Sections 8(a)(1), (3), and (5) of the Act. *See Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (“[T]he Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.”).

I. Background

A. Facts

Tenneco has a prototype engineering facility at Grass Lake, Michigan, where the Union represented between thirty and forty employees. On April 26, 2005, following failed collective bargaining negotiations, the Union commenced an economic strike. Some employees resigned from the Union and chose not to strike. The Union excused one unit employee, Joseph Helton, and allowed him to continue

working during the strike. Ten employees resigned from the Union and crossed the picket line during the strike. As the strike continued, Tenneco hired sixteen permanent replacements for strikers.

On August 29, 2005, Union Representative James Walker was informed that Tenneco planned to install video cameras in its test lab due to alleged incidents of tampering with Company property. The Union contended that installation of video devices in the workplace is a mandatory subject of bargaining and requested documentation of the alleged tampering so that it could bargain effectively. Tenneco never responded and ultimately decided against the installation of video cameras.

On January 19, 2006, while the strike was still ongoing, Helton wore a tee shirt to work displaying the slogan, "Thou Shall Not Scab." Company Supervisor Dan Eggleston told Helton to change his shirt because, he believed, some employees would not like the message. Instead, Helton covered the word "scab" with a piece of tape on which he had written the word "steal," so that the slogan read, "Thou Shall Not Steal." Eggleston objected to this message and told Helton to tape over the word "steal." Helton taped over "steal" and wrote the words "be a low life" on the new piece of tape. Eggleston again objected, and ordered Helton to tape over the slogan and leave it blank. After further discussion, Helton and Eggleston agreed that Helton should go home for the day. The next day, Helton received a written reprimand for wearing the "scab" slogan on his shirt and then altering the message to "goad fellow employees inappropriately and unnecessarily." Br. for NLRB at 9.

On January 27, 2006, Walker requested information about the persons hired as striker replacements, including their home addresses. Tenneco declined to provide the addresses because of concerns that the Union might use the

information to harass or intimidate the replacement workers at their homes. Tenneco sent a letter reminding the Union that it already had multiple means of communicating directly with replacements by posting notices on the Union bulletin board and by having the Union President, Vice President, and Steward (all of whom were working in the Company facility) interact with the replacements before and after working hours and during breaks. The Union later explained that, because the replacements were permanent employees and thus members of the unit, it needed the contact information to be able to communicate with these employees about working conditions, collective bargaining proposals, grievances, and other representational matters. Walker claimed that "mailing addresses are the only practical way for the Union to communicate with these bargaining unit members in a private fashion that cannot be monitored by Tenneco." Br. for NLRB at 10.

On January 27, 2006, after ten months of striking, the Union made an unconditional offer to have the striking employees return to work. The first four strikers returned on February 6, 2006, and Company Manager, Mark Kortz, held a meeting with all employees at the start of the shift. The work force then consisted of permanent striker replacements, returning strikers, and employees who had previously abandoned the strike. During his presentation, Kortz instructed the employees to refrain from inciting tensions. He amplified by saying that employees should "not . . . engage in taunting, verbal or physical threats, or in other conduct that is confrontational or meant to evoke a response from a co-worker." *Tenneco Auto., Inc.*, 2011 WL 4590190, at *7. Kortz also instructed employees not to post items in their work areas without approval. He made no reference to postings on bulletin boards. Following the February 6, 2006 meeting, Union officers posted items on bulletin boards, including notices of Union meetings, and employees also continued to

post items on the employee bulletin board. Union officers also communicated directly with the striker replacements without interference.

On December 4, 2006, an employee presented Tenneco with a petition signed by seventy-seven percent of the employees (twenty-four out of the thirty-one bargaining unit employees) asking Tenneco to withdraw recognition from the Union. After verifying the signatures on the petition, Tenneco notified the Union that it had received the petition and that it was withdrawing recognition of the Union.

B. Proceedings Below

After the Union filed unfair labor practice charges, the Board's Regional Director issued a consolidated complaint against Tenneco on July 31, 2007. The complaint alleged that Tenneco, throughout the course of the strike and upon its withdrawal of Union recognition, had committed multiple violations of Sections 8(a)(1), (3), and (5) of the Act. 29 U.S.C. § 158(a)(1), (3), (5).

