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Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*

LAURA J. COOPER**

How does a union gain the exclusive right to represent employees for purposes of collective bargaining? How do employees exercise their statutory right to decide if they want union representation? If you were to consult a labor law textbook or treatise in an effort to answer this question, you would find a large body of statutory text and case law from the federal courts and the National Labor Relations Board (NLRB) describing the elaborate legal process by which a union can seek the right to represent the employees.[1] The process begins with the union gathering authorization cards from employees and presenting the cards to the NLRB which will determine whether the union made a timely and sufficient showing of employee interest and sought representation in an appropriate bargaining unit. If, following an investigation and a possible hearing, the Board finds it appropriate to schedule an election, an NLRB-regulated campaign period will follow in which both the union and the employer communicate with employees in an effort to influence their votes. Finally, the NLRB conducts a secret ballot election and, if the union receives a majority of votes, and the Board finds no inappropriate conduct affecting the outcome, the Board will certify the union as the exclusive representative of the employees for dealing with the employer regarding terms and conditions of employment.

For the last several years, however, this governmentally regulated process has been increasingly overshadowed by a process created by private contracts between unions and employers. These contracts, called neutrality/card check agreements, are usually administered by private arbitrators empowered to interpret and apply them. In the last six to eight years, the American labor movement has significantly bypassed the legal structure Congress created for employees to express their desires regarding union representation and instead privatized labor law. In entering into neutrality/card check agreements, unions have focused on their goal of increasing union representation. However, such privatization has the secondary consequence of placing in the hands of private individuals serving as arbitrators some powers that had previously been the exclusive province of the NLRB, and other powers that even the NLRB never possessed. While scholarly, political, and administrative attention has understandably been focused on the broad public policy implications of neutrality/card check agreements, scant attention has been directed to what neutrality agreements require of arbitrators and whether these expectations are consistent with the institutional capacity

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1. *See generally* 29 U.S.C. § 151 (2000); ARCHIBALD COX, DEREK CURTIS BOK, ROBERT A. GORMAN & MATTHEW W. FINKIN, LABOR LAW (14th ed. 2006); THE DEVELOPING LABOR LAW (John E. Higgins, Jr. ed., 2006); ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW (2d ed. 2004).

and role of arbitrators.[2] Do arbitrators actually have the legal authority and administrative capacity to assume this role? Can neutrality/card check agreements achieve their intended objectives if arbitrators cannot perform that role? What role can and should arbitrators play when unions join with employers in agreeing to privatize labor law?

In Part I, I address the background of neutrality/card check agreements. Part II outlines the legal context for such agreements. Part III explores the paradoxes and challenges of the arbitrator's role in administering neutrality/card check agreements and the final section provides some concluding remarks.

I. NEUTRALITY/CARD CHECK AGREEMENTS: THE BACKGROUND

What is a neutrality/card check agreement? As its name suggests, a neutrality/card check agreement is a contract between a union and an employer that has two basic components, a neutrality provision and a card check. Although including both components is most typical, an organizing agreement could include one and not the other. In a neutrality provision, an employer agrees that should the union seek to organize its employees, the employer will remain neutral while its employees decide whether they want union representation.[3] In this Article, I use the term more specifically to mean an agreement in which an employer agrees that during an organizing campaign it will decline to exercise certain rights to communicate with employees that it would otherwise enjoy under the National Labor Relations Act (NLRA), or that it will afford the union means of access to and communication with employees that the employer would not be required to permit under the NLRA.[4] As to

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2. In addition to scholarly works cited elsewhere in this Article, other articles address the public policy issues. *See generally* Charles I. Cohen, Joseph E. Santucci, Jr. & Jonathan C. Fritts, *Resisting its Own Obsolescence—How the National Labor Relations Board is Questioning the Existing Law of Neutrality Agreements*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 521 (2006); Andrew M. Kramer, Lee E. Miller & Leonard Bierman, *Neutrality Agreements: The New Frontier in Labor Relations—Fair Play or Foul?*, 23 B.C. L. REV. 39 (1981). Two presentations to the National Academy of Arbitrators spoke to some extent to the tasks of arbitrators in enforcing neutrality/card check agreements, but neither explored whether those tasks were consistent with the institutional capacity and role of arbitrators. George J. Matkov, Jr., Larry G. Hall & Mark J. Mahoney, *Navigating the Uncharted Seas of Negotiated Tranquility: A Management Perspective on Employer Neutrality Agreements and Card Checks*, *in* ARBITRATION 2005: THE EVOLVING WORLD OF WORK, PROCEEDINGS OF THE FIFTY-EIGHTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 157 (Paul F. Gerhart & Stephen F. Befort, eds., 2006); Leonard R. Page, *Employer Neutrality and Card Checks: Address*, *in* ARBITRATION 2005: THE EVOLVING WORLD OF WORK, PROCEEDINGS OF THE FIFTY-EIGHTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 150, 152 (Paul F. Gerhart & Stephen F. Befort, eds., 2006).

3. There can be considerable variation in the extent of neutrality that an employer agrees to observe and the extent to which it preserves or waives various means of communicating with its employees. *See infra* text accompanying notes 86–88.

4. Such agreements may also include provisions in which a union waives certain rights or incurs additional obligations. Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 48 (2001); *see infra* text accompanying notes 89–91.

the card check, the employer agrees that if the union obtains cards from a majority of those in the bargaining unit authorizing the union to represent the employee, the employer will recognize and bargain with the union, foregoing its legal right to insist upon a Board-conducted secret ballot election.[5] A survey of neutrality/card check agreements found that about three-quarters of them provided for an arbitrator to resolve disputes arising under the agreement.[6]

The story of neutrality agreements begins with unions' frustrations in trying to counteract the decline in union density in the latter half of the twentieth century. In the mid-1950s union density reached its peak, including about a third of the workforce. By the mid-1970s density had dropped to about a quarter of the workforce.[7] Since then, the decline has accelerated to the point that union membership in 2007 included only 12.1% of the workforce.[8] For employees in the private sector whose labor relations are governed by federal law, the decline is even sharper than the 12.1% figure suggests. The 12.1% figure includes union membership of government workers, which has been rising as membership among private sector employees has declined. For 2007, the Bureau of Labor Statistics reported that while 39.8% of government workers were union members, only 8.2% of private sector workers were union members.[9]

There are multiple reasons for this decline in union density, but unions, legislators, and scholars have identified employer opposition to unions, expressed in both legal and illegal means, as a significant contributing factor to the decline in union representation.[10] Lawful employer tactics thought to contribute to union representation election losses include captive audience speeches, "aggressive and hierarchical" employer communications, and "intense personal campaigning by supervisors."[11]

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5. Alternatively, organizational agreements between employers and unions might provide for a different means to determine the union's majority status, such as an election privately supervised by an arbitrator or a neutral organization, or an expedited election conducted by the NLRB. This Article, however, is limited to the phenomenon of card checks as a means of determining majority status.

6. Eaton & Kriesky, *supra* note 4, at 48, 49 tbl.2.

7. THE WORLD ALMANAC AND BOOK OF FACTS 109 (2007).

8. Bureau of Labor Statistics, United States Department of Labor, (January 25, 2008), http://www.bls.gov/news.release/union2.nr0.htm.

9. Bureau of Labor Statistics, United States Department of Labor, (January 25, 2008), http://www.bls.gov/news.release/union2.t03.htm.

10. Eaton & Kriesky, *supra* note 4, at 43; H.R. Rep. No. 110-23, at 8–10 (2007) (Conf. Rep.). The American Anthropological Association recently concluded from a review of ethnographic research that American employees are not permitted to express their desire to join unions because "there are insufficient disincentives to managerial lawbreaking in its resistance to unions" and because "management uses tactics of intimidation and fear to coerce workers to vote against unions." American Anthropological Association, AAA Policy Brief #1, at 2 (Sept. 2007), http://www.aaanet.org/gvt/whtsnew.htm.

11. James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 832 (2005). The Supreme Court has recognized that despite regulation by the NLRB, "representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions" and that "labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." Linn v. United Plant Guard Workers Local 114, 383 U.S. 53, 58 (1966).

Election defeats are also blamed on unlawful employer conduct including threatening employees with individual and collective adverse consequences, and firing union supporters.[12] Empirical studies report that an employer's ability to take advantage of administrative procedures to delay the conduct of elections and the commencement of collective bargaining also contributes to union organizing failures.[13] In the mid-1970s, such criticisms led to legislative proposals to strengthen the NLRA to provide greater legal protections and enhanced remedies for unions and workers during organizing campaigns, but hopes of significant statutory changes were dashed when the Labor Reform Act of 1977, which had passed in the House of Representatives by over a hundred votes, died in the Senate in the face of a nineteen-day filibuster.[14]

The failure to achieve statutory reform approximately coincides with the rise of union self-help measures in the form of neutrality agreements. The first reported neutrality agreement was signed in 1976. In that agreement, between the United Auto Workers (UAW) and General Motors (GM), the company agreed that it would "neither discourage nor encourage" the union's effort to organize other GM employees and that GM would instead "observe a posture of neutrality in these matters."[15] While the UAW-GM neutrality provision was included in a collective bargaining agreement between an employer and a union that had already gained representative status as a means of facilitating union organizing elsewhere, unions soon realized that it sometimes also was possible to negotiate agreements with employers with whom the union had not previously had a bargaining relationship.[16]

While one can readily understand why an employer negotiating with the union that represents its employees might be willing to trade neutrality in an organizing campaign that might never eventuate for immediate union concessions at the bargaining table, it is less apparent why a non-union employer might be willing to contract with a stranger union to forego lawful campaign tactics and a government-conducted secret-ballot election, both of which would enhance its chances of remaining union-free.[17] Some advocates on behalf of employers have contended that neutrality/card check agreements are usually signed by employers being harassed by union "corporate campaigns" seeking to undermine the employer's relationship with customers, shareholders, regulators and the general public by communications to the media and complaints to regulatory agencies.[18] The more persuasive evidence, however, suggests

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12. Brudney, *supra* note 11, at 832–33.

13. *Id.* at 833–34.

14. S. 2467, 95th Cong. (1978); H.R. 8410, 95th Cong. (1977); 123 Cong. Rec. H32,613 (1977) (House passage); 124 Cong. Rec. S18,398, S18,400 (1978) (Senate filibuster).

