The High Road to Section 7 Rights: The Law of Voluntary Recognition Agreements

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Voluntary recognition agreements ("VRAs"), also known as "neutrality agreements" or "card check agreements" depending on their features, are an increasingly widespread and important aspect of America's labor relations landscape. Unions are turning to VRAs with increasing frequency because of their enormous frustration at the weakness of the NLRB machinery to realize the promise of employees' right to organize. The great majority of newly-organized members of my union, UNITE, which organizes very aggressively, come in through VRAs. Both opponents and proponents of VRAs agree that they produce a far higher rate of union success than the NLRB's election process.[1] VRAs are critical to the realization of employees' right to organize in the 21st century.

As we argue below, VRAs are a good thing, because they further the twin goals of our national labor policy: employee freedom of choice and industrial stability. Moreover, VRAs further another cornerstone of our labor policy: the principle that voluntary agreements developed in the give and take between private parties best tailor solutions for their specific circumstances. Part I of this paper looks at the range of provisions available in creating VRAs. Part II demonstrates that VRAs further federal labor policy and, therefore, should be viewed favorably by courts and the NLRB. Part III examines specific issues concerning VRAs in light of their furthering national labor policy. Specifically, we argue that i) VRAs are and should be enforceable under Section 301 of the NLRA; ii) that VRAs should be considered mandatory subjects of bargaining more frequently than they are currently; iii) that VRAs should preclude utilization of the NLRB's representation proceedings when necessary to protect the parties' bargain; and iv) that requesting a VRA should not constitute a demand for recognition and therefore a trigger for an RM petition.

I. What Are Voluntary Recognition Agreements?

The general term "VRA" refers to a broad range of agreements between an employer and a union that affects the representation process for the employer's employees. We use the term "VRA" rather than "neutrality/card check agreement" because VRAs contain a very wide range of provisions. Many require neither employer neutrality nor card check recognition.

VRAs can occur when a union represents some of the employees and seeks to represent others, or when a union seeks representation for the first time with an employer's employees. Most VRAs address some or all of the following subjects[2]:

(1) Recognition procedures. Most agreements call for recognition based on a certification of the union's majority status demonstrated by a review of signed authorization cards by a third party. However, VRAs may instead provide for private, non-Board elections or NLRB-conducted elections. Some agreements have a hybrid, in which the nature of the recognition process depends on the strength of union support manifested by authorization cards.[3]

(2) Definition of the bargaining unit. Most agreements provide for a stipulated group of employees for which the VRA will operate and whom the union seeks to organize.

(3) Access provisions. Some VRAs provide for limited union access to the employer's facilities and/or the provision of employee rosters.

(4) Dispute resolution procedures. The vast majority of VRAs outline dispute resolution procedures to address violations of the VRA, unfair labor practices, or other disputes.

(5) Limits on campaigning. The variety of campaigning provisions is especially great. Some VRAs require that the employer be "neutral," by not supporting or opposing the union's organizing efforts. Many others limit the employer's campaign by prohibiting the fear-mongering attacks on unions and the dire predictions of disaster following unionization that have become commonplace in NLRB election campaigns. These provisions permit the employer to stress the positives of its employment record, or to conduct "fact-based" campaigns to present the company's position. In one such clause, the employer committed itself to "communicat[ing] with [its] employees, not in an anti-[union] manner, but in a positive pro-[company] manner."[4] In another agreement, the employer pledged "to communicate fairly and factually to employees in the unit sought concerning the terms and conditions of their employment with the company and concerning legitimate issues in the campaign."[5] Yet another variant is to limit the methods in the employer's campaign, rather than its content. In one UNITE VRA, we agreed that the employer would address all the employees at the onset of a short campaign period (in a debate format in which the union also spoke). It was free to argue against unionization in any manner it wished. It was, however, thereafter prohibited from campaigning, including holding captive-audience speeches or conducting one-on-one meetings. Finally, in some such clauses the employer merely pledges to "strive to create a climate free of fear, hostility, or coercion."[6]

Many VRAs also include restrictions on the union's campaigning. More than three-quarters of Eaton and Kriesky's sample of agreements set limits on the union's behavior.[7] Unions often commit to notifying the employer of the union's intention to initiate a union organizing campaign.[8] Commonly, they also prohibit the union from picketing or striking during the recognition process. They may also limit the length of the union's campaign period,[9] ban the union from denigrating or disparaging the employer,[10] or allow the employer special rights to respond to misstatements of fact by the union.[11] As noted above, they may require the union

to obtain a supermajority of employee support to obtain card check recognition.[12] Finally, if disputes occur, unions (as well as employers) are typically committed to participate in dispute resolution processes.[13]

II. The Policy Rationale for VRAs

The primary goals of national labor policy, as implemented by the Act, are twofold: to assure employee free choice to engage in or refrain from organizing and collective bargaining, and to maintain industrial peace.[14] In furthering these principles, federal labor policy highly values "freedom to contract" between employers and unions.[15] All three of these aims are promoted by giving deference to VRAs, and each will be examined in turn.

A. VRAs Promote Employee Free Choice

The differential in organizing success between VRAs and NLRB elections is undisputed. Are NLRB elections distorted by employer coercion, or is recognition under VRAs instead distorted by union coercion, as the critics of VRAs charge?[16] In today's labor relations landscape, scarred by massive employer interference with employee Section 7 rights, the answer is crystal-clear: VRAs are an antidote to venomous employer "vote no" campaigns which routinely poison the NLRB election process.

1. NLRB Elections Do Not Protect Employee Free Choice

The current framework of NLRB representation procedures and unfair labor practice doctrines, including remedies, was established in the decades following the passage of Taft-Hartley. The law developed at a time when employer hostility to unions was much less vehement. In the 1950s and 60s, employers did not routinely engage in the massive legal and illegal sabotage of employee Section 7 rights that are commonplace today. Despite these changes, the NLRB has taken no serious measures to ensure that its representation and unfair labor practice procedures effectively protect employee free choice in today's context.

The representation process is flawed in three fundamental respects. First, an employer can delay the representation process so that it can either dissipate the union's majority before the election or destroy the union's bargaining power before it is required to bargain.[17] My union, for example, endured a delay while an employer litigated a single issue–whether UNITE was a labor organization under the Act. Many other hearings have little more merit than this. Moreover, even after a union has won an election, no enforceable court order will issue requiring bargaining until three or four years have passed.[18] The effects on employees are well-documented and disastrous. One study found that the unionization rate drops by 2.5% for each additional month between petition and election,[19] while another found a drop of 0.29% for each day of delay.[20]

Second, even if the employer limits its campaign to lawful activity, the volume and vehemence of the employer's campaign can terrorize workers. Employers often drown workers in a tidal wave of predictions about the calamities that will befall any workplace so unwise as to unionize. The incessant pounding of captive audience meetings and one-on-one meetings has nothing to do with a rational exchange of opinions in the free marketplace of ideas, but is intended to intimidate. The ALJ in *Parts Depot, Inc.*,[21] which upheld UNITE's claim of several employer unfair labor practices, discussed the employer's captive audience meetings, which he found completely lawful:

> If phrased in terms of war, [the company's] response was equivalent to America's B-52 carpet bombing of the Iraqi front line forces at the 1991 opening of 'Desert Storm' in the Persian Gulf War. As the Iraqis stumbled from their trenches begging the advancing United States soldiers to accept their surrender, so too, figuratively, the [company's] employees, shell shocked from the long series of verbal "carpet bombing" speeches and videos, would have stumbled toward the voting booths, begging for the chance to vote against the Union.... This is not to say that the speeches and videotapes ... constitute a threat ...[22]

Third, employer unfair labor practices during NLRB election campaigns have become routine.[23] All available statistics tell the same story: employer unfair labor practices have soared since the 1950s and 1960s, devastating Section 7 rights. One study showed that, in 1969-1976, the number of workers receiving back pay under Section 8(a)(3) of the Act totaled approximately 1.2% of voters in representation elections. In 1984-1997, that figure increased by almost 800%, to a level of 9.5%.[24] LaBlonde and Meltzer, who criticized figures in earlier studies as being exaggerated, nevertheless found a 600% increase in the relative incidence of discriminatory discharges from the late 1960s to late 1980s,[25] while another study revealed a 14-fold increase in employer discrimination against union activists during organizing drives between the 1950s and the late 1980s.[26] Yet another report found that 31% of all employers illegally fire at least one worker for union activity during organizing campaigns.[27] The former president of the National Academy of Arbitrators, the nation's leading organization of labor-management neutrals, stated in 1996 that "[t]he intensity of opposition to unionization which is exhibited by American employers has no parallel in the western industrial world."[28]

The rising tide of employer unfair labor practices, and particularly discriminatory discharges, against union supporters has contributed directly to the erosion of union win rates in elections.[29] Equally significant, continuing employer hostility results in only a narrow majority of election victories leading to the achievement of collective bargaining agreements. From 1975 to 1993, the success rate for obtaining first contracts fell from 78% to 55.7%.[30]

The remedies available to workers coerced in exercising their Section 7 rights (including postings and reinstatement with back pay) are insufficient both to deter such abuses or to erase their undermining of employee free choice. Postings are not likely to dissipate the effect of employer

threats.[31] Reinstated workers often are "so scarred by the discharge experience that they do not resume union activities," and studies show most reinstated workers are gone within a year, many reporting bad company treatment.[32] More than two-thirds of rerun elections produce the same result as the election overturned due to objectionable conduct.[33]

2. VRAs Further Employee Free Choice

VRAs protect employee free choice by eliminating crippling delay and employer coercion. Typically, representation issues are definitively resolved through VRAs in weeks or months rather than years. VRAs severely restrict delay prior to determining the union's majority support. The parties agree to a definition of the bargaining unit, eliminating the lengthy NLRB process of a hearing and appeal to Washington. Disagreements are typically resolved through arbitration, often with expedited procedures. Because the elimination of delay at the "front end" of the process is of great importance to defending employee free choice, VRAs often limit the campaign period to further produce a speedy result.[34]

For example, one SEIU agreement stated that the parties would jointly choose an election officer, who would both direct an election within five working days following the union's presentation of cards from at least 30% of the employees and oversee the election within 35 days in accordance with NLRB guidelines for assessing the validity of election results.[35] OtherVRAs may provide for NLRB elections, but contain commitments by the employer not to cause delay.[36]

VRAs may also minimize the delay between recognition, if attained, and the completion of a first contract. Many VRAs allow for decision by an arbitrator or similar neutral in the event that a party to the agreement fails in its duty to bargain. As discussed below, unions may obtain court orders under Section 301 enforcing arbitration decisions. Such a process is far quicker than an unfair labor practice proceeding through the Board to the Court of Appeals. An intransigent employer may, of course, appeal the district court's enforcement of an arbitration award, but this is unlikely to be successful.

VRAs also can help curb employer intimidation, through the variety of campaign limitations discussed above. Not only are coercive employer actions less likely in such an environment, but arbitration or other dispute resolution processes in VRAs can resolve potential violations much more expeditiously, and impose a wider array of remedies, than NLRB proceedings.[37] For example, one UNITE agreement provided for one of a panel of arbitrators to hold a hearing on complaints of campaign misconduct within 24 hours of the complaint and for a bench decision to issue.

3. VRAs Do Not Interfere With Employee Free Choice

Employer advocates claim that VRAs hamper employee free choice by limiting the ability of employees to hear the employer's "vote no" campaign and because card check recognition as a mechanism for assessing employee desires is less reliable than an NLRB secret-ballot election.

However, VRAs must be based on employee free choice. Enforcement of VRAs by the federal courts hinges upon the union's demonstration of a "fair opportunity" for employees to freely decide whether to accept it as a representative.[38] The Second Circuit summarized the requirement in no uncertain terms: "[c]ritical to the validity of such a private contract is whether the employees were given an opportunity to decide whether to have a labor organization represent them."[39]

Employer advocates claim that campaign limitation clauses undemocratically limit the ability of employees to hear both sides.[40] The Yale University Office of Public Affairs' statement on the issue is typical: "[E]mployees lose the benefit of a full and open debate that would occur prior to a union election."[41] Similarly, the employer in *Dana*[42] argued that the VRA it signed should not be enforced because limits on employer campaigning violate public policy; it "effectively silence[d]" the company, and thereby violated the statutory rights of its employees.[43] Rejecting the employer's argument, the court stressed two pertinent themes.

First, the court stressed that Section 8(c)[44] merely limits what employer speech may constitute evidence of an unfair labor practice, but does not require an employer to express its views.[45] "In fact, far from recognizing § 8(c) as codifying 'an absolute right' of an employer to convey its view regarding unionization to its employees . . . we have stated that an expression of an employer's views or opinion under § 8(c) is merely 'permissible.'"[46] Thus, Dana's "voluntary agreement to silence itself during union organizing campaigns does not violate federal labor policy."[47]

Second, the court held that limits on the employer's campaign could not interfere with the employees' Section 7 rights. "As Section 7 grants employees the right to organize or to refrain from organizing it is unclear how any limitation on Dana's behavior during a UAW organizational campaign could affect Dana's employees' Section 7 rights."[48]

This understanding of the limited relevance of Section 8(c) to Section 7 rights is consistent with *Linn v. United Plant Guard Workers of America, Local 114*,[49] in which the Court protected union members' speech against state law defamation claims absent actual malice. While stating that Section 8(c) reflected an "intent to encourage free debate on issues dividing labor and management,"[50] the Court also stated that

> [i]t is more likely that Congress adopted this section for a narrower purpose, i.e., to prevent the Board from attributing anti-union motive to an employer on the basis of his past statements.... Comparison with the express protection given union members to criticize the management of their unions and the conduct of their officers ... strengthens this interpretation of congressional intent.[51]

Additionally, most VRAs do not "silence" employers, but rather limit their campaigning, often with restrictions on

the unions' campaigns as well. The arbitrator's decision reviewed in the Dana decision concluded that "what the parties appear to have had in mind is that Dana argue its case in an objective high-minded fashion without resort to the kind of threats and innuendos which have often accompanied employer speech in organizing campaigns."[52] In today's climate, it is hard to imagine that employees in any case will not get an opportunity to hear and fairly evaluate anti-union arguments.

