The Legal, Economic and Business Case for Neutrality and Majority Verification of Worker Desire for Union Representation

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OVERVIEW

U.S. labor law is based on an "all or nothing" principle which requires firms to recognize and bargain with unions that gain a majority of worker support while allowing firms to refuse to meet with representatives of a union that falls short of majority status. Since only workers vote in the National Labor Relations Board (NLRB) elections for union representation, campaigns to unionize often produce bitter and expensive electoral battles pitting firms that want workers to vote "no" in the election against workers and their unions that want a "yes" vote on representation.

When workers seek union representation from a business, management has a choice in how to respond. It can be neutral in the organizing drive, accepting workers' decisions regarding union representation without employer propaganda/pressure; it can favor unionization, so long as it does not financially support the union or pressure workers to unionize; or, as is common in the United States, it can actively oppose the organizing effort.

A neutral employer will usually declare that it will not involve itself in the organizing process. If it prefers operating without collective bargaining, it can say so but will still stand aside to allow workers to make up their own minds. A neutral employer can also sign a neutrality agreement with the union that seeks to represent its workers (or potentially with any other organization), laying out the measures it will take to guarantee a neutral stance. Being neutral costs the firm little.

By contrast, an employer who chooses to fight an organizing drive embarks on a costly and often bitter campaign to pressure workers, many of whom have signed cards supporting a union, to vote "no" in an NLRB election. It will direct the company human resource department to communicate to workers that unionization may harm the company or even force it out of business. It will hire anti-union consultants to campaign against the union. As part of its campaign it will order workers to attend "captive audience" meetings where the firm or its consultants propagandize against unions while forbidding union supporters from speaking in favor of unionism.[1] It will order supervisors or lower level managers to campaign against the union regardless of their personal views, with the legal right to fire them if they do not follow the company line. While the National Labor Relations Act makes it an unfair labor practice to fire or discriminate against a worker seeking to unionize, the Act's modest penalties for breaking the law lead many employers to fire union activists in the battle to get the majority of workers to reject the union.

Should a company respond to a union organizing drive by choosing neutrality or by spending resources to battle its workers who seek to unionize? This memo makes three points about this choice:

1 - That staying neutral and accepting a union that demonstrates majority support without an NLRB election are lawful ways for businesses to respond to worker efforts to unionize. The majority of U.S. employers facing a union drive choose to spend resources against the union but there is no legal compulsion for an employer to do so. An employer has the prerogative of being neutral with or without signing a neutrality agreement and of accepting majority support for unions through verification of signed cards rather than via an NRLB election.

2 - That the economic benefits and costs of the choice between a firm staying neutral and fighting worker efforts to unionize will in some cases favor neutrality and in others favor campaigning against the union. As

1 See, e.g., Litton Sys., Inc., 173 NLRB 1024, 1030 (1968). Prescott Indus. Prod. Co., 205 NLRB 51, 51 (1973), enf'd in part, 500 F.2d 6 (8th Cir. 1974).

anti-union campaigns in the U.S. are expensive and painful to a firm and its workers, neutrality is less costly in the short run. Whether it pays off in the long run is unclear and likely varies among firms and industries. While most U.S. firms fight workers' efforts to gain union representation, enough choose neutrality in the belief that this pays off in a more harmonious productive work force and better relations with the public and governments, for firms to assess carefully the economics of the two options.

3 - That management teams experienced in bargaining and working with unions in the U.S. or overseas, in businesses that depend critically on workers interacting with customers directly or on-line in a highly regulated environment, have a potential competitive advantage toward establishing profitable labor relations through the neutrality route. In the case of banking, where firms operate profitably with unions in many countries worldwide, it may make economic sense for a firm to be neutral or even favorable to workers choosing union representation. Management should analyze the economics of the two choices rather than blindly joining the anti-union business climate in the U.S. in opposing unions come hell or high water.

BEING NEUTRAL AND ACCEPTING THE OUTCOME OF MAJOR VERIFICATION IS LAWFUL

Under § 8(c) of the National Labor Relations Act (NLRA) American employers have a statutory right to express their views on employee organization. They can say they favor unions, are neutral to an organizing drive, or that they oppose unions. A favorable employer can give a union access to the employees during work time to sign representation cards, tell workers they like to work with unions, and voluntarily accept signed cards for union representation as the way to establish majority representation.[2] There are no legal restrictions on an employer showing a positive attitude toward its workers choosing a union, other than not favoring one union over another if two unions seek to organize the workers.