15. Brudney, *supra* note 11, at 825 n.24 (citing *Auto Workers Approve General Motors Contract*, DAILY LAB. REP. (BNA), at A-13 (Dec. 8, 1976)).

16. Eaton & Kriesky, *supra* note 4, at 45.

17. In an empirical study examining 760 representation elections conducted by the NLRB, I found that unions that had collected authorization cards from 50–60% of the members of the bargaining unit won only 40.9% of the subsequent Board-conducted elections. Laura Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumptions Underlying the Supreme Court's* Gissel *Decision*, 79 NW. U. L. REV. 87, 118 tbl. 9 (1984).

18. Congressional Testimony of Charles I. Cohen, on behalf of the U.S. Chamber of Commerce, Oct. 8, 2002, and Statement of Jarol B. Manheim, Professor of Media & Public Affairs & Political Science, George Washington Univ., July 23, 2000, Appendix to Joseph Z.

that companies more likely sign such agreements as the result of a less coerced rational business judgment. An NLRB Regional Attorney listed three reasons why employers enter into such agreements: "to (1) resolve ongoing litigation resulting from union-organizing efforts, (2) enlist the union to support its regulatory objectives, or (3) take advantage of business opportunities available only to unionized employers."[19]

A study reporting on interviews with thirty-four employers who had entered into neutrality/card check agreements also revealed a diversity of motivations. A majority of respondents said that they were seeking to avoid costs of not agreeing, including potential picketing or work stoppages, the need for union concessions, or the potential loss of a client or project.[20] A significant minority of employers were motivated by potential benefits of unionization including cooperative worker-management decisionmaking, assistance in obtaining qualified skilled labor, and assistance in attracting business and customers.[21] Some employers who thought union organization inevitable welcomed the opportunity to shape the organizational process.[22] In a recent arbitration case, an employer representative testified that Yale-New Haven Hospital had entered into an organizing agreement with a union that had sought for a decade to represent hospital employees only because the City of New Haven had declined to issue zoning approvals for a new cancer center unless the hospital took action to resolve the continuing union organizational campaign.[23]

Whatever the motivation, there is no question that many employers have signed neutrality/card check agreements in recent years. Although it is impossible to measure precisely the extent of recent union organization achieved using neutrality/card check agreements, all indications are that it has been a remarkably successful mechanism. Professor James A. Brudney calculated that of the three million workers organized by the AFL-CIO between 1998 and 2003, less than one-fifth gained union representation as the result of an NLRB election.[24] Reviewing Brudney's data in 2007, Professor Cynthia Estlund concluded that probably more than half of the private sector employees organized in the last six to eight years had been organized as a result of neutrality agreements.[25] A 2004 article reported that the AFL-CIO was gaining

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Fleming & Daniel B. Pasternak, *Mutuality Agreements: Innovative Approaches to the Use of Neutrality Agreements — A Unique Proposal for Compromise*, SM031 ALI-ABA 561, 584, 586 (2007).

19. Joseph A. Barker, *Keeping Neutrality Agreements Neutral*, MICH. B. J. Aug. 2005, at 33, 34.

20. Adrienne E. Eaton & Jill Kriesky, *Dancing with the Smoke Monster: Employer Motivations for Negotiating Neutrality and Card Check Agreements*, *in* JUSTICE ON THE JOB: PERSPECTIVES ON THE EROSION OF COLLECTIVE BARGAINING IN THE UNITED STATES 139, 144–45 (Richard N. Block, Sheldon Friedman, Michelle Kaminski & Andy Levin eds., 2006).

21. *Id.*

22. *Id.* at 146–47.

23. Yale-New Haven Hospital, slip op. at 1-2 (2007) (Kern, Arb.), DAILY LAB. REP. (BNA), A-13 (Oct. 26, 2007), http://op.bna.com/dlrcases.nsf/r?Open=vros-78btxa. To cite an earlier example, a 1989 lease and development agreement between the Minneapolis Community Development Agency and the owners of a Hilton hotel to be built adjacent to the city's convention center included provisions requiring neutrality and a card check for future hotel employees. John W. Budd & Paul K. Heinz, *Union Representation Elections and Labor Law Reform: Lessons from the Minneapolis Hilton*, LAB. STUD. J., Winter 1996, at 3, 9–10.

24. Brudney, *supra* note 11, at 828–29.

25. Cynthia Estlund, *Something Old, Something New: Governing the Workplace by*

150,000 to 200,000 new members per year through card checks, but only 70,000 through federal elections.[26] A single union, the Service Employees International Union, said it had recruited 100,000 members as a result of these agreements.[27] Another study that collected organizing agreements and measured union success under them found 78.2% of the agreements that included both neutrality and card check provisions resulted in unions gaining representative status.[28]

This success has now brought the future of union recognition through card check procedures to an uncertain crossroads. Unions want to make card check recognition easier to obtain while employers hope to make it illegal or so unattractive or unlikely of success as not to be worth pursuing. Depending on the actions of Congress, the next President, and the National Labor Relations Board, we may be either about to witness a vast expansion of card check recognition or its rapid demise.

On the one hand, the next Congress may enact and the next President may sign the Employee Free Choice Act, which would permit the NLRB to certify union representative status on the basis of an authorization card majority.[29] This Act was passed in the House of Representatives in March 2007, but fell short of the votes needed to end debate in the Senate.[30] The Act will surely reappear in the next Congress.[31]

On the other hand, a majority of the NLRB recently began to decide a series of cases that may either outlaw card check recognition outright or, by redefining its procedural details, so undercut its value to unions as to make it largely worthless as an organizing tool.[32] In 2004, two members of the Board suggested that it might be time to question the fundamental assumption that an employer had the right to waive what the Board members viewed as a fundamental right of employees to vote in a Board election.[33] At the end of September 2007, a majority of the NLRB decided the long-

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Contract Again, 28 COMP. LAB. L. & POL'Y J. 351, 358 (2007).

26. Aaron Bernstein, *Can This Man Save Labor?*, BUS. WK., Sept. 13, 2004, at 80, 86.

27. William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 IND. L.J. 461, 485 (2007).

28. Eaton & Kriesky, *supra* note 4, at 52 tbl.3.

29. H.R. 800, 110th Cong. (2007); S. 1041, 110th Cong. (2007).

30. *Supporters of Card Check Bill Fall Short of Votes Needed to Limit Senate Debate*, DAILY LAB. REP. (BNA) at AA-2 (June 27, 2007).

31. Similar legislation has recently been enacted in several states permitting card check procedures to establish the majority status of unions seeking to represent state and local government employees who are outside the jurisdiction of the NLRA. MASS. ANN. LAWS ch. 150A, § 5(c) (LexisNexis 1999 & Supp. 2007); N.H. REV. STAT. ANN. § 273-A:10, IX (1999 & Supp. 2007); OR. REV. STAT. § 243.682 (2007).

32. In recent years, House and Senate members have introduced bills to make it unlawful for the NLRB to require an employer to recognize a union whose majority status is based on a card check, but such efforts have no chance of success in a Congress with a Democratic majority. *See, e.g.*, Secret Ballot Protection Act, H.R. 866, 110th Cong. § 3(b) (2007); Secret Ballot Protection Act of 2007, S. 1312, 110th Cong. § 3(b) (2007).

33. Shaw's Supermarkets, 343 N.L.R.B. 963, 964 (2004) (Battista & Meisburg) ("[W]e have some policy concerns as to whether an employer can waive the employees' fundamental right to vote in a Board election."). More recently, a majority of the Board seemed to leave open the question of the validity of neutrality/card check agreements. Dana Corp./Metaldyne Corp., 351 N.L.R.B. No. 28, at 3 (Sept. 29, 2007) ("We also do not address the legality of card-check and/or neutrality agreements preceding recognition.").

awaited consolidated *Dana/Metaldyne* case.[34] The Board majority ruled there that if an employer recognizes a union on the basis of authorization cards, the employees must be notified of a right to act within 45 days to petition the NLRB for an election to determine if the employees continue to want union representation.[35] Now, unions that gain representative status through card checks may have their representative status put in doubt for months or even years while simultaneously facing the always significant challenges of establishing a collective bargaining relationship. The two Board members dissenting in *Dana/Metaldyne* described the decision as "cut[ting] voluntary recognition off at the knees."[36] Other recent cases also have undermined the benefit of the card check process, and still others currently pending could weaken it even further.[37]

II. THE LEGAL CONTEXT FOR NEUTRALITY/CARD CHECK AGREEMENTS

A. The Substantive Law

If the National Labor Relations Act (NLRA) generally envisions a union organizational process governed by the NLRB and culminating in a secret-ballot election, what is the legal status of recognition resulting from neutrality/card check agreements? While the NLRB has historically considered Board-conducted elections as the "preferred route"[38] and the Supreme Court has said that elections have "acknowledged superiority,"[39] both affirm that the NLRA permits an employer to recognize a union on the basis of majority status demonstrated not by secret ballot, but by a showing of authorization cards.[40] Indeed, the Board has sometimes

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34. *Dana/Metaldyne*, 351 N.L.R.B. No. 28.

35. *Id.* The Board will hold the election if the petition is supported by 30% or more of the unit employees. *Id.* at 10.

36. *Id.* at 14 (Liebman & Walsh, dissenting in part).

37. In *Supervalu,* Inc., 351 N.L.R.B. No. 41 (Sept. 30, 2007), the Board held that an employer did not commit an unfair labor practice by repudiating a card check provision in a collective bargaining agreement requiring it to recognize the union as the representative of employees at other stores if employees at the other stores were not appropriately included in the same bargaining unit as the employees covered by the agreement.. In *Shaw's Supermarkets (UFCW),* 343 N.L.R.B. 963 (2004), the Board agreed to review whether an employer's agreement to an after-acquired-store clause in a collective bargaining agreement waived its right to petition for a Board-conducted election and whether, if it did, such a waiver was a violation of public policy. In *Marriott Hartford Downtown Hotel (UNITE)*, 347 N.L.R.B. No. 87 (Aug. 4, 2006), the Board agreed to consider whether a union's request for a card check agreement was a demand for recognition that permitted an employer to petition for an NLRB election. Later, however, a three-member panel of the Board affirmed the decision of the regional director to dismiss the employer's election petition. Marriott Hartford Downtown Hotel, No. 34-RM-88 (N.L.R.B. 2007). An attorney involved in the case speculated that the same issue may be posed in another case still pending before the Board. DAILY LAB. REP. (BNA), A-12 (Sept. 21, 2007).

