LABOR AND EMPLOYMENT LAW

"NEUTRALITY AGREEMENTS" AND THE DESTRUCTION OF EMPLOYEES' SECTION 7 RIGHTS

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I. Introduction.

There are few issues more critical in modern labor law than the legality under the National Labor Relations Act ("NLRA") of "neutrality and card check" agreements.[1] These agreements are eagerly sought by labor unions to ease the way toward unionization in a particular workplace. The use of neutrality and card check agreements (euphemistically called "voluntary recognition agreements" or "majority verification" by unions) has grown exponentially over the past decade, and the reasons are not surprising. Unions face a steady decline in the number of employees choosing union representation when given a free choice in a secret-ballot election, and financial self-interest has driven them to search for new ways of acquiring dues paying members.[2] The AFL-CIO's General Counsel has written that unions should "use strategic campaigns to secure recognition . . . outside the traditional representation processes."[3]

Unions are using "neutrality and card check" agreements because they silence employer opposition and eliminate employees' opportunity for a secret-ballot election. By design, employees have few legal protections "outside the traditional representation processes," and thus little possibility of protecting their NLRA § 7 rights to resist union organizing campaigns.[4] The demise of the secret-ballot election leads to an increase in union coercion and intimidation, as employees are pressured into signing authorization cards that are counted as "votes" for unionization.

Unions argue that substituting neutrality and card check agreements for secret-ballot elections enhances employees' freedom of choice by expeditiously determining whether a majority of them desire union representation.[5] Such arguments stem from the false premise that "unions" and "employees" are one and the same, with interests identical in every respect, and that the institutional goals of labor unions are of necessity the goals of employees. For example, one union advocate asserts that "voluntary recognition agreements are critical to the realization of *employees'* right to organize in the 21st century,"[6] even though most employees do not want to "organize" or have a third party stand between them and their employer.[7] Thus, while the negotiation of neutrality and card check agreements may be critical to the institutional efforts of unions to expand their power and influence, it is also undeniable that these practices subvert *employees'* § 7 rights to freely choose *or reject* unionization in an atmosphere free of restraint, threats and coercion.

The belief that what is expedient for the union is of necessity good for the employees ignores the NLRA's true guiding principle: employee freedom to choose or *reject* unionism. As one NLRB member cogently noted, "unions exist at the pleasure of the employees they represent. Unions *represent* employees; employees do not exist to ensure the survival or success of unions."[8] The United States Supreme Court agrees, recognizing that the heart of the NLRA is "voluntary unionism," the right to join *or reject* a union,[9] and that by "its plain terms . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers."[10] Nevertheless, employees' § 7 right to reject unionization—an equal corollary of their right to choose unionization—is destroyed by most neutrality and card check agreements.

Unions also insist that all permutations of neutrality and card check agreements are valid, because they are simply "arms length" transactions with employers, and that any agreements between these contending parties are encouraged by labor law and should be enforced by the courts and the NLRB. This construct ignores and omits the real players in all of this drama: the individual employees. These employees are the *only* parties with § 7 rights at stake.[11] However, they are rarely if ever consulted about the neutrality and card check deals cut by their employer and the union that covets them. In fact, the actual terms of most neutrality and card check agreements are held in strict secrecy by the union and the employer, and are not shared with the very employees whom they target—even though labor law condemns secret backroom arrangements between unions and employers.[12]

In sum, employees' § 7 right to freely choose *or reject* a union is under assault by neutrality agreements entered into by growth-starved unions and compliant (or coerced) employers.[13] This was recognized in a pending lawsuit brought under 29 U.S.C. § 186 to challenge such a secret "neutrality" agreement as an unlawful transfer of a "thing of value" from an employer to a union. In that case, the federal court denied motions to dismiss and stated that "Heartland Industrial Partners LLP [the employer] has apparently selected and contracted with a union of Heartland's choice," the Steelworkers.[14]

Agreements that place employer and union "labor peace" above the interests of the employees should be condemned in the same way that the courts and the NLRB have long condemned other collusive arrangements to force employees into unionization.[15] Most neutrality and card check arrangements are such collusive arrangements simply repackaged in an attempt to shield what would otherwise be unlawful employer support of a chosen labor union.[16] This article begins from the premise that most employees wish to hear all sides of the debate about the particular union that covets them, do not wish to be subjected to secret agreements between unions desperate for members and employers desperate for "labor peace," and that many have principled disagreements with union representation that must be protected.