Employers can also sign agreements with unions that commit them to be neutral in an organizing drive, and can condition neutrality on unions taking some policies helpful to the employer. The NLRB and circuit courts have rejected litigation challenging the neutrality agreements in two cases.[3] A third case brought to the Eleventh Circuit was granted Supreme Court certiorari but dismissed by the Court and withdrawn by the plaintiff.[4] While anti-union groups will likely keep challenging neutrality agreements, such clauses are legally valid today and in the foreseeable future. Firms can work out neutrality in different ways, selecting the wording and meaning of the agreement that most suits their circumstances.

An employer also has the right to accept signed cards from a majority of the workers as evidence that the union has majority status and can then begin to bargain with the union.[5] Labor law says that an employer is not obligated to recognize a union as bargaining for employees on the basis of a card check and can demand that workers show support through an NLRB election, but does not require the employer to do this.[6] Indeed, verification of signed cards is a widely used method to prove that the majority of workers favor unionization. An employer who rejects majority sign up usually commits itself to an expensive battle to convince or pressure employees favorable to the union to change their minds. With enough money, anti-

2 New England Motor Freight Inc., 297 N.L.R.B. 848, 851-52 (1990). In the Tecumseh Corrugated Box Co. case , 333 N.L.R.B. 1, 3, 6 (2001).

3 The charge is that by agreeing with a union on neutrality the firm is bribing the union in violation of the criminal provisions of § 302 of the LMRA,(Local 57 v. Sage Hospitality Resources, 390 F.3d 206 (3d Cir. 2004); Adcock v. Freightliner LLC, 550 F.3d 369, 371 (4th Cir. 2008)),

4 Mulhall v. UNITE HERE Local 355, 667 F.3d 1211, 1213 (11th Cir. 2012).

5 International Ladies Garment Wrks. Union v. NLRB, 366 U.S. 731, 739-40 (1961).

6 Card checks were historically used to win bargaining rights but the Supreme Court later established that an employer may insist for any reason on an election. The key Supreme Court case is Linden Lumber v. NLRB, 419 U.S. 301 (1974). In the transportation sector which is governed by the Railway Labor Act (RLA), the National Mediation Board which administers the RLA has right to "take a secret ballot of the employees involved, or to utilize other appropriate methods beyond secret ballot elections of ascertaining the representatives of workers for collective bargaining.

union consultants and lawyers, the employer often wins these battles, but at a cost of spending resources that could have gone into making the firm more productive and competitive and of creating bad will among workers and in the outside community.

Finally, an employer may choose to sign an agreement to recognize a union on the basis of a card check (verification of cards) showing majority support. "Such a contract, which bypasses Board-conducted elections, provides an alternative method for employees to accept or decline union representation."[7] Enough corporations agree to neutrality and majority sign-up so that voluntary neutrality and card check agreements are an important basis for union organizing in the United States.[8] Several major corporations such as Levi Strauss, Inc., AT&T, UPS, and Safeway, among others, and many smaller corporations have neutrality/card check agreements with a diverse set of unions. The listing of companies and workers in Table 1 shows close to 1.5 million workers with neutrality agreements in 2016.[9]

TABLE 1: EMPLOYERS WITH NEUTRALITY AGREEMENTS

Company with which neutrality agreement was	Total U.S. workforce
UPS	354,000
AT & T (and its subsidiaries such as DirecTV)	269,900
AT& T Mobility (and its subsidiaries such as Cricket	
Safeway	250,000
Verizon	177,000
American Building Maintenance	112,500
Kaiser Permanente	100,000
First Group	83,500
Group 4 (G4S)	54,000
US Steel	23,000
American Red Cross	17,000
International Service Systems	14,400
Arcelor-Mittal	13,000
Lear	9,800
Alcoa	9,600
DHL	4,000
Zara	3,600
Dow Jones	1,300
New York University	1,200

Source: Neutrality agreements confirmed through individual consultations with U.S. union signatories, November 2015. Total workforce information from 2014-2015 corporate annual reports.

7 See Hotel & Restaurant Employees Union Local 217 v. J.P.Morgan Hotel, 996 F.2d 566 (2d Cir. 1993); and many other cases.

8 James J. Brudney, Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms, 90 Iowa L. Rev. 819 (2005).

9 The National Right to Work Organization (http://www.nrtw.org/neutrality/info) lists agreements beyond those in Table 1: Angelica and UNITE HERE; California Nursing Home Operators and SEIU; Collins & Aikman and USWA; Dana Corp and UAW; Freightliner and UAW; Greater New York Health Care Facilities Association and SEIU; Heartland and USWA; Horseshoe Hotel and Casino and LJEBLV;Johnson Controls and UAW; League of Voluntary Hospitals and Homes of New York and SEIU; Lear and UAW; Mandalay Resort Group/Circus Circus Hotel and Casino and LJEBLV;Magna and UAW; Metaldyne and UAW and USWA; National Steel Corporation and USWA; Quebecor and Teamsters Union; Verizon Wireless and IBEW & CWA; Warnaco with UNITE; Zed F and UAW.