38. NLRB v. Gissel Packing, Co., 395 U.S. 575, 596 (1969).

39. Linden Lumber Div. v. NLRB, 419 U.S. 301, 304 (1974).

40. "Voluntary recognition itself predates the National Labor Relations Act and is undisputedly lawful under it." Dana Corp./Metaldyne Corp., 351 N.L.R.B. No. 28, at 3 (Sept. 29, 2007) (citing *Gissel*, 395 U.S. at 595–600); *Linden*, 419 U.S. at 304 (noting that

enthusiastically embraced the idea of voluntary recognition: "It is a long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations."[41] In the absence of prior agreement, however, an employer presented with evidence of a card-based majority has no legal obligation to recognize the union.[42] If, however, an employer agrees in advance that it will recognize a union on the basis of an authorization card-based majority, the employer is guilty of the unfair labor practice of refusal to bargain if it then reneges on its promise.[43]

The neutrality portion of an employer's neutrality/card check agreement has also been held not to be inconsistent with national labor policy. In the absence of threats or promises, the NLRA explicitly protects an employer's right to express to its employees information and arguments designed to discourage employees from seeking union representation.[44] It has been recognized, however, that since employers are free in the absence of an agreement to remain silent in the face of a union organizational campaign, they are also free to agree to maintain neutrality.[45]

B. Judicial Enforcement

In addition to being enforceable through NLRB unfair labor practice proceedings, neutrality/card check agreements alternatively are enforceable in federal court. Section 301(a) of the Labor Management Relations Act provides jurisdiction in federal court for "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . ."[46] Although this provision is most commonly applied to afford federal court jurisdiction to enforce collective bargaining agreements between employers and unions with majority status, the Supreme Court has held that its scope extends to the breadth of its terms. The statute does not require that the contract at issue be a collective bargaining agreement.[47] Nor does it require that the labor organization representing employees be the majority representative of *those* employees.[48] The Supreme Court held that this broad interpretation was consistent not only with the language of the statute but also

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authorization cards may "adequately reflect employee sentiment").

41. MGM Grand Hotel, Inc., 329 N.L.R.B. 464, 466 (1999).

42. *Linden*, 419 U.S. at 309–10.

43. Snow & Sons, 134 N.L.R.B. 709, 710 (1961); Houston Div. of Kroger Co., 219 N.L.R.B. 388, 389 (1975).

44. NLRA, § 8(c), 29 U.S.C. § 158(c) (2000) (stating that "[t]he 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 an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.").

45. Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corp., 961 F.2d 1464, 1470 (9th Cir. 1992). The NLRB has acknowledged the enforceability of employer neutrality obligations under Section 301. The New Otani Hotel & Garden, 331 N.L.R.B. 1078, 1081 n.9 (2000).

46. 29 U.S.C. § 185(a) (2000).

47. Retail Clerks Int'l Ass'n Local 128 & 633 v. Lion Dry Goods, Inc., 369 U.S. 17, 25 (1962).

48. *Id.* at 29.

with its intended purpose of promoting "responsible and stable labor relations."[49] Lower federal courts have applied the Supreme Court's broad interpretation of the scope of Section 301(a) specifically to hold that neutrality/card check agreements are enforceable in federal court.[50] In doing so, the courts rejected all of the employers' arguments that enforcement of neutrality/card check agreements would be inconsistent with federal labor policy because such agreements usurp the role of the NLRB, deny employees the opportunity to vote in a secret ballot election, and require employers to remain silent during organizational campaigns.[51]

Situating federal court jurisdiction under Section 301 has substantive law consequences for the role of arbitrators in disputes arising under neutrality/card check agreements. The Supreme Court has held that when Congress granted courts Section 301 subject matter jurisdiction, it also vested courts with authority to develop through the process of deciding cases the substantive law to govern interpretation of agreements between unions and employers.[52] This judicially created law includes rules for determining when a dispute is subject to arbitration and when an arbitrator's award may be judicially vacated.

In *United Steelworkers v. Warrior & Gulf Navigation Co.*, the Court articulated the basic rule for determining arbitrability in the context of a dispute alleging violation of a collective bargaining agreement: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[53] That presumption of arbitrability has been held equally applicable to disputes arising under neutrality/card check agreements.[54]

A second prong of federal common law governing collective bargaining agreements is a high level of judicial deference to arbitration awards. In *Enterprise Wheel*, the Court held that allowing federal courts to evaluate the merits of awards would undermine the federal policy of enforcing the parties' bargain that arbitrators' decisions are to be final. The Court stated that an arbitrator's award is legitimate and should be enforced so long as "it draws its essence from the collective bargaining agreement."[55] More recently, the Court emphatically restated the necessity for judicial deference, saying that courts should "only in rare instances" set aside awards, and that even if a court is convinced that the arbitrator committed "serious error," the award should still not be set aside so long as the arbitrator was "even arguably construing or applying the contract and acting within the scope of his authority."[56] This precedent

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49. *Id.* at 27.

50. Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 567 (2d Cir. 1993); *Marriott Corp.*, 961 F.2d 1464, 1469–70 (9th Cir. 1992).

51. *J.P. Morgan Hotel*, 996 F.2d at 567; *Marriott Corp.*, 961 F.2d at 1469–70.

52. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957).

53. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960).

54. United Steelworkers v. TriMas Corp., No. 07-1688 (7th Cir. July 3, 2008), DAILY LAB. REP. (BNA), E-64 (July 7, 2008); NY Health & Human Serv. Union 1199/SEIU v. NYU Hosp. Ctr., 343 F.3d 117 (2d Cir. 2003); United Steelworkers v. Hibbing Joint Venture, 2007 WL 2580546 at * 6–8 (D. Minn. Sept. 4, 2007). *Cf.* SEIU v. St. Vincent Med. Ctr., 344 F.3d 977, 983 (9th Cir. 2003) (applying the presumption of arbitrability to neutrality/election agreements).

55. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960).

56. E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57, 62 (2000)

has been applied in the context of neutrality/card check agreements to hold that, there too, the court's power of judicial review is "extremely limited."[57]

From this articulation of the substantive law developed under Section 301 it would seem that the arbitrator in neutrality/card check agreements occupies a clearly defined and highly respected place in the legal landscape. However, that impression turns out to be false when one realizes that the arbitrator is simultaneously occupying a different and far more precarious place in an alternative legal universe.

C. NLRB Deferral

The National Labor Relations Board has parallel jurisdiction over most of the issues likely to be decided by arbitrators under neutrality/card check agreements. Unlike the federal courts that are obliged to pay extraordinary deference to arbitrators' decisions, the NLRB need not pay any at all.[58] Most of the issues to be considered by arbitrators interpreting and applying neutrality/card check agreements are representational issues such as the definition of an appropriate bargaining unit and the determination of majority status. The authority to resolve such representational issues, however, is one of the principal statutory responsibilities of the NLRB.[59]

Issues that arise under neutrality/card check agreements are only one type of question over which labor arbitrators and the NLRB have overlapping jurisdiction. For example, an employer's subcontracting could be viewed as a violation of contract subject to arbitration as well as the unfair labor practice within the jurisdiction of the NLRB of refusal to bargain.[60] The discharge of a union steward could be seen as the arbitrable issue of whether the employer violated a "just cause" contract provision, or whether the employer violated the employee's statutory right not to be discriminated against for participation in union activities.[61] The question of whether a union demonstrated majority support in an appropriate bargaining unit could be presented to an arbitrator under a neutrality/card check agreement or raised by a representation petition filed with the NLRB.[62]

In deciding individual cases of such overlapping jurisdiction, the NLRB has developed a jurisprudence of deferral. This jurisprudence is intended to achieve multiple objectives—to foster collective bargaining by encouraging parties to abide by their agreed-upon dispute resolution process, to conserve agency resources, and to protect the parties from duplicative litigation.[63] The level of deference that the agency

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(quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)). *Eastern Associated Coal* also held that courts have the authority to overturn an arbitrator's award that violates public policy, but only when the court can identify an "explicit, well-defined, and dominant public policy . . . ascertained by reference to positive law and not from general considerations of supposed public interests." *Id.* at 63. As neutrality obligations and the card check recognition process are not made unlawful by statutes or by decisions of courts or the NLRB, it is unlikely that an arbitrator's decision under a neutrality/card check agreement would fall within this narrow public policy exception.

57. *J.P. Morgan Hotel*, 996 F.2d at 567–68.

58. *See* Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964).

59. 29 U.S.C. § 159 (2000).

60. *See* 29 U.S.C. § 158(a)(5) (2000).

61. *See* 29 U.S.C. § 158(a)(3) (2000).

62. 29 U.S.C. § 159(c)(1) (2000).

63. United Techs. Corp., 268 N.L.R.B. 557, 558–60 (1984).

will afford to an arbitral award is significantly dependent upon the issue involved. The NLRB eagerly defers to arbitrators' awards in those areas of contract interpretation in which it views arbitrators as possessing special skills and expertise.[64] The NLRB is also generally willing to defer to arbitrators' decisions in cases involving individual statutory rights such as allegations of discrimination because of union activities, so long as, in deciding the contractual issue, the arbitrator was presented generally with the same set of facts that would have been relevant in deciding the statutory issue.[65] The Board's deferral policy, however, is far less accepting of arbitrators' decisions regarding representational issues, precisely the type of questions likely to be posed to arbitrators under neutrality/card check agreements.

In *St. Mary's Medical Center*, the Board articulated its approach to arbitrators' decisions on representational issues: "Although the Board only infrequently defers to arbitration in representation proceedings, the Board will find deferral appropriate when the resolution of the issue turns solely on the proper interpretation of the parties' contract. Where resolution turns on statutory policy, the Board will not defer."[66]

This general refusal to defer to arbitrators' decisions in representational matters may make theoretical sense because representational issues may put into question the very existence of the collective bargaining relationship, or the fundamental applicability of the collective bargaining agreement from which the arbitrator's authority is derived. However, the Board's manner of articulating representational issue deferral policy—purporting to draw a bright line between issues turning on contract interpretation and those turning on statutory policy—is problematic in practical application because representation issues presented to arbitrators sit precisely on that line implicating both the contract and the statute. The application of this test, which artificially forces the Board to classify issues that are neither wholly contractual nor wholly statutory into a single category, has produced two problems—incoherent application of the test and an opportunity to manipulate the categories to achieve desired ends.