In October, 2007, a three-day hearing was held before an ALJ. The ALJ found that Tenneco's denial of the Union's request for the replacement workers' home addresses was permissible; that the discipline of Helton over the tee shirt incident did not constitute an unfair labor practice; that Kortz's instruction not to "evoke a response" was reasonable; that Kortz did not create a new posting rule without first consulting with the Union; and that, while Tenneco's denial of the Union's request for information about the installation of security cameras violated the Act, "under the circumstances," the violation was "very close to de minimus [sic]," because the cameras were never installed. *Tenneco Auto., Inc.*, 2008 WL 1786082. The ALJ credited several other allegations of unfair labor practices that were not discussed by the Board and are not before this court. Most

significantly, the ALJ concluded that Tenneco's withdrawal of Union recognition on December 4, 2006, was lawful. The ALJ predicated his decision on an application of "the *Master Slack* analytical framework [for] determining whether there is [a] causal relationship between the unfair labor practices and the employees' disaffection with the Union." *Id.* (relying on *Master Slack*, 271 N.L.R.B. at 84). In the ALJ's view, such a causal relationship was lacking.

On August 26, 2011, the Board rejected most of the ALJ's proposed findings. The Board agreed with the ALJ that Tenneco's failure to respond to the Union's request for information about the proposed installation of a security camera was an unfair labor practice; however, the Board rejected the ALJ's characterization of that violation as *de minimis* because the request was still relevant at the time it was made. *Tenneco Auto., Inc.*, 2011 WL 4590190, at *2. The Board found that Tenneco's failure to provide the replacement workers' home addresses violated the Act because there was no "clear and present danger" that the Union would misuse the information. *Id.* at *3-4. The Board also found that Tenneco's discipline of Helton for the tee shirt incident violated the Act because "Helton's protected conduct was a motivating factor in the Respondent's decision to issue the discipline, and... the evidence fails to show that the Respondent would have disciplined Helton in the absence of his protected activity." *Id.* at *4-6.

The Board also held that Kortz's direction to employees not to say or do anything that could "evoke a response" constituted another violation of the Act. The majority opinion for the Board noted:

The dissent suggests that the only reasonable interpretation of Kortz's statement is as a directive against threatening conduct not protected by the Act. In so doing, however, it ignores the fact that the statement

was made in the context of Kortz describing the work force in terms of strike status—those who crossed the picket line, permanent replacements, and reinstated strikers. Given this context, and absent any reference to unprotected employee conduct, it is simply not reasonable to conclude that employees would narrowly interpret the statement to exclude all Section 7 activity.

Id. at *8 (referring to 29 U.S.C. § 157, which protects the right of employees “to engage in other concerted activities for the purpose of collective bargaining”). The Board further held that Kortz’s announcement about the posting of signs in the workplace violated the Act because Tenneco’s “longstanding practice allowed employees to freely post materials without obtaining prior approval,” and thus “Kortz’s announcement declared a substantial change to this past practice.” *Id.* at *8.

In light of these findings, the Board concluded that Tenneco improperly withdrew recognition of the Union. The Board rejected the ALJ’s application of *Master Slack* and concluded “that certain of the[] unfair labor practices [committed by Tenneco] tainted the petition” for decertification. *Id.* at 9. Because the Board found that the employer’s illegal conduct was responsible for the employees’ disaffection with the Union, it held that the withdrawal was unlawful. *Id.* at 9-10.

Tenneco now petitions this court for review of the Board’s decision and the NLRB and the Union have cross-applied for enforcement.

