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Using the Ethical Principles of Union Organizing to Avoid Card-Check Neutrality and Corporate Campaigns

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Abstract

In the summer of 2013, after protracted negotiations, Hyatt Hotels and unite/here reached a landmark labor agreement. Of note in this agreement is the commitment by both parties to a process that leads to what they term “fair elections” for future labor representation. The concept of what represents a “fair agreement” has been a subject of debate, proposed legislation, and litigation for decades. In this paper, we explore a different concept of fairness. Rather than allow years of discord to limit the parties’ options, the proposal is to have both parties communicate under consistent standards, without intimidation and unrest. Our goal in presenting this proposal is to create an environment where all parties to a union representation decision have the opportunity to be heard fairly and, most critically, the employees are able to choose whether they wish to be represented in a free and fair election. That is, those employee groups who wish to be represented have the opportunity for collective bargaining, while those who do not want to be organized are not forced into representation.

Keywords

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Comments

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by Zev J. Eigen and David Sherwyn

EXECUTIVE SUMMARY

The current rules and conventions for union organizing for hotel employees seem to invite both labor and management to try to game the system in preparation for an election to determine whether employees will be represented by a union. The National Labor Relations Board has proposed regulations that would expedite the organizing process, based on the logical fallacy that the outcome of a process allows one to assess the fairness of that process. Alternatively, labor unions push for agreements that prevent employees from having the chance to cast an anonymous vote for or against organizing. Instead, the employees would become part of a bargaining unit if a sufficient number of cards are received indicating a preference for a union. This agreement is combined with a promise of employer neutrality during the process. In place of those agreements, or the current legally mandated method, this report proposes adopting a system that is intended to preserve the workers' right to self-determination and to create an even playing field for both labor and management. As explained here, the new system would be based on the Principles for Ethical Conduct During Union Representational Campaigns, developed by the Institute for Employee Choice, a project of Richard Bensinger and Dick Shubert, who wanted to reduce the unfairness to employees found in the current organizing system.

ABOUT THE AUTHORS

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In the summer of 2013, after protracted negotiations, Hyatt Hotels and UNITE/HERE reached a landmark labor agreement. Of note in this agreement is the commitment by both parties to a process that leads to what they term “fair elections” for future labor representation. The concept of what represents a “fair agreement” has been a subject of debate, proposed legislation, and litigation for decades. In this paper, we explore a different concept of fairness. Rather than allow years of discord to limit the parties’ options, the proposal is to have both parties communicate under consistent standards, without intimidation and unrest. Our goal in presenting this proposal is to create an environment where all parties to a union representation decision have the opportunity to be heard fairly and, most critically, the employees are able to choose whether they wish to be represented in a free and fair election. That is, those employee groups who wish to be represented have the opportunity for collective bargaining, while those who do not want to be organized are not forced into representation.

For hospitality employers concerned about union organizing, the elections of 2010 and 2012 ended the threat of passage of the Employee Free Choice Act (EFCA) and allowed the industry to exhale a collective sigh of relief. This relief, however, may not be the end of the story. The National Labor Relations Board (NLRB) is engaged in a rule making process to create a streamlined “quick election” process. The board’s new procedures would effectively shorten the time between filing a petition for an election and the election itself from the current median of 38 days to between 10 and 21 days. The NLRB’s rulemaking ability, however, did not survive judicial review because the board did not have a quorum of members, as we explain later in this report. Now that the NLRB is fully constituted, the proposed new rules could become reality. The quick elections may not, however, be relevant to the hotel industry, where the most relevant union, UNITE HERE, does not seek to organize through elections. Instead, UNITE HERE uses leverage to convince employers to agree to card-check neutrality agreements—a process that is significantly more union friendly than the organizing procedures that would have taken effect under EFCA.

At the heart of the NLRB’s rule making change and the unions’ insistence on card-check neutrality are contentions regarding fairness in connection with employees’ representation. Unions take the position that the current system, which involves an election regarding a bargaining representative, is not fair, and they further assert that card-check neutrality is fair. This perception is based on the anticipated outcome of the two competing approaches. The card-check proposal would result in increased union density, as compared with elections.¹ In this report, we discuss and redefine the concept of fairness by separating the process from the outcome. We analyze the current election-based system, card-check neutrality, and quick elections under this new rubric. We then set forth an entirely different perspective, based on ethical principles of union organizing. We contend that our proposed system is more fair than those that are proposed or in use. It will allow employees who wish to organize to become union members, and it would allow progressive employers to prevail in both a union election and in the competition for public approval.

What Is Fair?

The determination of fairness seems to be heavily weighted by the results of a system rather than by an assessment of the process that is used. For example, there is substantial literature comparing the results of employment discrimination cas-

¹ For a discussion of card checks and union elections, see: David Sherwyn, Zev Eigen, and Paul Wagner, “The Hotel Industry’s Summer of 2006: A Watershed Moment for America’s Labor Unions?,” *Cornell Hotel and Restaurant Administration Quarterly*, Vol. 47, No. 4 (November 2006), pp. 337-349.

es resolved in litigation with those resolved in arbitration.² One underlying theme of this work is that systems are fair if they have comparable results. Alternatively, according to some, there is a positive relationship between plaintiff victories and fairness.³ Similarly, there are those who point to the results of union organizing drives and elections and make conclusions about the fairness of the process by looking at the results. The system is fair, according to some, if the union wins the majority of elections but unfair otherwise. As we discuss below, the results of an adjudication system or a union representation election standing alone do not reveal anything about the system’s fairness.

The fairness correlation between rules and outcomes can only be assessed if we have determinative information prior to the time that we invoke the system. In sports, we would need to know the abilities of the teams. If the teams are of reasonably equal ability, then a fair system would result in each team winning about half the games.

To assess the fairness of a judicial process, we need to know the facts on which a holding is based. In discrimination claims we would need to know if the employer violated the law. Thus, if employee plaintiffs who go to trial in discrimination cases were in fact discriminated against 90 percent of the time, a fair system should generate approximately a 90-percent employee win rate. If plaintiffs were discriminated against only 10 percent of the time, we should expect to see a 10-percent win rate for those employees. With respect to discrimination, because the trial determines guilt or innocence, we cannot judge the fairness of the system merely by analyzing results. What we are describing here is known as the “base rate fallacy.” Without information on the reference category’s base rate (in this case, how much employers actually discriminate),

² See, e.g., Curtis Brown, *Cost-Effective, Fast and Fair: What the Empirical Data Indicate About ADR*, METRO. CORP. COUNSEL, NOV. 2004, at 56, 70 (summarizing several empirical studies comparing litigation with arbitration); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., NOV. 2003–JAN. 2004, at 44, 48 & tbl.1; Elizabeth Hill, *Due Process at a Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 824 (2003); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46 (1998); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1567–78, 1586–91 (2005) (reviewing prior empirical research and presenting the results of a case study finding arbitration faster and more efficient than litigation); Frederick L. Sullivan, *Accepting Evolution in Workplace Justice: The Need for Congress to Mandate Arbitration*, 26 W. NEW ENG. L. REV. 281, 308–12 (2004).