A typical example of such incoherence can be seen in the Board's decision in *Central Parking System, Inc.*[67] In this opinion, a three-member panel divided with the majority finding the issue to be solely contractual, and the dissenter equally emphatically labeling it as statutory. There, a union sought to enforce a provision in a collective bargaining agreement with Central Parking requiring the employer to

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64. Collyer Insulated Wire, 192 N.L.R.B. 837, 839 (1971).

65. Olin Corp., 268 N.L.R.B. 573, 573 (1984). The arbitration process must be "fair and regular" and "all parties [must] have agreed to be bound." *Id.* The Board also requires that the arbitrator's decision satisfy the low threshold of not being "clearly repugnant" to the NLRA, which it defines as a decision "not susceptible to an interpretation consistent with the Act." *Id.* at 574. More recently, the Board has held that an award may be considered consistent with the NLRA where the award is supported by some Board precedent despite being inconsistent with contrary Board precedent. Kvaerner Philadelphia Shipyard, Inc., 347 N.L.R.B. No. 36, at 3 (June 9, 2006).

66. St. Mary's Medical Center, 322 N.L.R.B. 954, 954 (1997) (citations omitted). The Third Circuit recently upheld the Board's policy also not to defer to an arbitrator's authorization card count if the Board independently finds that the arbitrator counted invalid cards. NLRB v. Regency Grand Nursing & Rehab. Ctr., 265 Fed. Appx. 74, 2008 WL 449782, at *77-*78 (3d Cir. 2008).

67. Central Parking System, Inc., 335 N.L.R.B. 390 (2001).

recognize the union as the representative of employees at after-acquired facilities. Central later acquired Allright. When Central refused recognition on the ground that Allright was a separate company that was not a party to the agreement, the union demanded arbitration. In response, the employer petitioned the NLRB to conduct a representation election among Allright's employees.[68] The Board majority dismissed the employer's petition, applying the test from *St. Mary's Medical Center*,[69] to conclude that the issue turned solely on interpretation of the contract. The dissenting Board member listed five different statutory questions that he thought necessarily required resolution by the agency rather than the arbitrator.[70] The line between statutory and contractual issues appears highly subjective and indeterminate if one Board member can find five statutory questions implicated while two other members find none.

The insistence on classifying as either statutory or contractual matters that could be given either label also creates an opportunity manipulatively to label issues to achieve desired ends without having to articulate why those ends are desired. The inference of manipulation can be drawn from Board decisions that sometimes defer to arbitration largely statutory matters while refusing to defer largely contractual cases.

In *Verizon Information Systems*, the parties had entered into a neutrality/card check agreement, but could not agree upon the scope of the appropriate bargaining units.[71] Their agreement provided that, in the event of impasse, determination of an appropriate bargaining unit was to be made by an arbitrator. The parties confined the arbitrator's authority exclusively to the bargaining unit issue and said that in making the decision the arbitration "shall be guided . . . by the statutory requirements of the National Labor Relations Act and the precedential decisions of the National Labor Relations Board and Appellate reviews of such Board decisions."[72] It would be hard to present a case that more clearly turned on statutory issues rather than interpretation of the parties' contract because the contract's sole function was to require application of the statute. Yet, the Board held in *Verizon* that the agency would not consider a representation petition the union filed with the NLRB,[73] in which the Board would have had the responsibility of defining the appropriate bargaining unit.[74] Instead, the Board overturned its Regional Director and dismissed the union's petition, holding that the union was bound by its agreement to have the issue resolved by an arbitrator because the union had already taken advantage of another term of the agreement by requesting and receiving from the employer information about the number and classification of employees at various work locations.[75] While the Board's opinion suggested that its holding was narrowly based on estoppel, the factual circumstances posed in *Verizon*, in which a party first benefitted from some provision of a neutrality/card check agreement

68. *Id.* at 390.
69. *See supra* text accompanying note 66.
70. 335 N.L.R.B. at 392.
71. Verizon Info. Sys., 335 N.L.R.B. 558, 558 (2001).
72. *Id.*
73. *Id.* at 560.
74. 29 U.S.C. §159(a) (2000).
75. *Verizon*, 335 N.L.R.B. at 560.

before seeking assistance from the Board, seem likely to occur in most, if not all, cases where Board assistance would be sought.[76]

While in *Verizon* the Board deferred to the arbitrator's decision in a case turning entirely on statutory issues, the opposite occurred in *Advanced Architectural Metals, Inc.*, where the Board refused to defer to an award that appeared to turn entirely on contractual interpretation.[77] There, the employer had been a party to a series of collective bargaining agreements of varying scope. Upon expiration of an agreement covering employees in the employer's shop, the union submitted a grievance asserting that those employees were now represented by it under a multiemployer agreement that covered "all work" in the employer's "warehouses, shops, or yards."[78] While the grievance was pending, but before the arbitrator issued an award, the employer submitted to the NLRB a unit clarification petition asking for a declaration that the shop employees were a separate unit. The NLRB Regional Director deferred the representation issue pending arbitration on the ground that the issue was solely contractual. After an arbitration award in which the arbitrator interpreted the contract to conclude that it covered the shop employees, the Regional Director dismissed the employer's petition, deferring to the arbitrator's award.[79] The Board reversed the Regional Director's decision, finding that deferral was inappropriate on the ground that the issues involved were in part statutory including "appropriate unit principles, community of interest criteria, and accretion standards."[80]

In summary, this review of the legal context for neutrality/card check agreements has shown that both the NLRB and courts have found such agreements to be enforceable and have accepted both neutrality pledges and card check recognition procedures as consistent with the NLRA. These agreements typically place at least initial responsibility for enforcement in the hands of arbitrators. Once an arbitrator has rendered an award interpreting a neutrality/card check agreement, the finality of that award fundamentally turns on which institution is asked to review or enforce the arbitrator's award. If heard by a court, the arbitrator's decision will receive extraordinary deference, but if heard by the NLRB, the award may be entirely disregarded.

III. THE ROLE OF THE ARBITRATOR

Labor arbitrators interpreting typical provisions of collective bargaining agreements, such as those prohibiting employers from discharging employees without "just cause," or defining management rights to subcontract, operate within a regime

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76. It seems reasonable to expect that a party to a neutrality/card check agreement would not immediately after entering into such an agreement petition the NLRB to address an issue covered by the agreement. Rather, it seems most likely that a party would seek the assistance of the NLRB only when, in the midst of performance under the agreement, a party became dissatisfied with the other side's performance in some respect.

77. Advanced Architectural Metals, Inc., 347 N.L.R.B. No. 111, at 2 (Aug. 31, 2006).

78. *Id.*

79. *Id.* at 1.

80. *Id.* at 2. The dissenting Board member thought that the case raised none of these statutory issues. *Id.* at 4–5.

with well-defined substance and procedures.[81] Similarly, when the NLRB decides representation issues, such as determining an appropriate bargaining unit or deciding whether an authorization card was signed under coercion, it operates under procedures and substantive doctrine well defined in statutory text and more than seventy years of case decisions.[82] When an arbitrator is asked to interpret and apply the provisions in a neutrality/card check agreement, the arbitrator is asked to perform a task distinct from both the ordinary work of a labor arbitrator and the ordinary work of the NLRB. The task requires the arbitrator substantively to replicate some of the Board's activities, but without equivalent procedural mechanisms or institutional authority. In part, the arbitrator is asked to develop substantive doctrine beyond the scope of NLRB-developed law, but in a different context—in a private proceeding—that nevertheless implicates issues of national labor policy. The arbitrator's task is made even more difficult because it must be done in a sense blindfolded. At the time that the arbitrator is engaged in decisionmaking, the arbitrator has no way of knowing whether those decisions will be reviewed by a deferential court or a dismissive federal agency. These are the paradoxes of the role of the arbitrator in neutrality/card check agreements. In this Part, I identify the variety of issues that may be presented to arbitrators under neutrality/card check agreements and evaluate the extent to which arbitrators have the appropriate procedural powers and institutional competence appropriately to resolve these matters.

Although provisions for employers to remain neutral in a union organizational campaign and provisions in which employers agree to recognize a union on the basis of an authorization card check are commonly found joined in combined neutrality/card check agreements, the two prongs of the agreement present quite different tasks for the arbitrator. When an arbitrator interprets and applies an employer's contractual obligation to refrain from exercising rights it would otherwise have under the NLRA to communicate with its employees, the arbitrator is deciding questions that would never be presented to the NLRB. Arbitrators' decisions interpreting and applying neutrality provisions necessarily resolve fundamental labor policy issues in a private process where employees whose rights are at stake are wholly unrepresented.

On the other hand, the issues an arbitrator confronts under a card check provision have significant parallels to issues considered by the NLRB, but they may be more difficult for an arbitrator to resolve because of the procedural differences between the administrative and arbitral processes. Although card check issues may appear to be the same in both arbitral and agency settings, the different settings may warrant different answers to the same questions.

Finally, should an arbitrator find that an employer has breached its contractual obligations under the neutrality/card check agreement, the arbitrator will need to determine an appropriate remedy, a remedy that will have national labor policy

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81. *See generally* THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS (Theodore J. St. Antoine ed., 2d ed., 2005); ELKOURI & ELKOURI, HOW ARBITRATION WORKS (Alan Miles Ruben ed., 6th ed., 2003); Laura J. Cooper, *The Process of Process: The Historical Development of Procedure in Labor Arbitration*, *in* ARBITRATION 2005: THE EVOLVING WORLD OF WORK, PROCEEDINGS OF THE FIFTY-EIGHTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 99 (Paul F. Gerhart & Stephen F. Befort, eds., 2006).

82. *See supra* note 1.

implications, most likely in a circumstance in which the remedial issue is not addressed either in the parties' agreement nor in the case law of the NLRB.

A. Arbitral Interpretation of Neutrality Provisions

In the absence of a neutrality agreement, both the First Amendment and the explicit language of Section 8(c) of the NLRA afford employers broad rights to communicate anti-union messages to employees in a variety of ways.[83] Substantively, the employer is free to disparage the union to whatever extent it wishes, including making false claims, so long as the employer's message contains no promises or threats.[84] Procedurally, the employer is free to hold unlimited numbers of mandatory meetings on company time, to distribute literature to employees at work and mail it to their homes, to communicate by telephone and e-mail, and to have its supervisors express anti-union messages in individual conversations with employees.[85] When an employer enters into a neutrality agreement with a union, it is waiving some or all of these communicational rights. While I have so far addressed neutrality agreements generically, as if they all restricted employer communications to the same extent, individual agreements as the product of separate negotiations place varying levels of restriction upon the content and form of employer communications.

