Conclusion

Let me end this with a good news/bad news admonition. The good news is, given the basic purpose of voluntary recognition agreements, arbitration proceedings should be relatively rare. The bad news is that for any arbitrator who gets such a case, it will be a most vigorous contest with about 99 percent of his or her job being the selection of the appropriate remedy.

II. NAVIGATING THE UNCHARTED SEAS OF NEGOTIATED TRANQUILITY: A MANAGEMENT PERSPECTIVE ON EMPLOYER NEUTRALITY AGREEMENTS AND CARD CHECKS

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Introduction

During the past quarter-century, labor unions have found it increasingly difficult either to expand or even to replenish their membership roles through the traditional means of winning union representation elections. It was estimated in 1997 that unions would need to organize approximately 400,000 new members annually in order to maintain the combined private- and public-sector union density rate at that time.[1] Yet, it has been reckoned that there were only 86,325 employees eligible to vote in representation elections conducted by the National Labor Relations Board that unions won that same year[2] and, notwithstanding a 5 percent increase in private, nonfarm employment during the intervening six years,[3] only 75,058 such employees in 2003.[4] The net result is that unions have found it increasingly necessary to turn to means

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[1]Bacon, *The Promise of a Raise Is Not Enough*, Dollars & Sense, Number 213 September/October 1997, at 20, cited in Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement,* 22 Berkeley J. Emp. & Lab. L. 369, 371–72 nn.6, 10 (2001).

[2]Daily Lab. Rep. (BNA) No. 4, at C-2 (Jan. 7, 2003).

[3]*See* Bureau of Labor Statistics, U.S. Department of Labor, Employment, Hours, and Earnings from the Current Employment Statistics Survey (National), available at www.bls.gov/webapps/legacy/cesbtab1.htm (Establishment Data, Table B-1, Total Private, not seasonally adjusted).

[4]Daily Lab. Rep. (BNA) No. 245, at C-2 (Dec. 22, 2004).

other than government-supervised representation elections to organize employees, most notably through securing neutrality agreements from employers under which employers and unions agree to a variety of arrangements that make it easier for unions to organize employees than if the employers retained all of the rights that they enjoy under the National Labor Relations Act, as amended (NLRA).[5]

The first formal neutrality agreement has been traced to a 1976 letter of agreement between General Motors Corporation (GM) and the United Automobile, Aerospace, and Agricultural Implement Workers Union (UAW).[6] In this letter, GM pledged to maintain "a posture of neutrality" with regard to the UAW's efforts to organize unrepresented production and maintenance employees, while voicing the reciprocal understanding that the UAW would "conduct itself in such organizing campaigns in a constructive and positive manner which does not misrepresent to employees the facts and circumstances surrounding their employment."[7] The UAW and the United Rubber, Cork, Linoleum and Plastic Workers Union (URW) led the way in negotiating similar agreements during the next five years.[8]

The great majority of neutrality agreements that exist today, however, have been entered into in the past 15 years. In the most comprehensive survey of neutrality agreements to date, Professors Adrienne Eaton and Jill Kriesky found that of the 36 national unions from which they obtained information during the period 1997–1998, 23 had at least one agreement that addressed "orga-

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[5]29 U.S.C. §§ 151–169 (2000). The centrality that such alternative means for organizing employees now have for unions' overall organizing efforts is reflected in the United Food and Commercial Workers' (UFCW) claim to have organized approximately 144,000 employees in 1996 and 1997 by card check alone. *See* Eaton & Kriesky, *Union Organizing Under Neutrality and Card Check Agreements,* 55 Indus. & Lab. Rel. Rev. 42, 46 (2001). If true, it would indicate that the UFCW organized approximately seven-eighths as many employees through card checks as were organized by all unions via Board-supervised elections during the same two-year period. *See* Daily Labor Rep. (BNA) No. 100, at C-2 (May 23, 2000). Even so, unions' use of neutrality agreements and card checks has not reversed the decline in overall or private-sector union density rates, which fell from 23.8% and 21.7%, respectively, in 1977, to 12.5% and 7.8%, respectively, in 2005. Hirsch & Macpherson, Union Membership and Coverage Database from the CPS (Documentation), available at www.unionstats.com (I. U.S. Historical Tables: Union Membership, Coverage, Density and Employment, 1973–2005, All Wage & Salary Workers and Private Sector).

[6]Kramer, Miller & Bierman, *Neutrality Agreements: The New Frontier in Labor Relations—Fair Play or Foul?,* 23 B.C.L. REV. 39, 40 (1981); Guzick, *Employer Neutrality Agreements: Union Organizing Under A Nonadversarial Model of Labor Relations,* 6 Indus. Rel. L.J. 421, 435 (1984).

[7]Letter of Agreement between G.M. and the UAW, *reprinted in* Kramer, Miller & Bierman, *supra* note 6, at 40 n.6.

[8]Kramer, Miller & Bierman, *supra* note 6, at 41.

nizing unorganized workers" and that, of the roughly 132 agreements that their investigation disclosed, approximately 80 percent had arisen since 1990.[9]

Contents of Neutrality Agreements

Neutrality agreements have increased in both their scope and complexity since their first appearance in the 1970s. In addition to the basic neutrality pledge, these agreements now commonly include language providing for union recognition on the basis of union authorization cards,[10] union access to company property for the purpose of organizing, union access to lists containing the names and home addresses of employees in the designated unit prior to the time the union would be entitled to such information under the Board's processes, and arbitration in the event of disputes arising under the agreement.[11] Some also provide for interest arbitration in the event the union organizes the unit and the parties are unable to come to terms on an initial collective bargaining agreement.[12]

Although some neutrality agreements contain no more than a bare commitment by the employer to remain neutral with regard to union organizing efforts, most attempt to define or qualify this obligation in some way.[13] In the much-litigated neutrality agreement between Dana Corporation and the UAW, for instance, "maintaining a neutral position" is characterized as campaigning only in a "positive pro-Dana manner."[14] In the UAW's agreement with Alcoa, neutrality is defined somewhat more precisely as "not comment[ing] negatively concerning the integrity or character of the Union or its officials."[15] Many neutrality agreements further contain reciprocal agreements by the union to avoid attacking the employer,[16] and a number of these expressly condition the em-

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[9]Eaton & Kriesky, *supra* note 5, at 45.

[10]Eaton and Kriesky found that 73% of the agreements in their study contained such card provisions. Eaton & Kriesky, *supra* note 5, at 48.

[11]*Id.* at 47–48; Davies, *Neutrality Agreements: Basic Principles of Enforcement and Available Remedies,* 16 The Labor Law. 215, 215, 218 (2000).

[12]Eaton and Kriesky, *supra* note 5, at 48; Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?,* 16 The Labor Law. 201, 204 (2000).

[13]Eaton & Kriesky, *supra* note 5, at 47.

[14]*Dana Corp.,* 76 LA 125, 126 (Mittenthal 1981) (quoting Letter from R. Bueter, Director of Industrial Relations, to D. Rand, Administrative Assistant to the Director of Dana Dept., UAW (1979)).

[15]Collective Bargaining Negot. & Cont. (BNA), 140:1501 (Mar. 12, 1998).

