

NEUTRALITY AGREEMENTS: THE NEW FRONTIER IN LABOR RELATIONS — FAIR PLAY OR FOUL?†

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[The first amendment presumes that] information is not in itself harmful, that people will perceive their own best interest if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Justice Harry A. Blackmun¹

The success of the enterprise, like the success of a marriage, depends upon the satisfactory adjustment of the conflicts and frictions in the day-to-day life of [labor and management]. . . . These adjustments must be made by the parties themselves and require daily cooperation in tolerant and generous consideration of each other's needs and complaints. And it is only by their honest and daily cooperation that the parties can achieve the greater end — an efficient enterprise operating with justice for those engaged in it and for the public welfare. That, indeed, is the ultimate justification for both private enterprise and labor unions.

Dean Harry Shulman²

One of the most significant recent developments in the field of labor relations has been the adoption of "neutrality agreements" in the automobile, tobacco and tire industries. Neutrality agreements generally require employers to remain "neutral" toward union organizational efforts at their facilities where employees are not presently represented by a union. Neutrality pledges greatly facilitate union organizing by restricting management's ability to take actions opposing union organizing efforts. Unions are able to obtain neutrality pledges covering nonunion facilities via their bargaining strength at an employer's unionized facilities. Such agreements constitute a form of cooperation between labor and management. While cooperation between labor and man-

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¹ Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

² OPINIONS OF THE ARBITRATOR, FORD MOTOR CO. — UAW, Section III preface (published privately 1946) quoted in H. Wellington, LABOR AND THE LEGAL PROCESS 91 (1968).

agement ordinarily should be encouraged,³ neutrality agreements are at variance with the right of individual employees to receive election information, and the employer's concomitant right of free speech, a right protected by the National Labor Relations Act⁴ and the first amendment.⁵

The primary purpose of this article is to examine these conflicts and to consider the impact of neutrality agreements upon national labor policy. To this end, various issues arising from the advent of such agreements will be addressed. First, the recent emergence of neutrality agreements as a significant organizing device will be examined against the backdrop of organized labor's setbacks in other areas. A discussion of the scope of a neutrality pledge and a tentative definition of "neutral" conduct will follow in the context of a review of several neutrality agreements. This article will then address the proper status of neutrality agreements as subjects of collective bargaining and review several problems in interpreting such agreements. The various forums in which such agreements may be enforced will also be surveyed. Finally, the article will consider the basic issue of whether neutrality agreements are lawful.

I. DEVELOPMENT OF NEUTRALITY AGREEMENTS

Labor neutrality agreements are of relatively recent origin. It was not until 1976 that the United Automobile, Aerospace, and Agricultural Implement Workers Union (UAW) and the General Motors Corporation (GM) entered into the first such agreement. The UAW-GM neutrality agreement was contained in a letter⁶ between the parties which was incorporated into their collec-

³ See generally *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 6 (1937); *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 631 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975); *NLRB v. Keller Ladders Southern, Inc.*, 405 F.2d 663, 667 (5th Cir. 1968).

⁴ 29 U.S.C. § 151 *et seq.* (1976).

⁵ U.S. CONST., amend. I.

⁶ The contents of this letter agreement are as follows:

Dear Mr. Bluestone:

During the course of the 1976 negotiations, the Union has expressed concern regarding activities undertaken by local management opposing the Union's efforts to organize production and maintenance employees at several recently established plant locations.

Over the years General Motors has developed constructive and harmonious relationships based upon trust, integrity, and mutual respect with the various unions which currently represent its employees. These relationships date back, in the case of the UAW, nearly 40 years. General Motors places high value on the continuation and improvement of constructive relationships with these unions as well as with all of its employees, union and nonunion alike.

In situations where the UAW seeks to organize employees not presently represented by a union, General Motors management will neither discourage nor encourage the Union's efforts in organizing production and maintenance employees traditionally represented by the Union elsewhere in General Motors, but will observe a posture of neutrality in these matters.

For its part, General Motors expects that the Union will conduct itself in

tive bargaining agreement.⁷ In this letter General Motors agreed that it would remain "neutral" with respect to any UAW efforts to organize employees at nonunionized General Motors locations.⁸

Since the UAW's initial success in obtaining a neutrality agreement from General Motors, neutrality agreements have played an increasingly important role in labor relations nationwide. The UAW, for example, has sought and obtained such agreements in its negotiations with several other employers.⁹ The United Rubber, Cork, Linoleum and Plastic Workers Union (URW) has also been active in this area, and has obtained neutrality pledges from most of the major rubber tire manufacturers.¹⁰ While the UAW and URW have served as the vanguard in promoting neutrality agreements, other unions have also successfully pressed this issue at the bargaining table. The International Union of Electrical, Radio and Machine Workers (IUE) and the Bakery, Confectionery and Tobacco Workers, for example, have both recently obtained neutrality agreements from major companies.¹¹

such organizing campaigns in a constructive and positive manner which does not misrepresent to employees the facts and circumstances surrounding their employment.

Very truly yours,

GEORGE B. MORRIS, Jr.
Vice President

* * *

Dear Mr. Morris:

The Union expects to conduct itself in a manner which neither demeans the Corporation as an organization nor its representatives as individuals. Should the Corporation charge that representatives of the Union have engaged in such conduct, the National General Motors Department will investigate and, if it finds the charge accurate, seek in good faith to remedy such conduct. Should the Union not remedy the situation, it is expected that the Corporation will communicate with its employees on the matter.

Sincerely,
IRVING BLUESTONE,
Vice President
Director, General Motors
Department

LEONARD WOODCOCK
President

[1976] DAILY LAB. REP. (BNA) A-13-14 (Dec. 8, 1976).

⁷ *Id.*

⁸ *Id.*

⁹ See, e.g., Neutrality Letter of Agreement Between International Harvester Co. and the UAW, May 2, 1980; Neutrality Letter of Agreement Between Dana Corp. and the UAW, December 7, 1979.

¹⁰ See Craft, *The Employer Neutrality Pledge: Issues, Implications, and Prospects*, 31 LAB. L. J. 753, 754 (1980) [hereinafter cited as *Craft*].

¹¹ *Id.*

The recent emergence of neutrality agreements as a significant organizing tool parallels organized labor's frustration in other arenas. The trade union movement has, for the most part, ceased to expand into new areas¹² and has declined sharply in numerical strength.¹³ From 1970 to 1980 union membership as a percentage of the total labor force fell from 24.7% to 20.8%,¹⁴ with the percentage decrease being even more pronounced in certain sectors of the economy.¹⁵ In addition, unions are losing over half of the labor representation elections held.¹⁶ Even where unions already represent employees, there has been a sharp upswing in employee¹⁷ efforts to decertify those unions.¹⁸ These trends have been exacerbated by an increasing tendency on the part of companies to begin operations in states with "right-to-work" laws.¹⁹ In such states even if a union wins a labor representation election, employees cannot be required, as a condition of employment, to join the union.²⁰

To reverse this apparent decline in union strength and to obtain what it felt was greater "balance" between labor and management, organized labor sought passage of the proposed Labor Law Reform Act of 1977.²¹ This legislation was passed by the United States House of Representatives, but was defeated by a filibuster in the United States Senate.²² Because the Republican party now controls both the Presidency and the Senate, it is unlikely that organized labor will obtain legislative redress of this perceived imbalance between labor and management in the near future. With this avenue foreclosed, unions will likely focus their attention instead on neutrality agreements and

¹² One notable exception is public sector unionism whose growth has mushroomed over the past two decades. See generally J. GRODIN, D. WOLLETT, & R. ALLEYNE, *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* 23 (1979).

¹³ See Barkin, *The Decline of the Labor Movement*, quoted in CONGRESSIONAL QUARTERLY, July 28, 1979 at 1507.

¹⁴ U.S. Department of Labor, Bureau of Labor Statistics, News Release, Sept. 3, 1981 quoted in [1981] DAILY LAB. REP. (BNA) B-1, 2 (Sept. 3, 1981).

¹⁵ Between 1978 and 1980 alone the International Association of Machinists lost 176,000 members (19.1% of its ranks). During that same period the URW lost 49,000 members (24.5% of its membership). *Id.* at B-1.

¹⁶ 44 NLRB ANN. REP. 296-97 (1979).

¹⁷ It is unlawful for an employer to initiate, prepare or sponsor an employee decertification petition. See, e.g., *Nassau Glass Corp.*, 222 N.L.R.B. 792, 793 (1976); *Lawrence Typographical Union v. McCulloch*, 349 F.2d 704, 707 (D.C. Cir. 1965); *Birmingham Publishing Co.*, 118 N.L.R.B. 1380, 1386 (1957).

¹⁸ See *Craft*, *supra* note 10, at 755.

¹⁹ *Id.* See also Schwab, *The Unions' Southern Discomfort*, NATION'S BUSINESS 35 (June, 1981).

²⁰ Under the National Labor Relations Act, unions can seek an agreement with an employer, called a "union shop" agreement, which requires all employees to join the organization after they have been on the job at least 30 days. 29 U.S.C. § 158(a)(3) (1973). Individual states, however, are permitted under the NLRA to prohibit such "union shop" agreements. 29 U.S.C. § 164(b) (1978).

²¹ For a listing of the proposed bills see Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755, 755 n.1 (1979) [hereinafter cited as Pa. Comment].

²² *Id.*

other gains at the bargaining table to bolster their declining fortunes. Indeed, the International Union of Electrical Workers (IUE) has already vowed to make neutrality a key issue in its 1982 talks with the General Electric and Westinghouse corporations.²³ Thus, it would seem that the next chapter in the history of neutrality agreements is just now beginning. To understand the direction which this next generation of neutrality agreements is likely to take, it is important to analyze the various types of agreements now extant.

II. TYPES OF NEUTRALITY AGREEMENTS

The specific form a neutrality agreement may take will vary from negotiation to negotiation. To some extent its content will depend on the relative bargaining strength of the parties and the relative importance each party places on the issue. The basic element found in all such agreements, however, is a contractual commitment by an employer to remain "neutral" with respect to certain organizing efforts by a given union at facilities where its employees are not presently represented by a union. For example, the 1979 neutrality agreement between B.F. Goodrich Tire and Rubber Company and the URW states that:

In situations where the URW seeks to organize production and maintenance employees in a plant in which a major product is tires and which is not presently represented by a union, Goodrich management or its agents will neither discourage nor encourage the Union efforts to organize these employees, but will observe a posture of strict neutrality in these matters.²⁴

²³ Labor Letter, Wall St. J., Dec. 30, 1980, at 1, col. 5.

²⁴ The full text of the agreement states:

1. During the course of the 1979 negotiations, the parties discussed various items of mutual interest regarding the relationship between the Company and the Union.

2. Over the years B.F. Goodrich has developed and will continue to strive to maintain and improve its constructive and harmonious relationship with the United Rubber Workers Union in locations where the URW represents its employees. B.F. Goodrich places high value on the continuation and improvement of the relationship with the URW.

3. In situations where the URW seeks to organize production and maintenance employees in a plant in which a major product is tires and which is not presently represented by a union, B.F. Goodrich management or its agent will neither discourage nor encourage the Union efforts to organize these employees, but will observe a posture of strict neutrality in these matters.

4. Additionally the company and its agents will not engage in dilatory tactics of any kind to delay its obligation to bargain with the URW once the NLRB has certified the URW as the bargaining agent of these employees or has ordered the company to bargain with the URW. It is understood by the parties that a resort to the courts of the United States shall not constitute a violation of this agreement so long as such action is undertaken in good faith and is pursued in an expeditious manner.

5. The Union will conduct itself in such organizing campaigns in a constructive manner which does not misrepresent to employees the facts and circumstances surrounding their employment.

In analyzing a specific neutrality agreement, several issues concerning the proper construction of the agreement will typically arise. The first major issue concerns the scope of the agreement. Will the agreement extend, for example, to the organizational activities of unions that are not signatories to the agreement? Will a parent corporation's neutrality pledge bind its subsidiaries? The second major issue is what constitutes neutral conduct. Some agreements are fairly specific in defining neutrality. As to these agreements, determining when the neutrality pledge has been breached is a relatively straightforward task. As to agreements in which the employer simply agrees to maintain a "neutral" posture, the task of determining when the agreement has been breached becomes more difficult. For example, under such agreements, does the employer have the implied right to respond to false or provocative statements directed against the company by the union? The following discussion will address each of these issues in the context of representative types of neutrality agreements.

The URW-Goodrich agreement quoted above raises several issues regarding the scope of neutrality agreements. The specific terms of the agreement cover only organizing efforts by the URW. Consequently, if another union, say the UAW, attempted to organize a Goodrich tire plant, the company would not be required to remain "neutral" with respect to those organizing efforts. A different question, however, arises if both the URW and the UAW seek to organize a heretofore unorganized Goodrich tire plant.²⁵ A literal reading of the URW-Goodrich agreement, on the one hand, would seem to require the company to remain "neutral" with respect to *any* organizational campaign involving the URW, even if other unions are also involved. On the other hand, such an agreement could be interpreted to apply only to the URW and not to any rival unions simultaneously seeking to organize the same

6. Should either party charge violations of this agreement the party alleging a violation shall notify AAA who shall immediately cause to be investigated the allegation. AAA shall be empowered to direct the offending party to make an immediate public disclaimer of the offense and state that such actions are in violation of this agreement.

7. The parties agree that the remedy contained in paragraph (6) above is not intended as an exclusive remedy and that the Union waives no rights it has to seek other remedies either before the National Labor Relations Board or the Courts.

8. The charges assessed by the AAA for the enforcement of paragraph (6) (six) shall be borne by the party filing the charge if no violation of this agreement is found or exclusively by the charged party if a violation is found.

See [1979] DAILY LAB. REP. (BNA) D-3 (July 11, 1979).