³ David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1262–63 (2009) (arguing empirical evidence tends to support that mandatory arbitration is unfair, as measured by aggregate pro-plaintiff dispositions).

there is insufficient information on which to base a decision on whether the process is fair.⁴

Union advocates apply the base rate argument to their contention that the current system of campaigns and elections is unfair. They often argue that the critical information about employees' desires with regard to a union is known prior to the election. Their argument rests on the fact that although they need just 30 percent of employee signatures on union preference cards to petition for an election, they often have well over 60 percent of the employees signing the cards.⁵ With that level of support, one would expect unions to win most elections, but instead a union loses anywhere from 30 percent to 60 percent of elections each year.⁶ Given that outcome, labor contends that the election system is unfair. In this context we must note that the union win rate has been at the top of that range in recent years. Unions prevailed in 67.6 percent of elections held in calendar year 2010 and in 68.7 percent of elections held in calendar year 2009. However, those percentages are subject to another argument, because a large number of filed petitions do not result in elections. According to one study, of 22,382 organizing drives occurring between 1994 and 2004 that filed an election petition, secret ballot elections were held in only 14,615 (65%).⁷ Of those 14,615 elections, unions won 8,155, or 56 percent.⁸ Thus, from the unions' view, the percentage of successful drives is relatively small.

Let's look next at the disparity between the percentage of organizing signatures and the vote outcome, which is another element of the argument that the election process is unfair. There are several explanations for why a union can have a large percentage of cards signed but still lose the election. Some observers contend that many employees sign authorization cards due to peer pressure or simply because they respect the American ideal of the democratic process of voting for one's representative. The cost to the employee of saying yes to having a vote is relatively low. Given these

arguments, employees could sign cards in favor of a vote even though they plan to vote against the union. The high percentage of signed cards might also be due to pressure, whether lawful or unlawful, exerted by union organizers on employees. Employees also might sign cards in response to the union's unilateral attempt to organize the employees, during which employees hear only one side of the story regarding workplace issues. By the time of the election, in contrast, employees have heard both sides of the story and may make a more informed decision. While it is possible that employers intimidate and otherwise unfairly influence employees, as unions sometimes charge, the drop in union support could also be the result of the workers' having more complete information at the time of the vote than they had when they signed the card. This often occurs in elections for public office, where a front-running candidate is unexpectedly defeated by a late entry who captures the electorate's imagination.

The outcome of union certification elections may also reflect changes in the way Americans view organized labor and collective rights and voice in the workplace. From the 1940s through the 1970s, the height of the private sector union movement, pro-union messages abounded in popular culture. Just as examples, Woody Guthrie sang about joining unions, textile workers had children singing "look for the union label," and Sally Field won the Academy Award in 1979 for her role as an employee and union organizer, "Norma Rae." Even "On the Waterfront," a 1954 Academy Award-winning film that portrayed unions in less-than-positive terms, concluded with employees getting their union back and running it on the "up-and-up." Fairly or not, unions can now be viewed as entities that cost us the World Series in 1994 and a large piece of the NBA season in 2011–12, have put a hammerlock on educational reform, and are being blamed for driving states into near bankruptcy. It's noteworthy that politicians such as Wisconsin governor Scott Walker are willing to sign bills that directly target unions.⁹ Legislators in Michigan, long known as the strongest of union states approved a right-to-work law in 2013, while New Hampshire has considered such legislation in both 2012 and 2013. Finally, a 2009 Gallup poll indicated a sharp decline in Americans' approval of labor unions—48 percent approved, down from 59 percent the year before,¹⁰ and that figure recovered only to 52 percent in 2010 where it

⁴ Jonathan J. Koehler, *The Base Rate Fallacy Reconsidered: Descriptive, Normative, and Methodological Challenges*, 19 BEHAV. BRAIN SCI. 1 (1996) (using an example of a coach on an Olympic basketball team trying to decide between two players to make a final attempt at shooting the game-winning basket, to illustrate the authors' point on base-rate fallacy).

⁵ 29 U.S.C. § 159(e)(1) (2006); 29 C.F.R. § 101.18(a) (2010); see Andrew W. Martin, *The Institutional Logic of Union Organizing and the Effectiveness of Social Movement Repertoires*, 113 AM. J. SOC. 1067, 1072 (2008) ("[M]any unions will not file [for a certification election] until a majority of workers sign [authorization cards].")

⁶ Martin, *supra* note 5, at 1089 tbl.7, 1096 fig.A-2.

⁷ John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004*, 62 INDUS. & LAB. REL. REV. 1, 6 (2009).

⁸ *Id.*

⁹ See Office of the Governor Scott Walker, *Governor Walker Introduces Budget Repair Bill* (February 18, 2011) available at http://www.wisgov.state.wi.us/journal_media_detail.asp?locid=177&prid=5622.

¹⁰ *Labor Unions See Sharp Slide in U.S. Public Support*, GALLUP, (Sept. 3, 2009) <http://www.gallup.com/poll/122744/Labor-Unions-Sharp-Slide-Public-Support.aspx> (last visited Jan. 23, 2011).

Ethical Principals for Employee Choice

Richard Bensinger and Dick Shubert developed the Institute for Employee Choice, grounded on two principles: **(1)** to do what is best for employees; and **(2)** to be governed by ethics—not law.

The Ethical Principles

These principles define ethical conduct for both unions and employers and are based on the premise that employees will make the decision about organizing through a contested secret ballot election.

Truthfulness. The Employer and the Union should be truthful and accurate in their campaigns. Although the law does not regulate honesty, the parties have the ethical obligation to present accurate information to employees. If either side contends that a statement by the other is not accurate and truthful, the Institute for Employee Choice, a joint labor-management entity, will provide an opinion.