[16]Eaton & Kriesky, *supra* note 5, at 48.

ployer's neutrality pledge on the union's observance of restraints in its communications with employees.[17]

Union and Management Positions Regarding Neutrality Agreements

In theory, there is no "management position" on the desirability of neutrality agreements, per se. Neutrality agreements are agreements like any other agreements and employers presumably have the same bargaining power to get something in exchange for their commitments under a neutrality agreement, whether that be the union's agreement to wage and benefit concessions or merely the cessation of picketing, as they would in exchange for the offer of any other benefit to the union. Indeed, it is precisely the potential for union concessions on wages and other matters of greater interest to the employees that unions represent in exchange for these agreements that raises the specter of potentially significant problems with such agreements under Section 8(a)(2) of the NLRA.[18]

As a practical matter, however, most employers would prefer that neutrality agreements were not part of their armory of potential bargaining chips. And, as a reflection of this, most neutrality agreements are obtained either by economically powerful unions in industries in which they predominate (e.g., the UAW), or by unions that deal with employers who deal directly with the public and who, thus, are particularly susceptible to pre-recognition picketing and other forms of disruption (e.g., the Hotel Employees and Restaurant Employees (HERE)), or by unions that deal with employers who are particularly sensitive to political and regulatory pressures (e.g., the Communications Workers of America (CWA)). Neutrality agreements almost always are sought by the union rather than the employer and often are obtained only as a result of the imposition on the employer of considerable economic pressure.

Neutrality agreements are labor unions' response to what many within the union movement perceive to be the principal causes of unions' difficulty in organizing employees through Board-supervised secret ballot elections. These include: employer intimidation and the ineffectuality of the Board's remedies therefor;

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[17] *See, e.g.,* United Steelworkers of America-Wah Chang agreement, *reprinted in* Collective Bargaining Negot. & Cont. (BNA) 8:121 (July 22, 2004); UAW-Alcoa agreement, *reprinted in* Collective Bargaining Negot. & Cont. (BNA) 140:1501 (Mar. 12, 1998).

[18] 29 U.S.C. § 158(a)(2) (2000).

employer advantages in communicating with employees while they are at work and the corresponding lack of access to employees on the part of unions; and the delay between the filing of a union representation petition and the Board-supervised secret ballot election.[19]

Of course, this diagnosis for what ails unions' efforts to organize employees through Board-supervised elections is not above challenge. There was, after all, only a median 40-day lapse in 2003 between the filing of a representation petition and the eventual election,[20] a not unreasonably long period of time considering the importance of the choice of a bargaining representative to employees' working lives, and only a very small percentage of elections result in the filing of election objections.[21] In addition, although employers have some decided advantages in communicating with employees during working hours, union representatives, but not members of management, may visit employees at their homes for the purpose of electioneering[22] and union representatives are far less constrained in what they can say than management.

Rather, the evidence suggests that the principal impediment to unions winning Board-supervised elections is the preferences and views employees carry with them into the election campaigns. In the much publicized survey of worker attitudes conducted by Professors Richard Freeman and Joel Rogers, nonmanagerial workers who were not union members responded by a 55–32 percent margin that they would vote against a union given the opportunity. [23]

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[19]Hartley, *supra* note 1, at 372, 379–85.

[20]*See* Amicus Brief of the General Counsel at 4 n.8, *Dana Corp. and Metaldyne Corp.,* NLRB, No. 8-RD-1976, et al. (on Review of the Regional Directors' administrative dismissals) (citing NLRB Office of the General Counsel, Summary of Operations (Fiscal Year 2003), Memorandum GC 04-01 (Dec. 5, 2003)).

[21]Brief *Amicus Curiae* of Associated Industries of Kentucky at 15 & n.23, *Dana Corp. and Metaldyne Corp.,* N.L.R.B., No. 8-RD-1976, et al. (on Review of the Regional Directors' administrative dismissals) (discussing Letter from NLRB Information Director David Parker to National Institute for Labor Relations Research (July 16, 2003) in which Parker noted that of the 14,078 Board-supervised union certification and decertification elections that had been held since October 1, 1999, 448 or 3% involved objections, roughly half of which had been filed by employers).

[22]*F. N. Calderwood, Inc.,* 124 NLRB 1211, 1212 & n.2 (1959); *Plant City Welding & Tank Co.,* 119 NLRB 131, 133 (1957).

[23]Freeman & Rogers, What Workers Want (1999) 69, Exh 4.1. Among the employee preferences that might work against trade unions is a desire on the part of employees to deal with their employers regarding workplace issues on a cooperative, rather than adversarial, basis. In the same Freeman and Rogers survey, nonmanagerial workers (union and nonunion) responded by a 63% to 22% margin, that they would prefer an employee organization that management cooperates with in discussing issues, but had no power to make decisions, over one that had more power, but management opposes. *Id.* at 57, Exh. 3.8. In addition, asked to choose among joint employee and management committees, unions or laws, 61% of workers (a group consisting of nonsupervisory personnel

Given the small numbers of employees who participate in Board-supervised elections each year, it is evident that the overwhelming majority of these employees formed their opinions regarding unionism without ever having been exposed to an employer's anti-union electioneering. The greater organizing success that unions enjoy under neutrality agreements, then, may have less to do with the elimination of employer intimidation and Board electoral delays than with (1) the hampering of all forms of employer expression that might tend to feed preexisting doubts about union representation in the minds of employees and (2) the substitution of secret ballot elections with a form of employee polling, i.e., the tabulation of signed union authorization cards, that is far less reliable and far more advantageous to the union.[24]

But, whatever the source of the problem, the neutrality agreement represents an effective union response. Eaton and Kriesky found that unions had a 78.2 percent organizing success rate under neutrality agreements containing both neutrality and card check language.[25] By comparison, unions won approximately 51 percent of representation elections conducted by the Board during the roughly contemporaneous period from 1996 to 2000.[26] Yet, even these figures tend to understate the comparative advantage for a union of organizing under neutrality and card check language, for, as the authors point out, "losses" in their study included "situations in which the union began organizing . . . and found insufficient interest to pursue a full card check or election campaign," a scenario "not included in the NLRB statistics."[27]

Policy Issues

Neutrality agreements have given rise to at least three policy debates upon which organized labor and management have gen-

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and low- and mid-level managers) chose joint committees, 23% chose unions and 16% chose laws as the most effective way to "increase employees' say in the workplace and make sure they are treated fairly." *Id.* at 31, 150–51, Exh. 7.4. These findings bode ill for the electoral prospects of organizations that historically have been associated with an adversarial bargaining process.

[24]Eaton and Kriesky's findings indicate that the card check provision is a more important component of union organizing success under neutrality agreements than the neutrality provision. For, whereas the authors found a 62.5% union success rate under agreements that contained card check, but not neutrality language, they found only a 45.6% union success rate under agreements that contained neutrality, but not card check language. Eaton & Kriesky, *supra* note 5, at 51–52.

[25]Eaton & Kriesky, *supra* note 5, at 52, Table 3.

[26]*See* Daily Lab. Rep. (BNA) No. 244, at C-2 (Dec. 21, 2001).