Researchers Adrienne E. Eaton and Jill Kriesky collected 118 neutrality/card check agreements and observed considerable variety in the substance of the neutrality provisions. They included (1) a pledge of "neutrality" without further definition; (2) neutrality definitions that allowed employers to communicate "facts" to employees, sometimes only in response to inquiries; (3) a prohibition on the employer communicating opposition to the union; (4) an obligation for the employer to communicate to employees that it welcomed their choice of a representative; (5) prohibitions on the employer attacking or demeaning the union; (6) obliging the employer only to strive to "create a climate free of fear, hostility, and coercion;" (7) obliging the employer to campaign in a "positive" manner or to keep its comments "pro-company;" and (8) stating in varying levels of detail that the employer would not make any statements regarding potential effects of unionization.[86] Some contracts released employers from their neutrality pledge if the union failed to abide by a contractual obligation not to attack the employer.[87]

Some agreements placed explicit restrictions on the employer's means of communication. The researchers found contracts that precluded (1) one-on-one meetings; (2) captive audience meetings; (3) communicating in writing or by telephone

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83. NLRA, § 8(c), 29 U.S.C. § 158(c) (2000); NLRB v. Gissel Packing, Inc., 395 U.S. 575 (1969). For the text of Section 8(c), see *supra* note 44.

84. Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 129–30 (1982).

85. *See generally* THE DEVELOPING LABOR LAW, *supra* note 1; GORMAN & FINKIN, *supra* note 1.

86. Eaton & Kriesky, *supra* note 4, at 47. See also, AFL-CIO, BARGAINING TO ORGANIZE REFERENCE MANUAL 35–38 (2000) (providing sample neutrality language from union-management contracts).

87. Eaton & Kriesky, *supra* note 4, at 53.

with employees about the organizing drive; and (4) employers questioning employees about union activities or membership.[88]

While the union's objective in these agreements is to restrict the employer's behavior, often employers are able to gain in exchange a waiver of some union rights or an imposition of additional restrictions upon the union beyond those required by law. Three-quarters of the agreements examined by Professors Eaton and Kreisky placed some limit on union behavior.[89] The most common was an agreement not to attack management.[90] Less common provisions required the union to notify the employer when commencing a specific campaign or to require that the campaign be conducted within a specified time period.[91]

Neutrality agreements may also afford union organizers affirmative rights to communicate with employees beyond those required by the NLRA. Professors Eaton and Kreisky found that in more than a third of the contracts they collected unions were afforded broader access to lists of employees than required by law,[92] under which there is no obligation to provide lists to facilitate the collection of authorization cards and under which lists need only be provided very late in an organizing campaign just before a scheduled election.[93] While the NLRA substantially limits the access of union organizers to an employer's property for the purpose of communicating with employees,[94] Eaton and Kriesky found that about two-thirds of the neutrality agreements they studied gave the union physical access to the employer's property.[95] Not surprisingly, the researchers also found that the text of the neutrality obligations gave rise to disputes between the parties that were presented to arbitrators, particularly when contracts included only general language or when they preserved for the employer some opportunity to communicate.[96]

A review of requests for arbitration under contract provisions for employer neutrality and union access reveal that the issues raised are largely ones that would never be addressed by the NLRB because they concern contract rights and prohibitions that exceed those established by statute. In *SEIU v. St. Vincent Medical Center*, the union sought arbitration of a claim that the employer's campaign communications had violated a provision requiring the parties' communications to be limited to "that which is factual."[97] In another case, the arbitrator had to determine whether the employer had violated its contractual obligation to "send" the employees a letter explaining the employer's neutrality (the specific content of which was an attachment to the parties' agreement) when the employer read the letter to the employees rather than mailing it.[98]

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88. *Id.* at 48.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* Examples of contract language requiring early provision of lists of employees appear in AFL-CIO, *supra* note 86, at 43–44.

93. Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1239 (1966).

94. Lechmere, Inc. v. NLRB, 502 U.S. 527, 532–34 (1992).

95. Eaton & Kriesky, *supra* note 4, at 48. Examples of contract language affording unions access to employer property appear in AFL-CIO, *supra* note 86, at 40–42.

96. Eaton & Kriesky, *supra* note 4, at 47.

97. SEIU v. St. Vincent Med. Ctr., 344 F.3d 977, 980–81 (9th Cir. 2003).

98. Alton Machine Works, 122 Lab. Arb. Rep. (BNA) 1801, 1802–04 (2006) (Heggie,

In *Yale-New Haven Hospital*, the arbitrator had to determine, among other things, the meaning of a contractual prohibition against conducting "mandatory meetings" with employees when the employer labeled meetings as voluntary and the union claimed that they were, as a practical matter, mandatory.[99] In that extraordinary case, the arbitrator, over a nine-month period, submitted decisions on eighty-one different claims by the parties that the other side had violated their organizing agreement.[100]

In *Alden North Shore*, an arbitrator issued a forty-five-page-long award addressing numerous issues.[101] They included whether the employer had violated a provision requiring the employer to afford union representatives "reasonable access to Employees on company property during reasonable times;"[102] whether the employer had a reasonable justification for the delay in furnishing a list of employee names and addresses; whether the employer's neutrality obligation was breached by increasing employee wages during the organizational campaign; and whether it was breached by suggesting in campaign literature that union representation would have no effect on pay, benefits, and job security, and that selecting a union representative posed potential risks with lasting adverse consequences for employees and their families.[103]

In *Dana Corp.*, an automobile parts manufacturer agreed that it would remain neutral in the UAW's organizing campaign, but reserved the rights to communicate "not in an anti-UAW manner, but in a positive pro-Dana manner" and "to speak out in any manner appropriate when undue provocation is evident in an organizing campaign."[104] The arbitrator there found that although the union's handbills might have constituted "provocation," they did not rise to the level of "*undue* provocation" that would allow the employer to respond in an "anti-UAW manner."[105]

At a manufacturing plant, the parties had mutually agreed that organizational campaigns would be "conducted in a manner free of harassment, which does not misrepresent to employees the facts and circumstances surrounding their employment and in a manner which does not demean either the Company or the Union as an organization nor their respective representatives as individuals," and that all campaigning would be "fair, factual, non-coercive, free from manipulation, and respectful of the other party."[106] The arbitrator there found that the employer had violated its obligation not to demean the union by sending a letter to its employees stating that the most effective way to address employee concerns was to "talk honestly" rather than have the union.[107]

When an arbitrator is interpreting ambiguous contract provisions, such as those regarding the scope of permissible communications or union rights of access to employees during an organizational campaign, the arbitrator is strictly a creature of contract, with authority from and direct responsibility to the contracting parties. The

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Arb.).

99. Yale-New Haven Hospital, slip op. at 1-2 (2007) (Kern, Arb.), DAILY LAB. REP. (BNA), A-13 (Oct. 26, 2007), http://op.bna.com/dlrcases.nsf/r?Open=vros-78btxa.

100. *Id.* at 4.

101. Alden N. Shore, 120 Lab. Arb. Rep. (BNA) 1469 (2004) (Malin, Arb.).

102. *Id.* at 1497.

103. *Id.* at 1496–1503.

104. Dana Corp., 76 Lab. Arb. Rep. (BNA) 125, 126 (1981) (Mittenthal, Arb.).

105. *Id.* at 130–31.

106. Timken Co., 119 Lab. Arb. Rep. (BNA) 306, 308 (2003) (Duff, Arb.).

107. *Id.* at 311–12.

arbitrator has no responsibility to the employees directly affected by the contract, nor, by definition, does the union that negotiated the agreement have the legal right to serve as the employees' representative. As a union's duty of fair representation to employees arises only when the union has the exclusive right to represent those employees,[108] the union also has no legal obligation to represent the interests of individual employees, either in negotiating the terms of the neutrality agreement or in presenting the union's position in arbitration. Nor does the arbitrator have the institutional competence or any obligation to render awards that are consistent with national labor policy. Indeed, even if the arbitrator desired guidance from the NLRB on how to approach particular questions, such as whether any presumptions should operate in interpreting ambiguous language regarding restrictions on communications, no such guidance would be available because the NLRB has not articulated any law governing the interpretation of neutrality agreements. The effect of such privatized decisionmaking is that arbitrators, by default, are making fundamental national labor policy with regard to such questions as the nature of appropriate campaigning and the extent of information appropriate for employees to hear, or not to hear, before making decisions about whether they wish a union to serve as their exclusive representative.[109]

B. Arbitral Interpretation of Card Check Provisions

We have seen that an arbitrator interpreting neutrality provisions in an organizing agreement is asked to go beyond any publicly-defined labor law to place new limitations upon employer conduct and grant new rights to unions. In contrast, an arbitrator implementing card check provisions of an organizing agreement is asked precisely to follow previously articulated labor law, but in a context in which the procedural mechanisms necessary to do so may not be appropriate or available, and where the legal doctrines may not be appropriate to apply because of the altered context.

It is possible that an arbitrator undertaking a card check to determine a union's majority status might be assuming a responsibility no more demanding than counting the cards and determining if they constitute a majority of the employees in the appropriate bargaining unit.[110] For the task to be so limited, however, the parties must

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108. Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 200–01 (1944).

109. This critique of arbitrators assuming the authority to decide representation issues parallels Circuit Judge Harry T. Edwards's contractual waiver theory articulated in his academic and judicial writing. *See* Hammontree v. NLRB, 925 F.2d 1486, 1501–03 (D.C. Cir. 1991) (Edwards, J., concurring); Harry T. Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23 (1985). Under that theory, arbitrators have the authority to determine statutory rights of individuals only if the union agreeing to the arbitration is already the employees' exclusive representative and the statutory rights at issue are those that an exclusive representative is empowered to waive on behalf of those it represents. Judge Edwards also notes that the employees' right to select a bargaining representative is non-waivable. *See Hammontree*, 925 F.2d at 1502; Edwards, *supra*, at 30.