II. Are These "Neutrality" Agreements or "Neutering" Agreements?

In a recent speech to the American Bar Association, NLRB Chairman Robert Battista criticized the growing use of neutrality agreements and stated that the "purpose of using neutrality agreements is not to expedite [employee free choice], but to silence one of the parties."[17] He is correct, as common "neutrality" provisions limit employer free speech and hinder or destroy employees' § 7 right to freely choose or reject unionization.

Gag Rule: Although most neutrality agreements purport to require an employer to remain "neutral," in reality they impose a gag on all speech not favorable to the union. Even front-line supervisors are prohibited from saying anything about the union or unionization during an organizing drive. Employees are only permitted to hear one side of the story: the version the union officials want them to hear.

For example, the model neutrality agreement used by the United Auto Workers ("UAW") states that an employer may not "communicate in a negative, derogatory or demeaning nature about the other party (including the other party's motives, integrity, character or performance), or about labor unions generally."[18] In practice, this requires employers to refrain from providing even truthful information in response to direct employee questions. In contrast to this employer silence, the Auto Workers' model agreement *requires* the signatory employer to affirmatively "advise its employees in writing and orally that it is not opposed to the UAW being selected as their bargaining agent."[19] Such limits on free speech, and requirements of forced pro-union speech, are purposefully designed to squelch debate and keep employees in the dark about the union that covets them.

It is for this reason that the Sixth Circuit was naive and wrong when it rejected an employer's challenge to the enforcement of the gag rule, stating: "As § 7 grants *employees* the right to organize or to refrain from organizing, . . . it is unclear how any limitation on [the employer's] behavior during a UAW organizational campaign could affect [the] employees' § 7 rights."[20] Factory workers, janitors, cooks and nurses aides seeking truthful information about a union and the effects of unionization in their workplace are entitled to truthful answers from their employer and a full debate, not rote incantations of "we do not oppose the union, and we can say nothing else." Employer silence extracted by a union and enforced by a federal court does not enhance *employee* free choice under § 7. Instead, by keeping employees in the dark, these union-imposed gag rules prevent the free flow of ideas that are critical to informed decision making.

Captive Audience Speeches: Unions often decry "captive audience" speeches in which employers criticize a union or unionization in general. But under many neutrality agreements, employers are required to conduct, and employees are mandated to attend, "captive audience" speeches in favor of the union. In these fora, high-level management officials do not simply declare "neutrality." Rather, a "strategic partnership" is announced, making it seem that unionization by an employer-chosen union is a foregone conclusion.[21] In some auto parts factories it is strongly implied (if not made explicit) that workers risk losing future job opportunities if they do not support the UAW's organizing effort.[22] Union leaders and apologists never explain why employer-paid captive audience speeches cajoling employees to sign cards in favor of the new "partner" union are acceptable, but employer speeches opposing the arrival of a new "partner" are to be condemned.

Union Access to Employees' Personal Information and Employers' Premises: Neutrality agreements frequently require the employer to provide the union with personal information about the targeted employees, including home addresses, phone numbers, and salaries. Employees are never asked if they agree with the release of their personal information. The union is also given permission to enter company property during work hours to solicit employee support and collect union authorization cards, even though unions normally have very limited rights of access to employer premises under the law.[23]

With this broad union access to them, both in the plant and at their homes, employees are subject to relentless group pressure to sign authorization cards. In one recent case where a hotel was pressured by the City of Pittsburgh to enter into a neutrality and card check agreement or lose its tax exempt financing, one of the housekeeping employees filed a sworn declaration in the resulting federal court litigation, stating:

> [After my employer gave the union my name and home address], two union representatives came to my home and made a presentation about the union. They tried to pressure me into signing the union authorization card, and even offered to take me out to dinner. I refused to sign this card as I had not yet made a decision at that time. Shortly thereafter, the union representatives called again at my home, and also visited my home again to try to get me to sign the union authorization card. I finally told them that my decision was that I did not want to be represented by this union, and that I would not sign the card.
>
> Despite the fact that I had told the union representatives of my decision to refrain from signing the card, I felt like there was continuing pressure on me to sign. These union representatives and others were sometimes in and around the hotel, and would speak to me or approach me when I did not want to speak with them. I also heard from other employees that the union representatives were making inquiries about me, such as asking questions about my work performance. I found this to be an invasion of my personal privacy. Once when I was on medical leave and went into the hospital, I found that when I returned to work the union representatives knew about my hospitalization and my illness. I felt

like their knowledge about me and my illness was also an invasion of my personal privacy.