[27]Eaton & Kriesky, *supra* note 5, at 52.

erally taken opposing sides. The first concerns the use of authorization cards to determine employee support for a labor union. It is widely acknowledged that, all other things being equal, a secret ballot election is a more reliable means of gauging majority sentiment regarding union representation than the solicitation of employee signatures on authorization cards or a petition. Although in *NLRB v. Gissel Packing Co.*[28] the U.S. Supreme Court approved the use of authorization cards as a means of ascertaining majority support for a union in those circumstances in which the employer's conduct has "made the holding of a fair election unlikely,"[29] it acknowledged "that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."[30] More recently, in *Levitz Furniture Co. of the Pacific, Inc.,*[31] the Board likewise "emphasize[d] that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions."[32] Indeed, as the Board noted, the AFL-CIO argued this very point in its brief in that case.[33]

There is, in fact, much empirical support for the proposition that the solicitation of union authorization cards by union organizers constitutes a particularly unreliable means of gauging majority sentiment regarding a union. One study found, based on Board election statistics for 1977, that "there were 27.5 percent more cards presented than yes votes actually cast during the election[s]" that year and that unions actually lost 28 percent of the elections in which they had signed authorizations from 100 percent of the employees in the unit.[34] Other studies have found a similar disconnect between the signing of a union authorization card and the casting of a ballot for a union in a secret ballot election.[35]

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[28]395 U.S. 575 (1969).
[29]*Id.* at 610.
[30]*Id.* at 602.
[31]333 NLRB 717 (2001).
[32]*Id.* at 723.
[33]*Id.* at 719.
[34]Sandver, *The Validity of Union Authorization Cards as a Predictor of Success in NLRB Certification Elections,* 28 Lab. L.J. 696, 699, 701 (1977).
[35]*See, e.g.,* Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment Underlying the Supreme Court's Gissel Decision,* 79 Nw. U. L. Rev. 87, 119 (1984) (finding that "[o]nly when a union had cards from more than 60% of employees did it achieve at least an even chance of winning the election" and that "[u]nions with authorization cards from 90-100% of the employees still won only 65.7% of the time."); Getman, Goldberg & Herman, Union Representation Elections: Law and Reality 101 (1976).

The reasons why union authorization cards might be an unreliable indicator of support for a union are not hard to fathom. Even if union organizers do not use overt threats or intimidation in soliciting an employee's signature on a union authorization card, the very fact that the employee's choice to sign or not sign the card is not secret means that the employee is subject to a variety of pressures that may influence the employee's decision, including peer pressure from the employee's co-workers and personal pressure from a persistent union organizer. Under these circumstances, an employee's signature on an authorization card may reflect nothing more than a desire to be rid of the union representative.[36] An employee also may have reason to fear, even if nothing is stated explicitly, that the union will retaliate against him or represent him less than vigorously should he refuse to sign a card and the union is later recognized as the bargaining representative. It takes an employee with either a stronger-than-ordinary personal constitution or a stronger-than-ordinary conviction regarding unionism to resist such pressures. Moreover, employee opinions regarding a union are apt to fluctuate during the course of the union's organizing drive. Yet, if an employee declines to sign a card on 19 occasions, but agrees to sign it on the 20th, it will only be the vote the employee casts on the 20th occasion that will be recorded. "Most employees having second thoughts about the matter and regretting having signed the card w[ill] do nothing about it. . . ."[37]

Why, then, until it was put in some doubt by the Board's decisions in *Dana Corp. and Metaldyne Corp.*[38] and *Shaw's Supermarkets,*[39] have the Board and the courts had a policy of promoting voluntary recognition on the basis of authorization cards? The explanation usually offered is that such recognition promotes "industrial peace" and the "harmony and stability of labor-management relations."[40] This explanation, however, made more sense in what historically had been the more typical case in which the employer extended recognition voluntarily without the compulsion of a prior commitment to do so under a preexisting recognition agreement. In that context, with little the union can threaten or offer as a quid pro quo, the recognition of the union by the em-

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[36] *See* Note, *Refusal-To-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice,* 33 U. Chi. L. Rev. 387, 390, 391 n.31 (1965).

[37] *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 566 (1967).

[38] 341 NLRB No. 150 (June 7, 2004).

[39] 343 NLRB No. 105 (Dec. 8, 2004).

[40] *MGM Grand Hotel, Inc.,* 329 NLRB 464, 465–66 (1999); *Ford Center for the Performing Arts,* 328 NLRB 1, 4 (1999).

ployer, who is ordinarily presumed to oppose union organization, can be seen as either the employer's bowing to the inevitable or as the product of the employer's calculation that the anti-union campaign that would be needed to dissipate the union's majority would not be worth the cost to its relations with employees and the union.

This explanation makes less sense, though, in the context of the modern neutrality agreement. For, in that context, the employer's recognition of the union, compelled as it is by the parties' prior agreement, no longer serves as a reliable indicator of a conviction on the part of the employer that the union's showing of cards demonstrates that it has majority support. At the same time, the neutrality agreement provides a ready means by which the parties can minimize conflict without depriving employees of the right to express their preferences in a secret ballot election. For instance, in lieu of recognition on the basis of a card check, an employer and a union could agree, as they often do under neutrality agreements, to conduct an expedited secret ballot election and to refrain from making disparaging communications regarding the other. It is difficult to see what industrial strife card check agreements save us from by eliminating such abbreviated and even-tempered election campaigns. Moreover, the legitimation in the eyes of the employer and employees that a union can obtain by winning a secret ballot election can itself be productive of a more stable bargaining relationship.[41]

Conversely, union efforts to obtain card check agreements are themselves often productive of industrial strife. Indeed, efforts by unions to obtain neutrality agreements from employers with whom they do not have an existing collective bargaining contract create a whole area of industrial tension that would not arise in the absence of such agreements.[42]

A second policy issue to which neutrality agreements give rise concerns restrictions contained in many agreements on employers' right to communicate with employees. Employer agreements to refrain from speech might be thought to be less objectionable than card check agreements because, in the former agreements, the employer waives only its rights and those of its representatives, and not those of its employees. And, one can certainly con-

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[41] *See* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 Harv. L. Rev. 1769, 1811–12 (1983).

[42] *See, e.g.,* UNITE (H & M), NLRB Gen. Couns. Mem. 2004 NLRB GCM LEXIS 51 (NLRB GCM, 2004) (Jan. 21, 2004) (discussing mass picketing and other tactics used by union to compel employer to enter into neutrality agreement).

ceive of circumstances when an employer's voluntary acceptance of some restraints on the communication of its views to employees would be unobjectionable from most points of view. For instance, it probably ill behooves an employer that is seeking the union's cooperation in obtaining favorable treatment for the employer from regulatory bodies to simultaneously engage in strident anti-union rhetoric at those employer facilities that the union may be attempting to organize.[43] A neutrality agreement also may be a vehicle by which upper management attempts to ensure that local plant managers and line managers follow company policy regarding the union while at the same time attempting to derive some benefit for this policy from the union at the bargaining table. As a general matter, however, agreements to refrain from noncoercive communication run counter to the policy that underlies the First Amendment, which is designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'"[44] and which is premised on the notion that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ."[45] Given that most employees prefer cooperative workplace arrangements, information regarding their employer's *actual* views regarding a union might be quite valuable to them. Such information, though, often will be denied to them under the terms of a neutrality agreement.

A third policy issue concerns the respective roles of the arbitrator and the Board with regard to union representation matters. In passing the National Labor Relations Act,[46] "Congress plainly meant to do more than simply to alter the then-prevailing substantive law."[47] Rather, "[i]t sought as well to restructure fundamentally the process for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body. . . ."[48]

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[43] *See* Hartley, *supra* note 1, at 391–92 (discussing leverage unions may have in getting employers to enter into neutrality agreements).