II. Analysis

A. Standard of Review

“As we have noted many times before, our role in reviewing an NLRB decision is limited. We must uphold the judgment of the Board unless, upon reviewing the record as a whole, we conclude that the Board’s findings are not supported by substantial evidence, or that the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case.” *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). We owe “substantial deference” to inferences drawn by the Board from the factual record. *Halle Enters., Inc. v. NLRB*, 247 F.3d 268, 271 (D.C. Cir. 2001). “When the Board concludes that a violation of the [Act] has occurred, we must uphold that finding unless it has no rational basis or is unsupported by substantial evidence. It is not necessary that we agree that the Board reached the best outcome in order to sustain its decisions. The Board’s findings of fact are conclusive when supported by substantial evidence on the record considered as a whole.” *Bally’s Park Place*, 646 F.3d at 935 (citations and quotations omitted).

Furthermore, substantial evidence review does not change when the Board disagrees with the ALJ. *Local 702, IBEW v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000). In such situations, the Supreme Court has instructed that an ALJ’s findings should not be given “more weight than in reason and in the light of judicial experience they deserve.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951). This means “that evidence supporting a conclusion may be less substantial when an impartial, experienced [ALJ] who has observed the witnesses and lived with the case has drawn conclusions different from the Board’s than when [the ALJ and the agency have] reached the same conclusion.” *Id.* However, an ALJ’s findings “are to be considered along with the consistency and inherent probability of testimony,” and

the significance of the findings will depend “largely on the importance of credibility in the particular case.” *Id.* When the Board and ALJ disagree, the Board’s obligation is to “make clear the basis of its disagreement.” *Local 702, IBEW*, 215 F.3d at 15. “[S]ince the Board is the agency entrusted by Congress with the responsibility for making findings under the statute, it is not precluded from reaching a result contrary to that of the [ALJ] when there is substantial evidence in support of each result, and is free to substitute its judgment for the [ALJ]’s.” *Id.*

The obligation of the reviewing court is to assess the “whole record,” meaning that our analysis must consider not only the evidence supporting the Board’s decision but also “whatever in the record fairly detracts from its weight.” *Universal Camera Corp.*, 340 U.S. at 488; *see also CitiSteel USA, Inc. v. NLRB*, 53 F.3d 350, 354 (D.C. Cir. 1995). A reviewing court must “ask whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion.” *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999).

B. Insubstantial Challenges Raised by the Company

As noted above, the parties’ dispute has narrowed to six contested issues. Those issues are whether the Company committed unfair labor practices when (1) it disciplined employee Joseph Helton because of his pro-Union activities; (2) refused to provide the Union with the home addresses of the striker-replacement employees; (3) refused to provide the Union with information regarding the planned installation of video cameras in the workplace; (4) directed employees not to say or do anything that could “evoke a response” from other employees; (5) unilaterally promulgated a rule requiring supervisory approval prior to the posting of material at the Company’s facility; and (6) withdrew recognition of the Union. We grant the Board’s cross-petition for enforcement as to the first five charges. The Board’s decision on these

matters speaks for itself and needs no amplification by the court. *See W.C. McQuaide, Inc. v. NLRB*, 133 F.3d 47, 49 (D.C. Cir. 1998) (noting that there is no reason for the court to address certain disputed matters when “the company’s . . . challenges are met by sufficient evidence in the record to support the Board’s findings”).

After careful review of the record and the parties’ arguments, we uphold the Board’s findings that:

[Tenneco] violated Section 8(a)(1) of the Act by directing employees to refrain from saying anything to each other that might be deemed offensive or evoke a response from another employee. [Tenneco] violated Section 8(a)(3) and (1) of the Act by issuing a written warning to employee Joseph Helton because of his support for and activities on behalf of the Union. [Tenneco] violated Section 8(a)(5) and (1) of the Act by (a) Failing and refusing to furnish the Union with requested information regarding the planned installation of video cameras (c) Failing and refusing to furnish the Union with requested information concerning the home addresses of the . . . permanent replacement employees. . . . (e) Promulgating a rule requiring supervisory approval prior to the posting of signs, letters, or printed material

Tenneco Auto., Inc., 2011 WL 4590190, at *11. These findings are supported by substantial evidence and are consistent with established precedent.

We now turn to the Board’s finding that Tenneco committed an unfair labor practice when it withdrew recognition of the Union. Because, for the reasons indicated below, we find no substantial evidence to support this charge, we grant the Company’s petition for review.