²⁵ Goodrich presently has no unorganized tire plants. The URW sought a neutrality agreement from Goodrich primarily because of the impact such an agreement would have on the other tire manufacturers, since Goodrich set the pattern for the industry in 1979. *See* Washington Post, July 8, 1979, at G1, col. 1.

bargaining unit. This latter interpretation would obviously be endorsed by the URW,²⁶ and as a matter strictly of contract interpretation, based on the intent of the parties, would probably be correct.²⁷

In addition to limitations as to the unions covered by the agreement, the scope of the URW-Goodrich agreement is also restricted to the attempted organization of "production and maintenance employees" in nonunionized plants whose "major product" is tires. Thus, if the URW attempted to organize clerical employees, no neutrality obligation on the part of the employer would be triggered. Similarly, only Goodrich operations where tires are the "major product" are covered by the neutrality pledge. The agreement, however, nowhere describes what constitutes a "major product." Further, it is unclear whether the URW-Goodrich agreement applies to company affiliates that are separate legal entities or to affiliates which have traditionally conducted their labor relations activities independent of the company signing the agreement.²⁸ For example, does a neutrality agreement apply to a wholly-owned subsidiary that operates autonomously from its parent corporation?²⁹

The second major issue concerns the limitations which the agreement places on the employer and the union. What does an obligation on the part of a company to remain "neutral" with respect to union organizational efforts require? The answer to this question will in turn depend largely on the specific contractual limitations set forth in given neutrality agreements.

Neutrality agreements may be divided into three general categories: basic agreements, neutrality agreements coupled with transfer rights, and agreements with specific reservations of rights. The URW-Goodrich agreement³⁰ is an example of a basic agreement. The UAW-Dana³¹ and the Tobacco Workers-Philip Morris³² agreements are examples of agreements with specific reservations of rights.³³ The 1979 UAW-GM agreement is an example

²⁶ Although the issue could not be raised by a rival union in a contract enforcement action, it might be raised before the NLRB under the *Midwest Piping* doctrine discussed at notes 176-177 *infra* and accompanying text.

²⁷ On the other hand, as discussed at notes 171-182 *infra* and accompanying text, in light of the statutory requirements of § 8(a)(2) of the NLRA, if a company were to agree to remain neutral toward a favored union it might be legally obligated to do so regarding any rival union simultaneously seeking to organize the same facility.

²⁸ It should be noted that similar issues arise in the UAW-GM agreement, the UAW-Int'l Harvester agreement, the UAW-Dana agreement, the URW-Firestone agreement, the URW-Uniroyal agreement, the Tobacco Workers-Philip Morris agreement and the IUE-GM agreement.

²⁹ See discussion in text and notes at notes 90-97 *infra*.

³⁰ The text of this agreement is set forth in note 24 *supra*.

³¹ For the full agreement see text at note 43 *infra*.

³² For the full agreement see text at note 42 *infra*.

³³ An even broader reservation of rights can be found in the letter agreement provided by Goodyear to the URW. This letter, of July 10, 1979, states in pertinent part:

of a neutrality agreement coupled with transfer rights.³⁴ Although the obligations of an employer may vary significantly even within each classification, comparing the obligations imposed by each basic type of agreement is useful in understanding the impact such agreements may have on union organizing efforts.

The URW-Goodrich agreement provides, in relevant part, that the Company will "neither discourage nor encourage" union organizational efforts "but will observe a posture of strict neutrality in these matters."³⁵ At a minimum, such agreements prevent an employer from taking a position actively opposing the union. This is the basic pledge common to almost all neutrality agreements.³⁶

The UAW-GM agreement provides an example of a neutrality agreement which also contains transfer rights for union members. The neutrality aspect of the UAW-GM agreement is similar in form to the basic agreement set forth in the URW-Goodrich letter of understanding.³⁷ In addition to its neutrality

A decision on the issue of union representation, in its final analysis, is solely that for the employees involved. This right of free choice is guaranteed and must be protected at all costs. The National Labor Relations Act provides that employees may select or reject a union without being coerced or restrained by either the Employer or the Union. Organization campaigns should permit employees to make a rational and accurate decision concerning the issue of representation. To insure this, employees must have access to and be able to properly appraise all relevant information in light of their own values and desires. Any organizational attempt should be free from restrictions that obstruct the free flow of information and from influences that will distort the assessment of the consequences. Employers and unions have an overriding obligation to see to it that employees have such an informed choice, free from coercion or intimidation of any sort.

In any legitimate organizing effort, the Company pledges to its employees and to the Union that no misleading or false assertions of fact will be provided to the employees nor will any derogatory statement about the Union or its representatives be made. Further, when an organizing attempt is initiated the Company agrees to meet with the Union for the purpose of discussing the basic ground rules for the campaign and to communicate these rules to its employees by publication in the plant house organ and on plant bulletin boards.

Goodyear refused to enter into the neutrality agreement negotiated by the industry. Due to the extremely limited nature of the above letter agreement it may be inappropriate to even characterize it as a neutrality agreement.

³⁴ The full text of the UAW-GM letter agreement relating to transfer rights is quoted in [1979] DAILY LAB. REP. (BNA) D-10 (Sept. 19, 1979).

³⁵ The full text of this agreement is set forth in note 24 *supra*.

³⁶ The actual language used will differ from agreement to agreement. The manner in which the agreement is drafted will, of course, control the proper interpretation of any particular agreement.

³⁷ Both agreements require the employer to maintain a posture of neutrality in the event of a union organizing drive. Although the GM agreement uses the phrase "neutrality" rather than the phrase "strict neutrality" used in the Goodrich agreement, as a practical matter this should not make any difference since, like pregnancy, one cannot be a little bit neutral.

pledge, however, General Motors also agreed³⁸ to give employees preferential transfer rights which would allow union members to transfer with full seniority to most new GM plants in the United States.³⁹ Thus, employees at existing plants were given the opportunity to transfer whenever General Motors "transfers operations or opens new plants that make products similar to those produced in the UAW represented plants."⁴⁰ Such transfer rights provide a core of union members⁴¹ to promote UAW organizing efforts at these plants. The potential for active union supporters and organizers to transfer freely to unorganized plants greatly increases the impact of a neutrality pledge on those plants.

Both the Dana and Philip Morris agreements take a more detailed approach than the Goodrich or GM agreements in setting forth their respective definitions of neutrality. Both agreements specifically reserve to the company the right to speak out during a union organizational campaign. The Tobacco Workers-Philip Morris agreement incorporated in a June 6, 1979 memorandum of understanding states:

Philip Morris U.S.A. agrees that in the event that the Bakery, Confectionery and Tobacco Workers International Union, A.F.L.-C.I.O., C.L.C. attempts to organize classifications of employees whom they represent in organized facilities in any facility of the Company which is presently unorganized, the Company will remain neutral to such organizing activity providing the Union conducts itself in a manner which neither demeans the Corporation as an Organization nor its representatives as individuals.

The Term "neutral" or "neutrality" shall not be construed to limit the Company's right to discuss with its employees any benefits which the Company provides to its employees.⁴²

In turn, the UAW-Dana agreement, reads as follows:

Our Corporate position regarding union representation is as follows:

We believe that our employees should exercise free choice and decide for themselves by voting on whether or not they wish to be represented by the UAW or any other labor organization.

We have no objection to the UAW becoming the bargaining representative of our people as a result of such an election.

Where the UAW becomes involved in organizing our employees, we intend to continue our commitment of maintaining a neutral position on this matter. The Company and/or its representatives will communicate with our employees, not in an anti-UAW manner, but in a positive pro-Dana manner.

³⁸ Transfer rights were added to the basic neutrality pledge during the 1979 negotiations between the UAW and GM.

³⁹ See UAW-GM letter agreement cited at note 34 *supra*.

⁴⁰ *Id.*

⁴¹ See Associated Press Release, July 17, 1979. See also Washington Post, July 8, 1979, at G1, col. 1.

⁴² Neutrality Agreement of June 6, 1979 between Philip Morris, U.S.A. and Local #16-T of the B.C.T.W.I.U.

If a majority of our employees indicate a desire to be represented by the UAW, we will cooperate with all parties involved to expedite an NLRB election.

In addition, we reserve the right to speak out in any manner appropriate when undue provocation is evident in an organizing campaign.⁴³

Each of these agreements specifically reserves certain areas as appropriate for comment by the company during an organizational campaign.

Under both the Dana and Philip Morris agreements, the company cannot attack the union directly during a campaign. The companies are free, however, to extoll the virtues of their company and the benefits that accrue as a result of being employed by them. The Dana agreement explicitly allows the company to communicate with its employees in a "pro-Dana" manner. The Philip Morris agreement simply states that "neutrality" should not be construed so as to limit the company's right to discuss with employees "any benefits" it provides to them.⁴⁴ The URW-Goodrich compact, by contrast, has no specific language reserving to the company the right to speak out during a union organizing campaign, although, as discussed below,⁴⁵ some such rights may be implicit in any neutrality agreement.

In addition, both Dana and Philip Morris specifically retained the right to respond to what might be described as attacks against the company by the union. The UAW-Dana agreement explicitly reserves the right "to speak out in any manner appropriate" where "undue provocation" becomes evident in a campaign.⁴⁶ The Tobacco Workers-Philip Morris agreement provides for a similar right to respond by stating that the company's neutrality pledge is abrogated should the union conduct itself in a manner which "demeans" the company as an organization or its representatives as individuals.⁴⁷ By way of contrast, the URW-Goodrich neutrality agreement is silent as to the right of Goodrich to speak out either offensively, by making pro-company statements, or defensively, by responding to attacks against the company.⁴⁸

The question, then, arises under a Goodrich-type agreement as to what the effect of the company's failure to specifically reserve such rights is. Is a

⁴³ Neutrality agreement between UAW and Dana Corporation contained in a letter of December 7, 1979 from Ronald Bueter, Director of Industrial Relations, Dana Corporation to Donald E. Rand of the UAW-Dana Department.

⁴⁴ See text at note 42 *supra*.

⁴⁵ See text and notes at notes 98-120 *infra*.

⁴⁶ See text at note 43 *supra*.

⁴⁷ See text at note 42 *supra*.

⁴⁸ The URW-Goodrich agreement does provide that the American Arbitration Association (AAA) shall be empowered to investigate violations of the agreement, which include violations of the union's pledge to "conduct itself . . . in a constructive manner which does not misrepresent to employees the facts and circumstances surrounding their employment." If a

company with that type of agreement thereby prohibited from speaking out in any fashion during an organizational campaign, or is the right to communicate in an objective manner with employees implied from the term "neutrality"?⁴⁹ or from the statutory and constitutional free speech protections employers enjoy during organizational campaigns?⁵⁰ It would seem that if neutrality agreements are legal at all, they should be interpreted in a way which protects the right of employees to receive election information. This right is implicit in the National Labor Relations Act.⁵¹ Accordingly, it would seem that the reciprocal right of an employer to make objective, nonderogatory statements during an organizational campaign should be implied in any legally enforceable neutrality agreement.

Numerous questions concerning neutrality agreements have yet to be resolved definitively. These questions extend far beyond the simple interpretation of such agreements, to such areas as the proper bargaining status of neutrality agreements, the proper forums for enforcement of such agreements, as well as the fundamental question of the legality of such agreements. It is to an attempt to analyze these issues and to offer some preliminary conclusions that this article now turns.

III. NEUTRALITY AGREEMENTS AND THE DUTY TO BARGAIN

Bargaining topics which relate to "wages, hours, and other terms and conditions of employment" constitute "mandatory subjects of bargaining."⁵² Management and labor are obligated to negotiate in "good faith" with respect to mandatory topics when such topics are raised by either party.⁵³ Although once mandatory issues are raised, the parties are required to bargain in good faith about them, this does not compel them to agree to a proposal or require

violation is found, the AAA is empowered to require the offending party "to make an immediate public disclaimer of the offense." For the full text of this provision see note 24 *supra*.

⁴⁹ See generally text and notes at notes 98-120 *infra*.

⁵⁰ *Id.*

⁵¹ See generally *Linn v. United Plant Guard Workers*, 388 U.S. 53, 61 (1966) (noting that § 8(c) of the NLRA, 29 U.S.C. § 158(c) (1976), was enacted to encourage "free debate" on labor-management issues).

⁵² 29 U.S.C. § 158(d) (1976). See generally *First Nat'l Maintenance Corp.*, 49 U.S.L.W. 4769, 4771-72 (June 22, 1981); R. GORMAN, *LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 498-523 (1976) [hereinafter cited as *Gorman*]; *THE DEVELOPING LABOR LAW* 389-423 (C. Morris ed. 1971) [hereinafter cited as *Morris*].

⁵³ 29 U.S.C. § 158(c) (1976); *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134-35 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953); *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 885 (1st Cir.), *cert. denied*, 313 U.S. 595 (1941); *Chambers Mfg. Co.*, 124 N.L.R.B. 721, 724 (1959), *enforced* 278 F.2d 715 (5th Cir. 1960). See generally *Morris*, *supra* note 52, at 271-347.

them to make any concessions.⁵⁴ Quite the contrary, either party can lawfully insist on its position on such issues to the point of impasse⁵⁵ and can take economic action in the form of strikes or lockouts to support its demands.⁵⁶

Bargaining topics which are not deemed to be "mandatory" are classified as either "permissive" or "illegal" bargaining subjects.⁵⁷ Parties are permitted, but not required, to bargain about permissive subjects.⁵⁸ Either party is free to refuse to discuss a permissive subject. However, if parties do negotiate and reach an agreement with respect to a permissive bargaining subject, the agreement can lawfully be incorporated into a binding collective bargaining agreement.⁵⁹ Strikes and lockouts may not be employed in support of a proposal concerning a permissive subject of bargaining.⁶⁰

The final category of bargaining subjects are those which are illegal. Generally, illegal subjects are those which if enforced would violate the National Labor Relations Act or other laws. For example, it is illegal under section 8(a)(3)⁶¹ of the National Labor Relations Act to have a "closed shop."⁶² It is illegal to bargain at all about such matters and agreements reached concerning illegal bargaining subjects are null and void.⁶³

Neither the Board nor the courts have yet had occasion to decide whether a neutrality agreement is a mandatory, permissive, or illegal subject of bargaining. An analysis of the relevant statutory provisions and of cases which have construed analogous agreements, however, suggests that neutrality agreements are not mandatory subjects of bargaining. Certainly, in a general sense, employer neutrality could be regarded as a "term and condition of

⁵⁴ 29 U.S.C. § 158(d) (1976); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937); *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953); *See generally* *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *Gorman*, *supra* note 52, at 496-98.