[44] *New York Times Co. v. Sullivan,* 376 U.S. 254, 266 (1964) (quoting *Associated Press v. United States,* 326 U.S. 1, 20 (1945)).

[45] *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting). *See also Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market. . . .").

[46] 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2000)).

[47] *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge,* 403 U.S. 274, 288 (1971).

[48] *Id.*

Although the Board defers to arbitration in a number of substantive areas, the Board generally does not defer with regard to representation matters, which lie at the core of the Board's administrative responsibilities and which involve the application of criteria that have few analogs in other statutory or decisional law. Yet, one of the principal objectives of many neutrality agreements is to avoid the Board's processes with regard to representation issues. The result is that neutrality agreements create a high risk of repetitive and conflicting litigation.

Of course, it is not the arbitrator's role to decide cases based on the side he or she may take with respect to any of these policy issues. Nonetheless, the arbitrator should keep in mind that these policy debates exist so that in those areas where the arbitrator has some discretion, such as the formulation of a remedy, the arbitrator does not needlessly tread on possible employer and employee rights or on policies promoted by federal law.

Jurisdiction of Arbitrator

An initial question that an arbitrator may face in a neutrality agreement case is whether the arbitrator should assume jurisdiction over it. The question as to the respective jurisdictions of arbitrators and the Board to consider representation matters and the deference to be paid to arbitral resolution of such issues by the courts is an unsettled area of the law. The principal reason for this is that the law pertaining to this area has developed on two entirely different tracks. On the one track is the strong federal policy announced by the U.S. Supreme Court favoring arbitration as a mechanism for resolving disputes arising under a collective bargaining agreement. Under this policy, "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[49] On the other track is the Board's policy of not deferring to arbitration in representation matters as well as the traditional judicial deference to the Board's primary jurisdiction in this area. Thus, although most courts will abjure consideration of representation issues themselves, leaving such matters to consideration by the Board in the first instance, should the parties contract contain an

[49] *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582–83 (1960).

arbitration clause that is susceptible to an interpretation covering the dispute, some of these same courts will compel the parties to arbitrate these issues.[50]

However, the mere fact that the parties could have been compelled to arbitrate a dispute arising under a neutrality agreement does not necessarily mean that an arbitrator must assume jurisdiction over the issue. For, although a court may avoid considering representation questions in ordering arbitration of a dispute arising under a neutrality agreement, the arbitrator who hears the case may not be able to do so.[51]

It has been the historic policy of the Board not to defer to arbitration in cases that involve representation questions.[52] This policy of nondeferral has extended to issues pertaining to the appropriateness of the unit, including its scope and composition; the eligibility to vote; the validity of union authorization cards; and the representation of employees.[53] Although the Board has recognized an exception to this rule when "the resolution of the underlying issue turns *solely* on the proper interpretation of a collective-bargaining agreement,"[54] the Board's recent opinion in *Shaw's Supermarkets*[55] suggests that the circumstances under which this exception might apply are extremely narrow. In reinstating the employer's election petition following its dismissal by the Regional Director for Region 1, the Board, by a 2-1 majority, found that a fairly standard *Kroger*-type[56] after-acquired-stores clause, under which the employer agreed to "'recognize the union and apply the contract'" at a new store "'when a majority of employ-

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[50] *See, e.g., Service Employees Int'l Union v. St. Vincent Med. Center,* 344 F.3d 977 (9th Cir. 2003); *United Food & Commercial Workers Union v. Shoppers Food Warehouse, Corp.,* 35 F.3d 958 (4th Cir. 1994).

[51] Arbitrators have differed in their willingness to resolve representation questions under the guise of contract interpretation. *Compare Manitowoc Eng'g Co.,* 114 LA 749 (Vernon 2000) (application of contract to employees of affiliate for Board to decide) and *Swift Cleaning & Laundry,* 106 LA 954 (Nelson 1995) (no jurisdiction to consider application of contract to nonunion stores owned by employer) *with A.W. Zengeler, Inc.,* 119 LA 1193 (Kohn 2004) (application of contract to relocated facility is arbitrable) and *ATC/Vancom of Nevada, LP,* 110 LA 626 (King 1998) (application of contract to merged operations is arbitrable). This division partly reflects the broader debate within the arbitral community as to the extent to which arbitrators should consider external law in arbitrations involving private contracting parties. *See generally,* Elkouri & Elkouri, How Arbitration Works, 6th ed. (BNA Books, 2003), 497–509, 524–30.

[52] *Shaw's Supermarkets,* 343 NLRB No. 105 (Dec. 8, 2004), slip op. at 2.

[53] *Id.; Mt. Sinai Hosp.,* 331 NLRB 895, 899 (2000), *enforced,* 8 Fed. Appx. 111, 2001 U.S. App. LEXIS 10463 (2d Cir. 2001); Carr-Gottstein Foods Co., 307 NLRB 1318, 1319 (1992).

[54] *MCAR, Inc.,* 333 NLRB 1098, 1105 (2001) (emphasis added).

[55] *Supra* note 52.

[56] *Kroger Co.,* 219 NLRB 388 (1975).

ees ha[d] authorized the Union to represent them,'"[57] did not, by itself, eliminate representation questions within the Board's primary jurisdiction, in part, because the clause did not specify "what the appropriate unit at [the new store was] or who the eligible employees [were]."[58] Although the Board noted that it had reached a contrary conclusion with respect to similar contract language in a 2-1 decision in *Central Parking System, Inc.*,[59] the Board stated that this latter holding "was contrary to the general rule that the Board does not defer representation case issues to arbitration" and that by reinstating the employer's petition it "ke[pt] open the possibility that the Board will abide by the general rule rather than *Central Parking*."[60]

In many neutrality agreement disputes the question of the Board's primary jurisdiction over representation matters will not come to a head. For instance, an arbitrator generally can remedy an employer's violation of a neutrality pledge without becoming embroiled in on representation matters. However, in other kinds of neutrality agreement cases, such as those involving a dispute regarding the composition of the bargaining unit, resolution of representation issues may be unavoidable. In view of *Shaw's Supermarkets,* a reasonable conclusion for an arbitrator to draw would be that the arbitrator should not assume jurisdiction over grievances that require the arbitrator to decide representation questions unless the contract is highly specific as to how they are to be resolved or the parties agree to arbitral resolution of the issue at the time of the hearing.[61]

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[57] *Shaw's Supermarkets,* 343 NLRB No. 105 (Dec. 8, 2004), slip op. at 3 (Member Walsh, dissenting) (emphasis by Walsh omitted).

[58] *Id.* at 1.

[59] 335 NLRB 390 (2001).

[60] *Shaw's Supermarkets,* 343 NLRB No. 105 (Dec. 8, 2004), slip op. at 2.

[61] With respect to unit determinations, it might be argued that just as the Board "give[s] full force and effect to [a unit] stipulation" by an employer and a union that "does not contravene the provisions of the [NLRA] or established Board policy," *Hampton Inn & Suites,* 331 NLRB 238, 239 (2000), even though the unit designation made may differ from the one the Board would have made on its own, *id.* at 238–39, the Board should similarly defer to unit designations made by an arbitrator when these do not contravene the NLRA or established Board policy. In both cases the unit designations are, either directly or ultimately, the product of the parties' agreement. However, the Board does not honor unit stipulations "where the objective intent [of the parties] is unclear or the stipulation ambiguous. . . ." *Genesis Health Ventures, L.P.,* 326 NLRB 1208, 1208 (1998). Although a neutrality agreement may clearly authorize an arbitrator to resolve questions concerning unit composition, it is not for that reason clear about the unit designations to be made.