C. Tenneco's Withdrawal of Union Recognition

When an employer has objective evidence that a union has lost majority support, such as “a petition signed by a majority of the employees in the bargaining unit,” it may unilaterally withdraw recognition. *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 31 (D.C. Cir. 2007) (quoting *Levitz Furniture Co. of the Pac.*, 333 N.L.R.B. 717, 725 (2001)). But an employer may not rely on an employee petition “when the employer’s unfair labor practices significantly contribute to the loss of majority status by undercutting the employees’ support of the union.” *Williams Enters.*, 956 F.2d at 1234.

The Board has explained that “not every unfair labor practice will taint evidence of a union’s subsequent loss of majority support.” *Lexus of Concord, Inc.*, 343 N.L.R.B. 851, 852 (2004). Thus, the Board has the burden of adducing substantial evidence to support its finding that an employer’s unfair labor practices have “significantly contributed” to the erosion of a union’s majority support. See *Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 496 (D.C. Cir. 1996). In *Master Slack*, the Board set out a four-factor test to determine whether “the unfair labor practices . . . have caused the employee disaffection [with the Union] or at least had a meaningful impact in bringing about that disaffection.” 271 N.L.R.B. at 84. The Board’s four-factor test, which we have endorsed, includes consideration of:

- (1) The length of time between the unfair labor practices and the employee petition;
- (2) the nature of the unfair labor practices, including whether they are of a nature that would cause a detrimental or lasting effect on the employees;
- (3) the tendency of the unfair labor practices to cause employee disaffection with the union; and
- (4) the effect of the unlawful conduct on the employees’ morale, organizational activities, and membership in the union.

Williams Enters., 956 F.2d at 1236 (citing *Master Slack*, 271 N.L.R.B. at 84)).

Both the ALJ and the Board applied the *Master Slack* factors and arrived at opposite conclusions. However, the Board's judgment is infirm because it disregards material evidence that belies any causal relationship between the Company's unfair labor practices and the employees' petition for decertification. Recognizing that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight," *Universal Camera Corp.*, 340 U.S. at 488, we conclude that on the record before us the Board's determination is not supported by substantial evidence.

First, it is highly significant that ten months passed between the last credited unfair labor practice and the submission of the employees' petition for decertification. "The length of time between the unfair labor practices and the withdrawal of recognition" is the first of the four *Master Slack* factors, 271 N.L.R.B. at 84, and it is obviously an important consideration. This temporal factor typically is counted as weighty only when it involves a matter of days or weeks. See, e.g., *Bunting Bearings Corp.*, 349 N.L.R.B. 1070, 1072 (2007) (eight to fifteen days was "close temporal proximity"); *Miller Waste Mills, Inc.*, 334 N.L.R.B. 466, 468 (2001) ("close temporal proximity" when unfair labor practices occurred two to six weeks before petition for withdrawal). However, a lapse of months fails to support, and typically weighs against, a finding of close temporal proximity. See, e.g., *Garden Ridge Mgmt., Inc.*, 347 N.L.R.B. 131, 134 (2006) (five-month delay weighed against finding that unfair labor practices caused employee sentiment against Union); *Lexus of Concord, Inc.*, 343 N.L.R.B. at 852 (no temporal proximity when lapse was three months). Here, even the NLRB admitted in its decision that ten months is "a relatively long period." *Teneco Automotive, Inc.*, 2011 WL

4590190, at *10. The Board maintained, however, that “the nature of some of the violations would tend to have a lasting detrimental effect on the employees’ view of the Union,” particularly Tenneco’s refusal to provide the addresses of the replacement workers. *Id.* In the Board’s view, this and other unfair labor practices “depriv[ed] the Union of opportunities to meaningfully address any lingering feelings of disconnect that would naturally exist in the aftermath of a contentious and divisive strike.” *Id.* But for reasons explained below, the cited conduct did not constitute the type of unfair labor practices that the Board has historically characterized as “detrimental or lasting.”