No threats, implicit or explicit. Neither the Union nor the Employer should make threats, implicit or explicit, in order to gain votes. A free choice requires that there be no coercion or fear. Under current law, veiled threats are tolerated and there are no meaningful penalties for direct threats. An atmosphere of fear is antithetical to free expression of employee choice.

No promises. Just as threats are not acceptable, neither are promises or bribes. Under the NLRA employers are prohibited to make promises but unions are allowed to make promises. Under these principles neither side is allowed to make promises to gain votes.

It is not fair to imply that the exception is the rule. A common way of distorting the truth is by presenting an unusual situation, and implying that this is the norm. The parties must not use extreme examples to sway opinion. And also should tell the whole story.

Corporate campaigns. If employers agree to these principles, then unions should not undertake “corporate campaign” strategies that are designed to pressure the employer. These principles presume that both parties reach out to employees to present their case. Corporate campaigns are only ethical when there is an uneven playing field such that employee free choice is not meaningfully present.

Discharges. There should be no discharges, subcontracting of work, or layoffs aimed at discouraging union activity. This is the ultimate coercion, and immediately chills any possible free choice. Employers who terminate a known union supporter or member of the union’s organizing committee should submit the termination to immediate arbitration. Penalties for discharging a union supporter should include quadruple back pay as well as punitive damages to discourage such conduct. The reason that multiple back pay and reinstatement is not a sufficient deterrent is because this behavior has such a drastic chilling effect on the rest of the workforce. Punitive damages as appropriate are essential to deter such conduct.

Equal time, equal access, equal posting rights, and all meetings are voluntary. The union must have equal access to the electorate including equal time for all meetings conducted as part of the employer’s campaign. A series of debates between management and the union is encouraged. The employees should have a right to hear both sides, without any advantage to either side. There should be no one-on-one meetings about the union between supervisors and employees. The union must be granted equal space to post literature on company property.

Delays. The employer should agree not to engage in delaying tactics. Parties cannot ethically rely on lengthy legal maneuvers to thwart freedom of choice.

No pressure to sign union cards. The union should not pressure employees to sign cards. Peer pressure or coercion to get people to sign union cards is not ethical.

Respect. Neither party should demonize its adversary. An atmosphere of mutual respect is necessary for an ethical climate. Unions have an important role in a democracy. Employers also are entitled to respect. Neither party should engage in smear tactics.

Stacking the deck. Neither party should attempt to “stack the deck.” If employers accept these principles, then the union may not ethically plant undercover union-supporters (salts) into the workplace. Neither can employers seek to hire anti-union personnel in order to gain votes.

The Golden Rule. The final principle is not a specific ethical guideline, but the Golden Rule—do unto others as you would have them do to unto you. Both employers and unions have an important role to play in a vibrant democracy, and ethical behavior is an end in itself. The Institute for Employee Choice is available to support and commend employers and unions who agree to adhere to these principles.¹

¹ The Principles are available by contacting Richard Bensinger, bensinger2@aol.com

remained in 2011 and 2012.¹¹ For comparison, in 1957, the approval rating was 75 percent.¹²

With all of these many uncontrollable factors, we contend that election results simply do not provide evidence of whether the system itself is fair. Accordingly, it is time to change the paradigm on how we judge fairness.

In this report, we propose a set of guiding principles for what we believe would be a fair system for determining whether a union would represent a group of workers. A fair system will result in employees believing that they had enough information to make an informed decision, that they were respected during the election process, and that they were not intimidated, threatened, or coerced. Such a system would be fair regardless of whether the union won or lost. Fortunately, we did not have to devise such a system or its operating principles, because we found this approach in Principles for Ethical Conduct During Union Representational Campaigns, developed by the Institute for Employee Choice, a project of Richard Bensinger and Dick Shubert, as described in the sidebar on the previous page.

Let's use the Principles for Ethical Conduct as a crucible for examining the current system and proposed system to see whether each is fair and gives employees due respect and information during the election process. Holding fairness aside, we also analyze these systems to see whether they would in fact remedy the problems they are intended to resolve and would produce the desired results.

The Traditional System for Union Organizing

The current union organizing process may begin when dissatisfied employees seek out a union,¹³ when unions initiate discussions with employees, or when organizers enter an employer's property and start handing out authorization cards or setting up picket lines.¹⁴ Unions may use current employees to "sell" the union to co-workers, or sometimes they send their members to apply for jobs with non-union employers the unions wish to organize.¹⁵

¹¹ *U.S. Approval of Labor Unions Remains Near Record Low*, GALLUP, (Aug. 12, 2010) <http://www.gallup.com/poll/142007/Americans-Approval-Labor-Unions-Remains-Near-Record-Low.aspx> (last visited Jan. 23, 2011).

¹² *Id.*

¹³ Employees often seek out unions because of perceived failures in one or more of five key areas: lack of recognition, weak management, poor communication, substandard working conditions, and non-competitive wages and benefits. See MARTIN JAY LEVITT, *CONFESSIONS OF A UNION BUSTER* 49 (1993).

¹⁴ See, e.g., *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 240–42 (6th Cir. 1995) (affirming a Board order finding an employer unlawfully interfered with its employees' Section 7 rights where the employer excluded union representatives from distributing union literature on state-owned property outside the employer's place of business).

¹⁵ The applicants' reason for applying is to organize the real employees. This method, referred to as "salting," has been the subject of a United

NLRB Rules for Organizing and Secret Ballot Elections

The National Labor Relations Act sets forth the laws regulating this form of employee organization.¹⁶ Under those rules, before any labor organization can be certified as the exclusive bargaining representative for any group of employees, the employees in that group, called a bargaining unit, vote for or against union representation in a secret-ballot election monitored by the National Labor Relations Board.¹⁷ In most cases, the NLRB seeks to schedule such an election approximately three to six weeks after the union initiates the process by filing a representation petition.¹⁸ This time period may be extended if the employer contests the bargaining unit or if other issues arise. In a study of 22,382 organizing drives from 1999 through 2004, the average case that went to election did so in 41 days, and 95 percent of elections were held within 75 days of filing.¹⁹ It is during this time period, often referred to quite appropriately as the "campaign period," that employers and unions compete to try to persuade the employees to vote their way. The length of the campaign is an issue in this discussion because studies have shown that delaying the vote—even by a single day—helps management.²⁰ Unionists argue that an extended campaign period translates into more opportunities for management to threaten, intimidate, and coerce employees into voting against the union. However, other observers suggest that a lengthy campaign period translates into a greater likelihood that employees will render informed decisions on voting day.