The Meaning of Neutrality

An arbitrator endeavoring to give substance to an employer's commitment to remain "neutral" with respect to a union's organizing efforts will find little guidance from the usual sources of arbitral and judicial authority. Although there have been many arbitration cases involving alleged violations of neutrality agreements, only a few awards in these cases have been published. Efforts to find authority on this issue are further stymied by the fact that most neutrality agreements define or qualify the employer's neutrality obligation in some way. About the most that can be gleaned from these sources is that while an unqualified commitment by the employer to remain neutral may preclude an employer from expressing outright opposition to union organization, it does not command the employer to silence with regard to the subject of the union's organizational efforts.[62]

Nevertheless, even in the absence of arbitral and judicial authority to draw upon, there would appear to be a number of inferences that can be safely made as to what neutrality entails. A seemingly useful thought experiment is to consider the kinds of communications that might be made during a union organizing campaign by an employer who was genuinely neutral as to its outcome. This thought experiment would seem to yield at least four classes of communications that an employer can engage in without violating a neutrality pledge even without specifically reserving a right to do so in the neutrality agreement. The first concerns responding to a union's factually inaccurate or disparaging communications about the employer. To illustrate, an employer might give representatives of a charity, such as the United Way, access to its property for the purpose of soliciting charitable contributions from its employees. Management might be neutral or even sup-

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[62] *See Alden North Shore and Alden Naperville,* 120 LA 1469, 1500 (Malin 2004) (contractual obligation "to remain neutral…does not require the employer to remain mute"); *International Union, UAW v. Dana Corp.* (Sept. 17, 1999) (Glendon, Arb.), at 5, 21, *quoted in Internatioal Union, UAW v. Dana Corp.,* 278 F.3d 548, 552–53 (6th Cir. 2002) (finding that employer's avowal in neutrality agreement that it had " 'no objection to the UAW becoming the bargaining representative of [its] people' " and pledges to " 'continue [its] commitment of maintaining a neutral position on this matter'" and to communicate with employees only in a " 'pro-Dana manner' " could not be "reconcile[d] with…any communication of outright *opposition* 'to the UAW becoming the bargaining representative,'" but observing that the neutrality agreement did not "sentence[ ]" Dana "to silence in a UAW organizing campaign . . ."); *Dana Corp.,* 76 LA 125, 129 (Mittenthal 1981) (noting that "[t]rue neutrality would mean…that Dana…could not be for or against the UAW," but finding "that kind of strict neutrality d[id] not appear to have been contemplated by the parties.").

portive of the charity's efforts. However, if in the course of soliciting donations the charity's representatives demeaned or conveyed factually incorrect information unfavorable to the employer, management almost certainly would be inclined to respond. Management also might publicly urge the representatives to refrain from similar communications in the future. No different rule should apply to unions and their representatives. Any inference that employees might draw that an employer is not neutral regarding the union's organizing success in those cases where the employer has responded, perhaps even on multiple occasions, to a union's factually inaccurate or disparaging statements would be attributable to the union's conduct, not the employer's. Indeed, the implausibility of a formal position of neutrality by an employer in the face of an ongoing attack by a union suggests that a neutrality commitment by an employer implies a certain level of reciprocal restraint on the part of the union even if the neutrality agreement does not so specify.

A second class of communications that would seem to be consistent with neutrality is factually accurate communications that are made in response to employee inquiries and that neither demean the union, nor contain expressions of opposition to it. A helpful reference point in gauging what an employer may communicate this way is the judicial interpretation of certain provisions of the Railway Labor Act.[63] That Act, which contains no comparable protection of employer free speech as the NLRA provides in Section 8(c),[64] states that "[r]epresentatives . . . shall be designated by the respective parties without interference, influence or coercion . . . by the other. . . ."[65] As Messrs. Kramer, Miller and Bierman point out in an early article on the subject of neutrality agreements, this language is "arguably more restrictive than an agreement to remain 'strictly neutral. . . .' "[66] Yet, as these authors also point out,[67] in interpreting this injunction against employer "influence," the Supreme Court concluded that "[t]he use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee."[68] Similarly, a manager need not remain

[63] 45 U.S.C. §§ 151–188 (2000).
[64] 29 U.S.C. § 158(c) (2000).
[65] 45 U.S.C. § 152 (2000).
[66] Kramer, Miller & Bierman, *supra* note 6, at 58.
[67] *Id.*
[68] *Texas & N.O.R.R. v. Brotherhood of Ry. & S.S. Clerks,* 281 U.S. 548, 568 (1930).

mute when questioned about matters pertaining to the union's organizing drive any more than the manager would likely remain mute when queried by an employee about other subjects about which the manager was neutral, but concerning which the manager had information. A manager, then, might address a broad range of topics relating to the union's organizing drive provided that the manager was not intentionally misleading and did not express opposition to the union. Such topics might include the significance of signing an authorization card and the right of an employee to revoke it, the process of collective bargaining, and the comparative wages and benefits of nonunion employees at the particular plant or firm and employees represented by the union, among many others.

A third class of employer communications that would appear to conform to a neutrality commitment is unsolicited communications regarding a union representation election that do not tend to steer employees either in the direction of voting for or voting against a union. Unsolicited communications regarding the makeup of the proposed bargaining unit and the mechanics of the union representation election process would be possible examples of such communications.

Finally, a neutrality pledge would not seem to prohibit the employer from making positive communications about itself. An employer has a number of reasons for touting its own wages and benefits quite apart from any desire on the part of management to thwart union organization, including promoting employee job satisfaction, reducing employee turnover, and increasing employees' interest in production by reminding them of possible financial incentives built into the employer's compensation package. These reasons do not disappear because a union is attempting to organize the employer's employees. Indeed, the cloud of innuendo that a union organizing campaign may generate with respect to the employer's fairness and the adequacy of its compensation package may precipitate the need for such pro-employer communications.

Because most neutrality agreements either define what is meant by neutrality or qualify the employer's neutrality obligation in some way,[69] some insight as to what is implied by neutrality when the concept is undefined may be gleaned from those agreements in which it is defined. Arguably, the presence of definitional lan-

[69] *See* Eaton & Kriesky, *supra* note 5, at 47.

guage in other agreements can cut both ways with respect to agreements that lack such language. On the one hand, such definitions may indicate what unions and employers generally mean by the notion of neutrality. On the other hand, the presence of a definition of neutrality in an agreement may be seen as evidence that the parties place a special meaning on the term "neutral" that is different from what parties ordinarily understand by it. Similarly, the reservation of certain rights to communicate with employees by an employer in other neutrality agreements may be taken as a clarification of what employers typically understand by the notion of neutrality or, conversely, as William Guzick argues, that when no such reservation of right is made that the employer does not enjoy such rights.[70] Nevertheless, given the ambiguous nature of the notion of neutrality and the dearth of judicial and arbitral explications of this concept, it would seem to be the better view that such definitions and reservations of right as can be found in many contracts more likely clarify what is generally meant by neutrality rather than describe exceptions to it.