I also saw the union representatives try to coerce another employee to sign a card, even though they never explained to the employee what this card meant, or told her that the union could be able to be automatically recognized as the representative of the employees without a secret ballot election. It was clear to me that this employee had no idea what this card meant when the union tried to get her signature.[24]

Sadly, this is the stock-in-trade of union organizers intent on procuring cards from fearful or unsuspecting employees. Another employee subject to a UAW card check drive at Dana Corporation attested as follows:

The UAW put constant pressure on some employees to sign cards by having union organizers bother them while on break time at work, and visit them at home. I believe that the UAW organizers also misled many employees as to the purpose and the finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back, not because they really wanted the UAW to represent them.[25]

Given such testimony, it is not surprising that the United States Supreme Court has recognized the untrustworthiness of authorization cards and the superiority of the secret-ballot election.[26]

Waiver of Secret-Ballot Election: Perhaps most egregious, neutrality agreements typically waive NLRB-supervised secret-ballot elections and substitute the "card check recognition" process, in which a signed authorization card counts as a "vote" for the union no matter how it was procured. Thus, the two most self-interested parties—the union that covets more dues payors and the employer that needs "labor peace"—prevent the employees from voting their conscience in private. Unions repeat the Orwellian mantra that "secret ballot elections are unfair,"[27] but experience shows that the process of soliciting union authorization cards relies upon coercion and misrepresentations, oftentimes with the complicity of the "neutral" employer.[28] Employees are sometimes told that authorization cards are health insurance enrollment forms, non-binding "statements of interest," requests for an NLRB election, or even tax forms. Sometimes they are threatened with bodily injury if they refuse to sign union cards.[29]

Hypocritically, the AFL-CIO argues that petitions and cards advocating decertification "are not sufficiently reliable indicia of the employees' desires" when employers seek to withdraw recognition from a union, and that already-unionized employees must resort to a secret-ballot election before they can remove the union.[30] Clearly, labor union officials are not advocating the "card check" process because they sincerely believe that cards or petitions reflect employee sentiment more reliably than a secret-ballot election. Rather, they advocate the card check process because they know that with it they can bring to bear enormous pressure on vulnerable employees.

In short, neutrality agreements are really "neutering agreements," using secrecy and coercion to stifle all dissent and quickly herd employees into unionization without a vote. Unions know that once they are "voluntarily recognized" by an employer, they will be entrenched for up to four years under the NLRB's pro-incumbency "voluntary recognition bar" and "contract bar" doctrines.[31]

III. "Neutrality and Card Check" Agreements Do Not Enhance Employees' § 7 Freedom to Choose or Reject a Union.

What is a typical hotel worker or truck driver to think when confronted with this array of special privileges given by their employer to a single, anointed union? Can it be said that such neutrality and card check agreements enhance the employees' freedom to choose or reject a union? Although unions' self-interest dictates use of card checks, "the Board itself has recognized . . . that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."[32]

Indeed, the union-controlled process of collecting authorization cards (akin to the "rule of the jungle") should be contrasted with the NLRB's rules governing the conduct of a secret-ballot election. The contrast could not be more stark.[33] In an NLRB-supervised secret-ballot election, even subtle pressures have been found to violate employee free choice under the "laboratory conditions" standard for representation proceedings. Those pressures need not rise to the level of an unfair labor practice to allow the Board to set aside the election result.[34] But unions operating under neutrality and card check agreements often become exclusive bargaining representatives by engaging in intimidating actions that would have precluded them from obtaining such status if committed during the course of a secret-ballot election.

For example, in an NLRB-supervised secret-ballot election, the following conduct has been held to upset the laboratory conditions necessary to guarantee employee free choice, thus requiring invalidation of the election: electioneering activities at the polling place;[35] prolonged conversations by representatives of a union or employer with prospective voters in the polling area;[36] electioneering among the lines of employees waiting to vote;[37] speechmaking by a union or employer to massed groups or captive audiences within 24 hours of the election;[38] a union or employer keeping a list of employees who vote as they enter the polling place (other than the official eligibility list);[39] and a union official handling a prospective voter's ballot.[40]

Such conduct disturbs the "laboratory conditions" necessary for employee free choice when it occurs during NLRB-supervised secret-ballot elections, *yet it occurs in almost every card check drive*. When an employee signs (or refuses to sign) a union authorization card, he or she is not likely to be alone. Indeed, it is likely that this decision is

made in the presence of one or more union organizers soliciting the employee to sign a card. This solicitation could occur during or immediately after a union mass meeting or a company-paid captive audience speech, or it could occur in the employee's own home during an unsolicited union "home visit." In all cases the union handles the "ballot" of the prospective "voter." Finally, in all cases the employee's decision is not secret, as in an election, because the union has a master list of who has signed a card and who has not.