We alluded to the 30-percent rule above and also mentioned a 60-percent threshold. Here's why. Under the NLRB

States Supreme Court case in which the Court held that an employer could not terminate a "salter" simply because the reason the employee joined the company was to organize it. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 98 (1995).

¹⁶ 29 U.S.C. §§ 151–69 (2006).

¹⁷ § 159(e)(1).

¹⁸ See *Customer Service Standards: Representation Cases*, NAT'L LABOR RELATIONS BD., http://www.nlr.gov/about_us/public_notices/customer_service_standards/representation_cases.aspx (last visited Jan. 23, 2011). In 2010, the median time period between filing the petition and the initial election was thirty-eight days, and 95.1% of all initial elections occurred within fifty-six days of the filing. Memorandum from Lafe E. Solomon, Gen. Counsel, Nat'l Lab. Rel. Bd. to Employees of the Off. of the Gen. Counsel, Memorandum GC 11-03, at 5 (Jan. 10, 2011), available at <http://nlrb.gov/publications/general-counsel-memos> (select "2011" from the "Year" drop-down menu, click the "Apply" button, and click "View" under "GC 11-03").

¹⁹ Ferguson, *supra* note 7, at 10 n.9.

²⁰ See generally Myron Roomkin & Richard N. Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 1981 U. ILL. L. REV. 75 (1981) (presenting a model of election outcomes that included delay as a significant predictor); Ferguson, *supra* note 7, at 14 (noting the negative impact of delay on union election win rates).

rules, a union may request the secret-ballot election only if a minimum of 30 percent of the employees in an appropriate bargaining unit have signed authorization cards.²¹ As a practical matter, however, most national unions will not file a petition unless at least 60 percent of the employees have signed cards.²² To prevail in the election, the union needs a simple majority of the ballots cast,²³ while employers win in the event of a tie.²⁴

Campaign Issues

The current rules specify employers' permitted activities during the campaign period. Employers may not threaten, interrogate, make promises to, or engage in surveillance of employees,²⁵ for example, nor may they solicit grievances or confer benefits.²⁶ If the employer violates these rules, the NLRB may either order the election to be rerun or issue a bargaining order.²⁷

Under the law, employers may, however, engage in numerous campaign activities to convince employees to vote against the union. During the campaign period, employers provide employees with the management perspective of employees' rights and the consequences of voting in favor of the union.²⁸ To get their message across, employers can and will require all employees to attend so-called "captive audience" speeches,²⁹ send letters home,³⁰ and spend significant time and money on communicating their message, often employing law firms and consulting firms that specialize in crafting anti-union campaign strategies. Management cannot offer employees any benefit for attending a meeting,³¹ but they may mandate attendance.³²

Unions, on the other hand, may not hold captive audience speeches³³ and, in fact, have no right to come onto an employer's property.³⁴ Unions are, however, entitled to a list

²¹ 29 U.S.C. § 159(e)(1) (2006); 29 C.F.R. § 101.18(a) (2010).

²² Telephone Interview with Richard W. Hurd, Professor of Indus. & Lab. Rel., Cornell Univ. Sch. of Indus. & Lab. Rel. (June 28, 2001); accord Martin, *supra* note 5, at 1072 ("[M]any unions will not file [for a certification election] until a majority of workers sign [authorization cards]."); Jack Fiorito, *Union Organizing in the United States*, in *UNION ORGANIZING: CAMPAIGNING FOR TRADE UNION RECOGNITION 200* (Gregor Gall, ed. 2003). Frankly, this is a conservative estimate based on conversations the authors have had with union officials over the past seven years. Some assert that the percentage of employees the union considers supporters (based on authorization card signatures) is between 75 and 90 percent.

²³ 29 U.S.C. § 159(a), as interpreted in: *Marlin-Rockwell Corp. v. NLRB*, 116 F.2d 586, 588 (2d Cir. 1941).

²⁴ *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 884 (D.C. Cir. 1988).

²⁵ See, e.g., 29 U.S.C. § 158(c); *NLRB v. St. Francis Healthcare Ctr.*, 212 F.3d 945, 962 (6th Cir. 2000) (finding the employer unlawfully interfered with representation election by threatening to close the facility if the union were elected); *Tamper, Inc.*, 207 N.L.R.B. 907, 938 (1973) (finding an unfair labor practice where the employer coercively interrogated its employees about their union sympathies); E.g., *NLRB v. Wis-Pak Foods, Inc.*, 125 F.3d 518, 522–23 (7th Cir. 1997) (finding that a promise to increase wages constituted an unlawful promise of benefit); *General Elec. Co. v. NLRB*, 117 F.3d 627, 637 (D.C. Cir. 1997) (finding a promise of a postelection gift constituted an unlawful promise of benefit); and *Cal. Acrylic Indus., Inc.*, 322 N.L.R.B. 41, 63 (1996) (finding the employer violated the Act where it videotaped meetings between employees and union representatives).

²⁶ *NLRB v. V & S Schuler Eng'g, Inc.*, 309 F.3d 362, 370–71 (6th Cir. 2002) (finding the employer violated the Act by soliciting grievances when he had not done so before, creating a "compelling inference that he is implicitly promising to correct those inequities . . . mak[ing] union representation unnecessary"); and *Wis-Pak*, 125 F.3d at 522, 524–25 (finding that favorable changes to the overtime and attendance policies constituted an unlawful grant of benefits).

²⁷ A bargaining order is an NLRB mandate requiring a company to "cease and desist from their unfair labor practices, to offer reinstatement and back pay to the employees who had been discriminatorily discharged, to bargain with the union on request, and to post the appropriate notices." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 585 (1969).

²⁸ As long as informing employees of the consequences does not rise to the level of a threat. 29 U.S.C. § 158(c) (2006). Employers typically raise some or all of the following issues, based in part on advice from counsel and from their unique circumstances, industry and employee demographics: Whether unions may "guarantee" increased pay, benefits, or anything else; how collective bargaining really works; what happens when strikes are called or picketing is conducted; what it costs to be a union member in terms of dues and initiation fees; where that money goes; how it is used, and by whom; whether the union's leaders are trustworthy and capable; the employer's record of responsiveness to employee issues; the fact that employees will be paying someone to do what they may have been able to do (represent themselves) for free; whether the organizing drive has actually been beneficial in the sense that it has called attention to problems that need to be addressed whether the union is there or not; and whether the employer should make management changes (because an organizing drive seems to have been triggered by a perceived lack of leadership).