Employers also claim that card check recognition is less reliable than an NLRB election because they are susceptible to fraud and coercion.[53] These arguments are unavailing for two reasons. VRAs provide mechanisms for preventing these problems, and the possibility of coercion in obtaining cards is in actuality far less of a threat to employee self-determination than employer coercion.

Card check procedures remain the primary mechanism for recognition within VRAs,[54] and labor law–as well as the terms of most VRAs themselves–require that any recognition following a VRA be free from coercion. If a union is accused of obtaining card support through fraud or coercion, an employer could refuse to recognize a union's claim of majority support. Such a refusal would trigger arbitration procedures, if provided by the VRA, or direct recourse under Section 301 to federal court. As noted above, the federal courts will not enforce VRAs if the union cannot demonstrate that employees had a "fair opportunity" to freely decide whether to accept it as a representative. If an arbitrator ever failed to require majority support, such failure would give the employer recourse at the Board.[55]

J.P Morgan, however, demonstrates that arbitration is fully capable of taking irregularities into account in determining majority status. The employer alleged that the union had coerced employees into signing authorization cards. In response, the arbitrator ordered a delay in the card count "until coercion charges were resolved because authorization cards obtained through coercion were invalid." After the arbitrator found no union coercion, the employer continued to fight recognition unsuccessfully in the Second Circuit, which upheld the arbitrator's decision.

Thus, the Board's existing case law governing card check irregularities will stand as a safeguard–whether enforced through arbitration, the courts, or the Board–against recognition of a union who has engaged in unfair labor practices.

B. VRAs Promote Industrial Peace and Stability

VRAs also curtail the industrial strife common in organizing drives. Indeed, one prerequisite for the enforcement of such contract through Section 301 suits is that they "forward labor peace."[56] The receptivity of federal courts to enforcing such agreements[57] indicates that those agreement have generally met this test.

That organizing campaigns often produce bitterness and divisiveness is uncontested. *J.P. Morgan* refers to "those tensions inevitably flowing from a union organizing effort."[58] Similarly, "intensive workplace discussions and arguments are common. After several weeks of such campaigning, the final days before an election usually reach a high level of tension."[59] In a typical campaign, the employer bombards employees with the message that, if the facility unionizes, the employees "may" lose their jobs, suffer reductions in wages and benefits due to collective bargaining, or face strikes and violence, and the union counters with greater promises in addressing the last attack and in anticipation of the next. Not surprisingly, such a campaign spirals into enormous division and bitterness among employees. The hostility in the workplace generated by a hard-fought and prolonged organizing campaign hurts employers, employees, and the general public.

VRAs dramatically ameliorate the strife and tension of organizing drives by changing their character. Most VRAs commit the employer (and typically also the union) to what the arbitrator in the *Dana* dispute called a "high-minded" campaign, in which the parties agree not to disparage each other but rather to promote themselves. Most often, campaign limitation clauses do not 'silence' the employer, but rather require of the parties "a civil atmosphere for the discussion of the issues surrounding the question of union representation."[60] Indeed, the clause to which Dana agreed permitted the corporation to "communicate with employees, not in an anti-UAW manner, but in a positive pro-Dana manner."[61] In interpreting the clause, the parties' arbitrator concluded that "what the parties appear to have had in mind is that Dana argue its case in an objective high-minded fashion without resort to the kind of threats and innuendos which have often accompanied employer speech in organizing campaigns."[62] The agreement reached between AK Steel Corporation and United Steelworkers of America provides another example.[63] Eliminating the fear-mongering common in "vote no" campaigns is a huge step toward furthering labor peace and stability.

SEIU's agreement with one health care employer committed the parties "to a process that resolves issues between [them] in a manner that not only reduces conflict, but also fosters a growing appreciation for [their] respective missions"[64] In a situation involving UNITE, the employer and union were locked in a bitter dispute for many months, with many NLRB charges and accusations flying back and forth. The parties entered into a VRA which provided for an expedited arbitration process to resolve complaints of campaign misconduct. Significantly, neither side invoked the process. Instead, the level of tension decreased dramatically after the VRA, and the communication between the parties improved so that disputes were settled without the need for arbitration.

Moreover, VRAs provide for expedited campaigns and dispute resolution, if and when charges arise. In addition to committing the employer not to engage in delaying tactics, many agreements impose time limits on the union for organizing.[65] Shortening the campaign process helps minimize tension. Moreover, arbitration provisions[66] allow for quick resolution of charges of coercion, which also minimize tension.

As noted above, a UNITE agreement permitted arbitration of alleged campaign conduct violations within 24 hours with a bench decision.

More than three-quarters of Eaton and Kriesky's sample of agreements set limits on the union's behavior.[67] Analyzing one such agreement, in which the union agreed to refrain from picketing and the employer agreed to card-check recognition, the Sixth Circuit concluded that "each gave up rights under the Act ¼ in an effort to make the union recognition process less burdensome for both."[68] VRAs leave the representation process itself far freer from strife and tension than the usual NLRB election.

C. Promoting VRAs Advances Party Resolution in Labor Relations

Encouraging private party solutions to labor disputes is a cornerstone of federal labor policy. *American National Insurance Company* stated that "[t]he [NLRA] is designed to promote industrial peace by encouraging the making of voluntary agreement governing relations between unions and employers."[69] Specifically, "voluntary recognition is a favored element of national labor policy."[70]

Arms-length bargaining will create better, more specifically tailored solutions to particular disputes than standard Board processes. "[I]t is incumbent upon the Board," the Board held in a recent case, "to recognize and encourage the efforts expended by [the parties] in attempting innovative bargaining structures and processes and novel contractual provisions."[71]

VRAs can solve problems in ways in which the Board cannot. Clearly, constitutional and statutory concerns of free speech and due process affect the Board's ability to limit campaigning and to provide expedited representation processes. VRAs are not so limited.

III. Adjudicating and Implementing VRAs

A. VRAs are Enforceable Under Section 301

Courts will enforce VRAs under Section 301[72] of the Act.[73] Given the importance national labor policy places in promoting voluntary agreements, this trend is positive and should be embraced.

In *J.P. Morgan*, the Second Circuit articulated a three-part test for determining whether a contract that resolves representational issues should be enforced. The contract must guarantee employee free choice, forward labor peace, and govern the employer's relationship with its employees.[74] The court found that the VRA satisfied each of the three criteria.

As noted above, the decision in *Dana Corp.* found that the VRA did not violate public policy. The Sixth Circuit held that Dana's contractual commitment to regulate its speech was permissible because it was certainly allowed to restrain itself in the absence of such agreement.[75] Section 301 jurisdiction over representation issues has been challenged also as an abridgement of the Board's authority. Nonetheless, the courts have noted that the Board's primary jurisdiction "does not deprive the courts of jurisdiction, rather, it raises prudential concerns about whether to exercise it."[76] Thus, "while the courts may not resolve representational issues, the parties may resolve these issues contractually."[77] In short, the concerns raised by court adjudication of representation issues–including the lack of experience in that area and the historic hostility of federal court to labor rights–are not present when the parties have formed private contracts that resolve them.