Thus, a choice against signing a card often does not end the decision-making process for an employee in the maw of a "card check campaign," but represents only the beginning of harassment and intimidation for that employee. The United States Supreme Court has recognized this fact: "We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue."[41]

In sharp contrast to the abuses inherent in any card check campaign, each employee participating in an NLRB-conducted election makes his or her choice one time, in private. There is no one with the employee at the time of decision. The ultimate choice of the employee is secret from both the union and the employer. Once the employee has decided "yea or nay" by casting a ballot, the process is at an end.

Thus, only in an Orwellian world can unions claim that "we safeguard employee freedom by doing away with the secret ballot election."[42] Employee free choice and § 7 rights are not enhanced by the demise of the secret-ballot election and the total exclusion of the NLRB from the representational process.

Indeed, securing "neutrality" from an employer undercuts the entire rationale for doing away with the secret-ballot election. For example, the UNITE HERE union's website states that:

> It might seem that a National Labor Relations Board-sponsored election would be the most democratic means of deciding the question of unionization. But these elections for Union representation, characterized by intense anti-union campaigns, are not like other types of elections because of the inherent coercive power an employer holds over an employee, i.e., the power to deprive a person of his or her livelihood.
>
> This imbalance of power is unparalleled in any other type of election in our society. Even if the employer does not expressly threaten employees with adverse consequences if they support the Union, employees can't help but be aware of this possibility any time an employer makes known his opposition to unionization.[43]

Even assuming, *arguendo*, that this self-righteous assertion is true, why does a union still need "card check recognition" and the elimination of the secret-ballot election once it has already secured "neutrality" (*i.e.*, gag rules and employer-paid captive audience speeches extolling the union), and thereby defanged the employer's supposed inherent coercive power to "terrorize" employees or "make known his opposition to unionization"? The true answer is that most unions dare not face any sort of secret-ballot election, even where complete neutrality is achieved, because they are still likely to lose. A case in point recently occurred at the Magna International plant in Lowell, Michigan. There, the UAW secured an agreement for strict employer neutrality, but with the stipulation that there be a privately-run secret-ballot election. The UAW lost soundly, with one employee publicly commenting to the local newspapers, "Unions are not needed in America anymore."[44] Is it any wonder that unions dare not chance a secret-ballot election even under the most favorable of conditions?

IV. To Protect Employees' § 7 Rights, the NLRB Must Strictly Scrutinize the Process by Which Unions Procure and Enforce "Neutrality and Card Check" Agreements.

Through a series of pending cases, the NLRB will soon have the opportunity to decide whether neutrality and card check agreements between unions and employers can trump employees' § 7 right to refrain from unionization. By a 3-2 vote, the Board recently granted Requests for Review and solicited amicus briefing in *Dana Corp.*, 341 N.L.R.B. No. 150 (2004). In that consolidated case, the UAW union secured neutrality and card check agreements from two employers, Dana Corporation and Metaldyne Corporation, and then secured "voluntary recognition" from both employers based upon purported majorities of card signers. But in each situation, dissatisfied employees filed decertification petitions within weeks of the voluntarily recognitions. At Metaldyne, a *majority* of employees signed the decertification petition, surely calling into question the validity of the initial recognition. NLRB Regional Directors nevertheless dismissed both decertification petitions, invoking the Board's so-called "voluntary recognition bar" doctrine, which provides that voluntary recognition of a union will bar a decertification petition for a "reasonable" period of time, up to one year.[45] In granting review in these cases, the Board recognized the need to re-examine policies that entrench unions anointed by an employer without a secret-ballot election:

> We believe that the increased usage of recognition agreements, the varying contexts in which a recognition agreement can be reached, the superiority of Board supervised secret ballot elections, and the importance of Section 7 rights of employees, are all factors which warrant a critical look at the issues raised herein.[46]

Through the *Dana* case, the Board will provide a long overdue answer to the question of whether employees' § 7 right to decertify an unwanted union is paramount, or whether voluntary recognition that springs from a neutrality agreement is of such "bar quality" as to prevent employees from challenging that employer-anointed union.