The second *Master Slack* factor is “the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees.” 271 N.L.R.B. at 84. The third factor is “any possible tendency to cause employee disaffection from the union.” *Id.* These factors obviously are related because unfair labor practices that have a lasting effects on employees are likely to be serious enough to cause disaffection with a union. The NLRB relied on four alleged unfair labor practices to show these adverse consequences: Tenneco’s refusal to provide the Union with the addresses of replacement employees; Kortz’s admonition to employees to avoid having discussions that could “evoke a response”; the requirement that employees obtain supervisor permission before posting materials in the Company facility; and Tenneco’s discipline of union advocate Helton. *See Tenneco Auto., Inc.*, 2011 WL 4590190, at *9-10. No violation of the Act is insignificant; but these violations were hardly “hallmark violations that were highly coercive and likely to remain in the memories of employees for a long time.” *Goya Foods of Fla.*, 347 N.L.R.B. 1118, 1121 (2006).

The Board has consistently held that the types of violations that have detrimental and lasting effects are those

involving coercive conduct such as discharge, withholding benefits, and threats to shutdown the company operation. *See, e.g., id.* at 1121-22 (discharging three union adherents and suspending another were “hallmark violations”); *JLL Rest., Inc.*, 347 N.L.R.B. 192, 193 (2006) (threatening employees with closure and job loss); *Beverly Health and Rehab. Serv., Inc.*, 346 N.L.R.B. 1319, 1328-29 (2006) (discharging active union supporter and unilaterally changing hours and vacation); *Overnite Transp. Co.*, 333 N.L.R.B. 1392, 1394 (2001) (hallmark violations included “the granting of an unprecedented wage increase, as well as threats that employees would lose their jobs and that the Employer would close if the employees selected the Union”). The unfair labor practices alleged in this case do not rise to these levels.

This court has agreed with the Board that “the unilateral implementation of changes in working conditions has the tendency to undermine confidence in the employees’ chosen collective-bargaining agent.” *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000). However, to be considered “hallmark violations,” such unilateral changes must normally involve the “issues that lead employees to seek union representation,” particularly employee earnings. *Goya Foods*, 347 N.L.R.B. at 1122; *see also M & M Auto. Grp., Inc.*, 342 N.L.R.B. 1244, 1247 (2004) (taint found where the employer’s “unilateral changes involved the important, bread-and-butter issues of wage increases and promotions for which employees seek and gain union representation”). Considered against this standard, the unilateral changes in workplace policy cited by the Board – a new rule regarding the posting of materials in the workplace and an admonition to avoid having hostile discussions that could “evoke a response” from other employees – did not risk having a “detrimental or lasting effect on employees.” *Master Slack*, 271 N.L.R.B. at 84. Indeed, the record makes it clear that both employees and Union officials continued to post notices on bulletin boards

without first obtaining permission from the Company; and Union officials freely talked with unit employees about work conditions and Union activities without interference from the Company.

Nor did the discipline of Helton rise to the level of “detrimental or lasting.” Helton received only a mild reprimand in the form of written counseling. And this was the only disciplinary action recorded prior to the Company’s withdrawal of Union recognition. *See Tenneco Auto., Inc.*, 2008 WL 1786082.

Likewise, there is no substantial evidence that Tenneco’s failure to supply the replacements’ home addresses had detrimental effects of the sort that the Board has described in cases involving “hallmark violations.” Union officials worked in the Company facility, the bargaining unit was relatively small, and Union officials had routine and easy access to all unit employees. This access did not excuse the Company’s failure to provide the Union with the addresses of the striker replacements, but there is nothing in the record to indicate that the Company’s failure resulted in “detrimental or lasting” effects sufficient to cause a large majority of the employees to sign a decertification petition.

The Board also failed to establish by substantial evidence that the alleged unfair labor practices in this case actually prevented communications between the employees and the Union. Thus, the Board fails to satisfy the fourth *Master Slack* factor by articulating what, if any, effect “the unlawful conduct [had] on employees morale, organizational activities, and membership in the union.” 271 N.L.R.B. at 84. The Board claims that the alleged unfair labor practices were particularly problematic because they “illustrate[] the [Company’s] hostility toward the free expression of employee views about union matters, and show[] a determination to prevent the occurrence of protected prounion speech in its workplace.”