⁵⁵ *See* *NLRB v. Wooster Div. of Borg-Warner Corp.*, 397 U.S. 342, 349 (1970). *See also* *Food Employees Local 347 v. NLRB*, 476 F.2d 546, 552 (D.C. Cir. 1973), *rev'd on other grounds*, *NLRB v. Food Employees Local 347*, 417 U.S. 1 (1974).

⁵⁶ *First Nat'l Maintenance Corp.*, 49 U.S.L.W. at 4771 (1981); *Gorman*, *supra* note 52, at 496-98.

⁵⁷ *See generally* *Gorman*, *supra* note 52, at 523-31.

⁵⁸ *NLRB v. Katz*, 369 U.S. 736 (1977); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *NLRB v. Sheet Metal Workers Local 38*, 575 F.2d 394, 398-99 (2d Cir. 1978) and cases cited therein. *See generally* *Morris*, *supra* note 52, at 424; *Gorman*, *supra* note 52, at 497.

⁵⁹ *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); *NLRB v. Massachusetts Nurses Ass'n*, 577 F.2d 894, 897, 899 (1st Cir. 1977). *See generally* *Gorman*, *supra* note 52, at 497.

⁶⁰ *See Gorman*, *supra* note 52, at 497.

⁶¹ 29 U.S.C. § 158(a)(3) (1976).

⁶² *See Penello v. United Mine Workers*, 88 F. Supp. 935, 939 (D.D.C. 1950). A closed shop is a facility where all employees hired are required to be union members when they begin working. *See Gorman*, *supra* note 52, at 641-42.

⁶³ *See, e.g., Amalgamated Meat Cutters and Butcher Workmen*, 81 N.L.R.B. 1052, 1054-55 (1949); *Julius Resnick, Inc.*, 86 N.L.R.B. 38, 39 (1949). *See generally* *Gorman*, *supra* note 52, at 529-31.

employment.” However, the United States Supreme Court has suggested that these words are to be read not as words of expansion but as “words of limitation.”⁶⁴ In *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*,⁶⁵ the Court articulated the test for determining whether an issue is a mandatory or permissive bargaining subject when third parties not currently within the bargaining unit covered by the contract are involved. In order for such matters to be mandatory subjects of bargaining, they must “vitally affect”⁶⁶ the employees within the bargaining unit. The Supreme Court in *Pittsburgh Plate Glass* held that pension benefits for retired employees did not “vitally affect” current employees⁶⁷ and were thus a permissive rather than a mandatory bargaining subject.

Under the *Pittsburgh Plate Glass* “vitally affects” test, a neutrality agreement would seem to be at most a permissive bargaining subject.⁶⁸ An employer’s pledge of neutrality in a collective bargaining agreement would not seem to have any effect on the work atmosphere of employees within the bargaining unit covered by the agreement. It would certainly not “vitally affect” the “terms and conditions of their employment.” The employees directly affected by a neutrality agreement would not be current employees within the bargaining unit. Rather, those directly affected would be employees who are not yet bargaining unit members subject to a collective bargaining agreement.⁶⁹

The case of *NLRB v. Wooster Division of Borg-Warner*⁷⁰ is also instructive on this issue. In *Borg-Warner*, the employer refused to reach a settlement with the

⁶⁴ See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 220 (1964) (Stewart, J., concurring).

⁶⁵ 404 U.S. 157 (1971).

⁶⁶ *Id.* at 179. The test to be applied where only the rights of employees within the bargaining unit are involved is somewhat less stringent. See generally *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979).

⁶⁷ Holding that retired employees are third parties outside the bargaining unit for purposes of collective bargaining, the Supreme Court stated in *Pittsburgh Plate Glass Co.*:

Together, these provisions establish the obligation of the employer to bargain collectively “with respect to wages, hours and other terms and conditions of employment” with “the representatives of his employees” designated or selected by the majority “in a unit appropriate for such purposes.” This obligation extends only to the “terms and conditions of employment” of the employer’s “employees” in the “unit appropriate for such purposes” that the union represents.

404 U.S. at 164.

⁶⁸ The URW in its 1979 negotiations with Goodyear attempted to insist on a neutrality agreement to the point of impasse. The company filed an unfair labor practice charge with the National Labor Relations Board. When the Board investigated the charge the union was unable to develop a case for neutrality as a mandatory bargaining subject and subsequently dropped the issue from negotiations. *Craft*, *supra* note 10, at 759.

⁶⁹ As the Supreme Court noted in *Pittsburgh Plate Glass Co.*, “[t]he benefits that active workers may reap by including retired employees under the same health insurance contract are speculative and insubstantial at best.” 404 U.S. at 180.

⁷⁰ 356 U.S. 342 (1958).

union unless the agreement contained a "ballot" clause.⁷¹ This clause would have required the employer's last bargaining offer in all future negotiations to be voted upon by unit employees before a strike could be called.⁷² The Court held that the ballot clause did not concern a mandatory subject of bargaining.⁷³ The decision rested in part on the conclusion that the clause dealt only with the relation between the employees and their union, rather than the employer-employee relationship.⁷⁴ It also rested on the Court's judgment that the clause undermined the independence of the union as the employee's representative by enabling the employer to bargain directly with the employees.⁷⁵ Thus, the Court held that although such a clause was not illegal, it could not be the subject of mandatory bargaining.⁷⁶

Along the same lines, the United States Court of Appeals for the Tenth Circuit in *Lonestar Steel Company v. NLRB*⁷⁷ has held that "application of the contract" clauses are not mandatory subjects of bargaining.⁷⁸ An "application of the contract" clause requires that an employer apply the terms of a collective bargaining agreement to any new operations acquired during the life of that agreement once the contracting union is recognized as the bargaining representative of a majority of the employees at the new facility.⁷⁹ In a hearing before the National Labor Relations Board, an administrative law judge found that an "application of the contract" clause did not relate to the terms and conditions of current employees' employment and was therefore not a mandatory subject of bargaining.⁸⁰ Moreover, he stated "that a principal purpose for the application of [the] contract [clause] . . . is to facilitate organizing."⁸¹ The ALJ therefore concluded that "the clause did not 'vitally affect' the unit employees and was not a mandatory subject of bargaining."⁸² The Board disagreed and held that such a clause did constitute a mandatory subject. However, the Tenth Circuit reversed the Board, adopting the administrative law judge's reasoning.⁸³

Neutrality agreements are analogous to both the "ballot clause" discussed in *Borg-Warner* and the "application of contract" clause discussed in *Lonestar Steel*. Like a "ballot clause," a neutrality agreement relates primarily to the relationship between the union and the employees. Such agreements have virtually no direct impact on the terms and conditions of employment in the

⁷¹ *Id.* at 347.

⁷² *Id.* at 345-46 n.3.

⁷³ *Id.* at 349-50.

⁷⁴ *Id.* at 350.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 639 F.2d 545 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1349 (1981).

⁷⁸ 639 F.2d at 559.

⁷⁹ *Id.* at 557.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 559.

bargaining unit covered by the agreement. Like an "application of the contract clause" the principal purpose of a neutrality agreement is to promote union organizing activity.⁸⁴ Thus, if "application of contract" clauses and "ballot" clauses are not mandatory bargaining subjects, neutrality agreements should fall outside the scope of mandatory bargaining as well.

Additionally, persuasive arguments⁸⁵ can be made that neutrality agreements are illegal subjects of bargaining because such agreements violate section 8(a)(2)⁸⁶ of the National Labor Relations Act and the general policies underlying sections 7,⁸⁷ 8(c),⁸⁸ 8(b)(7)⁸⁹ and other provisions of the Act. Consequently, it would seem that neutrality agreements are, at most, permissive subjects of bargaining.

IV. INTERPRETING NEUTRALITY AGREEMENTS

A. The "Single Employer" Issue

Neutrality agreements are generally reached as part of a master labor agreement between a union and a corporation.⁹⁰ The question then arises, absent specific language on this point in the agreement, whether a neutrality pledge by a corporation binds wholly-owned, but independent subsidiaries of that corporation which are not unionized.

The Labor Board and the courts regularly treat independent divisions or subsidiaries of corporations as "separate employers" for purposes of the National Labor Relations Act.⁹¹ In determining whether a corporate subsidiary is actually "independent" from a parent corporation under the Act, the following relationships between the parent and the subsidiary must be considered: interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control.⁹² The most im-

⁸⁴ See generally text and notes at notes 12-23 *supra*.

⁸⁵ See text and notes at notes 155-271 *infra*.

⁸⁶ 29 U.S.C. § 158(a)(2) (1976).

⁸⁷ 29 U.S.C. § 157 (1976).

⁸⁸ 29 U.S.C. § 158(c) (1976).

⁸⁹ 29 U.S.C. § 158(b)(7) (1976).

⁹⁰ See, e.g., *Neutrality Agreement between B.F. Goodrich and the URW*, [1979] DAILY LAB. REP. (BNA) D-3 (July 11, 1979); *Neutrality Agreement between General Motors and the UAW*, [1976] DAILY LAB. REP. (BNA) A-13 to 14 (Dec. 8, 1976).

⁹¹ See, e.g., *Telegraph Workers, AFL-CIO v. NLRB*, 571 F.2d 665, 667 (D.C. Cir. 1978); *cert. denied*, 439 U.S. 827 (1979); *Los Angeles Newspaper Guild, Local 69 (Hearst Corp.)*, 185 N.L.R.B. 303 (1970), *aff'd per curiam*, *Los Angeles Newspaper Guild, Local 69 v. NLRB*, 443 F.2d 1173 (9th Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972).

⁹² See *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Serv.*, 380 U.S. 255, 256 (1965) (*per curiam*), *quoted with approval in*, *South Prairie Constr. Co. v. Local 627, IUOE*, 425 U.S. 800, 802 & n.3 (1976); *United Telegraph Workers, AFL-CIO v. NLRB*, 571 F.2d 665, 667 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 827 (1979); *Marine Welding & Repair Works, Inc. v. NLRB*, 439 F.2d 395, 397 (8th Cir. 1971); *Sakrete, Inc. v. NLRB*, 332 F.2d 902, 905 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965).

portant of these factors is the degree of centralized control of labor relations exercised by the parent corporation.⁹³ If labor relations decisions are made by the subsidiary on an independent basis, the subsidiary will generally be viewed as a "separate employer" for purposes of the National Labor Relations Act.⁹⁴ The existence of common ownership is not determinative where common control of the entities is not exercised.⁹⁵

The collective bargaining obligations of a parent corporation are ordinarily not imposed on subsidiaries deemed to be "separate employers."⁹⁶ Accordingly, if a nonunion subsidiary is deemed a "separate employer" for purposes of the National Labor Relations Act, it generally should not be bound by a neutrality agreement entered into by its parent corporation.⁹⁷ The parties to a neutrality agreement are free to specify that all or some subsidiary corporations are to be bound by a parent's neutrality pledge. The absence of such a specific provision, therefore, should be interpreted as an intent not to bind independent subsidiaries. If the parties do specify in their agreement that certain subsidiaries are to be covered by the parent's neutrality pledge, then the pledge, if otherwise legal, should be binding on the subsidiary.

B. *Obligations Under Neutrality Agreements*

Generally, it would be conceded by both employers and unions that the primary purpose of a neutrality agreement is to limit the role an employer can play in union organizational drives and elections. Neither would deny that neutrality agreements are generally intended to restrict the right of an employer to express an opinion about a particular union or about unionism in general. Despite such unanimity on the general purpose and intent of neutrality pledges, disagreements as to the extent of the restrictions imposed by a particular agreement will inevitably arise. What must guide the proper resolution of any such dispute, however, is first, the specific language of a neutrality pledge, and second, the statutory and constitutional guarantees of employer free speech.

⁹³ See *Gerace Constr. Co., Inc. and Helger Constr. Co., Inc.*, 193 N.L.R.B. 645, 650 & n.9 (1971).

⁹⁴ See, e.g., *NLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971). But see *Canton, Carp's, Inc.*, 125 N.L.R.B. 483 (1959).

⁹⁵ See *Miami Newspaper Pressmen's Local 46 v. NLRB*, 322 F.2d 405, 408, 409 (D.C. Cir. 1963). See also *United Telegraph Workers, AFL-CIO v. NLRB*, 571 F.2d 665, 667 (D.C. Cir. 1978), cert. denied, 439 U.S. 827 (1979).

⁹⁶ In the only published arbitration, to date, which has dealt with neutrality, the parties do not seem to have contested the applicability of their neutrality agreement to a wholly-owned subsidiary. The arbitrator assumed, without offering any analysis, that since the subsidiary is a Dana facility it is covered under the neutrality agreement. See *Dana Corp.*, 76 Lab. Arb. & Disp. Settl. 125 (1981) (Mittenthal, Arb.).

⁹⁷ See *United Telegraph Workers, AFL-CIO v. NLRB*, 571 F.2d 665, 667-68 (D.C. Cir. 1978), cert. denied, 439 U.S. 827 (1979); *Frank N. Smith Associates, Inc.*, 194 N.L.R.B. 212, 218 (1971).