²⁹ See: Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing*, RES. STUD. & REP. 73 tbl.8 (2000), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=reports> (finding that, of 400 union campaigns studied, 92% included captive-audience speeches).

³⁰ However, in-person visits by management to employees' homes are per se prohibited. See *In re General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948). The union, on the contrary, may make home visits, as long as those visits are not threatening or coercive. Cf. *Simo v. Union of Needletrades, Indus. & Textile Employees, Sw. Dist. Council*, 322 F.3d 602, 620–21 (9th Cir. 2003).

³¹ See *supra* note 29 and accompanying text.

³² *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 406 (1953); see also Estlund, *supra* note, at 1536–37.

³³ *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 364 (1958) (stating, of captive-audience speeches, that unions are not "entitled to use a medium of communication simply because the employer is using it"); *Livingston Shirt Corp.*, 107 N.L.R.B. at 406.

³⁴ *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992); see also *Republic Aviation Corp. v. NLRB*, 342 U.S. 793, 803 & n.10 (1945) (finding no-solicitation rules presumptively valid); cf. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1955) (creating an exception to the rule that an employer may bar nonemployee union members from the employer's property when the location of the employees' workplace and homes make reasonable nontrespassatory efforts ineffective); *In re Dillon Cos.*, 340 N.L.R.B. 1260, 1260 (2003) (finding a no-solicitation rule that was

of the eligible employees,³⁵ and, unlike employers, unions may make promises, interrogate, solicit grievances, and confer benefits, including buying employees pizza and beer. Both sides may lie to employees, but neither may provide the employees with forgeries intended to deceive.³⁶

Employers and unions disagree about whether the playing field is level. For their part, employers argue that unions' ability to socially interact with employees gives unions at worst a level playing field and at best a significant advantage. In contrast, union advocates contend that the reason for labor's failure to organize, and the consequential drop in union density is that the rules of organizing unfairly favor employers, because they intimidate employees and either: (1) violate the law with impunity because there is no real enforcement or (2) act within the law because objectionable and effective conduct is not unlawful (although it should be). Indeed, union advocates claim that during most campaigns employers illegally threaten, intimidate, and terminate employees who favor the union. According to a 2005 report by the Center for Urban Economic Development at the University of Illinois at Chicago, when faced with organizing drives, 30 percent of employers fire pro-union workers, 49 percent threaten to close a worksite if the union prevails, and 51 percent coerce workers into opposing unions with bribery or favoritism.³⁷ Unions further point to the numerous unfair labor practice charges filed against employers and to evidence suggesting a connection between meritorious unfair labor practice charges filed and a lower likelihood of union election victories,³⁸ as well as offering anecdotal evi-

previously unenforced but resurrected at the beginning of the union's campaign was unlawful); *Supervalu Holdings, Inc.*, 347 N.L.R.B. 425, 425 (2006) (finding a no-solicitation rule invalid because it was enforced discriminatorily against union activity).

³⁵ *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969) (affirming the *Excelsior* rule); *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239–40 (1966) (establishing the disclosure requirement).

³⁶ *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 133 (1982) (“[W]e will no longer probe into the truth or falsity of the parties' campaign statements, and . . . we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is.”); see also *Metro. Life Ins. Co.*, 266 N.L.R.B. 507, 507–08 (1983).

³⁷ Chirag Mehta & Nik Theodore, *Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns*, at 5, 9, AM. RTS. AT WORK, (Dec. 2005) <http://www.americanrightsatwork.org/dm-documents/ARAWReports/UROCUEDcompressedfullreport.pdf> (last visited Jan. 23, 2011); accord Bronfenbrenner, *supra* note 35, at 73 tbl.8 (reporting similarly staggering statistics, including that, of employers in 400 union campaigns, 34% used bribes or special favors, 48% made unlawful promises of improvement, and 25% discharged union activists); Kate Bronfenbrenner et al., Introduction, in *ORGANIZING TO WIN* 1, 4–5 (Kate Bronfenbrenner et al., eds. 1998).

³⁸ See Ferguson, *supra*, note 7, at 15 (finding that meritorious unfair labor practice charges filed by unions against employers had a statistically

dence of outrageous employer behavior. In view of all those factors, unions contend that the system is unfair because they lose numerous elections.

Looking at that same outcome, employers and some scholars argue that unions lose elections because they have nothing left to sell to employees.³⁹ This perception is based on two arguments: (1) traditional labor–management relations simply do not serve employees' interests;⁴⁰ and (2) unions' ability to sell anything is diminished by a decline in the perceived trustworthiness to carry through on promises made. Others cite internal union weaknesses as a cause of failed organizing.⁴¹ This argument suggests that organized labor has failed to adapt with the times, and that unions have not connected to a new generation of workers who have a different view of the workplace than their elders. Other observers have argued that collective employment rights have been eclipsed by the staggering enactment of legislation protecting individual employee rights.⁴² Shifts in the U.S. economy are also cited for the drop in union organizing. An “enterprise based” system of industrial relations in private industry has meant that unions negotiate with single firms

significant impact on the likelihood of unions winning elections, reducing the success rate by 52%).

³⁹ According to management side labor lawyers, one of the key strategies in this regard is to examine what the union is selling and explain to the employees that the costs outweigh the benefits. One problem for the unions, according to some, is that organized labor does not always have much to sell. For example, one lawyer discussed a union organizing drive in which the union represented to employees that it would demand that the employer implement the union's health insurance plan if it were elected. The union extolled the fact that it would insist that the employer pay 100% of the cost of the plan, as opposed to their current plan under which the employees paid a portion of the cost. The employer held a meeting in which it compared the two plans side-by-side. While the union plan did not feature any up-front costs, the coverage was clearly so inferior that the employees concluded that they were better off with the employer plan and voted against the union. Employers contend that this insurance issue is a typical example of the current state of union organizing: at first the union pitch sounds great, but after close examination the employees do not want to buy what the union is selling. Employers argue that this is one reason why companies are able to defeat unions in elections.

⁴⁰ Richard B. Freeman & Joel Rogers, *WHAT WORKERS WANT* 56 (1999) (finding a desire among employees for an organization run “jointly” by both labor and management).