Tenneco Auto., Inc., 2011 WL 4590190, at *10. But the evidence does not support this claim. The Union introduced testimony that “the Company’s new rules effectively stifled both the Union’s and the employees’ ability to discuss union related matters.” *Tenneco Auto., Inc.*, 2008 WL 1786082. However, the ALJ discredited this testimony and found as a factual matter that between the bulletin board and direct conversations, “the Union had ample opportunity to present to the replacements its side of the strike, the need for union representation, and the progress of the negotiations that were ongoing.” *Id.* Indeed, the ALJ found that “the returning strikers could and did speak amicably and about union matters with some of the replacement workers while at work.” *Id.* The Board never rejected the ALJ’s credibility determinations regarding this testimony.

We do not hold that “hallmark violations” are always necessary to satisfy *Master Slack*. Nor do we mean to hold that an employer’s interference with communications between a union and unit employees cannot have a detrimental or lasting effect on employees. Rather, we simply hold that, on this record, there is no substantial evidence to support the Board’s finding of a causal relationship between the Company’s unfair labor practices and the employees’ petition for decertification.

In addition, the Board’s assessment of the facts leading up to the withdrawal petition is self-contradictory. At one point in its opinion, the Board asserts that the Company’s conduct “significantly interfered with protected speech among its employees.” *Tenneco Auto., Inc.*, 2011 WL 4590190, at *10. Yet, elsewhere the Board explained that “the record reveals that at least some replacement employees were on friendly terms with the union officials who were reinstated after the strike.” *Id.* at 3. Given the small size of the company facility (which facilitated communications between the Union

and unit employees) and the failure of the Board to address the ALJ's finding that the employees had ample opportunity to communicate with and about the Union, the Board has not met its burden under the substantial evidence standard to prove a causal connection.

Finally, it is noteworthy that the ALJ heard and credited testimony from nine of the petition-signing employees that "the Company had done nothing to influence their decision." *Tenneco Auto., Inc.*, 2008 WL 1786082. We understand that such testimony is not necessarily dispositive because it may be nothing more than the product of employer intimidation. Nevertheless, such testimony must be assessed on a case-by-case basis, especially when an ALJ has made credibility findings. *See Universal Camera Corp.*, 340 U.S. at 496 ("The significance of [the ALJ's] report, of course, depends largely on the importance of credibility in the particular case."). The Board is free to reject the ALJ's determinations, but it must "make clear the basis of its disagreement." *Local 702, IBEW*, 215 F.3d at 15. After listening to the employees' testimony, the ALJ found that

the General Counsel did not establish that the [petition] signers' disaffection with the Union was attributable to the [unfair labor practice] allegations that had been pending for over a year. In point of fact, it would be my finding and conclusion that the [unfair labor practices] in this case had essentially nothing to do with the signers' decision to petition for withdrawal of recognition of the Union. . . . [A]s I observed and heard them, [the employees'] morale as such was elevated based on their decision to disassociate from the Union.

Tenneco Auto., Inc., 2008 WL 1786082. The Board, in turn, simply ignored the signing employees' testimony without any explanation. Because the Board never explained any basis for disagreement with the ALJ's findings, we have taken the

findings into account in assessing whether there is substantial evidence to support the Board's judgment.

The foregoing considerations, in combination, forcefully contradict the Board's errant conclusion – based on a shortsighted assessment of the evidence – that Tenneco violated the Act when it withdrew recognition of the Union. Considering the whole record, we think it apparent that substantial evidence does not support the Board's finding that Tenneco's conduct tainted the decision of the employees' to sign a petition for decertification.

D. The Board's Affirmative Bargaining Order

The Board ordered Tenneco to, *inter alia*, “recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.” *Tenneco Auto., Inc.*, 2011 WL 4590190, at *12. The Board determined “that an affirmative bargaining order is warranted in this case as a remedy for the [Company's] unlawful withdrawal of recognition.” *Id.* Before this court, the Board argues that “Tenneco failed to challenge this bargaining order before the Board, and therefore the Court lacks jurisdiction to consider Tenneco's challenge to the remedy now.” Br. for NLRB at 58 (citing Section 10(e) of the Act, 29 U.S.C. § 160(e)). We disagree.