The Supreme Court has stated that arbitrators–who typically adjudicate labor disputes under VRAs–bring special expertise to the resolution of labor disputes, and that arbitration is particularly desirable when the parties have committed to such arbitration "as a substitute for labor strife."[78] On that basis, the Second Circuit in *J.P. Morgan* found a VRA's inclusion of an arbitration provision strengthened its conclusion that the contract was within its jurisdiction under Section 301. As a word of advice, VRAs should include arbitration clauses, since courts are comfortable with enforcing such decisions under Section 301.

B. Parties Cannot Use Board Processes to Evade Complying with VRAs

In *Central Parking* and *Verizon Information Systems*, the Board correctly determined that VRAs preclude the use of the Board's representation processes.[79] The Board concluded that parties to VRAs should be held to their bargains, and that Board processes should not be used to avoid or undermine a bargain. Dissents offered in the two cases suggest that the law on this point is not well-established.

In *Central Parking*, the VRA in question contained an "after-acquired" clause. The provision called for employees in subsequently-purchased parking facilities to be added to the existing unit upon a showing of majority support. When the company purchased a competitor's facilities, the union organized employees at those facilities via card check and demanded recognition. The employer argued that the employees were ineligible, as it believed the agreement covered only newly-created facilities. The union sued to compel arbitration according to the VRA's terms, and the employer filed an RM petition at the Board.

The Board rejected the RM petition, stating that the employer waived its right to an election by agreeing to card check recognition in the VRA. The meaning of the clause and the overall fairness of the parties' bargain could be maintained only by holding the parties to it:

> Interpreting these [card check] clauses to mean that the employer can...demand an election renders them totally meaningless and without effect ... [T]o permit the Employer to claim the very right which it has foregone, perhaps in return for concessions in other areas, would violate the basic national labor policy requiring the Board to respect the integrity of collective-bargaining agreements."[80]

Chairman Hurtgen's dissent in *Central Parking* argued that the uncertainty surrounding the terms of the after-acquired clause meant that the employer had not given a "clear and unmistakable" waiver of its right to an election. Under these circumstances, the dissent claimed that the issues presented in the case should be decided exclusively by the Board and not by arbitration because they concerned representation.[81]

Chairman Hurtgen's conclusion that the Board should be the exclusive forum for resolving representation issues, however, stands in marked contrast to the Board's deferral to private agreements in at least two notably comparable situations. First, the Board "has long held that a stipulated bargaining unit will not be cast aside solely because it designates a unit [it] might find inappropriate had resolution of the issue not been agreed upon by the parties."[82] Why should such voluntary agreements generally be upheld, but unit determinations made by arbitrators under VRAs not?[83] Second, the Board defers in non-representation disputes, and the explanation for treating representation cases differently is unpersuasive. The Board has stated that "'the determination of questions of representation ¼ do [sic] not depend upon contract interpretation but involve the application of statutory policy, standards, and criteria. These are matters for decision of the Board rather than the arbitrator.' But, in fact, every question of deferral involves application of" such factors.[84]

In *Verizon Information Systems*, a union sought a Board unit determination notwithstanding the terms of a VRA. After the union began organizing employees, it and the employer were unable to agree on the scope of the bargaining unit. The union filed for arbitration, and subsequently filed an RC petition seeking Board resolution of the same issue.

The majority found a "narrow exception to [the] rule" articulated in the *Central Parking* dissent that the Board would not defer its representation processes to private arbitration.[85] The Board ruled that the exception lay in the union's enjoyment of "the benefits of the arbitration agreement" and its reservation of "the right to go back to that agreement"[86] by virtue of its preceding arbitration filing. Thus deference to arbitration was essentially grounded in estoppel.[87] Had the union filed a petition at the Board initially, the Board would not find that the parties' VRA barred the petition, because the parties had not clearly and unmistakably waived their right to NLRB procedures.[88] As in *Central Parking*, the majority recognized the importance of holding parties to a VRA to their contract. Once the union invoked the agreement, "the fundamental policies of the Act [could] best be effectuated by holding the [union] to its bargain."[89] The Board concluded that "[t]o do otherwise would permit the Petitioner to take advantage of the benefits accruing from its valid contract while avoiding its commitment by petitioning to the Board ..."[90]

Member Walsh's dissent in *Verizon* argued that the VRA's omission of a "clear and unmistakable" waiver of the union's statutory right to file a representation petition meant that the petition from it should not be barred.[91] Nonetheless, on these facts, the *Verizon* majority's willingness to hold the union to its bargain correctly prevents the use of Board processes to undermine the party's agreement.

As mentioned above, the Board's treatment of "reverse neutrality agreements"–which commit union to not organize particular groups of employees–is similar to that of VRAs.[92] The seminal *Briggs Indiana* decision equally applies to VRAs:

> The question here is not whether we should enforce the agreement so as to deny an individual Briggs ... employee the right to select a UAW affiliate as his representative ... It is merely whether it is the proper function of the [NLRB] to expend its energies and public funds to confirm a result which the Union agreed it would refrain, temporarily, from seeking to achieve.... The International [of the UAW] may have good reason to regret the original commitment or to decline hereafter to renew it. But this Board should not take affirmative action to facilitate its avoidance. That is not the business of the Government of the United States.[93]

Indeed, *Verizon* emphasized that "[i]f there is an express promise, we will enforce it, for a party ought to be bound by its promise."[94]

In another word of advice, parties negotiating a VRA should expressly waive the right to utilize Board processes to avoid needless litigation.

C. VRAs as Mandatory Subjects of Bargaining

Differences within the Board and between the Board and the courts of appeals shows the categorization of VRAs as mandatory or permissive subjects to be an unsettled area of law. The distinction is critical for several reasons. Bargaining parties can violate agreements on permissive subjects without violating the NLRA, and union-employer agreements regarding permissive subjects may be enforced only via Section 301 suits or arbitration.[95] More importantly, parties engaged in bargaining may not insist to impasse on permissive subjects, and strikes over such demands are unlawful and unprotected.[96]

Mandatory subjects settle an aspect of the relationship between an employer and its employees.[97] In *Pittsburgh Plate Glass*, the Court ruled that matters involving individuals outside the employment relationship will be mandatory subjects if they "vitally affect the 'terms and conditions' of employment" for the unit.[98] By holding that an employer's breach of an "after-acquired store" VRA[99] violated its duty to bargain under Section 8(a)(5), the Board's decision in *Kroger II* implied that such agreements were mandatory subjects of bargaining.[100] In *Lone Star Steel*,[101] the Board ruled that an "application-of-contract" VRA[102] was also a mandatory subject of bargaining. The Tenth Circuit overruled the Board in *Lone Star*, however, arguing that the clause was "much broader than necessary to accomplish the

legitimate Union goal of protecting" wages and jobs of employees in the existing unit.[103]

The Board recently revisited the mandatory/permissive debate in *Pall Biomedical*.[104] The scope of the VRA in *Pall Biomedical* was extremely limited. It applied only to work performed at one other facility in the same geographic area and of the same type performed by bargaining unit employees, and would be activated only in the event that the other facility began performing bargaining unit work. Bargaining unit employees were so worried about the transfer of unit work to the other facility that they struck to obtain the VRA. Although they originally had sought a VRA that would apply the collective bargaining agreement to the facility upon recognition, the employees ultimately compromised with the employer in securing it (by agreeing that the parties would negotiate a new contract upon recognition), and simultaneously settled the strike. The Board, with Chairman Hurtgen dissenting, concluded without difficulty that the VRA "vitally affect[ed]" the unit and was thus a mandatory subject.