⁴¹ Bronfenbrenner suggested unions focused too little effort on recruitment during the 70s and 80s and failed to adapt their organizing strategies to new challenges. Bronfenbrenner, *supra* note 43, at 5–6. Getman agrees that unions' failure to adapt their thinking contributed to the demise, and points to other internal weaknesses: internal politics, inability to coordinate with other locals, corruption, and a divide between leadership and rank-and-file employees. Getman, *supra* note at 584–93.

⁴² Michael J. Piore & Sean Safford, *Changing Regimes of Workplace Governance, Shifting Axes of Social Mobilization, and the Challenge to Industrial Relations Theory*, 45 IND. REL. 299–325 (2006).

instead of corporations or industries,⁴³ thereby precluding industrial democracy and industrial stability as it formerly existed.⁴⁴ Still others mark the advent of enlightened human resources policies as explaining labor's inability to organize.⁴⁵ Management often contends that simply informing employees of the "truth" will allow them to prevail,⁴⁶ and further that the system is fair because the lack of union density reflects the will of the people. Unionists argue that the statistics (i.e., the outcomes) prove that the system is unfair,⁴⁷ but we contend that the system is unfair because of the process, rather than the outcomes.⁴⁸

As we have described here, the current system has different sets of rules for unions and management. Some rules do apply to both sides, including being able to lie to the employees, trash the other side, and pressure the employees to vote one way or the other.⁴⁹ Employers' rules give them the advantage of access to employees, particularly at captive audience meetings, as well as via impromptu conversa-

tions in the workplace. Unions, on the other hand, have the advantage of being able to make promises, visit employees' homes, and party with the employees. Employers have the inherent power advantage, while unions often have a head start in the race to the election. At the end of this process, the employees likely have little, if any, ability to gauge the accuracy of the information received from either side; they often fear reprisals for voting for one side or the other; and they likely feel like pawns whose desires are subordinated to those of two large entities. Management will swear that it has learned a lesson from the experience and will vow to change. For its part, the union will swear that no change which management may implement will remain intact without the perpetual threat of organization and that permanent progress is only attainable by certifying the union as the employees' representative.⁵⁰

Card-Check Neutrality Agreements and the Employee Free Choice Act

We are among those who are not enthusiastic about the current system, but it is important to note that it does at least result in a secret ballot election. One proposal to reform this broken, outdated means of selecting workplace labor organization representation is card-check neutrality. The Employee Free Choice Act carried a card-check provision, albeit without employer neutrality.⁵¹ In our view, the EFCA would have attenuated perhaps the most critical component of the process's fairness—employees' right to freely choose their representative or to choose not to be represented at all. In the following section, we'll describe card-check neutrality agreements and assess whether they would result in a fair system under the principles we have adopted.

Although neutrality agreements come in several forms, the common denominator for all of them is that employers agree to remain neutral with regard to the union's attempt to organize the workforce.⁵² Neutrality agreements commonly give the union access to employees in the form of a list of their names and addresses (and, sometimes, telephone numbers), as well as permission to come onto company property

⁴³ Ronald W. Schatz, *From Commons to Dunlop: Rethinking the Field and Theory of Industrial Relations*, in *INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE*, NELSON LICHTENSTEIN & HOWELL JOHN HARRIS, eds. 88 (1993).

⁴⁴ *Id.*

⁴⁵ Jack Fiorito & Cheryl L. Maranto, *The Contemporary Decline of Union Strength*, 5 *CONTEMP. POL'Y ISSUES* 12, 16–17 (1987).

⁴⁶ Surveys of union organizers and employees who have been through NLRB election campaigns seem to confirm this trend at least indirectly. See, e.g., *Workers Weigh in on Alleged Coercion During Card Check Campaign and NLRB Elections*, *AM. RTS. AT WORK* (Mar. 21, 2006) <http://www.americanrightsatwork.org/press-center/2006-press-releases/workers-weigh-in-on-alleged-coercion-during-card-check-campaigns-and-nlr-elections-20060320-239-345-345.html> (last visited Jan. 24, 2011).

⁴⁷ There are those that go beyond the statistics and make a normative assessment of the NLRA, arguing that it is biased in favor of employers. However, these analyses tend to omit or undervalue the advantages the Act accords unions and emphasize the advantages accorded employers. See, e.g., Getman, *supra* at 578–84.

⁴⁸ Others, a rare minority by our account of the current state of this relevant scholarship, such as John-Paul Ferguson (*supra* note 7) and Chris Riddell (*Union Certification Success under Voting versus Card-Check Procedures: Evidence from British Columbia, 1978-1998*, 57 *INDUS. & LAB. REL. REV.* 4, 493 (2004)), have suggested that systemic accountability potentially accounts for a greater percentage of variation in win-rates and union density than the other factors described above.

⁴⁹ Note well that all of this can be done without engaging in, for example, threats, interrogation, or recording campaign activity—tactics that neither management nor the union can employ. E.g., *Mike Yurosek & Son, Inc.*, 292 N.L.R.B. 1074, 1074 (1989) (setting aside an election where a union agent photographed employees engaging in anti-union campaigning and said "we know who you guys are...after the union wins the election some of you may not be here"); cf. *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 587 (8th Cir. 1997) (refusing to set aside an election on the basis of a rumor that the union would call the INS if it did not win in the absence of direct threats); *NLRB v. O'Daniel Trucking Co.*, 23 F.3d 1144 (7th Cir. 1994) (refusing to set aside an election on the basis of an employee's claim that a business agent was "leaning on" him).

⁵⁰ LEVITT, *supra* note 15.

⁵¹ Employee Free Choice Act of 2009, S. 560, 111th Cong. (2009).

⁵² While most agreements contain a definition of neutrality, the definitions vary widely. Most Communication Workers of America, United Auto Workers, and USWA agreements define neutrality as "neither helping nor hindering" the union's organizing effort, yet still allow employers to communicate facts to the employees. See Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 *INDUS. & LAB. REL. REV.* 42, 48–49 (2001). A different approach is apparent from the HERE agreements (from before the UNITE–HERE merger) that prohibit the employer from communicating any opposition to the union. *Id.* Less typical definitions declare that management will make an affirmative statement to their employees that it welcomes their choice of a representative. *Id.*

during work hours for the purpose of collecting authorization cards. This provision negates one employer advantage, since the employer currently has no obligation to provide and may actually be prohibited from providing the union with such sweeping access to its employees.⁵³

The card-check provisions found in most neutrality agreements require the employer to recognize the union if a majority of the bargaining unit employees sign authorization cards.⁵⁴ Thus, card-check agreements obviate any secret-ballot election, as we mentioned above.