Viewed from this perspective, the various neutrality agreements that define or expand upon the employer's rights and obligations in some way are instructive. Virtually all such agreements evince an expectation that the employer will communicate with employees regarding the union's organizing drive. For instance, in the CWA's neutrality agreement with Ameritech Publishing, Inc. (API), API agrees that,

> During CWA organizing attempts, API managers will maintain a policy of neutrality and will not advise employees concerning how they should respond or vote. However, API retains its right to respond openly to employees' questions, to freely discuss facts relative to issues, and to correct any misinformation.[71]

Similarly, the UAW's neutrality agreement with Alcoa provides,

> The Company agrees to a position of neutrality in the event that the Union seeks to represent any nonrepresented employees of the Aluminum Company of America. Neutrality means that the Company shall not comment negatively concerning the integrity or character of the Union or its officials.
>
> The Company's commitment to remain neutral shall cease if the Union, its agents, or its supporters comment negatively on the integ-

[70]Guzick, *supra* note 6, at 442–43.
[71]Collective Bargaining Negot. & Cont. (BNA), 140:1501 (Mar. 12, 1998).

rity or character of the Aluminum Company of America or its representatives.[72]

A further factor counseling against the over-interpolation of restrictions on employer speech rights from a generally worded neutrality agreement and, hence, the imposition of possibly unanticipated restrictions on an employer's ability to communicate with employees, is the doctrine of waiver. The right of an employer to engage in noncoercive communications with employees regarding the subject of union organization is protected by both Section 8(c) of the NLRA and the First Amendment. With regard to the former, the Board requires that a contractual waiver of a statutory right under the NLRA must be clear and unmistakable.[73] Arbitrators have often invoked this rule on behalf of a union's statutory right to bargain in the face of a claim that this right had been waived by a broad management rights or zipper clause.[74]

Likewise, the U.S. Supreme Court has stated that "[t]here is a presumption against the waiver of constitutional rights and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.' "[75] The Court has specifically applied this presumption against waivers of First Amendment rights[76] and lower courts have extended this presumption to claimed contractual waivers of these rights. Thus, in *Erie Telecommunications, Inc. v. City of Erie,*[77] the Third Circuit explained that to be effective a contractual waiver of First Amendment rights "must be voluntary, knowing, and intelligent, and must be established by 'clear' and 'compelling' evidence."[78]

Unless specifically defined in the agreement, the notion of remaining "neutral" toward a union is an inherently ambiguous one. Uncertainty as to the obligations that a neutrality agreement may entail is further compounded by the fact that, in many agree-

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[72] *Id.*

[73] *Wayne Mem'l Hosp. Ass'n,* 322 NLRB 100, 104 (1996); *Queen of the Valley Hosp.,* 316 NLRB 721, 722 (1995); *Northern Pac. Sealcoating, Inc.,* 309 NLRB 759, 759 (1992).

[74] *E.g., Columbian Chems. Co.,* 120 LA 11, 14 (Grupp 2004); *Walgreen Co.,* 85 LA 1195, 1198 (Wies 1985).

[75] *Brookhart v. Janis,* 384 U.S. 1, 4 (1966) (citations omitted). *See also Fuentes v. Shevin,* 407 U.S. 67, 95 (1972) (contractual waiver of constitutional rights "must, at the very *least,* be clear.").

[76] *Curtis Pub. Co. v. Butts,* 388 U.S. 130, 145 (1967) (Court will not infer waiver of First Amendment rights "in circumstances which fall short of being clear and compelling.").

[77] 853 F.2d 1084 (3d Cir. 1988).

[78] *Id.* at 1094 (citations omitted). *See also Lake James Community Volunteer Fire Dep't v. Burke County,* 149 F.3d 277, 280 (4th Cir. 1998); *Davies v. Grossmont Union High School Dist.,* 930 F.2d 1390 (9th Cir. 1991).

ments, the employer's obligation to remain neutral is conditioned upon the absence of some provocation or "undue provocation" by the union. The doctrine of waiver means that doubts as to what such contract language permits or forbids should be resolved in favor of the party, usually the employer, seeking to exercise its right of free speech.

Remedies

The arbitral remedies for employer breaches of neutrality and card check agreements generally have fallen within the following categories: orders to require the employer to recognize the union;[79] to cease and desist from further violations of the agreement; to engage in some form of compelled speech, including issuing withdrawals of prior employer communications; to publicize the arbitrator's findings; to restrain or discontinue specified anti-union communications (e.g., by removing anti-union pages from an employee handbook); to provide the union with a right of reply to offending employer communications; to grant the union access to the employer's premises to communicate with employees on an individual or group basis; to take steps to enable the union to police future violations of the neutrality agreement; to pay money damages—principally, paying for the cost of the arbitration; and to provide for a rerun election.[80] Board policies and the judicial presumption against the contractual waiver of First Amendment rights suggest that in crafting a remedy, arbitrators generally should steer clear of recognition orders or orders that either compel or restrain speech.

Recognition Orders

The need for an arbitrator to consider Board policy regarding representation disputes is perhaps at its greatest when it comes time for an arbitrator to formulate a remedy. It is the arbitrator's

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[79]Such an order may entail the application of a collective bargaining agreement to the facility that is the subject of the dispute and damages that may have accrued as the result of the employer's failure to apply the contract. *See, e.g., A.W. Zengeler, Inc.,* 119 LA 1193, 1207–08 (Kohn 2004).

[80]*See, e.g., AK Steel Corp. v. United Steelworkers of America,* 163 F.3d 403 (6th Cir. 1998) (enforcing arbitrator's access award); *Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel,* 996 F.2d 561 (2d Cir. 1993) (enforcing arbitrator's recognition order); *Timken Co.,* 119 LA 306, 312 (Duff 2003); *Dana Corp.,* 76 LA 125, 132 (Mittenthal 1981); *International Union, UAW v. Dana Corp.* (Sept. 17, 1999) (Glendon, Arb.), at 41–42, *award summarized in* Davies, *supra* note 11, at 221; *International Union, UAW v. CMH Global, N.V.* (Apr. 12, 2002) (Ipavec, Arb.), at 23–24.

charge to endeavor to make the grieving party whole for the injury resulting from the respondent's breach of contract. This may not be accomplished if the arbitrator chooses a remedy that is later rejected by the Board as being inconsistent with the policies of the NLRA.

The potential for conflict with the Board in neutrality agreement cases is at its zenith when the arbitrator orders an employer to recognize a union as the collective bargaining agent of a group of employees or awards damages that are predicated on the assumption that the employer has a duty to recognize the union as the representative of these employees. Current Board policy indicates that the circumstances in which it might be appropriate for an arbitrator to order an employer to recognize the union are extremely limited. One such circumstance would be when the neutrality agreement calls for an arbitrator to verify that the union has obtained authorization cards from a majority of employees in an agreed-upon unit and there is either no dispute regarding the composition of the unit or the validity of the cards or the dispute solely concerns the interpretation of contract terms and does not require the arbitrator to apply statutory criteria. An example of the latter might be an arbitration in which the sole dispute concerns whether an after-acquired-stores clause applies to a particular facility.