Additionally, the NLRB General Counsel has issued a series of complaints challenging the negotiation and enforcement of several Steelworkers and UAW neutrality agreements. These complaints arise under several different scenarios, and their resolution will also be critical in determining the supremacy of employees' § 7 rights over union institutional interests.[47]

In one case, the UAW and Freightliner (a Daimler-Chrysler subsidiary) signed a neutrality and card check agreement covering various plants, including Freightliner-owned Thomas Built Buses ("TBB") facilities.[48] These parties also signed an "Agreement on Preconditions to a Card Check Procedure" in which the UAW pre-negotiated numerous collective bargaining concessions that would take effect after the UAW organized the particular facility, notwithstanding the fact that the UAW did not then represent a single covered employee. In March 2004, the UAW and TBB launched a joint organizing drive against TBB's 1140 employees in High Point, NC, pursuant to the terms of the neutrality and card check agreement. This campaign featured several captive audience speeches in which high level company and union officials praised the UAW while dozens of UAW organizers simultaneously "worked the crowd" collecting union authorization cards. TBB subsequently recognized the union based on these cards.

The basic theories of the General Counsel's TBB complaint are: a) that the captive audience speeches were coercive and tainted the UAW's ostensible card majority: and b) that the "Agreement on Preconditions to a Card Check Procedure" constitutes unlawful, pre-mature bargaining over substantive employment terms with a minority union. On the latter point, the courts and the Board have long held that an employer may not choose the union it wants to represent its employees, work together with that union to secure employee support for it, and then negotiate basic contract terms in advance of majority employee support.[49] As the Board has ruled, negotiating with a union prior to the achievement of majority representative status constitutes "impressing upon a non-consenting majority an agent granted exclusive bargaining status," even though the negotiations may be conditioned on the union being able to "show at the 'conclusion' that they represented a majority of the employees."[50] Similar complaints have been issued and are awaiting trial in related cases.[51]

Some neutrality agreements are also being challenged by the NLRB General Counsel under § 8(e) of the Act, 29 U.S.C. § 158 (e). In *Heartland Industrial Partners, Collins & Aikman Co., and United Steelworkers of America*,[52] the parties negotiated a neutrality agreement that requires Heartland (the employer) to impose a neutrality agreement on any business enterprise in which it substantially invests or acquires control. The new business enterprise is then required to impose the neutrality agreement on all of its parents, affiliates, and joint ventures. (Agreements of this type have been referred to as "virus clauses" for the way in which they are spread exponentially from one employer to another). Also, all signatory companies must assist the Steelworkers with its organizing drives against their employees, and ultimately require that all organized employees pay union dues to the Steelworkers. The theory of the General Counsel's complaint in this case is that the neutrality agreement unlawfully forbids Heartland and signatory companies from doing business with employers who refuse to become a party to an agreement with the Steelworkers.

V. Conclusion.

Although the NLRB and the courts have yet to squarely decide many of the neutrality and card check issues that are pending, they are not without guidance from past cases. It has long been unlawful for an employer to select a particular union and pressure employees into supporting it. It has long been illegal for a minority union to negotiate terms of employment for employees it does not represent. It has long been unlawful for unions and employers to limit employees' § 7 rights to join or refrain from joining a union. And finally, the Board and the courts have long recognized that employee freedom is best protected through secret-ballot elections, not secret schemes that waive elections and exclude the NLRB from all oversight of the union selection or rejection process. The NLRB and the courts must act vigilantly to ensure that employees' § 7 rights remain at the pinnacle of the Act's considerations, not relegated to the status of an afterthought.

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Footnotes

[1] *See, e.g.*, Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, THE LABOR LAWYER (Fall 2000); 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 (2001); Andrew Strom, *Rethinking the NLRB's Approach to Union Recognition Agreements*, 15 BERKELEY J. EMP. & LAB. L. 50 (1994); Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 EMPL. REL. L.J. 21 (Spring 1999).

[2] The facts are well known: most unions are desperate for new dues paying members. In 2003, 12.9 % of wage and salary workers were union members, down from 13.3 % in 2002, according to the U.S. Department of Labor's Bureau of Labor Statistics. http://www.bls.gov/news.release/union2.nr0.htm (Jan. 21, 2004). The number of persons belonging to a union fell by 369,000 in 2003, to a total of 15.8 million. The union membership rate has steadily declined from a high of 20.1 % in 1983, the first year for which comparable union data is available. For example, in 1982, the Steelworkers union claimed 1.2 million members, but by 2002 the number was 588,000. In 1982 the United Auto Workers claimed 1.14 million members, by 2002 only 700,000. As of today, only 8.2% of the private sector workforce is unionized, and the other 91.8% does not appear to be flocking to join. *IBM Corp.*, 341 N.L.R.B. No. 148, at 19 n.9 (2004). In *UFCW Local 951 (Meijer, Inc.)*, 329 N.L.R.B. 730 (1999), Texas A & M labor

economist Morgan O. Reynolds testified that the single largest factor hindering union organizing is *employee* resistance. According to Prof. Reynolds, polling data commissioned by the AFL-CIO indicates that two-thirds of employees are not favorably disposed towards unions. (Hearing Transcript, pp. 1382-83).