The language used in various neutrality agreements differs significantly. In the basic UAW-GM neutrality agreement, for example, General Motors agreed that when the UAW was engaged in organizational activities, it would neither "encourage [n]or discourage the union's efforts," but would maintain "a posture of neutrality."⁹⁸ B.F. Goodrich, in contrast, agreed to similar language in its agreement with the URW, but with the proviso that it would observe a posture of "strict neutrality" during union organizing efforts.⁹⁹ The Dana Corporation's neutrality pledge represents another approach. In its agreement with the UAW, Dana expressly reserved the right to speak out in a pro-company manner and to respond in any manner whatsoever to "undue" union provocation.¹⁰⁰ An important question thus arises as to what, if anything, these differences require in the context of employer and union conduct. This issue will be examined with reference to the statutory and constitutional framework governing national labor policy as well as the contractual differences these basic approaches represent.

An argument can be made that a pledge of "neutrality," in the absence of a specific reservation of rights, requires an employer to refrain from making any statements concerning a union's organizing campaign. Such an interpretation would clearly define permissible conduct. Arguably, a less restrictive definition of "neutrality" would be impossible to enforce. This is because it would be difficult to distinguish permitted pro-company communication from proscribed anti-union communications. Furthermore, if a company has pledged neither to "encourage [n]or discourage" unionization, a pro-company communication, even if not anti-union, might still work to "discourage" unionization and arguably violate this pledge.

These arguments favoring an absolute ban on all communications relating to a union's organizing activities, however, are not persuasive. Judges and arbitrators are called upon regularly to make distinctions similar to those which would be called for in deciding whether a statement is a "neutral" one or one which is intended to "discourage" union organizing efforts.¹⁰¹ There is no reason why neutrality agreements should be treated differently than other types of agreements which require courts and arbitrators to draw fine lines between acceptable and unacceptable conduct. Even under a restrictive interpretation of neutrality, an arbitrator would be required to distinguish ordinary communications involved in the operation of the business from those specifically aimed at union organizing efforts. Moreover, the statutory and constitutional implications of neutrality agreements arguably prevent such a blanket prohibition, or at least militate against interpreting the prohibitions of such agreements so broadly. Thus, even in the absence of a specific reservation of

⁹⁸ See note 6 *supra*.

⁹⁹ See note 24 *supra*.

¹⁰⁰ See text at note 43 *supra*.

¹⁰¹ See generally F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 296-320 (1978) (outlining the role of arbitrators in interpreting contracts) [hereinafter cited as *Elkouri*].

rights in a neutrality agreement employers should generally be permitted to provide factual information which may be relevant to a union organizing effort or to make statements which are "pro-company" in nature.

The concept of employer "neutrality" with respect to union organizational activities has been considered by both the Labor Board and the Supreme Court. Between 1935 and 1941 the National Labor Relations Board adopted a policy of requiring "neutrality" with respect to employer speech.¹⁰² Under the Board's approach, *any* interference whatsoever by an employer during the union organizational process would constitute an unfair labor practice.¹⁰³ Thus, at least where a neutrality agreement requires an employer to observe a posture of "strict neutrality," one could argue that the Board's prior interpretation of that phrase prohibits an employer from saying anything with respect to the topic of unionization.

In light of the subsequent history of the Board's "neutrality" doctrine, however, reliance on such early Board precedent would be inappropriate. In *NLRB v. Virginia Electric & Power Co.*,¹⁰⁴ the Supreme Court found that such limitations on an employer's right to state his views were unconstitutional impingements on an employer's first amendment rights.¹⁰⁵ Thus, the Court held that an employer's expression of his views on labor matters could not, in and of itself, constitute a violation of the NLRA.¹⁰⁶ This holding was later codified and expanded upon by Congress in section 8(c)¹⁰⁷ of the National Labor Relations Act which explicitly guarantees the right of employer free speech during organizing campaigns.

Consequently, to the extent neutrality agreements legally restrict an employer's right of free speech, such agreements must be viewed as contractual waivers of both statutory and constitutional rights. In this context, the National Labor Relations Board has made it clear that waivers of such rights will not be readily inferred.¹⁰⁸ Indeed, a union maintaining that an employer has waived these rights has the burden of making a "clear and unmistakable showing" that such a waiver has occurred.¹⁰⁹ Moreover, agreements in derogation

¹⁰² Pa. Comment, *supra* note 21, at 756-58.

¹⁰³ See Note, *Employer Free Speech in Union Organizing Campaigns*, 15 U. FLA. L. REV. 231, 231 (1962).

¹⁰⁴ 314 U.S. 469 (1941).

¹⁰⁵ *Id.* at 477. The Supreme Court's ruling that the Board cannot mandate absolute silence from an employer does not necessarily mean that an employer cannot voluntarily agree to such quietude. Certainly the Board's pre-*Virginia Electric* holdings construing its neutrality doctrine to require employer silence are without any precedential value.

¹⁰⁶ *Id.*

¹⁰⁷ 29 U.S.C. § 158(c) (1976).

¹⁰⁸ See *Gary Hobart Water Corp.*, 210 N.L.R.B. 742, 744 (1974), *aff'd*, *Gary Hobart Water Corp. v. NLRB*, 511 F.2d 284 (7th Cir.), *cert. denied*, 423 U.S. 925 (1975); *Beacon Piece Dyeing & Finishing Co.*, 121 N.L.R.B. 953, 957 (1958); *Tide Water Associated Oil Co.*, 85 N.L.R.B. 1096, 1098 (1949).

¹⁰⁹ *Id.* at 744.

of statutory and constitutional rights should generally be construed narrowly.¹¹⁰ Neutrality agreements, therefore, would seem to fall within this general rule.

Regardless of the employer's avowed determination to remain neutral during a campaign, at least one NLRB decision seems to require that an employer correct union misrepresentations during a campaign or be held to have waived any right to complain about union misconduct during the campaign. In *Landmark Hotel*,¹¹¹ the Board refused to overturn a decertification election, despite a material misrepresentation by the union, because the employer had the opportunity to correct the misrepresentation and failed to do so.¹¹² The Board held that an employer was not excused from its obligation to correct such a misstatement because it had maintained a position of neutrality throughout the campaign.¹¹³ Maintaining "neutrality" in the face of such misstatements operated as a waiver of its rights to object to the election results. Thus, the Board stated:

While the Employer has the right to maintain a policy of neutrality with regard to the election issues, it may not utilize that policy as a basis for denying to employees access to knowledge readily available to it which is necessary to their proper evaluation of campaign propaganda. Having denied its employees access to the truth concerning the Union's misstatements, the Employer may not now be heard to object on the basis that it had insufficient opportunity to make an effective reply. We conclude, therefore, that, even assuming *arguendo* the Union's misstatements were substantial, they do not warrant setting aside the election results. We do not see this result as "unjustly" penalizing the Employer "for electing to remain neutral," as does our dissenting colleague. The result does, to some extent, penalize the Employer for closing its ears to employee questions, which it could answer or not answer as it saw fit.¹¹⁴

It would seem, then, that neutrality agreements would allow, and may even require, that an employer correct any misstatements or factual errors perpetrated by a union seeking to organize its facilities pursuant to such an agreement.

Further support for the view that, even in the absence of a specific reservation of rights in a neutrality agreement, an employer should be free to make factual statements relevant to issues raised during an organizational campaign as well as statements which are "pro-company" in nature, can be found by reference to judicial construction of the Railway Labor Act.¹¹⁵ Unlike the

¹¹⁰ See generally *In Re Gault*, 387 U.S. 1, 55 (1967) (holding that a juvenile's waiver of constitutional privilege against self-incrimination will be subject to strict scrutiny); *NLRB v. Auto Crane Co.*, 536 F.2d 310 (10th Cir. 1976) (holding that a union/company agreement involving a waiver by the union of its statutory right to bargain will be construed narrowly).

¹¹¹ 210 N.L.R.B. 822 (1974).

¹¹² *Id.* at 823.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 45 U.S.C. § 151 *et seq.* (1976).

National Labor Relations Act, which guarantees the employer freedom of speech, the Railway Labor Act prohibits any "interference, influence or coercion" by management in the designation of a union representative.¹¹⁶ In interpreting this proscription, which is arguably more restrictive than an agreement to remain "strictly neutral," the United States Supreme Court has stated:

The intent of Congress is clear with respect to the sort of conduct that is prohibited. "Interference" with freedom of action and "coercion" refer to well-understood concepts of the law. The meaning of the word "influence" in this clause may be gathered from the context. . . . The 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. "Influence" in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls "self-organization." The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, . . .¹¹⁷

The Supreme Court has therefore held that, as a matter of law, ordinary communications between an employer and its employees do not "influence" the process of employee self-organization. Thus, the Railway Labor Act does not prevent employers from speaking out during organizing campaigns.¹¹⁸ By analogy, there is no reason why factual communications with employees during an organizational campaign should be viewed as breaching an employer's neutrality pledge.

In sum, difficult issues of contractual interpretation arise as to what is the proper scope of conduct allowed under a neutrality agreement. If specific restrictions are set forth in the agreement, then that language should govern. Absent such explicit restrictions, however, it seems that such agreements should be strictly construed, in light of the important statutory and constitutional principles involved. In addition, interpretation of such agreements to permit factual communications by an employer during an organizational campaign where such communications are not "anti-union" in nature would be

¹¹⁶ The Railway Labor Act provides, in relevant part: "Representatives . . . shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives." 45 U.S.C. § 152 (1976).

¹¹⁷ *Texas & N.O.R. Co. v. Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548, 568 (1930) (citation omitted). *See also* *Virginia Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 543 (1937).

¹¹⁸ Indeed, in more recent cases the courts have interpreted the Act's prohibitions against "influencing" elections of employee representatives even less restrictively. *See, e.g.,* *Adams v. Federal Express Corp.*, 470 F. Supp. 1356, 1369 (W.D. Tenn. 1979); *Brotherhood of Ry. & S.S. Clerks v. Philadelphia, Bethlehem & New England R.R. Co.*, 428 F. Supp. 1308, 1314 (E.D. Pa. 1977); *Teamsters v. Braniff Airways, Inc.*, 70 L.R.R.M. 3333, 3334 (D.D.C. 1969). *Contra*, *Brotherhood of R.R. Trainmen v. Richmond, Fredericksburg and Potomac R.R. Co.*, 69 L.R.R.M. 2884, 2885 (E.D. Va. 1968).

consistent with the dictionary definition of "neutrality."¹¹⁹ Moreover, such an interpretation would be in accord with the approach specifically adopted in a number of neutrality agreements.¹²⁰

V. ENFORCEMENT OF NEUTRALITY AGREEMENTS

The effectiveness of any neutrality agreement will, to a great extent, depend on the ability of the parties to enforce it. Therefore, the methods by which such agreements are enforced can be as important as the contents of neutrality agreements. Enforcement of neutrality agreements may be sought in a variety of forums. It is to an examination of these various forums that the discussion now turns.

Section 301 of the NLRA provides that suits for violations of labor contracts can be brought in any federal district court having jurisdiction over the parties without regard to the amount in controversy or the parties' citizenship.¹²¹ Labor agreements may also be enforced pursuant to section 301 in state court.¹²² Neutrality pledges contained in labor agreements are therefore enforceable in either state or federal court. In either court, under the doctrine set forth by the Supreme Court in *Textile Workers Union v. Lincoln Mills*,¹²³ federal substantive law will apply.

In most cases, however, the role of the courts in enforcing neutrality agreements will be quite limited. This is because the vast majority of private sector labor agreements have clauses providing for dispute resolution by binding grievance arbitration.¹²⁴ If a labor agreement contains an arbitration clause, courts are asked initially to decide only whether the dispute is arbitrable.¹²⁵ If the court determines that the particular arbitration clause is broad enough to cover the dispute at issue it will order the parties to arbitrate the dispute.¹²⁶ In this context, the Supreme Court held that although parties are free to draft their arbitration clause as narrowly as they wish, there will be a general presumption in favor of arbitrability.¹²⁷ Accordingly, disputes involving a neutrality pledge will ordinarily be resolved by arbitration, unless the

¹¹⁹ Webster's Third New Int'l Dictionary (1976), defines "neutral" as "not engaged on either side; not siding with or assisting either of two or more contending parties."

¹²⁰ See generally discussion in text and notes at notes 24-51 *supra*.

¹²¹ 29 U.S.C. § 185 (1978).

¹²² See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

¹²³ 353 U.S. 448, 456 (1957).

¹²⁴ See *Elkouri*, *supra* note 101, at 7.

¹²⁵ See generally *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960).

¹²⁶ *Id.* at 569.

¹²⁷ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

parties to a labor agreement expressly provide otherwise.¹²⁸ Where a dispute is governed by an applicable arbitration clause, the role of the courts will ordinarily be limited to compelling arbitration of the dispute, at least in the first instance.

The recent case of *UAW v. Dana Corp.*,¹²⁹ however, demonstrates how courts may at times overstep their proper role in the enforcement of neutrality agreements. In *Dana* the UAW brought an action in federal court alleging that the company had breached its neutrality agreement with respect to union organizational efforts at a plant of one of the corporation's subsidiaries.¹³⁰ The court found the dispute to be arbitrable under the parties' contractual arbitration clause and ordered that it be sent to arbitration.¹³¹ The court, however, also granted the union's request for a temporary restraining order prohibiting the company from communicating in any way with employees at the plant regarding the upcoming labor election.¹³² *Dana* refused to abide by this order and was subsequently held in contempt of court.¹³³

The issuance of injunctive relief by the *Dana* court appears to be clearly at odds with the general ban on labor injunctions as set forth in the Norris-LaGuardia Act¹³⁴ and as construed by the Supreme Court in *Buffalo Forge Com-*

¹²⁸ Parties may also set up special arbitration procedures for alleged neutrality agreement violations. The URW and B.F. Goodrich, for example, have done this in their neutrality agreement. For the text of the URW-Goodrich neutrality agreement arbitration procedure see note 24 *supra*.

¹²⁹ 104 L.R.R.M. 2687 (N.D. Ohio 1980).