What Effect Do Neutrality Agreements Have on Unionization?

Neutrality agreements radically change the landscape of union organizing. One study found that unions prevailed in 78 percent of the situations in which neutrality agreements had been signed, compared to a 46-percent success rate in contested elections.⁵⁵ We're certain that this study understates the effect of the neutrality agreement if only because the sampled populations for the two figures are different. The figure for elections includes only organizing attempts where the union has 50 to 60 percent of signed employee cards.⁵⁶ Thus, the 46-percent figure excludes situations where the union could not get at least 51 percent of the employees to sign cards and did not have an election. On the other hand, the neutrality figure includes employers who signed such agreements, although the chances that all those workplaces would become organized with an election is far less than that in the case of a neutrality agreement. Those employers whose employees had no interest represent the 22 percent of companies that remained non-union. In other words it is likely that 100 percent of the companies that went to election would have been unionized under a neutrality with card-check, and that 22 percent of those under card-check agreements would never have gone to election. Assuming there is enough employee interest to warrant an election in the first place, the company's chances of becoming unionized were less than 50 percent under the NLRB's election procedures and nearly guaranteed under a neutrality agreement with a card-check provision.

Are Neutrality Agreements Fair?

Under our definition of fairness, card-check neutrality fails. A system where the parties hear only one side of the story,

have access to only one union, don't get to vote in a secret ballot election, and are therefore susceptible to union intimidation is, to us, the antithesis of fairness. In a conference at Indiana University, we heard one scholar suggest that unions would never intimidate employees to sign cards. The scholar, however, could not dispute the following logic: union organizers working under a card check are successful only if they get the employees to sign cards. Successful organizers are promoted. Unsuccessful organizers are not promoted and are pushed out of the organization. Sometimes one card is the difference between success and failure. Thus, how can anyone contend that an organizer faced with success or failure will not do anything necessary to be successful?

Quick Elections

Let's return to the NLRB's potential rule change that would mandate quick elections, again on the grounds of fairness. While analyzing the entire proposed rules is beyond the scope of this paper, NLRB board member Hayes asserted that the new rules will result in elections in 10 to 21 days after the cards are signed.⁵⁷ Labor argues that a shortened time period would allow a secret ballot election, but would curtail management's ability to threaten, intimidate, coerce, promise benefits to, and observe employees.

This proposed election scheme fails the fairness test and, in fact, may hurt the efforts of both sides. It's hard to argue that a 10- to 21-day campaign period would allow management sufficient time to convey its side of the story. Moreover, the expedited process may provoke more lawsuits, which would hurt both sides. Before holding a union election, one of the most difficult issues to resolve is the proper scope of the bargaining unit. Those advocating for quick elections argue that a "vote now and litigate later" approach will sufficiently address these issues. In the current approach, management decides whether to contest the bargaining unit before the election. As a practical matter, employers often consent to the proposed unit to avoid the expense of challenging the proposal, the risk of losing the challenge, and the potential of appearing obstructionist to employees. In contrast, if "vote now and litigate later" were the norm, management would have every incentive to litigate should it lose the election. Such litigation would almost certainly delay the union's certification for months or even years.

⁵³ *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534 (1992);

⁵⁴ *Eaton & Kriesky*, *supra* note 60, at 47 tbl.1 (finding seventy-three percent of neutrality agreements studied had card-check language).

⁵⁵ *Id.* at 52 & tbl.3; *see also* Chris Riddell, *supra* note 55 (finding a union success rate difference of approximately 19% in British Columbia attributable to card-check procedures as compared to mandatory voting procedures).

⁵⁶ *See supra* note 24 and accompanying text.

⁵⁷ *See* 155 CONG. REC. S3, 636 (daily ed. Mar. 24, 2009) (statement of Sen. Arlen Specter) (proposing a quick-election scheme where the initial election would be held within twenty-one days of the filing of the petition); *Implications of the Employee Free Choice Act*, METRO. CORP. COUNSEL, Sept. 2009, at 12, 12. *See also*, the dissent of Member Hayes to the NLRB's proposed Rule making at: <http://www.nlr.gov/sites/default/files/documents/525/dissent.pdf>

Developing a New System for Union Organizing

As we have stated throughout this report, we contend that a fair system would be one in which employees have the opportunity to obtain full information from both the union and management. At the end of the process, employees should feel that they were treated with respect and not threatened or intimidated by either side. The procedures in the current process, including card-check neutrality agreements, card-checks without neutrality, and quick elections, all fail to meet that fairness standard. Also of questionable fairness is the current NLRB rules that allow both sides to behave in questionable fashion and encourage both sides use all possible weapons defeat each other.

To develop a system for electing labor organizations that is focused on what is best for the voting employees, we sought a system that would operationalize our core beliefs, which are summarized as follows: (1) unionization will benefit some employees, but will not benefit others; (2) some employees want a union and others do not; (3) policy should be driven by employee choice, not by achieving labor peace regardless of the cost; (4) employees should have full information, or at least the maximum opportunity for exposure to full information; (5) employees should vote in a secret ballot election; (6) management and unions have corrupted the current NLRA rules so that the goal is to win and not to facilitate employee choice; and (7) a union organizing system will be successful if, regardless of the result, at its conclusion, the employees feel they have been respected, fully informed, not intimidated, and are satisfied that they made the choice they wanted to make. Given that framework, we encourage unions and management to adopt the Principles for Ethical Conduct which we are introducing in this report.

The principals of the Institute for Employee Choice, Richard Bensinger and Dick Shubert, both have considerable labor experience. Bensinger is a long-time union organizer whose résumé includes being the first head of organizing for the AFL-CIO, as well as working with UNITE/HERE, the United Auto Workers, and other unions. Shubert is the former president of Bethlehem Steel and was Deputy Secretary of Labor in the Nixon and Ford administrations. The two men grew frustrated by the current system and its perverse incentives for both unions and management. Despite coming from opposite sides of a polarized issue, Bensinger and Shubert shared the core beliefs listed above. They developed the ethical principals that we presented in the sidebar on page 8, based on their experiences and their beliefs.