The United Auto Workers (UAW) model neutrality agreement specifies that the firm "adopt a position of neutrality in the event UAW seeks to represent employees … (where) Neutrality is hereby defined to mean that neither party will conduct itself or communicate in a negative, derogatory or demeaning nature about the other party ...(nor) engage in conduct, threats, misrepresentations, or delaying tactics which might thereby frustrate the desires of the employees or interfere with the employee efforts to select union representation." The employer further "agrees that the UAW may select the method for establishing its majority status ... determine the appropriate bargaining unit as long as a comparable unit exists at any other location of the (company) or in the industry (and)... provide the union with a list of all employees in the bargaining unit … with reasonable access to employees in non-work areas (parking lots, break areas, cafeterias, hallways, etc.) during work hours."

The Communications Workers of America (CWA) neutrality and voluntary recognition agreement with the telecommunications multinational AT&T specifies that "the Company agrees to and shall instruct all appropriate managers that the Company shall remain neutral and shall neither assist nor hinder the Union on the issue of Union representation. For the purposes of this Agreement neutrality shall mean that management will not, within the course and scope of their employment by the Company, express any opinion for or against Union representation for any existing or proposed bargaining unit, or for or against the union, or any officer, member or representative thereof in their capacity as such. The Union also agrees that, in the course of any effort by the Union to obtain written authorization from employees… neither the union nor its officers, representatives, agents or employees will express publicly any negative comments concerning the motives, integrity, or character of the Company, any affiliate of the Company, its parent Company or any of its officers, agents, directors or employees." Regarding voluntary recognition, the AT&T neutrality agreement indicates that "the Company agrees that the CWA shall be recognized as the exclusive bargaining agent for any bargaining unit(s) established under this Agreement not later than ten days after receipt by the Company or written notice from the American Arbitration Association (AAA) that the Union has presented valid authorization cards signed by a majority of the employees."

The agreement between Denmark's global facilities service provider ISS, which operates in the U.S. along with many other countries, and the UNI Global Union exemplifies the commitment of a firm that prefers working with organized labor to ensure that unions have access to inform employees about union membership and to recruit employees who wish to join a union without employer opposition. "ISS fundamentally supports not only employees' rights but also proper opportunities to organise. As one of the big employers in the world, with 440,000 people under the ISS flag and more joining every day, we want to spearhead the raising of standards and better conditions in our industry globally. Whether our employees join a union or not is their free choice, but we want to make that choice available to them in the best possible way. That is essentially what this agreement is about," said Group CEO Jørgen Lindegaard from ISS.

NEUTRALITY AND MAJORITY CARD CHECK VERIFICATION CAN HAVE ECONOMIC BENEFITS

Just because a firm can legally choose unilateral neutrality, sign neutrality agreements with unions or agree to majority status card check in the U.S. (or elsewhere) does not make these responses to an organizing drive economically the best choice for firms facing an organizing drive. Neutrality and majority card check have benefits and costs compared to spending company resources fighting union drives that management should weigh in deciding their response to an organizing drive.

Employer anti-union groups publicize the costs of unions to firms in terms of the higher wages and benefits and loss of employer power at workplaces as associated with unions. (This is the management side of better wages, benefits, and working conditions that unions deliver to workers). What is less widely known or studied are the benefits of a firm staying neutral and accepting majority verification when its employees

seek to unionize as opposed to the costs of battling the union in an NLRB election.

In the short run neutrality has a clear economic advantage to the firm (and workers, unions, and society writ large). It avoids the time and money spent on labor conflict, which almost surely creates disharmonious labor relations and potentially harms productivity as well, not only during the campaign but in the future regardless of the outcome. Since firms that go all-out in an effort to fight workers seeking a union often break labor laws, which can harm its reputation, neutrality also avoids the firm risking its good name.