The D.C. Circuit in *Pall Corporation*,[105] arguably misapplying a two-prong test it found in *Oliver*,[106] reversed. Insofar as it "vitally affect[ed]" the terms and conditions of employment of bargaining unit employees, the Pall VRA passed the first prong of *Oliver*. The court said that it did not pass the second prong, which asks whether the matter constitutes "a direct frontal attack upon a problem thought to threaten" the interests of bargaining unit employees.[107] The court noted the "modest reach" of the agreement merely put the union "in a position" to address the prospect of transferred bargain unit work. "The Union would still have to negotiate a CBA, which might or might not equalize labor costs between the new and old plants. Thus, even expedited recognition is only the first step ..."[108] *Pall Corp.* concluded that "prescribing the manner of recognition at a new facility is not 'a direct frontal attack'... [and] therefore the [VRA] does not concern a mandatory subject of bargaining."[109]

Pall Corporation is deeply problematic. As both union and management attorneys agree, the decision threatens to complicate collective bargaining with unnecessary tension and strife.[110] Because more extensive VRAs (requiring application of the collective bargaining agreement to newly-organized employees) are more likely mandatory subjects under *Pall Corporations*'s analysis, unions and employers are less likely to compromise and avoid destructive, but protected, strikes or lockouts.[111] The willingness of Pall's employees to settle their strike for a lesser VRA meant that the strike (had it not settled) might become unprotected and the resulting VRA unenforceable. Kane notes that "the paradox created ... in *Pall* also hinders the Act's overriding goal of stability in labor-management relations, good faith in collective bargaining, and the quick, efficient disposition of the organizing process."[112] If compromise solutions are not mandatory subjects, compromise will be impeded and unnecessary strikes will result.

Aside from its probable consequences for the collective bargaining process, *Pall Corporation* takes an unpersuasively narrow view of what types of VRAs should be mandatory. It is illogical to conclude, as did the D.C. Circuit by application of the "direct frontal attack" standard, that a compromise agreement that poorly defends an existing unit (as the *Pall* VRA may have, by including recognition, but not contract extension, provisions) is not nonetheless capable of furthering the interests of the unit. The VRA in Pall Biomedical did not "clog up"[113] the bargaining process, as the dissent suggests, but was rather a vital concern of the existing unit.

Moreover, increasing union members throughout an employer, even if in unrelated divisions, may vitally increase the union's bargaining power on behalf of existing units. The recent *Meijer*[114] decision suggests the relevance of broader organizing efforts (which VRAs aim to further) to the bargaining strength of existing units. In that case, the Ninth Circuit held that unions may charge non-member employees, as a part of agency fees, costs associated with organizing non-unit employees in the relevant market. The court ruled that such costs were "germane to collective bargaining" because they "may ultimately inure to the benefit of the members of the local union..."[115] *Meijer*'s commonsense "germane to collective bargaining" standard–which, unlike the paradoxical result of *Pall Corporation*, promotes such bargaining and implicitly recognizes the broader role VRAs play in strengthening existing bargaining units–should be the test for determining the mandatory or permissive character of VRAs.

The General Counsel Memorandum in *Sahara Hotel*[116] presents another approach to the mandatory/permissive debate. *Sahara Hotel* suggests that a VRA's constituent parts should be analyzed piecemeal, with various provisions (including after-acquired clauses, access to employee contact information and to company facilities, and employer speech clauses) labeled individually as mandatory or permissive.[117] The memo's treatment of the "employer speech clause," however, deserves further attention. Such clauses are central to many agreements, and crucial–given the prevalence of legal and illegal employer coercion during organizing campaigns–for promoting employee Section 7 rights.

Despite the importance of such clauses, the memo argued that they are permissive subjects because "they require the Employer to waive its Section 8(c) right," and noted that proposals requiring a party's waiver of statutory rights have been found permissive subjects of bargaining in "a wide variety of situations."[118] This assessment is misguided for several reasons. First, as noted above, Section 8(c) does not confer a statutory right, but rather merely exempts from regulation a category of speech. Second, waivers of putative statutory rights are not necessarily permissive subjects. Employers may insist to impasse on no-strike clauses, despite the fact that the ability to engage in primary strikes is expressly protected in Section 13 of the NLRA.[119]

D. Demands for VRAs Do Not Justify RM Petitions

In three recent cases–*New Otani Hotel & Garden*,[120] *Rapera, Inc.,*[121] *and Brylane, L.P.*[122] –the Board has properly

found that a union's campaigning for a VRA including a card check recognition process did not justify an employer-filed representation petition ("RM petition"). Dissents in each case highlight the unsettled nature of the law in this area.

Only an "actual present demand for recognition" suffices for an RM petition, not organizational efforts which are designed to lead toward a demand for recognition. As the *New Otani* decision noted, "It would be contrary to the Congressional intent underlying Section 9(c)(1)(B) to find that any conduct with a representational objective, which falls short of an actual, present demand for recognition, will support an election petition filed by an employer."[123]

This rule stems from Congress's desire to protect Section 7 rights from employer manipulation. "Congress sought to prevent employers from utilizing such [RM] petitions as a means to undermine employee free choice,"[124] and from obtaining "a vote rejecting the union before the union had a reasonable opportunity to organize."[125] Congress did not wish to allow employers to "short-circuit the process or immunize itself from recognitional picketing by precipitating a premature election."[126]

The Board has never found the basis for an RM petition in situations in which unions have waged a campaign for campaign limitations and a card-check recognition process. To the contrary, the Board has found RM-petitions justified only when a union requests that an employer sign a contract or immediately recognize the union.[127]

Chairman Hurtgen dissented in *New Otani* and Member Cowan dissented in *Brylane*. *Rapera* upheld the Regional Director's dismissal of the RM petition by a vote of two (Members Liebman and Walsh affirming the dismissal) to two (Members Hurtgen and Chairman Truesdale voting to reverse). The Hurtgen/Truesdale opinion found that the union's requesting a card check recognition process combined with a sworn statement submitted to district court[128] that the union enjoyed majority status constituted a "present demand for recognition." The Liebman/Walsh opinion stressed that statements made to third parties could not constitute a demand made to the employer. We, needless to say, agree with Liebman and Walsh. The Board should maintain its precedent and not permit employers to preclude union campaigns for VRAs by expanding the basis for RM petitions.

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Footnotes

[1] One study found that the rates of success across organizing campaigns governed by card check recognition and card check recognition with so-called "neutrality" provisions were 62.5% and 78.2%, respectively, as compared with the NLRB election win rate for 1983-98 of 45.64%. Adrienne E. Eaton and Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 IND. & LAB. REL. REV. 42, 51-52. *See also* David E. Weisblatt, *Neutrality Agreements are Neither Neutral Nor Very Good for Employers*, McDonald Hopkins, at *http://www.mhbh.com/topics/business/neutrality.html* (citing percentages of union victories in card check recognition campaigns [78%] and secret ballot elections [53%]).