110. Having a neutral party determine majority status by comparing signed cards to a list of employees in the bargaining unit is designed to insulate an employer from a violation of Section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2) (2000), which makes it unlawful for an employer to grant exclusive representative status to a union that lacks majority status, and to insulate a union

not have placed in dispute any of a wide range of issues that potentially underlie the question of majority status. Majority status could rest on determining such matters as: (1) the appropriate bargaining unit; (2) whether specific persons are "employees" entitled to be included in the bargaining unit; (3) whether authorization cards are too stale to be counted; (4) whether individual cards are invalid because they were signed as the result of misrepresentation; (5) whether specific cards are invalid because they were solicited by supervisors; (6) whether certain cards are invalid because they were signed as a result of coercion; and (7) whether particular cards were effectively withdrawn by employees after signing.

The definition of appropriate bargaining units is often hotly contested between unions and employers because it can determine whether a union will be able to establish majority status at all.[111] Often, employers seek to define units as large as possible or include employee groups thought to be more hostile to organization in efforts to make the union's organizational task that much more difficult. The NLRA grants the NLRB broad discretion in defining bargaining units by imposing only a few limited prohibitions and only the most general affirmative direction.[112] The NLRB has promulgated only a single narrow regulation on bargaining unit definition[113] but decided a large body of case law articulating bargaining unit definition principles.[114] The case law is, however, less than clear because courts have sometimes imposed conflicting approaches to bargaining unit definition[115] and because many of the

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from violation of Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (2000), which makes it unlawful for a union lacking majority status to accept exclusive representation. ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731 (1961).

111. Although bargaining unit definition issues may be presented to some arbitrators implementing neutrality/card agreements, in other cases, the terms of the contract between the union and the employer may unambiguously stipulate the scope of the bargaining unit in which the union's majority is to be determined. It is not inconsistent with federal labor policy for an employer and a union to be afforded considerable discretion to define a bargaining unit consensually. The NLRB grants its regional directors authority to approve bargaining unit definitions stipulated by the parties so long as the Board would "arguably . . . find the unit appropriate." NATIONAL LABOR RELATIONS BOARD, CASEHANDLING MANUAL, PART TWO – REPRESENTATION PROCEEDINGS, § 11084.2, *available at* http://www.nlrb.gov/Publications/Manuals/r_-_casehandling_manual_(II).aspx.

112. The NLRA directs the NLRB in determining the appropriate bargaining unit "to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter," 29 U.S.C. § 159(b) (2000), and those rights include not only the right to participate in union activities but also the right to refrain from such participation. 29 U.S.C. § 157 (2000). The Board is further directed not to combine professional and non-professional employees in the absence of the consent of the professional employees, not to preclude designation of a craft unit because of the prior designation of a different unit unless the craft employees vote against separate representation, and not to approve a unit including both guard and non-guard employees. 29 U.S.C. § 159(b) (2000). Section 9(c)(5) of the NLRA, 29 U.S.C. § 159(c)(5) (2000), states that in determining an appropriate bargaining unit "the extent to which the employees have organized shall not be controlling."

113. A regulation defines acute care hospital bargaining units, but even that regulation is not controlling in "extraordinary circumstances" or where there are different pre-existing units. 29 C.F.R. § 103.30 (2007).

114. The standard treatise on labor law devotes nearly a hundred pages to the Board's case law on bargaining units. THE DEVELOPING LABOR LAW, *supra* note 1, at 637–730.

115. For example, circuit courts do not agree on the meaning of the statutory language that

standards that both the Board and the courts apply are inherently subjective and can easily lead to different results.[116] As the labor arbitrators who are generally asked to implement card check agreements may not be attorneys,[117] arbitrators asked to determine appropriate bargaining units may not possess the necessary skill competently to research and interpret bargaining unit definition doctrine. Even arbitrators with labor law expertise may find it difficult accurately to duplicate NLRB bargaining unit definition outcomes because of doctrinal indeterminacy.

Once the Board or an arbitrator has concluded which employee job titles are contained within the appropriate bargaining unit, a new task arises of determining which specific employees fall within that bargaining unit. There may be disputes about whether specific persons satisfy the statutory exclusions from the definition of "employee" as a result of being, for example, supervisors or independent contractors. Here, too, the NLRB has created an elaborate body of case law to further structure the inquiry into which persons are "employees" entitled to be within a bargaining unit.[118] Even those persons who are not excluded by the definition of "employee," may be kept outside the bargaining unit by virtue of another body of Board doctrine that excludes persons who have insufficient attachment to the workforce. This case law, for example, may exclude certain seasonal or occasional employees, part-time employees, or those who are on leave or on layoff status.[119] As with bargaining unit definitional issues, questions of which specific persons are properly within the bargaining unit may require arbitrators to resolve contested issues that may stretch or exceed the arbitrator's knowledge of labor law.

Under Board doctrine, authorization cards must be "current" to be counted. The Board takes account of the circumstances of each case in determining whether a particular card was signed sufficiently close in time to the date of the card count to be

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specifies that the union's extent of organization shall not be controlling in defining a bargaining unit as appropriate. 29 U.S.C. § 159(c)(5) (2000). *Compare* NLRB v. Lundy Packing Co., 68 F.3d 1577 (4th Cir. 1995) (holding that the Board gave unlawful controlling weight to extent of organization by presuming appropriateness of union-proposed unit), *with* NLRB v. Lake County Ass'n for the Retarded, 128 F.3d 1181 (7th Cir. 1997) (holding that the extent of organization is controlling only if no other factor plays a significant role in determining the outcome). These two cases are compared in GORMAN & FINKIN, *supra* note 1, at 92–94.

116. GORMAN & FINKIN, *supra* note 1, at 88.

117. The most comprehensive survey of practicing labor arbitrators concluded that about half have a legal education. MARIO F. BOGNANNO & CHARLES J. COLEMAN, LABOR ARBITRATION IN AMERICA: THE PROFESSION AND PRACTICE 26 (1992). A 1999 survey of the most experienced labor arbitrators, those who are members of the National Academy of Arbitrators, found that 61.4% had a law degree. Michel G. Picher, Ronald L. Seeber & David B. Lipsky, *The Arbitration Profession in Transition: Preliminary Results From a Survey of the National Academy of Arbitrators*, *in* ARBITRATION 1999: QUO VADIS? THE FUTURE OF ARBITRATION AND COLLECTIVE BARGAINING: PROCEEDINGS OF THE FIFTY-SECOND ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 241, 247 (Jay E. Grenig & Steven Briggs eds., 2000).

118. The NLRA excludes both a "supervisor" and an "independent contractor" from the definition of an "employee" whose rights are protected by the Act. 29 U.S.C. § 152(3) (2000). The Act defines the characteristics that indicate supervisory status. 29 U.S.C. § 152(11) (2000). For an overview of NLRB decisions elaborating upon the nature of supervisor and independent contractor status see THE DEVELOPING LABOR LAW, *supra* note 1, at 2262–74 (supervisor) and 2285–98 (independent contractor).

119. *See* THE DEVELOPING LABOR LAW, *supra* note 1, at 2674–75.

included in the count.[120] When an arbitrator is asked to perform a card check, there may be questions about whether the parties have, by contract, explicitly or implicitly shortened or extended the NLRB's standards for the currency of cards and, if they did so, whether the arbitrator should enforce that alteration of governing law. For example, a contract might include both a directive to the arbitrator to follow the law under the NLRA as well as a provision defining how old a card may be to be included in the count. In any case, the arbitrator may need to engage in a fact-finding process to assess precisely when specific cards were signed.

Board doctrine regarding misrepresentations that may occur during the card-signing process is divided, with some kinds of misrepresentations considered to be sufficient to invalidate a card and others considered entirely irrelevant. The Board will invalidate cards from employees who signed them after receiving information from a union representative that, in essence, told them that the card's purpose was not, as it said on its face, to authorize the union to represent the employee, but rather for some other purpose, such as to permit the employee to attend a union meeting or to enable the union to obtain a secret ballot election.[121] In the arbitration setting, making the determination of whether a misrepresentation is sufficient to invalidate a card is highly problematic because of the ways in which the arbitrator's fact-finding procedure differs from that of the NLRB. As is discussed below in Part III.C., the arbitrator presides over a process that is adversarial, in which responsibility for gathering and presenting evidence vests in the union and the employer. In contrast, the NLRB, as a federal administrative agency, has confidential investigatory powers that can be used to gather information in a manner that can better protect vulnerable employees from retaliation and the fear of retaliation. The ability of the NLRB, as a neutral government agency, to gather information from employees in a more protected setting is also likely to lead to more accurate testimony less influenced by fears of retaliation or the excesses of an adversarial presentation.

While misrepresentations to employees regarding the effect of signing an authorization card are relevant to Board determinations of majority status, the Board leaves wholly unregulated other misrepresentations that do not rise to the level of fraud.[122] Thus, false statements of fact by unions and employers, whether intentional or inadvertent, that surely occur in the course of most organizational campaigns, are not considered by the NLRB to be either unfair labor practices nor grounds for setting aside election results.[123] Consequently, the Board takes no action when parties make these kinds of misrepresentations, such as those that misstate such matters as the level of the employer's profits, the obligations of union dues, or the wages and benefits obtained by the union at other workplaces.[124] One of the Board's reasons for deregulating campaign misrepresentations was the belief that free speech was more likely than regulation to produce the desired "laboratory conditions" in which

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120. NATIONAL LABOR RELATIONS BOARD, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES, § 5-500 (2005), *available at* http://www.nlrb.gov/publications/manuals/r_-_case_outline.aspx.

121. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 606–09 (1969); Colonial Lincoln Mercury Sales, Inc., 197 N.L.R.B. 54, 65–66 (1972), *enforced*, 485 F.2d 455 (5th Cir. 1973).

122. *See* Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 133 (1982).

123. GORMAN & FINKIN, *supra* note 1, at 188–190.

124. *Id.*

employees could make a free choice about union representation.[125] Only truly free speech can potentially provide a corrective to erroneous statements of fact. The NLRB's policy is based on a campaign environment in which both sides may speak freely, but the arbitrator is regulating a campaign in which one side is contractually silenced. It seems problematic for arbitrators to adopt the NLRB's policy of accepting authorizations cards obtained in the midst of false factual representations if falsehoods are so relevant and serious as to put the cards' validity in question. On the other hand, it would be similarly problematic if arbitrators implementing neutrality/card check agreements could develop an alternative policy for the regulation of campaign speech that was based on neither existing labor law nor the parties' contractual agreement.