¹³⁰ *Id.*

¹³¹ *Id.* at 2688.

¹³² *Id.*

¹³³ *Dana* was ordered to purge itself of the contempt by:

1. . . . sending a written communication, in form satisfactory to the plaintiff, to all employees of . . . [the] Corporation repudiating both the written and oral statements of . . . [the Company President], promising to abide by the contents of its neutrality agreement, and indicating its neutrality in any forthcoming National Labor Relations Board election;

2. . . . provid[ing] access to each plant of . . . [the] Corporation in which . . . [the Company President] addressed assembled workers, for a representative of the plaintiff to address each shift of workers, assembled, for the length of time that . . . [the President] addressed such shift, and . . . [the President] shall be and remain present throughout the giving of each such address;

3. . . . clear[ing] all the specially colored bulletin boards throughout the . . . Corporation plants of any and all anti-union materials, refrain[ing] from posting such material on any bulletin boards in the future, reserv[ing] no less than half the space upon said bulletin boards for the use of plaintiff to affix communications, and giv[ing] a representative of the plaintiff daily access to each such bulletin board for posting and for reviewing posted materials until a National Labor Relations Board election shall be held

UAW v. Dana Corp., Case No. 80-3458 (N.D. Ohio 1980) (pending before the United States Court of Appeals for the Sixth Circuit).

¹³⁴ 29 U.S.C. § 101 *et seq.* (1976).

pany v. *United Steelworkers of America*.¹³⁵ In *Buffalo Forge*, the Court emphasized that federal courts, given the proscriptions of the Norris-LaGuardia Act, do not as a rule have the power to enjoin claimed violations of labor contracts.¹³⁶ In so ruling the Court distinguished its previous decision in *Boys Markets, Inc. v. Retail Clerks Union*,¹³⁷ where it had held that when a strike in violation of a no-strike clause is precipitated by a grievance arbitrable under an applicable arbitration clause, a court may enjoin the strike pending resolution of the underlying grievance through arbitration.¹³⁸ *Boys Markets* involved a strike in violation of a no-strike clause resulting from a dispute over whether supervisors could rearrange frozen food cases. The Supreme Court held that such a strike was enjoinable.¹³⁹ In contrast, *Buffalo Forge* involved a sympathy strike, where the work stoppage was not precipitated by an underlying contractual grievance.¹⁴⁰ The Court held that under these circumstances where the only alleged contract violation was the strike itself, and there was no underlying grievance to arbitrate, an injunction clearly would not lie.¹⁴¹

In *Dana* the court was not faced with a *Boys Markets* situation of a strike precipitated by an alleged contractual violation. The facts of *Dana* presented instead only an alleged violation of the neutrality agreement itself.¹⁴² Under such circumstances, the controlling precedent is *Buffalo Forge*, and the appropriate remedy is not to enjoin the alleged breach of contract but rather simply to compel the parties to arbitrate the dispute. Thus, it seems that the *Dana* court had no authority to enjoin the alleged violation of the neutrality agreement. By granting a temporary restraining order the *Dana* court contravened the ban on labor injunctions set forth in the Norris-LaGuardia Act.¹⁴³

In short, disputes over the interpretation of neutrality agreements will normally be resolved by an arbitrator or panel of arbitrators. After reviewing

¹³⁵ 428 U.S. 397 (1976).

¹³⁶ *Id.* at 409.

¹³⁷ 398 U.S. 235 (1970).

¹³⁸ *Id.* at 253.

¹³⁹ *Id.*

¹⁴⁰ *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397, 399-400 (1976).

¹⁴¹ *Id.* at 406-13.

¹⁴² Where a union which has agreed to a no-strike clause in return for an employer's promise to submit all contractual disputes to arbitration goes on strike, such a strike directly undercuts the arbitration process. Furthermore, in such cases the union has made an express promise to maintain the status quo, *i.e.*, not strike, pending the resolution of disputes by an arbitrator. In the instant case, however, *Dana* made no general promise, express or implied, not to act pending an arbitrator's ruling as to the legality of the proposed action. Consequently, an injunction against their action does not appear appropriate. See *Amalgamated Transit Union, Div. 1384 v. Greyhound Lines, Inc.*, 550 F.2d 1237, 1238 (9th Cir. 1977). But see *Lever Bros. Co. v. International Chem. Workers Union*, 554 F.2d 115, 121-23 (4th Cir. 1976) (disagreeing with the *Greyhound* standard).

¹⁴³ 28 U.S.C. § 101 *et seq.* (1976). *Dana* is currently appealing the lower court's action *UAW v. Dana Corp.*, Case No. 80-3458, pending before the United States Court of Appeals for the Sixth Circuit.

the contract, the arbitrator will determine the intentions of the parties and will decide in a given case whether an employer's communications violate the neutrality agreement. The arbitration award will then be specifically enforceable in federal or state court.¹⁴⁴

The Court's scope of review in such cases is extremely limited. As the Supreme Court held in *United Steelworkers v. Enterprise Wheel & Car Corp.*,¹⁴⁵ so long as the arbitrator's award "draws its essence from the collective bargaining agreement" and does not represent an abuse of discretion, it must be upheld.¹⁴⁶ Where an arbitrator goes beyond interpreting and applying the parties' collective bargaining agreement, in an effort to dispense "his own brand of industrial justice,"¹⁴⁷ his award will be overturned.¹⁴⁸

Arbitrators disagree on whether they are obligated to enforce contracts which, in their opinion, violate the law, with some arbitrators taking the position that they are empowered only to interpret the terms of the agreement.¹⁴⁹ Whether an arbitrator will reach the ultimate issue of the legality of a given neutrality agreement will depend on his judicial philosophy. However, in reviewing an arbitrator's decision on the legality issue, a court is likely to reexamine the issue *de novo* and will not be bound by the arbitrator's view of the law. A court may examine the legality of the agreement *sua sponte*, even where the arbitrator has chosen not to.¹⁵⁰

The one published arbitration decision involving a neutrality agreement arose from the previously discussed dispute between the UAW and Dana Corporation. In this decision the basic issue of the legality of the agreement does not appear to have been considered.¹⁵¹ In *Dana*, the arbitrator narrowly interpreted the provisions in the neutrality agreement which gave the company the right, under certain circumstances, to speak out against the union.¹⁵² The arbitrator held that various union misrepresentations, including false statements about the rate of pay of other company employees, did not represent "undue provocation" of the kind which permitted the company to avoid its pledge to remain neutral. In an extraordinary action, the arbitrator also awarded

¹⁴⁴ See generally *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

¹⁴⁵ 363 U.S. 593 (1960).

¹⁴⁶ *Id.* at 597-99.

¹⁴⁷ *Id.* at 597.

¹⁴⁸ See *Gorman*, *supra* note 52, at 593-94.

¹⁴⁹ Compare Arbitrator Bernard D. Meltzer's view that where there is a clear conflict between the agreement and the law, the arbitrator should respect the agreement and ignore the law with Arbitrator Robert G. Howlett's view that "[a]ll contracts are subject to statute and common law; and each contract includes all applicable law" quoted in *Elkouri*, *supra* note 101, at 326; see generally *id.* at 321-64 (outlining the proper role of a labor arbitrator in applying external law).

¹⁵⁰ See generally *Gorman*, *supra* note 52, at 594-98.

¹⁵¹ *Dana Corp.*, 76 Lab. Arb. & Disp. Settl. 125 (1981) (Mittenthal, Arb.).

¹⁵² *Id.* at 129-31.

\$10,000 in damages to the union, even though the UAW did not seek such monetary relief.¹⁵³

Although arbitration may be the forum in which the legality of neutrality agreements will first be considered, it is the courts and the National Labor Relations Board who will ultimately resolve this issue. Courts will likely address this issue in section 301 actions to vacate an arbitrator's award. In such actions, courts will be forced to look beyond the four corners of the collective bargaining agreement and to determine whether the contract is legally enforceable.¹⁵⁴ The legality issue will also arise in unfair labor practice hearings before the National Labor Relations Board. It may arise in the context of an employer's refusal to bargain over a particular neutrality provision, or possibly in the context of a representational election where the employer, a rival union, or an employee in the bargaining unit charges that a neutrality agreement violates section 8(a)(2) or some other provision of the National Labor Relations Act. In any event, given the importance and controversial nature of the subject, it seems likely that the question of the legality of neutrality agreements, to which this article now turns, will ultimately be determined by the United States Supreme Court.

VI. THE LEGALITY OF NEUTRALITY AGREEMENTS

A. *Neutrality Agreements and Section 8(a)(2) — Lawful Cooperation Versus Unlawful Support*

Section 8(a)(2) of the National Labor Relations Act provides, in part, that it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."¹⁵⁵ A major tension in our national labor policy underlies this statutory provision. This tension arises from the interplay of two important labor relations principles. On the one hand, fostering cooperation between labor and management is one of the primary purposes of the National Labor Relations Act.¹⁵⁶ As the late Dean Harry Shulman remarked, labor and management are in a sense "joint enterprisers" with the success of the enterprise requiring "daily cooperation" between the two parties.¹⁵⁷ On the other hand, cooperation between labor and management must not become too great lest it become unlawful support prohibited under section 8(a)(2).¹⁵⁸ At the root

¹⁵³ *Id.* at 132.

¹⁵⁴ See *Gorman*, *supra* note 52, at 593-98.

¹⁵⁵ 29 U.S.C. § 158(a)(2) (1976).

¹⁵⁶ The Act was enacted in large measure to decrease labor strife and promote peaceful cooperative solutions to labor-management problems. See National Labor Relations Act, § 1, 49 Stat. 449 (1935). See also *NLRB v. Keller Ladders Southern, Inc.*, 405 F.2d 663, 667 (5th Cir. 1968).

¹⁵⁷ See note 2 *supra*.

¹⁵⁸ *NLRB v. Keller Ladders Southern, Inc.*, 405 F.2d at 663, 667 (5th Cir. 1968).

of section 8(a)(2) appears to be the concern that if the relationship between labor and management loses its adversarial nature, the rights of individual employees¹⁵⁹ inevitably will be impaired.¹⁶⁰

The scheme envisioned by the NLRA is therefore analogous to the adversarial system of American justice. Under that system, lawyers involved in litigation are expected to cooperate with each other to facilitate the orderly administration of justice,¹⁶¹ yet their basic role is that of adversaries.¹⁶² Similarly, although both unions and employers have an interest in cooperating so that business will prosper, each also has conflicting interests. It is through the clash of these interests, that a fair accommodation is reached as to the competing interests of the individual employee, the corporation and the union. Just as the courts have always struck down collusive lawsuits,¹⁶³ the Labor Board and the courts will strike down clearly collusive behavior between unions and employers.¹⁶⁴

The critical question, of course, is where on the continuum between lawful cooperation and unlawful support neutrality agreements fall. Neutrality agreements clearly represent a form of management cooperation with labor. Under such agreements, employers agree to waive their rights to speak out against certain union organizing efforts. This waiver of rights may be relatively broad,¹⁶⁵ or may be of a more limited nature.¹⁶⁶ In any event, the result is that employers yield some of their free speech rights in an effort to reach a general accord with the union with which they have a bargaining relationship.

There is, of course, nothing wrong *per se* with an employer agreeing at the request of a union to waive certain rights as part of the collective bargaining process. Agreements with respect to "permissive" bargaining subjects¹⁶⁷ often involve waivers by employers of traditional management rights.¹⁶⁸ In this context, waivers by an employer which are voluntarily and knowingly made

¹⁵⁹ Hotpoint Division, General Elec. Co., 128 N.L.R.B. 788, 792 (1960):

The objective of Section 8(a)(2) is to vouchsafe to the employees that in the bargaining relationship those purporting to act for them not be rendered so subject to employer control or dependent upon employer favor as to tend to deprive them of the will and the capacity to give their devotion to the interest of the group they represent.

Id.

¹⁶⁰ This is particularly so because under the NLRA a union selected to represent the employees becomes the "exclusive" representative of those employees, and once a representation election is held, another election in that unit is barred for at least one year. 29 U.S.C. §§ 159(a), 159(c)(3) (1976).

¹⁶¹ ABA CANONS OF PROFESSIONAL ETHICS, CANON 7, EC 7-38 & 39.

¹⁶² ABA CANONS OF PROFESSIONAL ETHICS, CANON 7, EC 7-1.

¹⁶³ See *United States v. Johnson*, 319 U.S. 302 (1943); *Cleveland v. Chamberlain*, 66 U.S. (1 Black) 419, 425 (1861). See also *Shop Rite Foods, Inc.*, 205 N.L.R.B. 1076, 1080 (1973).

¹⁶⁴ See, e.g., *NLRB v. Mid-States Metal Products, Inc.*, 403 F.2d 702, 705 (5th Cir. 1968) and cases cited therein.

¹⁶⁵ See text and notes at notes 24, 30 *supra*.

¹⁶⁶ See text and notes at notes 31-33 *supra*.

¹⁶⁷ See text and notes at notes 57-60 *supra*.

¹⁶⁸ See generally *Morris*, *supra* note 52, at 426-35.

should ordinarily be upheld.¹⁶⁹ Arguably, if an employer agrees to bargain away his right to speak out against a union in future organizing campaigns in return for some other benefits, he should be free to do so. Indeed, if the employer and the union were the only parties involved, one could hardly argue against this proposition. The employer and the union, however, are not the only parties involved.¹⁷⁰ Both employees and rival unions are greatly affected by such agreements. It thus becomes imperative to analyze the extent to which neutrality agreements represent assistance or support of a kind which unlawfully interferes with the rights of individual employees and rival unions. Case law interpreting section 8(a)(2) is instructive in this regard.

