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NEUTRALITY AGREEMENTS AND THE NLRB
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NEUTRALITY AGREEMENTS AND THE NLRB

I. Neutrality Agreements – Generally

A. Attempt by unions to jumpstart organizing in face of declining union membership.

B. Definition – neutrality agreements take many forms and sizes, but generally require the signatory company to maintain “campaign neutrality” and can include an agreement:

1. To limit communications to employees about the union.
2. To extend preferential hiring rights at unorganized facilities.
3. To meet promptly with the union to discuss issues such as appropriate unit, supervisory employees, and excluded employees.
4. To provide the union with an early list of the names and addresses of employees in the agreed-to unit.
5. To grant the union access to the facilities of the target employer to distribute union literature and meet with employees.
6. To recognize the union based on authorization card majority without an NLRB election.
7. To include the employees in the extant collective bargaining unit.
8. To agree to start contract negotiations for the newly-organized unit within a specified (and short) time frame and submit open issues to binding interest arbitration if no agreement is reached within sixty days.
9. To extend coverage of the neutrality agreement to affiliates of the signatory company.
10. To avoid the creation of another entity in the same industry without ensuring that it adopts the neutrality agreement.

C. Industries where neutrality agreements are prevalent

1. Telecommunications
2. Automobile manufacturing
3. Steel
4. Hotels and restaurants
5. Gaming
D. Reverse Neutrality Agreements

1. Definition: a union’s promise not to organize certain groups of the employer’s employees.

II. Status of Neutrality Agreements at the NLRB

A. Mandatory versus permissive subjects of bargaining

1. Mandatory subjects of bargaining – party may insist upon to a point of impasse.


   b. Either side may resort to economic force (strikes or lockouts) to secure agreement on mandatory subject of bargaining.

   c. Does not generally extend to matters involving individuals outside the bargaining relationship between the employer and its employees.

      (i) Exception: if “the third-party concern . . . vitally affects the terms and conditions” of employment of bargaining unit employees. Id. at 178.

   d. Enforceable by the NLRB through an 8(a)(5) unfair labor practice charge.

2. Permissive subjects of bargaining – a party may not insist upon to a point of impasse.

   a. Subject does not deal with rates of pay, hours and terms and conditions of employment of the bargaining unit employees.


   c. Enforceable only through arbitration or Section 301 suit.

B. Recent NLRB cases
1. **Pall Biomedical Products Corp.,** 331 NLRB No. 192 (Aug. 31, 2000)

   a. **Facts:** The clause at issue was not a neutrality agreement, per se, but it bound the employer to extend recognition to the union in another facility in the event that the company employs one or more employees performing bargaining unit work. Significantly, the newly recognized employees would not be included in the existing bargaining unit.

   b. **NLRB Holding:** Because the parties’ recognition agreement vitally affects the terms and conditions of bargaining unit employees by addressing their concern that bargaining unit work might be transferred to the employer’s other non-union facility, the clause related to a mandatory subject of bargaining. Therefore, the employer’s revocation of the agreement violated Section 8(a)(5).

   c. **Hurtgen’s Dissent:** There has been no showing that the new facility posed any threat to the terms and conditions of employment of employees at the existing facilities. Therefore, the clause is not a mandatory subject of bargaining.

   d. **Enforcement denied by the D.C. Circuit.**
      
      (i) DC Circuit held that the employer’s revocation of the agreement was not an unfair labor practice. The agreement did not concern a mandatory subject of bargaining because it was not a “direct frontal attack” upon the problem of work transfer. **Pall Corp. v. NLRB**, -- F.2d – , slip op. at 7 (Jan. 4, 2001).

   e. **Impact of the D.C. Circuit’s Pall Biomedical decision on the Board’s enforcement of neutrality agreements**
      
      (i) The D.C. Circuit’s holding in **Pall Biomedical** is correct -- neutrality agreements should be deemed permissive subjects of bargaining.

      (a) With new appointees and a new Republican majority, a future Board may follow the D.C. Circuit’s decision in **Pall Biomedical**.

      (b) The new General Counsel may also be reluctant to prosecute 8(a)(5) cases against employers accused of violating a neutrality agreement.