The substance of the principles appeal to us for a number of reasons. The obvious reasons are that they provide for elections, full information, and truthfulness, and they prohibit coercion and intimidation. More important, they

address implicit threats from management that fly under the NLRB's radar.⁵⁸ Perhaps most salient is that the principles establish a single set of rules for both sides. Employees will get equal access to both sides and neither side will be able to exploit differential rules to gain an advantage. Instead of employers using captive audience speeches and unions buying pizza and beer, both sides can have captive audience speeches and neither side can buy pizza or beer. While employers may bristle at inviting the union onto the premises, the elimination of corporate campaigns, which are driven by union intimidation and management's fear of the loss of business, should make an acceptable trade.

In addition to satisfying our goals, the principles are attractive because they may soon be operationalized. While the institute has overseen only one election, the United Auto Workers in 2011 announced a plan to operate under these principles for all new elections.⁵⁹ The UAW's 2012 negotiations with the major multinational car manufacturers included provisions to make the principles the method for all future elections.⁶⁰

Anecdotal evidence from the one past election found that the employees who voted did, in fact, believe that they had full information to make a choice free from intimidation.⁶¹ The fact that these principles may be used allows us to make a call for future research. We propose a commissioned study where researchers survey employees who have gone through organizing under the NLRA procedures, neutrality, and the fairness principles to determine whether any system truly satisfies the goals outlined above.

Even with implementation of the fairness principles, some issues still need to be addressed. The principles prohibit supervisor–employee one-on-one conversations, but do not address the same practice by union organizers. To be even-handed we would allow such supervisor conversations, as long as they otherwise complied with the principles. We would also allow union organizers to have similar conversa-

⁵⁸ For an example of veiled threats, compare what an employer cannot lawfully tell its employees with what employers may lawfully tell employees. Management cannot say, "If you vote for the union there will eventually be a strike, and there will be no wages, no health insurance, and strikers can lose their jobs when the strike is over," But management can couch a similar message as follows: "We will bargain in good faith, but will not agree to unreasonable union demands. If the union does not accept our offer its only choice will be to call a strike. The company hopes this does not happen, but if it does, there will be no wages, no health insurance, and strikers can lose their jobs when the strike is over. We hope this does not happen, but it's a real concern if you vote for the union."

⁵⁹ See *Answering UAW's Call: Doing the Right Thing*, UNITED AUTO WORKERS <http://www.uaw.org/story/answering-uaw%E2%80%99s-call> (last visited Feb. 27, 2011).

⁶⁰ Paul Ingrassia, *The United Auto Workers Test Drive a New Model*, WALL STREET JOURNAL, Feb 7, 2011.

⁶¹ Telephone interview with Richard Bensinger, Co-chair, Instit. For Emp. Choice (Feb. 7, 2011).

tions on an employer's property. After the petition is filed, we would prohibit off-site campaigning by either side.

While the exact nature of the principles could be amended depending on the situation, the most difficult issue is one of enforcement. We suggest that the parties agree upon a mediator to resolve issues if either side alleges a violation of the principles before the election is held. In this case, the mediator would first attempt to mediate this dispute. If mediation fails, the mediator would be empowered to conduct an arbitration hearing, taking testimony and evidence in the traditional manner. The mediator-arbitrator then may determine whether the alleged offense violates the parties' agreement and (if so) what remedy to fashion. If the offense by management is so egregious that it poisons the chances of conducting a fair election, the arbitrator may issue a bargaining order. The bar for such an order should be significantly lower than it is under current board law. That is, the penalty associated with highly egregious violations of the principles should be high. Similarly, if the offense by the union is so egregious that it poisons the chances of conducting a fair election, the arbitrator may rule that no election is to be held and that the union is barred from attempting to organize the employees for up to three years. For non-egregious violations of the principles by management or the union, or in the event that employees (not privy to the agreement itself) are found to have done something that violates the terms of the agreement, the arbitrator is empowered to fashion awards as she deems necessary to facilitate a fair election procedure. This may include, but is certainly not limited to, requiring management and the union to issue joint statements, or requiring one or the other to issue unilateral statements that ameliorate any tainting effects of conduct found to violate the principles.

After elections are held, the results will be not be released or publicized in any way for six days. Employers and unions may use this time to determine whether any violations of the principles occurred and to bring a claim to the mediator. If no claims are lodged during this time, the results of the election will be released and both sides will have by default waived their rights to allege any violations of the principles or to challenge any of the votes for any reason other than issues relating to interpreting intentions of voters from their ballots. If charges are filed during the six-day period, the mediator shall mediate the dispute, and failing suc-

cessful mediation, arbitrate in the same manner as described above. Again, the mediator-arbitrator shall be empowered to issue any manner of award, including issuing a bargaining order for egregious employer violations, or an election bar for up to three years for egregious union violations.

A mediation-arbitration system like this one is likely to work best because it offers informality and flexibility, two important qualities of a dispute resolution system for resolving claims arising out of a morally valenced contract.⁶² More control over the process should beget more control over the resolution of disputes and should result in more creative integrative solutions than an adjudicatory process by itself.⁶³ The opportunity for greater ownership over the dispute-resolution process and the ability to exert more influence over the outcomes of disputes should also be held out as a significant incentive for agreeing to the principles.

Employers reading this article might wonder why they should agree to a process using the principles. We give two reasons. First, we expect that employees would perceive the election procedure under the principles as being more fair. Increased perceived procedural fairness would likely lead to greater acceptance of the final outcome, and hence less industrial strife.⁶⁴ Second, and probably of more value to employers, the principles are the best defense to union demands of card-check neutrality and corporate campaigns. The union mantra is: employers who refuse to give card-check neutrality are mistreating employees and refusing to allow them workplace dignity. The principles provide true dignity by allowing for full information and a secret ballot election without all of the alleged negatives allowed under the NLRA. We believe that progressive employers will prevail in a fair election and thus, such employers can take the highest road and achieve the desired result by using the principles. ■

⁶² Roy Lewicki & Blair Sheppard, *Choosing How to Intervene: Factors Affecting the Use of Process and Outcome Control in Third Party Dispute Resolution*, 6 J. OCCUPATIONAL BEHAV. 49 (1985); see also A. DOUGLAS, *INDUSTRIAL PEACEMAKING* (1962); ROBERT WALTON, *INTERPERSONAL PEACEMAKING* (1969); ROBERT WALTON & ROBERT MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (1965);

⁶³ Corinne Bendersky, *Organizational Dispute Resolution Systems: A Complementarities Model*, 28 ACAD. MAN. REV. 643 (2003).

⁶⁴ E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224 (1993).



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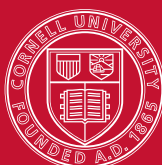
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