With respect to rival unions, the law is clear that an employer's noncoercive declaration of a preference for one union over another does not constitute a violation of section 8(a)(2).¹⁷¹ Such a declaration is protected by the employer's right to free speech and does not reach the level of "unlawful assistance" to the favored union. Discriminatory conduct which favors¹⁷² one rival union over another, however, constitutes a violation of section 8(a)(2).¹⁷³ For example, employers clearly cannot solicit authorization cards on behalf of a favored union,¹⁷⁴ nor can they lockout or otherwise force employees to join the favored union.¹⁷⁵ Furthermore, under the Labor Board's *Midwest Piping* doctrine,¹⁷⁶ employers cannot recognize one union where there is a real question of representation between two rival unions.¹⁷⁷ Finally, employers cannot grant a favored union advantageous access to employees.¹⁷⁸

¹⁶⁹ Cf. *D.H. Overmeyer v. Frick Co.*, 405 U.S. 174, 185 (1972) (outlining the appropriate standard for waiver of constitutional rights in the civil area and noting that the standard for waiver of corporate-property rights might be less than the "knowing, intelligent, and voluntary" standard applied in constitutional cases).

¹⁷⁰ "The purpose of the Board is to protect the bargaining rights of employees, not the bargaining rights of [a] union." *NLRB v. Ben Duthler, Inc.*, 395 F.2d 28, 34 (6th Cir. 1968). See also *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 564 (4th Cir. 1967).

¹⁷¹ *Rold Gold of Cal., Inc.*, 123 N.L.R.B. 285, 286 (1959). See also *NLRB v. Corning Glass Works*, 204 F.2d 422, 427 (1st Cir. 1953); *Alley Constr. Co.*, 210 N.L.R.B. 999, 1004 (1974) and cases cited therein; *Harry Davies Molding Co.*, 117 N.L.R.B. 1737, 1739 (1957).

¹⁷² Conduct which does not significantly favor one of the two rival unions is ordinarily tolerated under the Board's *de minimis* doctrine. See generally *Shopwell, Inc.*, 213 N.L.R.B. 186, 188 (1974). See also *Consolidated Flavor Corp.*, 238 N.L.R.B. 326, 329 (1978) (holding lawful an employer's allowing an incumbent union to hold two short meetings on company premises during non-working time even though a rival union was also seeking to organize the same unit).

¹⁷³ See generally *Gorman*, *supra* note 52, at 205.

¹⁷⁴ See *Independent Ass'n of Steel Fabricators, Inc.*, 231 N.L.R.B. 264, 290 (1977), *modified on other grounds*, *NLRB v. Independent Ass'n of Steel Fabricators*, 582 F.2d 135 (2d Cir. 1978); *Komatz Constr., Inc.*, 191 N.L.R.B. 846 (1971), *enforced in relevant part*, *Komatz Constr., Inc. v. NLRB*, 458 F.2d 317 (8th Cir. 1972); *B.F.G. Gourmet Foods, Inc.*, 236 N.L.R.B. 489, 491 (1978).

¹⁷⁵ See *Mountaineer Shaft and Tunnel Constr. Co.*, 234 N.L.R.B. 929, 933 (1978), *modified on other grounds*, 624 F.2d 50 (6th Cir. 1980).

¹⁷⁶ See *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945).

¹⁷⁷ *Id.* at 1070-71.

¹⁷⁸ See *Samuel Liefer and Harry Ostreicher d/b/a River Manor Health Related Facility*,

Accordingly, if neutrality agreements are viewed as mere expressions of preference for the contracting union, then such agreements would appear to be lawful. Under this analysis, no violation of section 8(a)(2) would be posed by the kind of neutrality agreement which forbids a company from saying anything about the favored union's organizational efforts, but permits the company to denigrate other unions. As a practical matter, however, a neutrality agreement which favors one of two rival unions goes beyond the mere expression of a preference for one union over another. By contractually binding itself to a posture of neutrality, an employer confers a certain status on the favored union. This status derives from the employer's actions in accepting that union's capacity to enter into an agreement (*e.g.* a neutrality agreement) applicable to a facility in which it has not won a representation election. This status far exceeds that which is conferred by an employer's mere expression of a preference for a given union, or by an employer's voluntary silence during a particular organizational campaign. In this fashion an employer gives the union signatory an unfair advantage over other unions that may wish to represent employees at an unorganized facility of the employer.¹⁷⁹

In reality, what is set up under a neutrality agreement is a legally enforceable scheme guaranteeing a continuing advantage to the favored union for the duration of the agreement. The act of entering into such an agreement with one of two rival unions will likely be interpreted¹⁸⁰ by unorganized employees as a statement by the company that it is more willing to negotiate with one union than another.¹⁸¹ Statements to that effect would clearly require that an election be set aside.¹⁸² It follows, therefore, that neutrality agreements violate section 8(a)(2) of the Act.

244 N.L.R.B. 227, 241 (1976), *enf'd*, 95 L.R.R.M. 3011 (2d Cir. 1977); *NLRB v. O'Keefe & Merritt Mfg. Co.*, 178 F.2d 445, 447 (9th Cir. 1949); *Interpace Corp.*, 189 N.L.R.B. 132, 138 (1971).

¹⁷⁹ *Cf. International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 78 (1940) ("[even] slight suggestions as to the employer's choice between unions may have a telling effect . . .").

¹⁸⁰ The United States Supreme Court has made clear that an employer need not intend to aid a union unlawfully for a § 8(a)(2) violation to be found; as long as the result of the employer's actions is unlawfully to aid the union and hamper employee free choice, a § 8(a)(2) unfair labor practice action will exist. *ILGWU v. NLRB (Bernhard-Altman Texas Corp.)*, 366 U.S. 731, 738-39 (1961). Further, employees' subjective reactions to employer support of a union need not be proved for a § 8(a)(2) action to lie. What is of primary consequence is the tendency of the employer's assistance to coerce employees in the exercise of their rights. *NLRB v. Vernitron Electrical Components, Inc.*, 548 F.2d 24, 26 (1st Cir. 1977).

¹⁸¹ R.E. WILLIAMS, P.A. JANICE, & K.C. HUHN, *NLRB REGULATION OF ELECTION CONDUCT* 203 (1974).

Presumably, Section 8(c) of the Act protects the employer's right to express his approval or dislike for a particular union. However, approval or dislike, when expressed in strong terms, may be interpreted as carrying an implication that the employer would deal differently with the preferred union if elected than with the rival organization. This will result in election invalidation.

Id.

¹⁸² *Cf. Boston Mutual Life Ins. Co.*, 110 N.L.R.B. 272, 275-76 (1954) (setting aside election where employer stated it would be more willing to negotiate with one union than the other).

By focusing on the effect of neutrality agreements on rival unions, the preceding analysis has suggested the doubtful legality of such agreements. An analysis which focuses instead on the effect of neutrality agreements on individual employees suggests a similar conclusion. As stated by the Supreme Court, Congress intended section 8(a)(2) to guarantee employees "complete and unfettered freedom of choice"¹⁸³ in determining who will represent them or whether they even want union representation at all. It is therefore the right of employees to freely choose their bargaining representative that is protected by the NLRA generally¹⁸⁴ and by section 8(a)(2) in particular. This right, according to the Supreme Court, derives from "a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence."¹⁸⁵ The assumption of section 8(a)(2), therefore, is that the rights of employees to vote in free and fair elections will not be protected where a union is unduly assisted and supported in its organizing efforts by an employer.

The NLRB has assessed the legality of employer conduct under section 8(a)(2) by looking to whether the "natural tendency" of supportive activities by an employer is to "inhibit employees in their choice of a bargaining representative."¹⁸⁶ Applying this analysis, the Labor Board has found that employers may freely state their opinion that employees should join a union,¹⁸⁷ but may not provide significant assistance to an organizing union.¹⁸⁸ Providing financial support to unions is a form of "significant assistance," and is expressly prohibited by the terms of the Act itself.¹⁸⁹ Similarly, helping unions by distributing authorization cards for them,¹⁹⁰ or by permitting them to use company facilities for organizational purposes has been held to violate section 8(a)(2).¹⁹¹ Furthermore, employers clearly cannot recognize and contract with

¹⁸³ NLRB v. Link-Belt Co., 311 U.S. 584, 588 (1941).

¹⁸⁴ Thus, for example, the court stated in NLRB v. Mid-States Metal Prods., Inc., 403 F.2d 702 (5th Cir. 1968):

The Act "was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions, and the prohibition of unfair labor practices designed by an employer to prevent the free exercise by employees of their wishes in reference to becoming members of a union was intended by Congress as a grant of rights to the employees rather than as a grant of power to the union."

Id. at 704.

¹⁸⁵ International Ass'n of Machinists v. NLRB, 311 U.S. 72, 80 (1940).

¹⁸⁶ Kaiser Foundation Hospitals, 223 N.L.R.B. 322 (1976).

¹⁸⁷ See, e.g., Coppus Engineering Corp. v. NLRB, 240 F.2d 564, 570-71 (1st Cir. 1957) (employer's statement that employees should form a company union not violative of § 8(a)(2)).

¹⁸⁸ Conduct which in some minor respect assists union organizing efforts is frequently ignored under the board's *de minimis* doctrine. See discussion at note 172 *supra*. See also Monon Trailer, Inc., Div. of U.S. Railway Mfg. Co., 217 N.L.R.B. 257, 268 (1975).

¹⁸⁹ 29 U.S.C. § 158(a)(2) (1976). See, e.g., American Tara Corp., 242 N.L.R.B. 1230, 1245 (1979); Dennison Mfg. Co., 168 N.L.R.B. 1012, 1016-17 (1967), *enf'd*, NLRB v. Dennison Mfg. Co., 419 F.2d 1080 (1st Cir. 1970).

¹⁹⁰ See Packing House & Indus. Services, Inc., 590 F.2d 688, 694 (8th Cir. 1978); The Drackett Co., 207 N.L.R.B. 447, 453 (1973), *enf'd*, 90 L.R.R.M. 2844 (7th Cir. 1974); B.F.G. Gourmet Foods, Inc., 236 N.L.R.B. 489, 491 (1978).

¹⁹¹ See, e.g., Utrad Corp., 185 N.L.R.B. 434, 442 (1970). Where, however, the cir-

a union absent a showing that the union represents an uncoerced majority of their employees.¹⁹² The Board is especially wary of any employer support to a union before the union has been selected by the employees in a free and fair election.¹⁹³ As a practical matter neutrality agreements provide greater assistance to the favored union than other forms of support which the Board has held to violate section 8(a)(2).¹⁹⁴ Such assistance is provided not only prior to an election being held, but also with the acknowledged purpose of facilitating union organizing effort.¹⁹⁵

Although an employer is free to remain silent during a union organizing campaign or even to state his preference for a union, it is unrealistic to view neutrality agreements as having no more force than a mere public statement by the employer setting forth his views about unionization. Under a neutrality agreement, an employer binds itself contractually for a specified period not to oppose the organizational efforts of the union with which the agreement was reached. The very fact of having reached such an agreement with the employer thus enhances the union's stature in the eyes of the company's employees. Such agreements may therefore be seen as binding contracts to assist, albeit through their silence, a favored union. Viewed in this way, neutrality agreements rise to the level of unlawful assistance to the favored union and therefore violate section 8(a)(2).¹⁹⁶

Neutrality agreements also violate section 8(a)(2) because their "natural tendency" is to "inhibit employees in their choice of a bargaining representative."¹⁹⁷ Employee freedom of choice is inhibited by such agreements in two ways. First, because such agreements tend to demonstrate, through an employer's conduct, deference to a certain union, employees may be more likely to view that union as more powerful and therefore a worthier representative. Second, although neutrality agreements may seal the lips of an employer, in the process of so doing, they say a great deal about the employer's willingness to negotiate with rival unions. Employees unwilling to incur the wrath of their employer may feel compelled to vote for the favored union. Viewed in either

circumstances are such that it would be otherwise impossible for a union to reach the employees, union access to company facilities for organizational purposes will be permitted. *See, e.g., S&H Grossinger's Inc. v. NLRB*, 372 F.2d 26, 29 (2d Cir. 1971).

¹⁹² *See, e.g., ILGWU v. NLRB* (Bernhard-Altman Texas Corp.), 366 U.S. 731 (1961); *Komatz Constr., Inc. v. NLRB*, 458 F.2d 317, 332 (8th Cir. 1972); *Triangle Sheet Metal Works Div. of P&F Indus., Inc.*, 237 N.L.R.B. 364, 370 (1978).

¹⁹³ *See NLRB v. The Summers Fertilizer Co.*, 251 F.2d 514, 518 (1st Cir. 1958) and cases cited therein.

¹⁹⁴ *See* text and notes at notes 190-191 *supra*.

¹⁹⁵ *See generally* [1979] DAILY LAB. REP. (BNA) D-10 (Sept. 19, 1979); *Cf. Craft, supra* note 10, at 754-57 (citing the need to improve union organizing as the genesis of neutrality agreements).

¹⁹⁶ Drawing an analogy from constitutional doctrine, neutrality agreements can be seen as a form of "speech plus." *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 598 (1978). As such, they can be subject to governmental regulation and/or proscription.

¹⁹⁷ *Kaiser Foundation Hospitals*, 223 N.L.R.B. 322 (1976).

fashion, as a promise of reward for voting for the favored union, or as a threat against voting for rival unions, neutrality agreements tend to unlawfully inhibit the freedom of choice guaranteed by section 8(a)(2).

In one sense entering into such an agreement constitutes *de facto* recognition of a favored union, without a majority of employees in the bargaining unit deciding to support that union. Moreover, the persons directly affected by neutrality agreements are employees who have heretofore not chosen to be represented by any union. Entering into a neutrality agreement with a union would certainly affect these employees more than bargaining with the union about the price of food in the vending machines at the plant.¹⁹⁸ Yet, recognizing the union and bargaining about the latter would, in the absence of a showing that the union represented an uncoerced majority of the employees in the unit, clearly violate section 8(a)(2). Such employer assistance to unions surely inhibits employees in their choice of a bargaining representative and should be proscribed.