[2] Many thanks to Guerino J. Calemine, III, of Zwerdling, Paul, Leibig, Kahn & Wolly, P.C., and Larry Engelstein, of SEIU Local 32B-32J, for their unpublished scholarship on various provisions available in drafting VRAs and on VRAs more generally.

[3] Eaton and Kriesky, *supra* note 2, at 48. In one common variation, over 65% cards signed leads to card check recognition, 50-65% triggers a non-NLRB election, and between 33%-50% leads to a Board election.

[4] *International Union v. Dana Corp.*, 278 F.3d 548, 551 (6th Cir. 2002) (quoting Joint Agreement at 92).

[5] 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, 380 n.59 (2001) (quoting Kerri J. Selland, *AK Propaganda War Erupts*, Am. Mtl. Mkt., May 18, 1995, at 2, available in 1995 WL 8070195).

[6] Eaton and Kriesky, *supra* note 2, at 47.

[7] *Id.* at 48.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *See Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27, 38 (1987); National Labor Relations Board, *The NLRB: What It Is, What It Does*, available at *http://www.nlrb.gov/publications/whatitis.html*.

[15] *See N.L.R.B. v. American National Ins. Co.*, 343 U.S. 395 (1952); Stanley D. Henderson, LABOR LAW: CASES AND COMMENT 90 (Foundation Press 2001).

[16] "I wonder why the Unions were unwilling to go to elections to avoid this result. Was it because they doubted that the employees who signed cards would vote the same way in secret elections?" Jonathan Kane and James P. Thomas, *Pall Corp. v. NLRB–What About Section 7?* 7 (2003) (unpublished paper presented to ABA Labor and Employment Law Section Sub-Committee on Practice and Procedure under the NLRA, Pepper Hamilton LLP). (quoting *Houston Div. of the Kroger Co.* (*Kroger II*), 219 N.L.R.B. 388, 391 (1975) (Kennedy, M., dissenting)). *See also* Weisblatt, *supra* note 2.

[17] *See* Hartley, *supra* note 6, at 381-82; Andrew Strom, *Rethinking the NLRB's Approach to Union Recognition Agreements,* 15 BERKELEY J. EMP. & LAB. L. 50, 53-55 n.59 (1994)

[18] *See Parts Depot, Inc.*, 332 N.L.R.B. No. 64, slip. op. at 7 (2000) (citing *Garvey Marine*, 328 N.L.R.B. No. 147, slip. op. at 7 (1999)).

[19] Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self Organization under the NLRA*, 96 HARV. L. REV. 1769, 1777 (1983)

(citing Prosten, *The Longest Season: Union Organizing in the Last Decade, a/k/a How Come One Team Has to Play with its Shoelaces Tied Together?*, 31 PROC. ANN. MEETING INDUS. REL. RESEARCH A. 240, 243 (1978)).

[20] *Id.* (citing Roomkin & Juris, *Unions in the Traditional Sectors: The Mid-Life Passage of the Labor Movement*, 31 PROC. ANN. MEETING INDUS. REL. RESEARCH A. 212, 217-18 (1978)).

[21] *Parts Depot, Inc.*, 332 N.L.R.B. No. 64 (2000).

[22] *Id.*, slip op. at 14.

[23] *See* Brent Garren, *When the Solution is the Problem: NLRB Remedies and Organizing Drives*, 51 LAB. L.J. 76, 76-8 (2000) (surveying numerous studies).

[24] *Id.* at 77 (citing Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMP. RTS. EMP. POL. J. 317, 329-30 (1998)).

[25] *Id.* (citing Robert J. LaBlonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953 (1991)).

[26] Garren, *supra* note 21, at 77 (citing Commission on the Future of Worker-Management Relations, *Fact Finding Report*, issued by the Commission on the Future of Worker-Management Relations, June 2, 1994, as reprinted in the Daily Labor Report, June 3, 1994 at WL * 191).

[27] Kate Bronfenbrenner, *The Effects of Plant Closings or Threats of Plant Closing on the Rights of Workers to Organize*, Labor Secretariat of the North American Commission for Labor Cooperation (1996).

[28] Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards* (2000) (quoting Theodore St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.-KENT L. REV. 631, 639 (1985).

[29] *See* Garren, *supra* note 21, at 77-78 (citing Paul C. Weiler, *Hard Times for Unions: Challenging Time for Scholars*, 58 U. CHI. L. REV. 1015, 1029-30 (1991); William Dickens, *The Effect of Company Campaigns On Certification Elections: Law and Reality Once Again*, 36 IND. AND LAB. R. 560, 574 (1983)); Eaton and Kriesky, *supra* note 2, at 43.

[30] *Id.* at 78 (citing Benjamin W. Wolkinson, et. al., *The Remedial Efficacy of Gissel Bargaining Orders*, 10 IND. REL. L.J. 509-10 n.3 (1989); Dunlop Commission Report, *supra* note 24, at WL * 197-98).

[31] In light of the findings of a 1991 poll (that 59% of workers believed they would lose favor with their employer for supporting a union and 79 % agreed that workers and 'very' or 'somewhat' likely to be fired for trying to organize a union), "the idea that a piece of paper on the wall dissipates the effect of employer threats borders on the absurd." *Id.* at 78.

[32] *See id.* at 80 (citing Les Aspin, *Legal Remedies under the NLRA Under 8(a)(3)*, (1970), as reprinted in Julius G. Getman & Jerry R. Andersen, 6 LABOR RELATIONS AND SOCIAL PROBLEMS 133, 134 (1972)).

[33] *Id.* at 81 (citing Daniel Pollitt, *NLRB Re-run Elections: A Study*, 41 N.C. L. REV. 209, 212 (1963)).

[34] For example, UNITE has entered into agreements limiting the campaign period to 15 days.

[35] *Agreement*, [Employer] and Service Emp. Int'l Union (1991) (on file with author).

[36] Hartley, *supra* note 6, at 382.

[37] Despite this flexibility, however, "arbitrators arguably have been quite conservative in the remedies they have, in practice, ordered." Eaton and Kriesky, *supra* note 2, at 54 (citing Adrienne Eaton and Debra Casey, *Bargaining to Organize: Disputes and Their Resolution*, unpublished manuscript, Rutgers University (2001)). *But see* George N. Davies, *Neutrality Agreements: Basic Principles of Enforcement and Available Remedies*, 16 LAB. LAW. 215, 220-221 (2000) (highlighting the strong remedies awarded by arbitrators and subsequently challenged unsuccessfully in *United Steelworkers of American v. AK Steel Corp.*, 163 F.3d 403 (6th Cir. 1998) and *International Union v. Dana Corp.*, 278 F.3d 548 (6th Cir. 2002)).