Before the Board, Tenneco clearly opposed the unfair labor practice charge based on its alleged withdrawal of recognition. And the Company preserved this challenge in its petition for review in this court. The Board's decision makes it clear that the *sole* basis for the Board's bargaining order is Tenneco's alleged “unlawful withdrawal of recognition.” Because we have found that no substantial evidence supports the Board's finding of an unfair labor practice, there is no longer any basis for the bargaining order. Obviously, the

sanction for an unfair labor practice cannot survive once the Board's finding of an unfair labor practice has been reversed.

III. Conclusion

With respect to its withdrawal of recognition, we grant Tenneco's petition for review and deny the Board's cross-application for enforcement. The Board's decision regarding the withdrawal of recognition is reversed and the accompanying bargaining order is vacated.

Tenneco does not contest the Board's findings that it violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with requested information concerning Joseph Helton's discipline and work performed by an outside contractor during the strike, and refusing to process Steven Prysianzy's grievance to the third step. We therefore grant the Board's request for summary enforcement of its Order with respect to these violations. With respect to the other unfair labor practice charges at issue in this case, we deny Tenneco's petition for review and grant the Board's cross-application for enforcement.

Exhibit 5

On Wednesday November 21st, I was at work and while my husband was at home a union rep come to our door and rang the door bell. My husband did not answer the door since he did not know who it was and did not want to be bothered at the time. The gentleman at the door left our doorstep and return 5 minutes later and rang the bell again. My husband again did not answer the door and the union rep continued to do this two more times. My husband was about to call the police when the union rep finally left and did not return. We have surveillance video at my house and I do have this occurance as well as two others on video tape. On Saturday Noberm 24th my husband and I were in our back yard washing our dogs when a gentleman poked his head over our brick wall and asked if [REDACTED] was home. I told him that [REDACTED] was not home, he continued to ask me if [REDACTED] was at work at Chapman or if I knew where she was. I told her that she was not home and I did not know when she would be returning. I did not reveal myself to him since I did not want to speak with a union rep. I do not wish to be bothered on the weekends at my house, if they wish to speak with me they can speak with me at work. On Monday November 26th, I walked home from work and I got home around 5:40pm. I was in my house when two union representatives, one man and one woman came to my doorstep and rang the door bell. I was unavailable to answer the door to tell them to leave. They continued to stay at our door step and ring the bell two more times. The third and last time they rang the door bell they rang it constantly four rings before they decided to leave. I do not appreciate people coming to my door and lingering while ringing my door bell numerous times. They had my dogs barking which disturb the neighbors. If I do not answer the door then kindly leave. Again, if they wish to speak with me they can approach me on a break at work. I felt very uncomfortable when the union rep looked over our wall. I was taken by surprise that they would do this.

[REDACTED]

on Saturday NOV 24th around 6:00pm,
a Union member came to my door, young
male dark hair. He asked if I was [REDACTED],
I said yes. I saw who he was (Union Rep.)
& I said I have to go. He tried asking
me what my job title was and department
I worked in, I told him once again I have
to go and closed the door. Him and
another person sat in their car in front
of my house for 30 mins. I felt harassed
and violated that they came to my
house.

[REDACTED]

November 29, 2012

Chapman Medical Center
2601 East Chapman Avenue
Orange, CA 92869

To Whom It May Concern:

This is to inform you that a SEIU representative came to my house yesterday, November 28, 2012 at 8:00am inquiring about what I voted with regards to saying "Yes" or "No" to the union. They have made negative statements such as "The administration is a liar."

With this event, for me, was offensive and had a feeling of being harassed.

The SEIU representative knows my home address. I am writing this letter to gain protection against any retaliation or negative feedback whether it be a peaceful or violent reaction from them. My goal is also to give Administrative members of Chapman Medical Center knowledge of this event so that anytime there would be an action of union against me and would have caused my safety, you know that it was caused by this organization.

Thank you in advance for addressing my concern.

Sincerely,


Unit