Given that neutrality and majority verification almost certainly increase the chances that a firm will be unionized, key factors for the firm deciding between the neutrality/majority verification and oppositional stances are: the magnitude of the different likelihoods of unionizing in the two cases; the resulting nature of labor relations; and the potential to build or undermine good will among the surrounding communities from which the employer draws its customer base. The firm that agrees to neutrality and majority verification will likely end up with non-contentious and cooperative labor relations, with a "high road" labor relations partner that helps make the business work and invests in practices that support productivity and quality. If workers choose not to unionize, being neutral avoids the ill feelings that will likely arise if the firm has bludgeoned the workers to vote "no" through a strong anti-union campaign. Similarly, if the firm fights an organizing campaign and loses, it is likely to end up with a union that has little trust in the firm and makes change at the workplace difficult. By contrast, a firm that negotiates a neutrality agreement with a union could gain union commitments to help the business in ways that will show up in the bottom line, as are found in some neutrality arrangements. Whether the firm unionizes or not, neutrality will build a better reputation for the firm with customers, community groups, and local and higher level government regulators, from which the company may benefit.

In the long run the firm that unionizes will almost surely pay higher wages, benefits and give workers greater say over working conditions than the firm that defeats an organizing drive. While these costs can be substantial the unionized firm will benefit from the lower turnover rates and the larger queues of job applicants induced by union wages and benefits, and from a better understanding of worker concerns. The unionized firm will likely have lower pay disparity between executives and workers and less dispersed pay among workers. In an era of increasing concern over inequality, such wage policies may turn out to benefit the firm in unexpected ways.

The economics of choosing between neutrality and opposing worker efforts to obtain union representation thus come down to contrasting the savings in the short run from neutrality vs. committing resources to an uncertain campaign to get workers to vote "no" in an NLRB election with the possible loss of future profits when higher wages and benefits outweigh the positive effects of unionism on company performance. The net of these factors likely differs among firms depending on the nature of its business, the experience of the firm with unions, the extent to which workers are committed to union representation, and the extent to which the union can help the firm.

FIRMS WITH UNION EXPERIENCES HAVE A COMPETITIVE ADVANTAGE

Consider two managements. Management A has little or no experience working with unions and adheres to the anti-union business attitude that has come to dominate the U.S. business community. In the finance sector in the U.S., where just 1.7% of workers reported being represented by a union in 2015[10] most managements likely fit this characterization. They would find it difficult to adjust their style to managing unionized workers, much less to finding ways to benefit from union organization.

10 http://www.bls.gov/news.release/union2.t03.htm

Management B, by contrast, has considerable experience working with unions and has learned how to deal with them in ways that create extra value from cooperating with them. In the finance sector in many advanced and developing countries, where banking is heavily unionized, most managements likely fit this characterization. Such managements would seem to have a competitive advantage in succeeding with the neutrality/majority verification response to workers who seek union representation rather than the oppositional stance adopted by many U.S. firms. As their union partners outside the U.S. would likely find standard U.S. union-busting campaigns sufficiently egregious, going down that route would risk union cooperation overseas and their reputation as responsible employers more broadly.

In short the business calculus should impel multinational firms in finance (and other minimally organized sectors in the U.S.) with successful experiences working with unions outside the U.S. to think through the neutrality/majority verification response to organizing drives carefully. There are several financial institutions operating in the U.S. that have extensive experience working with unionized employees covered by collective bargaining agreements. (See Table 2). These institutions have a competitive advantage in working cooperatively with unions that they can use to their economic benefit – an advantage they could lose by following the low road of union-busting.

TABLE 2 : GLOBAL BANKS WITH UNIONIZED WORKFORCES IN HQ AND OPERATIONS COUNTRIES

Bank	Headquarters Country	Countries Where Bank Has Union Representation and Collective Bargaining	
Banco do Brasil	Brazil		
		Argentina	Japan
		Brazil	Paraguay
BBVA	Spain		
		Argentina	Paraguay
		Brazil	Peru
		Chile	Spain
		Mexico	Uruguay
BNP Paribas	France		
		Algeria	Guinea
		Belgium	Italy
		Cameroon	Poland
		Czech Republic	Portugal
		France	Tunisia
Citigroup	USA		
		Argentina	South Africa
		Belgium	Sweden
		Brazil	Tanzania
		Colombia	Turkey
		Philippines	Uruguay
		Portugal	Venezuela
HSBC	United Kingdom	United Kingdom	
		Argentina	Malaysia
		Australia	Malta
		Belgium	United Kingdom
		France	
Santander	Spain		
		Argentina	Mexico
		Brazil	Poland
		Chile	Portugal
		Germany	Spain
		Italy	United Kingdom
Unicredit	Italy		
		Bulgaria	Italy
		Czech Republic	Poland
		Germany	Romania
		Hungary	Turkey

Source: UNI Global Union, Finance Sector union affiliate consultations, November 2015