Representation issues also may be removed from a contractual dispute by prior Board action or inaction. For instance, in *Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel,*[81] the arbitrator held a card count in abeyance pending the Board's investigation of a charge that the union had used coercion in obtaining the authorization cards. Following the dismissal of that charge, and without any further charges pending, the arbitrator verified the card majority and ordered the employer to recognize the union.[82]

The circumstances in which it might be appropriate for an arbitrator to employ a recognition order as a *remedy* for a breach of a neutrality agreement would seem to be narrower still, arising only in those pre-election situations in which all of the following conditions apply: the union has obtained a card majority in the sought-after unit,[83] there is no dispute regarding the validity of

[81] 996 F.2d 561 (2d Cir. 1993).
[82] *Id.* at 564, 568.
[83] *Gourmet Foods, Inc.,* 270 NLRB 578, 586 (1984).

the cards that requires the arbitrator to apply statutory criteria, there is either no dispute regarding the composition of the unit or the dispute is resolvable solely by reference to the contract, and the contract specifically states that the arbitrator may order the employer to recognize the union on the basis of cards in the event that the arbitrator has found the employer to be in violation of the neutrality agreement.[84] This last criterion is essential because the Board requires that an employer's or union's waiver of the right to petition the Board for an election, like the waiver of other statutory rights, must be clear and unmistakable.[85] However, no such waiver could be clearly and unmistakably inferred from a neutrality agreement that either contemplates that the parties will proceed to a Board-supervised election or is silent with regard to the issue.

Nor could such a waiver seemingly be inferred merely from the fact that the neutrality agreement provides for a private election. Although contract language that specifically calls for a private election may, when considered in isolation, seem to waive an employer's right to a Board-supervised election, the very fact that the agreement calls for a private election suggests that the employer's waiver is not absolute, but conditioned upon the availability of the private alternative. When that condition is not met, absent some further evidence from the language of the neutrality agreement

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[84]There would appear to be no circumstances in which the Board would defer to an arbitrator's order that an employer recognize a union following an election that the union has lost. Although the employer in this hypothetical situation *could* have agreed to recognize the union on the basis of cards, either at the time of a union proffer of cards or pursuant to a prior card check agreement, the employer did not do so. As such, the intervening evidence of majority sentiment provided by the election ordinarily would seem to preclude the employer from subsequently recognizing the union on the basis of cards that the union obtained prior to the election. *Cf. Human Dev. Ass'n,* 293 NLRB 1228, 1236 (1989), *enforced*, 937 F.2d 657 (D.C. Cir. 1991) (in recognizing union on the basis of authorization cards, employer may not rely on cards signed by employees who also signed authorization cards for other union prior to employer's voluntary recognition of union). Arguably, because the Board, itself, will ignore election results and issue a bargaining order if the employer's pre-election unfair labor practices were so egregious as to render "the holding of a fair [rerun] election unlikely," *Faith Garment Co. Div of Dunhall Pharmaceutical, Inc.,* 246 NLRB 299, 299–300 (1979), *enforced,* 630 F.2d 630 (8th Cir. 1980), an arbitrator might do so under the same circumstances when the arbitrator sits in the role of the Board. However, the determination of whether a fair rerun election is possible necessarily "involv[es] the application of statutory policy, standards and criteria . . ." and, hence, constitutes an issue to whose arbitral the Board would not defer. *Central Pa. Reg'l Council of Carpenters (Novinger's, Inc.),* 337 NLRB 1030, 1034 (2002), *enforced*, 352 F.3d 831 (3d Cir. 2003).

[85]*A-1 Fire Protection, Inc.*, 250 NLRB 217, 220 (1980), *resolution remanded on other grounds sub nom. Road Sprinkler Fitters Local Union No. 669 v. NLRB,* 676 F.2d 826 (D.C. Cir. 1982), *on remand* 273 NLRB 964 (1984), *enforced sub nom. Road Sprinkler Fitters Local Union No. 669 v. NLRB,* 789 F.2d 9 (D.C. Cir. 1986).

or elsewhere, the employer's intent would appear to be ambiguous, at best.

A further factor counseling against an arbitrator's imposition of a bargaining order as a remedy for an employer's violation of a neutrality agreement is the arbitral and judicial policy against awarding speculative damages. Whether a union would have won a representation election but for an employer's misfeasance ordinarily will be a matter of complete conjecture. Scholars disagree as to the effect of unfair labor practices on the outcomes of union representation elections.[86] These uncertainties are magnified when the complained-of conduct by the employer consists of noncoercive violations of a neutrality agreement.

Cease and Desist Orders and Other Restrictions on Employers' Speech

Perhaps the most often invoked and, from the employer's point of view, least objectionable remedy imposed for an employer's violation of a neutrality commitment is an order for the employer to cease and desist from speech that violates the agreement. However, potential conflicts with policies promoted by the First Amendment arise when an arbitrator attempts to sanction an employer by formulating more extensive restrictions on employer speech than those specifically agreed to in the neutrality agreement.

The First Amendment doctrine of waiver reflects the view that, because of the paramount interest that an individual or organization has in the ability to exercise his, her, or its right of free speech under the First Amendment, a contractual waiver of this right should not be readily inferred, but found only where it is manifest that this waiver was "knowing, voluntary and intelligent."[87] This interest is equally strong whether the arbitrator is interpreting a neutrality agreement or devising a remedy for a breach thereof. Thus, just as the arbitrator should not readily infer a waiver of an employer's right to communicate with employees when interpreting the contract, the arbitrator should not impose limitations on that right in formulating a remedy unless it is clear that the employer either agreed to such limitations or agreed that the

[86] *Compare* Getman, Goldberg & Herman, *supra* note 35, at 115–16, 126, 141, 154 and Cooper, *supra* note 35, at 115–18, 139 *with* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 Harv. L. Rev. 1769, 1781–86 (1983) and Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again,* 36 Indus. & Lab. Rel. Rev. 560 (1983).

[87] *Leonard v. Clark,* 12 F.3d 885, 889 (9th Cir. 1993), *amended,* 1993 U.S. App. LEXIS 36532 (9th Cir. Dec. 27, 1993).

arbitrator could impose such limitations to remedy its breaches of the neutrality agreement.

Retractions and Affirmations of Neutrality

One of the problems with providing remedies for violations of neutrality agreements is that many of these agreements are sought by unions for what might be considered the improper purpose of misleading employees as to an employer's actual sentiments regarding the union. Although some employers enter into these agreements out of a philosophical commitment to cooperate with the union, one can have no confidence that professions of neutrality extracted from an employer as a result of a corporate campaign, picketing, or political pressure reflect the employer's actual sentiments. As a result, in many cases, the facade of neutrality is easily punctured and, once punctured, difficult to repair. The temptation for the arbitrator in such a case is to attempt to do the impossible and, thus, to require the employer to engage in various forms of compelled speech that can sometimes have the aura of the denunciatory placard and dunce cap. Such orders should be avoided not only because they can be simultaneously punitive and ineffective, but also because they infringe on First Amendment freedoms.