The final listed issues that might come before arbitrators address the circumstances under which authorization cards were improperly solicited or arguably withdrawn. These issues raise the same sort of problematic adversarial fact-finding that an arbitrator would encounter in attempting to discern whether card solicitors misrepresented to employees the purpose of card signing. In addition, if the issue is one of supervisory solicitation, the arbitrator would also have to decide if the particular solicitor possessed supervisory status, an issue addressed by the NLRA but encrusted with decades of technical case law decisions.[126]

In summary, when an arbitrator is asked to enforce the provisions of a neutrality/card check agreement, the arbitrator is assuming tasks far different than those encountered when enforcing typical provisions of a collective bargaining agreement. The arbitrator may be asked to create policy of national significance in areas in which the NLRA and the NLRB offer no guidance. With regard to other tasks, the arbitrator may be asked to apply established NLRA and NLRB doctrine, but may lack the expertise to do so or may, in doing so, apply those legal doctrines within an alternative environment where they may no longer be appropriate.

C. Arbitral Procedures for Fact Finding under Neutrality/Card Check Agreements

Whether the arbitrator is determining issues under the neutrality or the card check provisions of an organizing agreement, the arbitrator is likely to encounter not only questions of what rules to apply but also questions of fact. The arbitrator's procedural authority, however, lacks many of the procedural mechanisms inherent in the NLRB's administrative process that promote accurate fact-finding and protect vulnerable employees.

The NLRB has independent investigatory powers to find facts in an effort to determine what position to take regarding an issue. The Board agent conducting the investigation is directed to approach the inquiry from a neutral perspective and to seek out all relevant evidence so as to offer as complete a factual picture as possible.[127] The Board agent is expected to pursue all promising leads regardless of whether they were

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125. *Midland*, 263 N.L.R.B. at 129–30.

126. THE DEVELOPING LABOR LAW, *supra* note 1, at 2262–74; *supra* note 118.

127. NATIONAL LABOR RELATIONS BOARD, CASEHANDLING MANUAL, PART ONE — UNFAIR LABOR PRACTICE PROCEEDINGS, § 10050, *available at* http://www.nlrb.gov/Publications/Manuals/ulp_casehandling_manual_(I).aspx [hereinafter ULP CASEHANDLING MANUAL].

suggested by a party.[128] Board agents are instructed to avoid interviewing third-party witnesses, such as employees, on the charged party's premises.[129] They are also instructed not to permit party representatives to be present during the interviews.[130] The NLRB normally affords such third-party witnesses the right to have counsel or another representative present during the interview.[131] In order to encourage open and honest accounts, the Board agent may offer reluctant third-party witnesses confidentiality and statutory protection from retaliation.[132] If the investigating agent encounters an uncooperative witness, the NLRB has authority "to issue subpoenas ad testificandum and duces tecum to third-party witnesses whenever the evidence sought would materially aid in the determination of whether a charge allegation has merit and whenever such evidence cannot be obtained by reasonable voluntary means."[133] When contacting the charged party, Board agents are expected to avoid disclosing the identity of those who have been interviewed and to avoid revealing factual details that might help to identify a witness.[134] NLRB agents document the statements of interviewees in sworn affidavits.[135] Board agents can assure interviewees that their affidavits will remain confidential unless it is necessary for the affidavit to be produced in connection with a formal proceeding.[136] For example, if the Board's regional office obtains affidavits that persuade it that there are insufficient valid authorization cards to seek a bargaining order, it will simply not pursue a bargaining order and the names of the witnesses to whom it spoke and the content of their affidavits will never be revealed.

The Board has special procedures for investigations in which the authenticity or validity of authorization cards is in question. Board agents are expected to attempt to interview every union agent who solicited cards and, in some cases, every person who signed a card.[137] If individual card signers cannot be located, agents are authorized to obtain expert testimony to determine the validity of card signatures.[138] The Board may use its investigatory subpoena power to obtain employer records necessary for identifying employees as members of the relevant bargaining unit.[139]

The arbitrator with an obligation to engage in fact-finding regarding issues identical to or similar to those addressed by the NLRB faces the task with a much more limited and problematic array of procedural tools. Most fundamentally, the arbitrator presides over an adversarial process rather than an investigatory one. The arbitrator is dependent upon the parties to investigate and present the evidence. The arbitrator does

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128. *Id.* at § 10054.

129. *Id.* at § 10054.3.

130. *Id.*

131. *Id.*

132. *Id.*; *see also* 29 U.S.C. § 158(a)(4) (2000) (declaring that it is an unfair labor practice for an employer to discriminate against an employee for giving testimony under the NLRA).

133. ULP CASEHANDLING MANUAL, *supra* note 127, at § 10054.3.

134. *Id.* at § 10054.4.

135. *Id.* at § 10060.

136. *Id.* at § 10060.5; *see also* 29 C.F.R. § 102.118 (2007) (statements given to Board agents are confidential, except that if the person who gave the statement later testifies in an NLRB administrative proceeding, a copy of any such prior statement in the possession of the NLRB General Counsel must, on motion, be given to the respondent).

137. ULP CASEHANDLING MANUAL, *supra* note 127, at § 10066.1.

138. *Id.*

139. *Id.* at § 10066.2.

not control the circumstances in which, in preparation for a hearing before the arbitrator, the union and the employer seek to obtain information from employees about the circumstances of card signing or the nature of party election communications. The union and the employer are themselves necessarily initiating interviews with employees in preparation for those hearings. Far from being a neutral investigator who affords employees the promise of confidentiality and the protections of administrative law, the employer and the union single out individual employees, who have no counsel or other representation. The employer and the union are also likely able easily to intimidate employees or cause them to fear retaliation for giving testimony adverse to the interests of the interrogating party. While employee witnesses who appear before labor arbitrators in claims arising under collective bargaining agreements are protected from retaliation for their testimony by the "just cause" provisions of those agreements,[140] employee witnesses in neutrality/card check hearings are unlikely to have any similar contractual protection.[141]

Although the NLRB has clear and broad subpoena authority as well as the ability, in many cases, to obtain information by making a party aware of the agency's power to decide issues adversely in the absence of requested information, the existence of arbitral authority to subpoena witnesses and documents and to issue discovery orders is far from clear. Although arbitrators deciding issues arising under collective bargaining agreements can draw upon the parties' mutual obligations derived from the NLRA to provide information necessary for the arbitration process,[142] the parties to many neutrality/card check agreements have no pre-existing exclusive representative status from which a statutory duty to provide information could derive. To the extent the parties lack such status, the arbitrator's authority to issue subpoenas becomes more uncertain.[143] Because neutrality/card check agreements are enforceable under § 301 of

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140. *See* LAURA J. COOPER, DENNIS R. NOLAN & RICHARD A. BALES, ADR IN THE WORKPLACE 278–79 (2d ed. 2005) (if a collective bargaining agreement contains a "just cause" provision, as nearly all do, arbitrators may overturn an employer's discipline of an employee if, in the view of the arbitrator, the employer's discipline lacked "just cause"). Arbitrators have also found implicit authority in collective bargaining agreements to protect employees from retaliation by unions for the employee's testimony in a labor arbitration proceeding. ELKOURI & ELKOURI, *supra* note 81, at 425–26.

141. The article by Professors Eaton and Kreisky reporting on provisions included in neutrality/card check agreements makes no mention of any contracts containing protections for employees testifying in arbitration proceedings to enforce the agreements. Eaton & Kriesky, *supra* note 4. The AFL-CIO's manual for unions entering into neutrality/card check agreements includes numerous sample contract provisions, but none addressing job protections for employees testifying in arbitration proceedings to enforce the agreement. AFL-CIO, *supra* note 86.

142. *See* Laura J. Cooper, *Discovery in Labor Arbitration*, 72 MINN. L. REV. 1281, 1290–93, 1326–27 (1988).

143. There is a remarkable lack of clarity with regard to the source and scope of subpoena powers, even for arbitrators whose authority is derived from collective bargaining agreements. *See generally* ELKOURI & ELKOURI, *supra* note 81, at 355–62; Timothy Heinsz, *An Arbitrator's Authority to Subpoena: A Power in Need of Clarification*, *in* ARBITRATION 1985: LAW AND PRACTICE: PROCEEDINGS OF THE THIRTY-EIGHTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 201 (Walter J. Gershenfeld ed., 1986).

the Labor Management Relations Act,[144] arbitrators do have broad authority to determine appropriate procedures to the extent the parties' agreement lacks procedural direction.[145] Labor arbitrators, however, rarely encounter discovery requests in the normal course of hearing cases arising under collective bargaining agreements. In that setting, arbitration only occurs at the end of a series of steps in a contractual grievance procedure in which information is exchanged—meetings that amount to settlement conferences with parties of increasing settlement authority.[146]

When administering a neutrality/card check agreement, there is no parallel preceding grievance process to satisfy the need for pre-hearing information exchange. Consequently, labor arbitrators need to rethink their habitual reluctance to facilitate a discovery process. Arbitrators operating under neutrality/card check agreements need to craft discovery standards and processes to assure the fundamental fairness of their fact-finding efforts. It is hardly fair, for example, to expect a union immediately to respond in the course of a hearing to an employer claim that a particular authorization card was obtained by improper means when the union has had no prior notice that the communication between a specific employee and a specific card solicitor would be put at issue. It is asking a great deal to expect the arbitrator, on an ad hoc basis, fairly to craft a specific discovery regime appropriate to the context of neutrality/card check proceedings.

This comparison of the procedural mechanisms and powers available to the NLRB and to arbitrators acting under neutrality/card check agreements makes evident that arbitrators are left with a decidedly inferior ability accurately to determine the facts underlying disputed issues. Arbitrators are limited to hearing only evidence that was gathered to support the adversarial position of a party—evidence acquired and presented under circumstances that lack critical protections to ensure its reliability. Significantly, the adversarial arbitral process may put vulnerable workers at risk since it requires potential employee witnesses to be interviewed in private by interested parties and obligates them to give their testimony in open hearings before unions and employers alike.

D. Arbitral Determination of Remedies Under Neutrality/Card Check Agreements

When the NLRB encounters unfair labor practices or behavior that violates its standards for the conduct of organizing campaigns, its remedial authority is defined by statute and elaborated by established case law doctrine. When labor arbitrators function in their usual setting under collective bargaining agreements, their remedial authority is relatively well-defined by the traditions of arbitral practice, the so-called "common law" of arbitration,[147] and the decisions of reviewing courts that have occasionally limited the exercise of that authority.[148] An arbitrator who finds that a

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144. *See supra* text accompanying notes 46–51.