[38] *See, e.g. Pall Biomedical Products Corp.*, 331 N.L.R.B. 1674, 1676 (2000); *Hotel Emp., Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468-69 (9th Cir. 1992); *Hotel & Restaurant Emp. Union v. J.P. Morgan*, 996 F.2d 561, 566 (2nd Cir. 1993); *Local 3-193 Int'l Woodworkers v. Ketchikan Pulp Co.*, 611 F.2d 1295, 1299-1301 (9th Cir. 1980); Strom, *supra* note 18, at 62 (citing *Advice Memorandum of the NLRB General Counsel, General Motors Corp., Saturn Corp., and UAW*, 122 L.R.R.M. 1187, 1190-91 (1986)).

Even if VRAs do not explicitly condition recognition on the showing of majority support, since the Board will read the requirement into such contracts. *Houston Div. of the Kroger Co.* (*Kroger II*), 219 N.L.R.B. 388, 389 (1975).

[39] *J.P. Morgan*, 996 F.2d at 566.

[40] *See* Eaton and Kriesky, *supra* note 2, at 59 n.1 (citing two articles arguing that VRAs prevent employees from "getting the full story"); Kane and Thomas, *supra* note 17, at 6-7.

[41] Yale University Office of Public Affairs, *Labor Negotiations at Yale University: Frequently Asked Questions about Union Neutrality*, at *http://www.yale.edu/opa/labor/faq_neutrality.html*.

[42] 278 F.3d 548 (6th Cir. 2002).

[43] *Id.* at 558.

[44] Section 8(c) of the NLRA states: "The expression of any views, arguments or opinions or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any provision of this...[law], if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

[45] *Dana*, 275 F.3d at 558 (citing *Hotel Emp., Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1470 (9th Cir. 1992)).

[46] *Id.* at 559-60 (citing *N.L.R.B. v. St. Francis Healthcare Ctr.*, 212 F.3d 945, 954 (6th Cir. 2002).

[47] *Id.*

[48] *Id.* at 559.

[49] 383 U.S. 53 (1966).

[50] *Id.* at 62.

[51] *Id.* at 62 n.5.

[52] *Dana,* 275 F.3d at 552.

[53] *See* Eaton and Kriesky, *supra* note 2, at n.1; Kane and Thomas, *supra* note 17, at 6-7; Yale University Office of Public Affairs, *supra* note 38.

[54] Eaton and Kriesky found that 73% of the sample of 118 agreements they collected from a wide variety of sources called for card

check arrangements. Eaton and Kriesky, *supra* note 2, at 48.

[55] *Central Parking System, Inc.*, 335 N.L.R.B. No. 34, slip op. at 2 n.5 (2001). As Strom notes, adopting a policy of deference to arbitration awards resulting from disputes in voluntary recognition situations would not preclude the Board from stepping in to curb genuine Section 8(a)(2) violations. Strom, *supra* note 18, at 81.

[56] *Id.* at 566.

[57] For further discussion on the question of Section 301 enforceability, see Part III.A, *infra*.

[58] 996 F.2d at 566 (citing *N..L.R.B. v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274 (1960)).

[59] Commission for Labor Cooperation, *Union Organizing Systems in the Three NAALC Countries*, available at *http://www.naalc.org/english/publications/nalmcp_7.htm*.

[60] Hartley, *supra* note 6, at 380. For a discussion of the content of various VRAs, *see supra* Part I.

[61] *International Union v. Dana Corp.*, 278 F.3d 548, 551 (6th Cir. 2002) at 551-52.

[62] *Id.* at 552.

[63] "Neutrality means that the Company shall neither help nor hinder the Union's conduct of an organizing campaign, nor shall it demean the Union as an organization or its representatives as individuals¼. [T]he Company reserves the right ¼ [t]o communicate fairly and factually to employees ¼ concerning the terms and conditions of their employment with the Company and concerning legitimate issues in the campaign. For its part, the Union agrees that all facets of its organizing campaign will be conducted in a constructive and positive manner which does not misrepresent their employment and in a manner which neither demeans the Company as an organization nor its representatives as individuals." *AK Steel Corp. v. United Steelworkers of America*, 163 F.3d 403, 410-11 (6th Cir. 1998) (Appendix A).

[64] *Agreement* (on file with author).

[65] Eaton and Kriesky, *supra* note 2, at 48.

[66] *Id.* (reporting that more than 90% of the agreements they studied called for dispute resolution, and that the process most frequently outlined was arbitration).

[67] *Supra* note 2, at 48.

[68] 996 F.2d at 566.

[69] *N.L.R.B. v. American National Ins. Co.*, 343 U.S. 395, 401 (1952).

[70] *N.L.R.B. v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978).

[71] *MGM Grand Hotel*, 329 N.L.R.B. 464, 467 (1999).

[72] "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act ... may be brought in any district court of the United States ..." NLRA Section 301, 29 U.S.C. § 185(a) (1998).

[73] *See* SEIU Local 1199 v. NYU Hospitals Center, 2003 U.S. Dist. LEXIS 4343 (S.D.N.Y. 2003); *International Union v. Dana Corp.*, 278 F.3d 548, 554 (6th Cir. 2002); *United Steelworkers of American v. AK Steel Corp.*, 163 F.3d 403 (6th Cir. 1998)*; Hotel & Restaurant Emp. Union v. J.P. Morgan*, 996 F.2d 561 (2nd Cir. 1993); *Hotel Emp., Local 2 v. Marriott Corp.*, 961 F.2d 1464 (9th Cir. 1992).

[74] 996 F.2d at 566.

75 *See International Union v. Dana Corp.*, 278 F.3d 548, 558 (6th Cir. 2002).

[76] 996 F.2d at 565 (quoting 1 *The Developing Labor Law* 975 (Patrick Hardin et al. eds., 3d ed. 1992).

[77] *Marriott Corp.*, 961 F.2d at 1468-9. In that case, the court concluded that "it is the NLRB, not the courts, that should determine policy" regarding whether card check agreements imply an employer obligation to grant a union access to its property and a list of its employees.

[78] *See Hotel & Restaurant Emp. Union v. J.P. Morgan*, 996 F.2d 561, 567 (2nd Cir. 1993).

[79] *See Central Parking*, 335 N.L.R.B. No. 34 (2001); *Verizon Information Systems*, 335 N.L.R.B. No. 44 (2001).

[80] 335 N.L.R.B. No. 34, slip op. at 5 (quoting *Houston Division of the Kroger Co.*, 219 N.L.R.B. 388, 389 (1975)).

[81] 335 N.L.R.B. No. 34, slip op. at 3 (citing *Hershey Foods*, 208 N.L.R.B. 452 (1974); *Commonwealth Gas*, 218 N.L.R.B. 857 (1975)).

[82] *Hampton Inn and Suites*, 331 N.L.R.B. 238, 239 (2000) (citing *Otis Hospital*, 219 N.L.R.B. 164, 165 (1975); *The Leonard Hospital*, 220 N.L.R.B. 1042 (1975)).

[83] *See* Strom, *supra* note 18, at 81.

[84] *Id.* at 79 (quoting, in part, *Marion Power Shovel Co.*, 230 N.L.R.B. 576, 577 (1977)).