[3] Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, LAB. L.J., Summer/Fall 1996, at 176.

[4] Section 7 of the NLRA, 29 U.S.C. § 157, states (emphasis added):

> 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* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

[5] *See, e.g.*, Brent Garren, *The High Road to Section 7 Rights: The Law of Voluntary Recognition Agreements,* 2003 LAB. L.J. 263 (2003).

[6] *Id.* (emphasis added).

[7] According to the Department of Labor's Bureau of Labor Statistics, only 8.2% of the private sector workforce is unionized. *See* source cited *supra* note 2. Even at their peak after World War II, unions never represented a majority of American workers.

[8] *MGM Grand Hotel, Inc.*, 329 N.L.R.B. 464, 475 (1999) (Member Brame, dissenting).

[9] *See* Pattern Makers League v. NLRB, 473 U.S. 95 (1985).

[10] Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992); *see also* Bloom v. NLRB, 153 F.3d 844, 849-50 (8th Cir. 1998) ("Enlisting in a union is a wholly voluntary commitment; it is an option that may be freely undertaken or freely rejected"), *vacated & remanded on other grounds sub nom*. OPEIU Local 12 v. Bloom*,* 525 U.S. 1133 (1999).

[11] Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers.")

[12] For example, on August 13, 2003, Dana Corporation and the United Auto Workers announced a neutrality and card check agreement which they denominated as a "partnership," except that the "terms of the agreement were not disclosed by agreement of the parties."http://www.dana.com/news/pressreleases/prpage.asp?page=1295. *But see* Merk v. Jewel Food Stores Div. of Jewel Co., 945 F.2d 889 (7th Cir. 1991) (secret agreements violate federal labor policy); Aguinaga v. United Food & Commercial Workers, 993 F.2d 1463 (10th Cir. 1993); Lewis v. Tuscan Dairy Farms, Inc., 25 F.3d 1138 (2d Cir. 1984) (union breached duty of fair representation by making secret agreement with employer not to enforce seniority rights of employees).

[13] Most "neutrality and card check" arrangements are thinly disguised "bargaining to organize" schemes, in which union officials commit to act in a manner favorable to management interests in exchange for employer assistance with gaining and maintaining control over employees. Even the pro-union press has noted the United Auto Workers's proclivity to trade away employee wages and benefits for "neutrality." *See* "UAW Trades Pay Cuts for Neutrality," at http//www.labornotes.org/archives/2003/07/c.html and http//www.labornotes.org/archives/2003/10/b.html.

[14] Patterson v. Heartland Indus. Partners, LLP, Order Denying Motion to Dismiss at 3, Case No. 5:03CV1596 (N.D. Ohio Jan. 12, 2004), *mandamus denied sub nom.* United Steelworkers of America v. United States Dist. Ct., No. 04-3290 (6th Cir. Apr. 28, 2004).

[15] Duane Reade, Inc., 338 N.L.R.B. No. 140 (2003) (employer unlawfully assisted Needletrades union with organizing several of its stores); Fountain View Care Center, 317 N.L.R.B. 1286 (1995), *enforced*, 88 F.3d 1278 (D.C. Cir. 1996) (supervisors and other agents of the employer actively encouraged employees to support the union); N.L.R.B. v. Windsor Castle Healthcare Facility, 13 F.3d 619 (2d Cir. 1994), *enforcing* 310 N.L.R.B. 579 (1993) (employer provided sham employment to union organizers and assisted their recruitment efforts); Kosher Plaza Super Market, 313 N.L.R.B. 74, 84 (1993); Brooklyn Hosp. Center, 309 N.L.R.B. 1163 (1992), *aff'd sub nom.* Hotel, Hosp., Nursing Home & Allied Servs., Local 144 *v.* NLRB, 9 F.3d 218 (2d Cir. 1993) (employer permitted local union, which it had already recognized as an exclusive bargaining representative, to meet on its premises for the purpose of soliciting union membership); Famous Casting Corp., 301 N.L.R.B. 404, 407 (1991) (employer actions unlawfully supported union and coerced the employees into signing authorization cards); Systems Mgt., Inc., 292 N.L.R.B. 1075, 1097-98 (1989), *remanded on other grounds*, 901 F.2d 297 (3rd Cir. 1990); Anaheim Town & Country Inn, 282 N.L.R.B. 224 (1986) (employer found to have violated §§ 8(a)(1) and (2) when it actively participated in the union organizational drive from start to finish); Meyer's Café & Konditorei, 282 N.L.R.B. 1 (1986) (employer invited union it favored to attend hiring meeting with employees); Denver Lamb Co., 269 N.L.R.B. 508 (1984); Banner Tire Co., 260 N.L.R.B. 682, 685 (1982); Price Crusher Food Warehouse, 249 N.L.R.B. 433, 438-49 (1980) (employer created conditions in which the employees were led to believe that management expected them to sign union cards); Vernitron Elec. Components, 221 N.L.R.B. 464 (1975), *enforced,* 548 F.2d 24 (1st Cir. 1977); Pittsburgh Metal Lithographing Co., Inc., 158 N.L.R.B. 1126 (1966).