      (c) The D.C. Circuit’s decision implies that a neutrality agreement would be a mandatory subject of bargaining if it required application of the existing unit.
collective bargaining agreement to newly-organized facilities.

f. Based on the D.C. Circuit’s holding in Pall Biomedical, an employer may pursue a Section 8(b)(3) charge against a union which insists to impasse or strikes over a proposed neutrality agreement.

2. Central Parking Systems, Inc., 335 NLRB No. 34 (August 27, 2001)

a. Facts: The union made a demand for recognition of employees pursuant to an “after-acquired” clause in the collective bargaining agreement. The contractual provision did not specify whether the newly-organized employees would be included in the existing bargaining unit, or whether they would constitute a separate bargaining unit. The employer refused to grant recognition, and filed an RM petition with the NLRB for a separate bargaining unit. The union subsequently filed a grievance. The Regional Director dismissed the petition because the union had not made a demand in the petitioned-for unit, but rather sought to accrete the new employees to the existing unit.

b. NLRB Holding: Board dismissed the employer’s election petition and deferred to arbitration the issue of whether the collective bargaining agreement contained an “after acquired” clause requiring recognition of the union upon a showing of majority status.

c. Hurtgen’s Dissent: Because the union made a demand for recognition under 9(c)(1)(b), he would process the RM petition, and not defer a representation issue (accretion) to arbitration.

3. Verizon Information Systems, 335 NLRB No. 44 (August 27, 2001)

a. Facts: Parties’ agreement contained a broad neutrality clause. When the parties could not agree upon the scope of the bargaining unit, the parties proceeded to third party neutral arbitration. However, the union also filed a petition with the NLRB. The Regional Director processed the petition, and the employer sought review from the NLRB.

b. NLRB Holding: The union, by virtue of invoking the neutrality and card check recognition agreement, is barred from filing the representation petition. “The fundamental policies of the Act can
best be effectuated by holding the Petitioner to its bargain.” Id.
slip op. at 3.

c. Walsh’s Dissent: The parties’ agreement does not bar the petition because the union never “clearly and unmistakably” waived its right to file a petition under the agreement, and the union is not equitably estopped from filing a petition based upon invoking provisions of the neutrality agreement.

d. However, by dismissing election petitions, the NLRB enforces the parties’ neutrality agreement.

(i) Thus, parties may be able to obtain enforcement of a neutrality agreement in a representation case, even though the parties would be unable to obtain enforcement through an unfair labor practice charge.

(ii) NLRB case law on permissive subjects of bargaining should have been considered.

4. Raley’s, 336 NLRB No. 30 (Sept. 28, 2001)

a. Facts: The collective bargaining agreement contained a provision requiring the employer to recognize the union following the opening of any new store within the local’s geographic area. The clause does not specify whether the employees will be included in the existing bargaining unit or whether they will constitute a separate bargaining unit. After union demanded recognition at other stores, the employer refused.

b. NLRB Holding: The recognition clause waived the employer’s right to demand a Board election. If the union demonstrates that it had majority support, then the employer violated 8(a)(5) by refusing to recognize the union.

(i) Board relied on Kroger (finding an “after-acquired” store clause to be a valid contractual waiver of the employer’s right to demand a Board-conducted election at a particular store on proof of majority status).

c. Hurtgen’s Dissent: Because Kroger only applies to “after acquired” stores, and the store at issue was preexisting in this case, the parties’ agreement is unenforceable as a waiver of the employer’s right to an election.

C. NLRB case law on reverse neutrality agreements
1. **Briggs Indiana Corp.**, 63 NLRB 1270, 1272 (1945)
   a. NLRB Holding: Board dismissed a union’s election petition based upon the union’s promise not to organize certain groups of the employer’s employees.

2. **Cessna Aircraft**, 123 NLRB 855 (1959)
   a. NLRB Holding: a union’s agreement not to organize will bar a petition only when there is an “express promise” by the union to refrain from seeking to represent the employees in question.

   a. NLRB Holding: a union’s express promise not to organize one of the employer’s facilities waived the union’s right to file an election petition to represent those employees. The Board clarified *Cessna*, finding that while the agreement must be express, it must not be contained in a collective bargaining agreement.