145. *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987); Cooper, *supra* note 142, at 1313–16.

146. *See* COOPER ET AL., *supra* note 140, at 16–18 (providing a description of grievance procedures under collective bargaining agreements).

147. *See generally* Marvin F. Hill, Jr., *Remedies in Arbitration*, *in* THE COMMON LAW OF THE WORKPLACE: THE VIEW OF ARBITRATORS 355 (Theodore J. St. Antoine ed., 2d ed. 2005).

148. Courts generally afford broad deference to arbitrator's decisions. *See supra* notes 55–57

party has violated the terms of a neutrality/card check agreement, however, cannot draw directly on either of these remedial traditions when determining appropriate remedies.

Congress and the Supreme Court have restricted the range of remedies available to the NLRB. The NLRA limits Board remedies to "affirmative action" that will "effectuate the policies" of the Act.[149] The Supreme Court has held that this language precludes the Board from awarding punitive damages.[150] The Supreme Court's articulated catalogue of remedies available to the NLRB does not include, for example, damages to reimburse a union for its costs incurred in an organizing campaign that failed because of the employer's unfair labor practices.[151] The NLRB has held that, even if it has such statutory authority, it will decline to order an employer to reimburse a union for its excess organizational costs even if "a nexus has been shown between such excess costs incurred by a union and the unfair labor practices committed by an employer."[152] Instead, NLRB remedies for campaign violations are limited to orders to cease and desist, posting of notices, rerun elections, and in egregious cases, bargaining orders, but those are only available in cases in which the union at some time demonstrated majority status through authorization cards.[153] While arbitrators acting under collective bargaining agreements do award damages in appropriate cases, the tradition generally limits those damages to make-whole remedies and those are most often relatively modest sums, such as a discharged employee's lost wages less interim earnings.[154]

The arbitrator seeking to impose remedies for violations of a neutrality/card check agreement thus faces particular challenges. Although an arbitrator might readily issue a declaration that a majority of employees in the bargaining unit have authorized the union to represent them, the arbitrator may reasonably assume that the authority to order an employer to bargain with a union as the exclusive representative of the employer's employees is a power reserved to the NLRB alone. In any case, circumstances in which neutrality/card check agreements were breached are likely to be those in which the union is alleging that the employer's violations precluded the union from gaining an authorization card majority, a circumstance in which even the NLRB believes it inappropriate to issue a bargaining order.[155]

Thus confronting circumstances in which bargaining orders would be inappropriate even if permitted and generally lacking experience in issuing significant damage

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and accompanying text. The Supreme Court has held that even greater deference should be given to arbitrator's remedial decisions because of the need for flexibility in designing remedies in disparate circumstances. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960); THE DEVELOPING LABOR LAW, *supra* note 1, at 68–69.

149. 29 U.S.C. § 160(c) (2000).

150. Republic Steel Corp. v. NLRB, 311 U.S. 7, 11–12 (1940).

151. *See id.* at 12.

152. Heck's Inc., 215 N.L.R.B. 765, 767 (1974).

153. HOW TO TAKE A CASE BEFORE THE NLRB 556–64 (Brent Garren, Elaine S. Fox & John C. Truesdale, eds., 7th ed., 2000) (overview of Board remedies); NLRB v. Gissel Packing, Inc., 395 U.S. 575, 614 (1969) (Board may issue bargaining order if union had once attained majority support); Gourmet Foods, Inc., 270 N.L.R.B. 578, 585 (1984) (Board lacks authority to issue bargaining order if majority status never attained).

154. ELKOURI & ELKOURI, *supra* note 81, at 1201–02; THE COMMON LAW OF THE WORKPLACE, *supra* note 81, at § 10.17.

155. Gourmet Foods, Inc., 270 N.L.R.B. 578, 585 (1984).

awards, arbitrators have found themselves uncertain of their authority to remedy violations of neutrality/card check agreements. The law affords arbitrators in this setting no remedial guidance, and contracts are unlikely to include remedial directives. How, then, have arbitrators resolved this remedial dilemma in those cases in which they have found contract violations?

In *Dana Corp.*, arbitrator Richard Mittenthal awarded the UAW damages of $10,000, based on his conclusion that the employer's violation of neutrality provisions had deprived the union of the benefit of its investment in the organizing campaign and required it to expend additional resources to continue the effort.[156] In *Alden North Shore*, arbitrator Martin H. Malin declined to adopt a similar remedy because he found no evidence there that the employer's violations had diminished the value of the union's organizing efforts and the union had offered no evidence of its organizing costs.[157] Instead, he ordered the employer to cease and desist in its violations, to post and distribute various notices to employees listing its violations and promising neutrality, and to distribute union flyers with employee paychecks.[158] In *Timken Company*, arbitrator James Clair Duff, finding that the employer had violated its agreement by improperly demeaning the union in a campaign communication, rejected union remedial requests (unstated in the award) as excessive, and instead ordered the employer strictly to adhere to the agreement in the future and to pay the full costs of the arbitration proceeding.[159]

By far, the most extraordinary remedy for violations of an organizing agreement was recently imposed by arbitrator Margaret M. Kern against Yale-New Haven Hospital.[160] Arbitrator Kern, a former NLRB administrative law judge, found that the hospital's numerous violations constituted "a methodical dismantling of the terms and commitments" of the parties' agreement.[161] Despite the extensive employer violations, she nevertheless rejected the union's request for a bargaining order, both on the ground that the union's majority status had not been conclusively established, but more fundamentally because she was not persuaded that she had the authority to issue a bargaining order.[162] The extent of her condemnation of the employer's conduct, however, was evidenced by the overwhelming size of the damage remedy she awarded. Arbitrator Kern directed the hospital to reimburse the union for the entire cost of its organizing effort of over $2.2 million.[163] In addition to remedying harm to the union, the arbitrator concluded that the employer's violations damaged individual employees by threatening them, forcing them to attend mandatory meetings, and depriving them of factual campaign information. To remedy harm to individual employees, the

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156. Dana Corp., 76 Lab. Arb. Rep. (BNA) 125, 132 (1981) (Mittenthal, Arb.). Arbitrator Mittenthal also ordered the employer to send a letter to employees repudiating its contract violation and promising neutrality, to afford the union an opportunity to address the employees, and to agree to an expedited NLRB election. *Id.*

157. Alden N. Shore, 120 Lab. Arb. Rep. (BNA) 1469, 1512 (2004) (Malin, Arb.).

158. *Id.* at 1513–14.

159. Timken Co., 119 Lab. Arb. Rep. (BNA) 306, 311–12 (2003) (Duff, Arb.).

160. Yale-New Haven Hospital, slip op. (2007) (Kern, Arb.), DAILY LAB. REP. (BNA), A-13 (Oct. 26, 2007), http://op.bna.com/dlrcases.nsf/r?Open=vros-78btxa.

161. *Id.* at 43.

162. *Id.* at 41.

163. *Id.* at 44.

arbitrator decided that the cumulative harm to the employees could be measured by the amount of money that the employer had paid to campaign consultants who facilitated the employer's violations, a sum also exceeding $2.2 million.[164] As a result, she ordered that amount to be divided equally among the 1736 bargaining unit members, giving each in excess of $1200.[165] Subsequently, the employer paid the employees as ordered by the arbitrator and, after initially disputing the arbitrator's order to reimburse the union for its expenses, settled with the union for $2 million.[166]

This review of arbitrators' remedial orders demonstrates that arbitrators have struggled with both the extent of their remedial authority and the appropriate exercise of their remedial discretion. Just as the substantive rules arbitrators impose on parties to such agreements, and the procedural mechanisms they devise, have broad public policy implications, so do the remedies that arbitrators choose to apply in the absence of statutory or contractual direction. In this respect, arbitrators who have no authority and little procedural structure to determine and apply public policy are being thrust into that role.

CONCLUSION

Neutrality/card check agreements have become increasingly widespread and highly successful in achieving union representation. Such agreements intentionally displace the traditional statutory process for determining union representational status. They place communicational limits on employers beyond those imposed by law, afford unions access to employees beyond those required by law, and provide for union recognition in the absence of NLRB-conducted elections. Neutrality/card check agreements are nevertheless currently considered legally valid and consistent with national labor policy. One important effect of these agreements has not previously been seriously addressed: neutrality/card check agreements give private arbitrators the authority to make decisions with broad public policy implications. Arbitrators exercising authority under these agreements are privately making fundamental labor policy by determining substantive employer communication rights and union access rights, implementing card check recognition procedures, creating adjudicative procedural structures, and determining remedies. These public policy functions would be more properly accomplished by a public forum.[167] As the NLRB, Congress and the

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164. *Id.* at 47.

165. *Id.*

166. *Health Care Employees, Yale-New Haven Hospital, District 1199 Reach Settlement Over Election Dispute*, DAILY LAB. REP. (BNA) at A-10 (Aug. 18, 2008).

167. The NLRB has recently issued a notice of proposed rulemaking for a new type of representation election that could provide an alternative to arbitrator-administered card checks for unions and employers that desire expeditious determination of majority status and are willing to stipulate to the terms for the election. 73 Fed. Reg. 10199 (proposed Feb. 26, 2008) (to be codified at 29 C.F.R. pts. 101, 102). Under the proposed procedure, employers and unions could jointly submit petitions for a Board-conducted election without providing any initial showing of the extent of employee support for the union. The joint petition would have to include a stipulated bargaining unit and election date less than 28 days hence as well as a list of names and addresses of employees eligible to vote. The Board would conduct the election as requested so long as the petition was complete and accurate and the bargaining unit description

courts focus, as they will in the near future, on the legal status of neutrality pledges and authorization-card-based recognition, they should not fail to consider whether the present regime of privatized labor law should be allowed to continue in its present form or whether it should be guided by or replaced by public law made by public institutions.

"appropriate on its face and not contrary to any statutory provision." *Id.* at 10199. Any election or post-election dispute would be resolved with finality by the Board's Regional Director. It is uncertain how the current existence of Board-member vacancies would affect the likelihood of the proposed rule being promulgated. As of August 2008, there are three vacancies on the five-member Board. *See* Press Release, R-2653, National Labor Relations Board, Labor Board Temporarily Delegates Litigation Authority to General Counsel; Will Issue Decisions with Two Members After Members Kirsanow and Walsh Depart (Dec. 28, 2007), http://www.nlrb.gov/About_Us/News_Room/press_archives.aspx.