Neutrality agreements are similar to other employer conduct which has been found to inhibit employees in their choice of bargaining representative. For example, in *NLRB v. Keller Ladders Southern Inc.*,¹⁹⁹ the Fifth Circuit upheld a Board finding that cooperation between a company and a favored union "went beyond legally protected cooperation over into the proscribed domain of interference with the freedom of choice of the employees."²⁰⁰ In *Keller*, the questionable conduct involved the plant manager's making employees available to assist the union organizer in setting up an organization meeting and allowing such a meeting to take place on company premises.²⁰¹ The criticism leveled at such conduct by the *Keller* court applies equally well to neutrality agreements:

We can see circumstances where management will be less resistant to a union which already has another or other of its plants organized. This is an example of cooperation but there is a line between cooperation and a situation where, as here, a fair inference may be and was drawn that the company and the union are working together and that the employees are not in possession of all of the facts but were rushed, on company time and under company auspices, into the arms of the union. This oversteps the line.²⁰²

Thus, union-management cooperation which unduly undercuts the rights of individual employees will be found to violate section 8(a)(2) of the Act.

Similarly, in *Steak and Brew*,²⁰³ the Board held that a company violated section 8(a)(2) by entering into a pre-election agreement which favored one of two rival unions seeking to organize its facilities.²⁰⁴ In *Steak and Brew*, the company

¹⁹⁸ See generally *Ford Motor Co. v. NLRB*, 441 U.S. 488, 501-02 (1979).

¹⁹⁹ 405 F.2d 663 (5th Cir. 1968).

²⁰⁰ *Id.* at 667.

²⁰¹ *Id.* at 666.

²⁰² *Id.* at 667.

²⁰³ 213 N.L.R.B. 450 (1974).

²⁰⁴ *Id.* at 453.

agreed to have a private election conducted by an independent person agreeable to both the company and the favored union.²⁰⁵ According to the terms of the agreement, the name of a rival union also seeking to organize the restaurant was to appear on the ballot. The rival union, however, was not offered an opportunity to participate in the agreement.²⁰⁶ The costs of the election, including payment of the person conducting the election, were divided between the company and the favored union.²⁰⁷ The agreement also provided that if the favored union won the election, the company would grant it recognition, visitation rights and participation in a grievance procedure.²⁰⁸ No comparable pledge was made to the rival union if it won the private election.²⁰⁹ As a consequence, the Board held that "the Company rendered unlawful assistance to the [favored union] and interfered with freedom of choice in the election, thereby invalidating the results thereof."²¹⁰

Although more egregious than the neutrality agreements discussed above, the pre-election agreement at issue in *Steak and Brew* offered an advantage to the favored union similar in kind to the advantages offered to favored unions under neutrality agreements. For example, a neutrality agreement which provides that the company will remain neutral with respect to the organizing activities of the union signatory²¹¹ ordinarily would not offer a reciprocal pledge as to other unions seeking to organize that same facility. Another criticism of the arrangement in *Steak and Brew* was that "employees were told at the polls that the election was being conducted by an individual whose compensation came from the favored union and the Company, [the] implication being that the rival union did not have sufficient interest in the matter to contribute its share."²¹² Along these same lines, neutrality agreements tend to enhance the status of a union which had obtained a neutrality agreement vis-à-vis other unions. As the Supreme Court observed in *International Association of Machinists v. NLRB*,²¹³ "even slight suggestions as to the employer's choice between unions may have a telling effect among men who know the consequences of incurring the employer's strong displeasure."²¹⁴

Neutrality agreements therefore represent employer assistance or support of favored unions which impermissibly interferes with the rights of individual employees and rival unions. This conclusion is consistent not only with the

²⁰⁵ *Id.* at 451.

²⁰⁶ *Id.* at 452.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See generally notes 24-27 *supra* and accompanying text.

²¹² 213 N.L.R.B. at 452.

²¹³ 311 U.S. 78 (1940).

²¹⁴ *Id.* at 78. Similarly, employer concessions to an incumbent union and acceding to a grievance of four or five laid-off employees nine days prior to an election were held to be an unfair interference with free choice. See *Kiekhäfer Corp.*, 120 N.L.R.B. 95, 96-97 (1958).

standards for section 8(a)(2) violations established by case law, but also with the purposes and legislative history of the NLRA. Section 7 of the Act sets forth the rights of employees to organize. As originally enacted in 1935, section 7²¹⁵ guaranteed "[e]mployees . . . the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."²¹⁶ Reading this provision in conjunction with other relevant sections of the Act,²¹⁷ the National Labor Relations Board initially viewed the encouragement of union organization as one of its principal functions.²¹⁸

Congress, however, subsequently made clear that this was not the proper role for the Board to play. In the Taft-Hartley amendments of 1947²¹⁹ Congress set forth a more evenhanded approach to the regulation of labor-management relations. One of the linchpins of this new approach was Congress' amendment of section 7 of the Act. The amendment added to the original language of section 7 the proviso that employees "shall also have the right to refrain from any or all such activities."²²⁰ Congress thus made clear that it is not unionization that is important, but rather that individual employees have complete freedom either to join or not to join unions as they desire. Enforcement of neutrality agreements undercuts the freedom of choice and individual employee rights which are the cornerstones of the representational system set up by the National Labor Relations Act.

Persuasive arguments support the view that neutrality agreements violate the spirit, if not the precise language, of section 8(a)(2). Such agreements do not promote the "complete and unfettered freedom of choice" which Congress sought to guarantee by enacting section 8(a)(2). On balance, neutrality agreements appear to go beyond mere cooperation between labor and management and can reasonably be seen as representing unlawful employer support of union organizing efforts in violation of section 8(a)(2). In addition to these problems posed under section 8(a)(2), neutrality agreements may also violate other sections of the Labor Act. Such agreements adversely affect the free speech rights accorded to employers under section 8(c), the right to vote in free and open representation elections guaranteed to employees by section 7, and

²¹⁵ Pub. L. No. 74-198, § 7, 49 Stat. 452 (1935).

²¹⁶ *Id.*

²¹⁷ Section 1 of the Labor Act, 29 U.S.C. § 151 (1976), for example, states that: "It is declared to be the policy of the United States . . . [to encourage] the practice and procedure of collective bargaining. . . ." As the Board initially viewed this policy, collective bargaining implied unionization.

²¹⁸ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). See also Note, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns*, 72 YALE L.J. 1243, 1245 & n.17 (1963).

²¹⁹ Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947).

²²⁰ 29 U.S.C. § 157 (1976). In parallel amendments, Congress also made it an unfair labor practice for unions to force unionization on employees. 29 U.S.C. § 158(b)(1) (1976).

the right of employees to be free from imposed unionism. The remainder of this article will address the impact of neutrality agreements on these statutory rights of employers and employees.

B. *Neutrality Agreements, Free Speech, and Free Elections.*

Congress enacted section 8(c) in 1947, as part of the Taft-Hartley amendments to the National Labor Relations Act. The section guarantees freedom of speech to employers during union organizing campaigns by providing that:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of any unfair labor practice under any provision of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.²²¹

Congress therefore intended section 8(c) to guarantee employers complete freedom to speak out on such matters as unionization, so long as such speech is noncoercive in nature.

The enactment of this statutory provision represented the codification of the Supreme Court's holding in *NLRB v. Virginia Electric & Power Co.*²²² Before *Virginia Electric*, the Board had viewed its role as one of promoting the right of employees to unionize.²²³ In pursuit of that goal, it was reluctant to permit any "interference" with this right,²²⁴ even where an important competing right such as freedom of speech²²⁵ was involved. The Board therefore took the position that employers were required to remain "neutral" during a union organizational campaign.²²⁶ According to the Board, maintaining a posture of "neutrality" precluded an employer from saying anything about union organizational activities. In *Virginia Electric* the Supreme Court discredited this approach. The Court ruled that the Board's policy requiring an employer to remain "neutral" violated the free speech rights guaranteed by the first amendment.²²⁷ Thus, the Court held that a violation of the Labor Act could not be found on the basis of speech alone.²²⁸ In enacting section 8(c), Congress explicitly incorporated this concept into the National Labor Relations Act.²²⁹

²²¹ 29 U.S.C. § 158(c) (1976). For a discussion of the legislative history of § 8(c) see *NLRB v. Golub Corp.*, 388 F.2d 921, 926-27 (2d Cir. 1967); Cox, *Some Aspects of the Labor Management Relations Act*, 61 HARV. L. REV. 1, 18-20 (1947).

²²² 314 U.S. 469 (1941).

²²³ See Note, *Employer Free Speech in Union Organizing Campaigns*, 15 U. FLA. L. REV. 231, 231-32 (1962). See also *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941).

²²⁴ See text and notes at notes 102-03 *supra*.

²²⁵ See generally A. COX, LAW AND THE NATIONAL LABOR POLICY 40, 42-44 (1960).

²²⁶ See text and notes at notes 102-03 *supra*.

²²⁷ *NLRB v. Virginia Elec. Power Co.*, 314 U.S. 469, 477 (1941). "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST., amend. I.

²²⁸ 314 U.S. at 477-79.

²²⁹ See 29 U.S.C. § 158(c) (1976).

Neutrality agreements appear to be inconsistent with the underlying philosophy of section 8(c). That provision was enacted by Congress as an expression of its disapproval of legally enforced employer "neutrality" during union organizational campaigns.²³⁰ By enacting section 8(c), Congress sought to encourage "free debate" on labor-management issues.²³¹ The effect of a neutrality agreement, however, is to make this "debate" entirely one-sided.

Certainly, section 8(c) does not require employers to speak out during union organizational campaigns. As a general rule, employers are free to speak out or not as they see fit during such campaigns.²³² Moreover, to the extent neutrality agreements represent the expression of an opinion by employers, they are clearly protected by section 8(c). The problem, however, is that neutrality agreements represent more than an employer's opinion on the merits of unionization. Such agreements legally restrict what an employer can say in response to union organizational efforts. The agreement is legally binding even if the employer later desires to discuss the merits of unionization with his employees.²³³ Consequently, employees are cut off from any possibility of hearing their employer's views during an organizing campaign. The only views employees will hear are those of the union or unions seeking to organize the facility. Although an employer is free to refrain voluntarily from taking a position during an organizational campaign, the imposition of legal obstacles

²³⁰ See generally Grunewald, *Empiricism In NLRB Election Regulation: Shopping Kart and General Knit In Retrospect*, 4 INDUS. REL. L.J. 161, 166-67 (1981); Pa. Comment, *supra* note 20, at 761.

²³¹ See *Linn v. United Plant Guard Workers*, 388 U.S. 53, 62 (1966).

²³² See generally 29 U.S.C. § 158(c) (1976).

²³³ The fact that such agreements are legally binding regardless of how circumstances may change over time seems to differentiate them sharply from the case where an employer has simply decided not to speak out against the union. In the latter case, unlike the former, should the employer at some later point want to address his employees, he is free to do so. If the courts can be used to enforce these restrictions, it would allow organized labor to do indirectly that which is constitutionally and statutorily impermissible. To paraphrase the United States Supreme Court in *Shelley v. Kramer*, 334 U.S. 1 (1948):

[I]t is . . . clear that restrictions . . . of the sort sought to be created by the private agreement in these cases could not be . . . imposed by state statute or local ordinance. . . . So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that . . . the provisions of the Amendment have not been violated. . . .

But here there was more. These are cases in which the purposes of the agreement were secured only by judicial enforcement. . . .

Id. at 11-13. *But cf.* *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974) (state insufficiently connected with electric company's termination of plaintiff's service to constitute state action under the fourteenth amendment). Like racially restrictive covenants, neutrality agreements seek to utilize the courts to circumvent rights protected under federal law. It is not to protect the property rights of those who voluntarily enter into racially restrictive covenants that the courts will not enforce such agreements but rather it is to protect the constitutional rights of the would-be minority purchaser. Similarly, it would seem that neutrality agreements should be held violative of § 8(c) — not to protect the rights of the employer but rather to protect the rights of the employees to make an informed choice.

to the right of employees to receive information during such campaigns would seem to be contrary to the statutory scheme envisioned by Congress in enacting the NLRA.²³⁴

Neutrality agreements therefore impair a right of perhaps even greater importance than that of employer free speech. That right, guaranteed to employees by section 7, is the right to vote in free and open representation elections. As the NLRB observed in its seminal *General Shoe Corp.*²³⁵ decision, "[i]n election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."²³⁶ Indeed, the overriding purpose of the NLRA is to guarantee employee "free choice"²³⁷ — one that is uncoerced, reasoned and thoughtful.²³⁸ As the Fifth Circuit noted in *Southwire Co. v. NLRB*:

²³⁴ See e.g., *Linn v. United Plant Guard Workers*, 388 U.S. 53, 62 (1966), where the Supreme Court acknowledged that § 8(c) of the NLRA was passed to encourage "free debate" on labor-management issues. In the first amendment context, the Supreme Court has recognized an inherent right to receive information. As the Court stated in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978):

... [T]he Court's decisions involving corporations in the business of communications or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas. . . . Even decisions seemingly based exclusively on the individual's right to express himself acknowledge that the expression may contribute to society's edification. . . .

Nor do our recent commercial speech cases lend support to appellee's business interest theory. They illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information." (citations omitted)

Id. at 783.

²³⁵ 77 N.L.R.B. 124 (1948).

²³⁶ *Id.* at 127.

²³⁷ As Senator Wagner stated in the debates on the Wagner Act in 1935:

That is what I am interested in. Whatever the men want to do, if they want to bargain individually, or through an organization within a plant, that is all right, only if it is the free choice of the men. Of course, we are all for that. That is all I am seeking to do, to make the worker a free man to make his choice, and I think that I have been emphasizing that. . . . The free choice of the worker is the only thing I am interested in.

I LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 440 (1935).