[16] *See generally* Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 EMPL. REL. L.J. 21 (Spring 1999).

[17] Daily Labor Reporter, *Five Members Discuss Decisionmaking, Wide Variety of Issues at ABA Meeting*, Aug. 15, 2003, at B-1.

[18] The text of the UAW's model "Accretion to the Unit and Neutrality Agreement" can be accessed at http://www.nrtw.org/d/uawna.pdf.

[19] *Id.*

[20] International Union, UAW v. Dana Corp., 278 F.3d 548, 559 (6th Cir. 2002).

[21] On August 13, 2003, Dana Corporation and the UAW announced a "partnership agreement," which "is expected to benefit both Dana and the UAW by contributing to business growth, improved productivity, enhanced operational cost-efficiency, and continued workforce opportunities and options. Terms of the agreement were not disclosed by agreement of the parties." http://www.dana.com/news/pressreleases/prpage.asp?page=1295. This partnership agreement was quickly followed by the waiver of previously scheduled secret-ballot elections, captive audience speeches to employees extolling the "partnership," and announcement of "voluntary recognition" at several plants.

[22] For example, the text of such a captive audience speech, delivered by officials of Johnson Controls, is available on-line at http://www.nrtw.org/d/jci_captive.htm.

[23] *See* Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

[24] Declaration of Faith Jetter in Support of Motion to Intervene or, Alternatively, to File a Brief Amicus Curiae, Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res., LLC, 390 F.3d 206, (3d Cir. 2004).

[25] Declaration of Clarice K. Atherholt in Support of Her Decertification Petition, Dana Corporation and UAW, NLRB Case No. 8-RD-1976.

[26] Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 306 (1974) (in any given situation there may be "rational, good-faith grounds for distrusting authorization cards"); *id.* at 315 n.5 (Stewart, J., dissenting) (recognizing "the possibility of undue peer pressure or even coercion in personal card solicitation"); *see also* NLRB v. Gissel Packing Co., 395 U.S. 575, 601-10 (1969).

[27] The website of the recently merged Union of Needletrades, Textiles and Industrial Employees and Hotel Employees and Restaurant Employees International Union (UNITE HERE) claims that a "'card count neutrality agreement' . . . is . . . more democratic than an election." http://www.unitehere.org/about/organizing.asp#, "card check and neutrality."

[28] *See supra* note 15 for cases concerning the granting and receipt of unlawful employer assistance.

[29] An egregious example of union abuse in the card check process occurred in *HCF, Inc.,* 321 N.L.R.B. 1320 (1996). There, an employee testified that a union militant warned her that if she didn't sign an authorization card, "the union would come and get her children ... " *Id*. at 1320. The NLRB found that this flagrant threat did not require the upsetting of an election result, because the union militant was not a paid union agent and harming people's children was not a "'purported union policy.'" *Id.*

[30] Brief of the AFL-CIO to the NLRB in *Chelsea Indus. & Levitz Furniture Co. of the Pacific, Inc.*, Case No. 7-CA-36846, at 13 (May 18, 1998).

[31] These doctrines were not established by statute, but were created out of whole cloth by the Board. *See*, *e.g.*, MGM Grand Hotel, Inc., 329 N.L.R.B. 464 (1999) ("voluntary recognition bar" can last up to one year); Waste Mgmt., 338 N.L.R.B. No. 155 (2003) (after a contract is signed, employees are blocked from filing for decertification for up to three years).

[32] NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969).