The Supreme Court has found that the "freedom of speech" guaranteed by the First Amendment "necessarily compris[es] the decision of both what to say and what not to say."[88] In emphasizing the equivalent status under the First Amendment of "[t]he right to speak and the right to refrain from speaking," the Court has described these two rights as but "complementary components of the broader concept of 'individual freedom of mind.' "[89] This right not to speak encompasses not only the right to refrain from "compelled statements of opinion," but also "compelled statements of 'fact' "[90] and applies to both individuals and corporations.[91]

Thus, an arbitrator's order requiring an employer to publicly withdraw communications found to be in violation of the neutrality agreement and to make such further avowals of neutrality as the

[88] *Riley v. National Federation of the Blind, Inc.,* 487 U.S. 781, 796 (1988).
[89] *Wooley v. Maynard,* 430 U.S. 705, 714 (1977) (quoting *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 637 (1943)).
[90] *National Federation of the Blind, Inc.,* 487 U.S. at 797–98.
[91] *See United States v. United Foods, Inc.,* 533 U.S. 405 (2001) (mandatory assessments used primarily to fund advertising promoting mushroom sales violated corporation's First Amendment right to refrain from speech).

arbitrator deems necessary to remedy the employer's breach of the neutrality agreement once again raises the issue of waiver. For this reason an arbitrator should eschew orders that require the employer to "withdraw" communications or to make avowals of neutrality beyond those contained in the neutrality agreement unless the arbitrator determines that the employer has clearly waived its right to refrain from making these communications.[92] Such a waiver, however, cannot be inferred merely from an employer's generalized commitment to remain neutral during a union organizing drive or from an employer's agreement to submit disputes arising under a neutrality agreement to arbitration. Likewise, the employer's mere acquiescence with prior arbitral awards ordinarily would not establish the requisite waiver.[93]

Right of Reply

Rather than attempting to remedy violations of a neutrality agreement by imposing further limits on an employer's speech rights or by attempting to rebuild a false impression of subjective neutrality on the part of management toward the union, it would be preferable to respond to such violations by increasing the union's ability and opportunity to communicate with employees. Such an approach would be more in keeping with the stated goal of unions to create a more level playing field for union organization. It also would be more in keeping with the First Amendment principle that the answer to objectionable speech is "more speech, not enforced silence."[94]

One way that an arbitrator can remedy a neutrality agreement violation without infringing an employer's right of free speech is

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[92]On the other hand, there would seem to be nothing objectionable from the point of view of the employer's First Amendment rights in requiring the employer (a) to post notices or to send letters to employees to publicize the fact that the arbitrator has found the employer to be in violation of the neutrality agreement or to make copies of an arbitration award available to employees, as these would be the arbitrator's communications and not the employer's, or (b) to republish its commitments in the neutrality agreement, as this communication was agreed to by the employer and remains in effect.

[93]*See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 n.13 (1983) (union's failure to seek modification of the contractual no-strike clause following two arbitration decisions upholding imposition of disparately severe punishment of union officials for their participation in unlawful strikes did not constitute a waiver by the union of the statutory protection against such treatment where the arbitrator did not find "that the bargaining agreement itself clearly and unmistakably impose[d] an explicit duty on union officials to end unlawful work stoppages" and the two arbitrations did not create so "clear and consistent [a] pattern" that the parties might be deemed to have incorporated "the decisions into their subsequent bargaining agreements.").

[94]*Linmark Associates, Inc. v. Town of Willingboro*, 431 U.S. 85, 97 (1977) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

for the arbitrator to afford the union a right of reply. For instance, in one case, as a remedy for the employer's distribution of what the arbitrator took to be a non-neutral flyer with employee paychecks, the arbitrator ordered the employer to distribute a flyer prepared by the union with employee paychecks for a subsequent pay period.[95]

Access and Other Remedies

Another way that an arbitrator can increase the union's opportunity to communicate with employees is by providing the union with additional access to the employer's property. However, because such remedies implicate employer property rights, some further considerations apply to the formulation of such remedies.

A well-established principle of arbitral remedies is that "[r]emedies that are novel in form" or the source of "possible well-founded surprise" should be avoided.[96] This principle is especially relevant in the context of an alleged violation of a neutrality agreement where, for employers and arbitrators, at least, the accessible precedent is scarce; the injury claimed—an alteration in the views of employees as to the desirability of union representation—lends itself to no easy measurement; and the remedies that might conceivably alleviate the injury are numerous and varied. A useful guide for an arbitrator, then, in devising remedies for breaches of a neutrality agreement is whether the right afforded by the remedy is of the same type as rights already afforded by the neutrality agreement. Ideally, the remedy should flow from the nature of the violation.

This rule may be profitably applied to access remedies. The Supreme Court has recognized that, except in certain unusual cases, such as a company town, employers have a right to exclude union organizers from their property provided the employer does so on a nondiscriminatory basis.[97] In light of this historic recognition of employer property rights, an employer would have cause for surprise if an arbitrator ordered an employer to grant the union access to the employer's property where the agreement did not grant the union such access in some manner.

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[95] *Alden North Shore and Alden Naperville,* 120 LA 1469, 1513 (Malin 2004).

[96] Ryder, *Arbitrators and the Remedy Power: Discussion,* Labor Arbitration and Industrial Change, Proceedings of the 16th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books 1963), 69, quoted in Elkouri & Elkouri, *supra* note 51, at 1192.

[97] *Lechmere, Inc. v. NLRB,* 502 U.S. 527, 539-40 (1992); *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 112–13 (1956).

Where, however, the employer's neutrality agreement with the union contemplates that union organizers shall have access to the employer's property, then the employer's property interest in excluding the union is vitiated in much the same way it is vitiated when the employer allows the general public or other outside organizations access to certain areas of the employer's property.[98] In such circumstances, an employer would seem to have little cause for surprise or complaint should an arbitrator attempt to remedy a breach of the neutrality agreement by affording the union additional access to similar areas of the employer's property for the purpose of communicating with employees in the sought-after unit, provided such access does not interfere with the employer's operations or the ingress and egress of the employer's employees, customers, and contractors.[99]

Of course, providing unions with additional avenues for communicating with employees is not the only way that an arbitrator can effectuate a remedy for violations of a neutrality agreement without impinging on an employer's statutory or First Amendment rights or on employees' interest in exercising their right of free choice concerning union representation under the protections afforded by a secret ballot election. For instance, in an arbitration involving Dana Corp. and the UAW, Arbitrator Mittenthal ordered Dana to agree to an expedited election should the UAW request one. [100] Most neutrality agreements will allow the arbitrator to make similar adjustments in attempting to restore the organizing environment to one that is more favorable to the union.

Conclusion

In sum, the emergence of employer neutrality agreements has thrust arbitrators into a role that historically has been reserved for the Board. In filling this unfamiliar role, arbitrators should take care that they do not inadvertently impede the exercise of employer and employee rights or infringe upon matters properly resolved by the Board. In particular, an arbitrator should be cognizant that neutrality agreements ordinarily do not command em-

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[98] *See Lechmere, Inc.*, 502 U.S. at 535.

[99] *Cf. AK Steel Corp. v. Steelworkers,* 163 F.3d 402 (6th Cir. 1998) (upholding arbitrator's award that granted Steelworkers access to employer's property for the purpose of communicating with represented employees regarding the ratification of an affiliation agreement as remedy for violation of neutrality agreement that provided for such access for the purpose of organizing unorganized employees).

[100] *Dana Corp.,* 76 LA 125, 132 (Mittenthal 1981).

ployer silence and that the presumption against the waiver of the right of free speech dictates that contractual waivers of that right should not be liberally inferred. Likewise, in devising a remedy for an employer's breach of a neutrality agreement, an arbitrator should bear in mind that the interests of employees and the parties, alike, are probably better served by the expansion of a union's opportunities to communicate with employees than by an employer's enforced silence and compelled and, quite likely, insincere-sounding disavowals of its prior communications.