Strom suggest that the degree of deference given to different types of voluntary agreements should be rooted in an assessment of the degree to which such agreements threaten to undermine employee free choice under Section 7. Examining such representation questions as accretions and the scope of bargaining units, Strom argues that the arguments against Board deferral to private representation processes apply more strongly in the case of accretions; in such cases, it is conceivable that a union and an employer could agree that a contract will cover workers at a facility without adequately determining whether the workers want the union to represent them. Id. at 80. Such an agreement would clearly violate Sections 8(a)(2) and 8(b)(1) of the NLRA.

Arguments against deferral to private processes are weaker in unit determinations, where, "in contrast to cases of accretions, there are only minimal concerns about limiting employee self-determination"; in even inappropriate, privately-created units, employees will have a chance to express their desires regarding unionization. *Id.* at 80-81.

[85] 335 N.L.R.B. No. 44, slip op. at fn.11.

[86] *Id.*

[87] 335 N.L.R.B. No. 44 at 5.

[88] *See id.* at 3 fn.8.

[89] *Id.* at 3.

[90] *Id.*, slip op. at 4. (quoting *Lexington House*, 328 N.L.R.B. 894, 897 (1999)).

[91] *See id.* at 3.

[92] *See*, e.g., *Briggs Indiana Corp.*, 63 N.L.R.B. 1270 (1945); *Cessna Aircraft Co.*, 123 N.L.R.B. 855 (1959)); *Lexington Health Care Group*, 328 NLRB 894 (1999).

[93] *Verizon*, 335 N.L.R.B. No. 44, slip op. at 3 (quoting *Briggs Indiana*, 63 N.L.R.B. 1270 (1945)).

[94] *Id.* (quoting *Lexington House*, 328 N.L.R.B. 894, 896 (1999)).

[95] "The remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract ... not in an unfair practice proceeding." *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157, 188 (1971).

[96] *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *Nassau Insurance Co.*, 280 N.L.R.B. 878, fn. 3 and 891-92 (1986).

[97] 404 U.S. at 179.

[98] *Id.*

[99] Such an agreement places employees in a company's newly-acquired stores in the existing bargaining unit upon recognition.

[100] *Pall Biomedical Products Corp.*, 331 N.L.R.B. 1674 (2002), *rev'd*, 275 F.3d 116 (2002).

[101] *Lone Star Steel*, 231 N.L.R.B. 573 (1973), *rev'd*, 639 F.2d 545 (10th Cir. 1980).

[102] Such an agreement places a company's employees in new bargaining units and extends the existing collective bargaining agreement to those new groups of employees.

[103] 639 F.2d at 558.

[104] 331 N.L.R.B. 1674 (2002).

[105] *Pall Corp. v. N.L.R.B.*, 275 F.3d 116 (D.C. Cir. 2002).

[106] *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 294 (1959). In *Oliver*, the Court held that a collective bargaining agreement's provision of a minimum wage was exempt from a state antitrust law because it constituted "a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure" in the collective bargaining agreement.

Subsequent Court decisions suggest that *Oliver*'s supposed "direct frontal attack" prong is merely a different formulation of the more common "vitally affects" test. In *Pittsburgh Plate Glass*, for example, the Court said that the subjects in both *Oliver* and *Fibreboard*–which, like Pall, addressed loss of unit work to third parties–were mandatory because they were "integral to th establishment [of benefits] for clearly covered employee[s]." 404 U.S. at 178 (quoting *United States v. Drum*, 368 U.S. 370, 382-83, n.26 (1962)). In both *Oliver* and *Fibreboard*, the *Pittsburgh* decision concluded, "the question ... [is] whether [the third-party concern] vitally affects the 'terms and conditions' of active employees." *Id.* at 179.

[107] *Id.* at 294.

[108] 275 F.3d at 122.

[109] *Id.*

[110] Calemine*;* Cohen, *supra* note 22, at 5-6.

[111] Calemine: "It is not difficult to imagine a bargaining scenario where, thanks to *Pall Corporation*, compromise is now less likely and a strike or lockout is more likely. For instance, a union might open negotiations with a *Kroger*-type 'after-acquired stores' proposal, perhaps confident that it is tailored as a 'direct frontal attack' on job security issues for the existing bargaining unit and therefore a mandatory subject of bargaining. The employer might reject the proposal. Now, the union has a difficult choice. Does it counter with a new, watered-down proposal that would render the matter a permissive subject–with all th implications that entails–or does it dig in its heels and insist on the original, mandatory proposal in order to better protect its right to strike over the matter? On the other side of the table, an employer now has an extra incentive to push for recognition-only type clauses, *sans* contract extensions, if any clause at all, in order to, for example, retain the option of repudiating it without violating Section 8(a)(5). In short, *Pall Corporation* may affect bargaining dynamics in ways which do not bode well for negotiating compromises and avoiding strikes or lockouts."

[112] Kane, *supra* note 18, at 6.

[113] *Pall Biomedical Products Corp.*, 331 N.L.R.B. 1674, 1681 (2000) (Hurtgen, C., dissenting).

[114] *UFCW, Local 1036 v. N.L.R.B. (Meijer)*, 284 F.3d 1099 (9th Cir.), *cert. denied sub nom. Mulder v. N.L.R.B.*, 123 S.Ct. 551 (2002).

[115] Cohen, *supra* note 22, at 212 (citing *Meijer*, 329 N.L.R.B. No. 69 at 6).

[116] General Counsel Memorandum, *Sahara Hotel & Casino*, Case 28-CB-4349, 1995 WL 937191 (November 30, 1995).

[117] *Id.*

[118] *Id.* These situations include waivers of the union's right to file Board charges alleging that the employees engaged in an unfair labor practice or of the right to select union stewards, withdrawals of Board charges, settlements of backpay liability, adoption of an industry promotion program where such adoption would effectively compel the employer to designate an employer association as its bargaining representative.

[119] "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike ..." NLRA Section 13, 29 U.S.C. § 163.

[120] 331 N.L.R.B. No. 159 (2000).

[121] 333 N.L.R.B. No. 150 (2001).

[122] 338 N.L.R.B. No. 65 (2002).

[123] *New Otani*, 331 N.L.R.B. No. 159, slip op. at 7-8 (citing *Windee's Metal Industries*, 309 N.L.R.B. 1074, 1075 (1992)).

[124] *PSM Steel Construction*, 309 N.L.R.B. 1302, 1304 (1992).

[125] *New Otani*, 331 NLRB No. 159, slip op. at 5.

[126] *Id.* at 7 (citing *Albuquerque Insulation*, 256 N.L.R.B. 61, 63 (1981)).

The legislative history stresses this important policy concern. As stated in Senate Report No. 105 on S. 1126 (1 Leg. Hist. 417): "If an employer could petition at any time, he could effectively frustrate the desire of his employees to organize by asking for an election on the first day that a union organizer distributed leaflets at his plant." Similarly Senator Morse expressed concern that the employers' right to petition "may be subject to abuse, in that employers may seek an election at the earliest possible moment in an organizational campaign and thereby obtain a vote rejecting the union before it had a reasonable opportunity to organize." House Report No. 245 on H.R. 3020, 2 Legislative History of the Labor Management Relations Act 983.

[127] *Windee's Metal Industries, Inc.*, 309 N.L.R.B. 1074 (1992).

[128] The opinion contrasted the sworn statement to other statements that might be dismissed as "campaign puffery."