[33] On May 12, 2004, Rep. Charlie Norwood introduced H.R. 4343, the Secret Ballot Protection Act of 2004, to amend the NLRA to ensure the right of employees to a secret-ballot election conducted by the NLRB. This stands in sharp contrast to the so-called "Employee Free Choice Act," legislation introduced by Sen. Ted Kennedy (S. 1925) and Rep. George Miller (H.R. 3619), that would essentially ban secret-ballot elections by mandating the acceptance of card checks.

[34] General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

[35] Alliance Ware, Inc., 92 N.L.R.B. 55 (1950); Claussen Baking Co., 134 N.L.R.B. 111 (1961).

[36] Milchem Inc., 170 N.L.R.B. 362 (1968) ("The final minutes before an employee casts his vote should be his own, as free from interference as possible. Furthermore, the standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter.")

[37] Bio-Medical Applications of P.R., 269 N.L.R.B. 827 (1984); Pepsi Bottling Co., 291 N.L.R.B. 578 (1988).

[38] Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

[39] Piggly-Wiggly, 168 N.L.R.B. 792 (1967).

[40] Fessler & Bowman, 341 N.L.R.B. No. 122 (2004). In *Fessler*, the Board recognized the potential danger when a union official merely touched a prospective voter's ballot. On that basis, the Board set aside an election and created prophylactic rules to ensure the integrity of the election process.

[41] NLRB v. Gissel Packing Co., 395 U.S. 575, 604 (1969).

[42] Unions do make this outrageous claim. For example, UNITE HERE's web-site asserts that a "'card count neutrality agreement' . . . is . . . more democratic than an election." http://www.unitehere.org/about/organizing.asp, "card check and neutrality."

[43] *Id.*

[44] *"Neutral" union bid fails first local test,* GRAND RAPIDS PRESS, Sept. 27, 2003, at A-1. Similarly, when faced with strong employee opposition during an organizing campaign at another Magna International subsidiary, Optera, the UAW called off the campaign and withdrew its election petition at the NLRB, while vowing to extend a previous neutrality agreement with the parent company. Holland, MI, SENTINEL, Apr. 16, 2004, http://www.hollandsentinel.com/stories/041604/loc_041604022.shtml.

[45] MGM Grand Hotel, Inc., 329 N.L.R.B. 464 (1999) (3-2 decision) (voluntary recognition bar can last for over eleven months); *see also* Seattle Mariners, 335 N.L.R.B. 563 (2001) (2-1 decision) (voluntary recognition bar prohibits decertification elections even if employees signed a showing of interest for decertification prior to the employer's recognition).

[46] 341 N.L.R.B. No. 150, slip op. at 1. The briefs of the parties and the amici are available on the Board's website, www.nlrb.gov.

[47] On November 17, 2004, NLRB General Counsel Rosenfeld issued a Report on Recent Case Developments which explains his rationale for issuing complaints in many of these neutrality cases. This report can be accessed at http://www.nlrb.gov/nlrb/press/releases/r2544.htm.

[48] UAW and Thomas Built Buses/Freightliner, Case Nos. 11-CB-3455-1 and 11-CA-20338.

[49] International Ladies' Garment Workers' Union v. NLRB (Bernhard Altman), 366 U.S. 731 (1961); SMI of Worchester, 271 N.L.R.B. 1508, 1519 (1984), *citing* Majestic Weaving Co., 147 N.L.R.B. 859, 860, 866 (1964).

[50] Majestic Weaving Co., 147 N.L.R.B. 859, 860, 866 (1964).

[51] *See UAW and Freightliner/Daimler-Chrysler, Inc.,* Case Nos. 11-CA-20070-1, 11-CA-20071-1, 11-CB-3386-1, 11-CB-3387-1 (in these cases, Freightliner promised employees that they would get their customary raises in July 2003, but those raises were withheld after the UAW refused to give its permission, even though the union admittedly did not represent a majority of the affected employees); *see also UAW & Dana Corp. (Bristol, VA)*, Case Nos. 11-CB-3397, 11-CB-3398, 11-CB-3399, 11-CA-20134, 11-CA-20135, 11-CA-20136, *and UAW &*

Dana Corp. (St. Johns, MI), Case Nos. 7-CA-46965-1, 7-CB-14083-1, 7-CA-47078-1, 7-CB-14119, 7-CA-47079-1, and 7-CB-14120 (in these cases, the General Counsel alleges that the Dana-UAW "partnership" agreement constitutes unlawful premature bargaining by a minority union over substantive employment terms, and that any "voluntary recognition" flowing from that illegitimate relationship is tainted and must be dissolved).

[52] NLRB Case No. 8-CE-84-1 (Region 8, Cleveland, OH).