²³⁸ *General Shoe Corp.*, 77 N.L.R.B. at 126. See also *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962) where the Board stated:

Our function, as we see it, is to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from elements which prevent or impede a reasoned choice.

The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available.²³⁹

When activities, even if not constituting unfair labor practices, create an "atmosphere" which prevents "a free and untrammelled choice by the employees," a representation election will be invalidated.²⁴⁰

This right to free and open labor elections held under "laboratory conditions," has been upheld by the courts even when challenged on constitutional grounds. Thus, the United States Court of Appeals for the Second Circuit, in *Bausch & Lomb, Inc. v. NLRB*²⁴¹ differentiated between the first amendment standards applicable to labor elections and those applicable to general public elections. The court stated that any impingement on first amendment rights resulting from the Board's insistence on "laboratory conditions" in labor elections "must be weighed against the interest of employees and the public at large in free, fair and informed representation elections."²⁴²

In assessing whether neutrality agreements violate section 7 it is useful to examine the legal principles governing the concept of waiver. The United States Supreme Court in *NLRB v. Magnavox Company*²⁴³ held that a union could not waive the section 7 rights of the employees it represents to distribute organizational materials during otherwise permissible time periods.²⁴⁴ The Supreme Court noted that such a waiver should not be permitted "... where the right of employees to exercise their choice of a bargaining representative is involved — whether to have a bargaining representative, or to retain the present one, or to obtain a new one."²⁴⁵ Neutrality agreements represent a situation analogous to that in *Magnavox*. Specifically, in negotiating a neutrality agreement the company and the favored union are in effect agreeing to a waiver of the right of employees to vote in free and open representation elections.

Moreover, although neutrality agreements may not be prohibited under the first amendment, the free speech rights of both employers and employees guaranteed under section 8(c) of the Act go beyond those constitutionally pro-

Id. at 70. *Cf.* *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946) (Congress has entrusted the Labor Board with a wide degree of discretion in adopting procedures to insure that employees have a free and fair choice in labor elections).

²³⁹ 383 F.2d 235, 241 (5th Cir. 1967).

²⁴⁰ *General Shoe Corp.*, 77 N.L.R.B. at 126.

²⁴¹ 451 F.2d 873 (2d Cir. 1971).

²⁴² *Id.* at 879.

²⁴³ 415 U.S. 322 (1974).

²⁴⁴ *Id.* at 324.

²⁴⁵ *Id.* at 325. The Court was particularly concerned that in such a case the union may be more interested in perpetuating itself and its own power than in the rights of the individual employees. *Id.*

tected.²⁴⁶ Thus, for example, in *Hudgins v. NLRB*,²⁴⁷ the Supreme Court held that although the first amendment did not guarantee the rights of employees to engage in economic picketing on private property, such rights might exist under the National Labor Relations Act.²⁴⁸ The NLRB subsequently confirmed that such rights were protected under the Act.²⁴⁹ The United States Supreme Court had previously recognized such rights during union organizing efforts.²⁵⁰ In *Central Hardware Co. v. NLRB*²⁵¹ the Court recognized that the free exercise of organizational rights "depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others."²⁵² The Court held in both *Central Hardware* and *NLRB v. Babcock & Wilcox Co.*,²⁵³ that under the NLRA, where private property rights and organizational rights conflict, the former must yield.²⁵⁴ In *Hudgins*, the NLRB endorsed under section 7 an employees' "right to receive information" during an organizational campaign.²⁵⁵ As discussed above, it is this right which is severely impinged upon by neutrality agreements.

Although it can be argued that neutrality agreements contain an element of protected expression and that such agreements reinforce the goal of reducing labor strife through peaceful cooperation,²⁵⁶ these considerations must be weighed against the interest of employees and, indeed, the interest of the public at large²⁵⁷ in "free, fair and informed representation elections."²⁵⁸ When these

²⁴⁶ Cf. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 910, 153 Cal. Rptr. 854, 860, 592 P.2d 341, 347 (1979), *aff'd*, 48 U.S.L.W. 4650 (June 9, 1980) (holding that the reasonable exercise of free speech and petitioning in a privately-owned shopping center is protected under the state constitution). For an excellent discussion of protections of free speech under state constitutions, see Note, *Private Abridgement of Speech*, 90 YALE L.J. 165, 165-80 (1980). Some such protections would also seem to be guaranteed, by analogy, under §§ 7 and 8(c) of the NLRA.

²⁴⁷ 424 U.S. 507 (1975).

²⁴⁸ *Id.* at 521.

²⁴⁹ *Scott Hudgins*, 230 N.L.R.B. 414, 418 (1977).

²⁵⁰ See *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543-47 (1975); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-13 (1956).

²⁵¹ 407 U.S. 539 (1975).

²⁵² *Id.* at 543.

²⁵³ 351 U.S. 105 (1956).

²⁵⁴ *Id.* at 113; 407 U.S. at 547.

²⁵⁵ Thus the Board stated:

It is clear that the Section 7 rights involved in *Babcock & Wilcox*, as in *Central Hardware*, are those of the employees rather than those of the nonemployees seeking to organize them. That is to say, if the employees are beyond the reach of reasonable union efforts to communicate with them, it is the employees' right to receive information on the right to organize that is abrogated when an employer denies nonemployee union organizers access to the employer's property.

230 N.L.R.B. at 416.

²⁵⁶ See 29 U.S.C. § 151 (1976).

²⁵⁷ Certainly to the extent the outcome of labor elections and the decisions of individual employees to unionize or not affects the national economy, the public at large indeed has a strong interest.

²⁵⁸ *Bausch & Lomb, Inc. v. NLRB*, 451 F.2d 873, 879 (2d Cir. 1971).

competing interests are considered, it seems that the interest of the individual employees in making an informed decision in a "free and fair election" and the interest of the public in maintaining the integrity of the electoral process should prevail. It follows from this that neutrality agreements violate the "laboratory conditions" required for holding representation elections pursuant to the National Labor Relations Act. Labor elections are not conducted under "laboratory conditions" when employees are legally restricted from receiving information from their employer — the only interested party who realistically is able to provide a point of view that differs from that of the union seeking to organize the employees.²⁵⁹ Neutrality agreements therefore impermissibly impair the right of employees to receive information during organizing campaigns and should be held to violate section 7 of the NLRA.

C. Neutrality Agreements and Imposed Unionism

The safeguards which exist to insure free and fair labor elections are meaningless if bargaining representatives are imposed on employees without having obtained the uncoerced majority support of the employees they purport to represent. Unfortunately, this was often the case in the early years of the administration of the Labor Act. One method by which employees were forced to join unions was through organizational picketing, *i.e.*, picketing of an employer's premises for the purpose of getting the employer to recognize the union without an election. In such cases the employees were forced to join unions not of their choice and regardless of their wishes.²⁶⁰

To rectify this situation, Congress in 1959 enacted section 8(b)(7) of the National Labor Relations Act.²⁶¹ As the Court of Appeals for the Seventh Circuit recently noted:

[T]he ban on recognitional picketing was significantly motivated by a desire to end the union practice of going into an employer's office without any concern for the sentiments of the majority of the employees and threatening to engage in picketing indefinitely unless the employer recognized the union as the bargaining representative of the employees.²⁶²

Section 8(b)(7) puts strict limitations on the use of organizational picketing. Under section 8(b)(7) unions are not permitted to engage in organizational picketing at all if another union represents the employees. Even if the employees are unrepresented, a union can engage in such activities for no more than thirty days before they must file a petition for a labor election.²⁶³ Further-

²⁵⁹ Of course, the greater the extent employer free speech is allowed under a neutrality agreement the less likely it is to violate the "laboratory conditions" test.

²⁶⁰ See LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1175 (1959) (statements of Senator McClellan).

²⁶¹ 29 U.S.C. § 158(b)(7) (1976).

²⁶² *International Brotherhood of Teamsters v. NLRB*, 568 F.2d 12, 18 (7th Cir. 1977).

²⁶³ For a good discussion of this topic see J. FEERICK, H. BAER & J. ARFA, *NLRB REPRESENTATION ELECTIONS — LAW, PRACTICE AND PROCEDURE* 119-45 (1980).

more, in the case of unrepresented employees, a representation election will be arranged on an expedited schedule if the employer files a section 8(b)(7) unfair labor practice charge with the NLRB.²⁶⁴

Congress in amending the National Labor Relations Act in 1959 generally condemned union representation which was not freely chosen by the employees involved. Senator McClellan, a sponsor of the amendments, stated this best when during the congressional debates on organizational picketing he said that:

Unionizing and collective bargaining are premised on the free choice of individuals who work together to join a union of their choice, and to bargain collectively; it is not based upon compulsion to join a union.

"Compulsion" is an ugly word. Decent unionism does not require it; decent unionism does not need it. Honest unionism does not need to apply that kind of tactics.

If unionism is good, if it is sound, if it is right, if it is just, we can trust in the good faith and the quality and integrity of American Workers voluntarily to accept it, to desire it honestly, and to be enthusiastic to secure the benefits which flow from worthy unionism. The workers will seek to unionize. But they ought not to be compelled and hijacked to join unions whether they want or not, when they are not given a free choice. Compulsion and hijacking are nothing in the world but top-down organization; and top-down organization has no place in American law or American institutions.²⁶⁵

Hence, one of the primary purposes of section 8(b)(7) was to end the practice of a union being designated as a bargaining representative without having obtained the support of a majority of the employees in the unit.

This precept is inherent in the scheme of labor representation set forth in the National Labor Relations Act.²⁶⁶ This basic policy was most recently endorsed by the Supreme Court in *Connell Construction Co. v. Plumbers Local 100*.²⁶⁷ In *Connell*, despite seemingly clear language in section 8(e) of the National Labor Relations Act permitting such arrangements, the Supreme Court struck down an agreement between a construction industry employer and a union whereby the employer agreed to use only unionized subcontractors.²⁶⁸ In striking down this agreement, the Court specifically cited the enactment by Congress of section 8(b)(7), and discussed how the enforcement of the agreement in question would work to thwart the desires of individual employees and the

²⁶⁴ See generally *Gorman*, *supra* note 52, at 235.

²⁶⁵ See note 260 *supra*.

²⁶⁶ See generally 29 U.S.C. § 159(c) (1976) (outlining the selection of bargaining representatives by majority vote).

²⁶⁷ 421 U.S. 616 (1975). The Court stated: "One of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of the employees. Congress accomplished this goal by enacting § 8(b)(7) which restricts primary recognitional picketing. . . ." *Id.* at 632.

²⁶⁸ *Id.* at 624-25.

underlying goals of that statutory provision.²⁶⁹ The Supreme Court in *Connell* evidenced a marked willingness to protect individual employee rights inherent in the framework set up under the NLRA.

Although neutrality agreements do not constitute organizational picketing violative of section 8(b)(7), nevertheless, such agreements do share many of the basic characteristics of organizational picketing. In a very real sense, they are an attempt by unions to use their bargaining strength at a company's unionized plants to "coerce" or "buy" management silence in organizing campaigns at its unorganized plants. Thus, like organizational picketing, they represent a form of "top-down" organizing.

In the final analysis, neutrality agreements will often have the practical effect of imposing unionism on employees. This will result from the restrictions placed on the free flow of information under neutrality agreements from sources other than the organizing union, as well as from the very act of entering into an agreement with a union which has not obtained an uncoerced majority in the unit covered by that agreement. Thus, it seems that neutrality agreements conflict with the Act's underlying policy of preventing the imposition of unionism on employees. As such, they should be struck down as violative of sections 8(a)(1) and 8(b)(1)²⁷⁰ even if they do not specifically violate section 8(b)(7).²⁷¹

CONCLUSION

Neutrality agreements represent a new labor relations frontier. Unions, seeing little hope over the next few years of achieving gains in the political arena, perceive them as a way of regaining lost ground. Employers may agree to go along with such agreements to buy labor peace, particularly if they have only a limited number of unorganized facilities and do not foresee opening any new ones in the immediate future. However, the group that loses the most when neutrality agreements are entered into are the individual employees. They are the least powerful of the relevant groups and have no say in the decision to enter into such agreements. Neutrality agreements prevent such employees from getting the full story during an election campaign. Ultimately, under neutrality agreements, the choice to be represented by a union is not really a free and informed one as envisioned by the drafters of the NLRA.

This is not to suggest that an employer, in every instance, has an obliga-

²⁶⁹ *Id.* at 632 & n.11.

²⁷⁰ 29 U.S.C. § 158(a)(1), 158(b)(1) (1976). Section 8(a)(1) and 8(b)(1) protect the rights of employees from "restraint of coercion" by employers and labor organizations, respectively.

²⁷¹ 29 U.S.C. § 158(b)(7) (1976). In other labor contexts, the courts have refused to enforce, as violative of § 8(a)(1) or 8(b)(1), agreements which conflict with national labor policy. Thus, for example in *Scofield v. NLRB*, 349 U.S. 423 (1968) the Supreme Court refused to enforce union rules that "invade or frustrate an over-riding policy of the labor law." *Id.* at 429.

tion to become involved in an organizing campaign. An employer is and should be completely free to decide to remain neutral in any given campaign. It is one thing, however, for an employer to decide to remain neutral in a given campaign, but it is an entirely different matter to agree to remain neutral in all future campaigns involving a certain union. In light of the broader policy concerns discussed herein, it would seem that neutrality agreements threaten the very assumptions upon which the selection of a representative under NLRA depend.

Even an employer who has a constructive working relationship with a union could be expected to balk at entering into an agreement which will cast doubt on the integrity of the electoral process and which will jeopardize individual employee rights. However, regardless of an individual employer's willingness to enter into a neutrality agreement, the NLRB and the courts have the ultimate responsibility for insuring the rights of individual employees to a free and fair representation election under the National Labor Relations Act. In keeping with that responsibility, the National Labor Relations Board and the courts should hold that neutrality agreements fall outside the proper bounds of the National Labor Relations Act.

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