This Article examines the recent growth of agreements, negotiated between employers and unions, which provide that an employer shall remain neutral when unions seek to organize non-union facilities and subsidiaries owned by the employer. After analyzing the causes of recent decline in union membership, the author argues that this decline has spurred the growth of neutrality agreements. Such agreements are not violative of the National Labor Relations Act nor of employer free speech rights, but rather are legally binding and may be enforced by arbitration and injunction. Neutrality agreements are therefore an appropriate extension of collective bargaining and can contribute to an emerging attitude of cooperation between labor and management.

INTRODUCTION

Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshaling cooperation and designing mechanisms which allow it to flourish, they will not be at the center of the most creative social experiments of our time.1

President Derek C. Bok
Harvard University
March, 1983

* The author wishes to thank Professor Paul C. Weiler, Harvard Law School, for his assistance in the preparation of this Article.
One of the most creative social and economic experiments of our time is the emergence of a new philosophy of industrial relations. The main feature of the "new industrial relations" is the development of a nonadversarial labor-management relationship in order to maintain the competitiveness of American industry. In pursuit of increased productivity and quality, management has solicited union cooperation to increase worker participation in workplace decisionmaking through quality circles, labor-management steering committees, and semi-autonomous work groups.

Unions, whose organizing campaigns have been stifled by growing resistance from employers, are attempting to extend such labor-management cooperation by promoting the adoption of "neutrality agreements." These agreements contain a pledge by the employer that it will remain "neutral" in the union's organizing campaigns conducted in the employer's nonunion facilities. The first neutrality agreement was negotiated in 1976. Since that time, there has been a quick but quiet development of these agreements in many industries.

This article argues that neutrality agreements are a lawful and desirable form of labor-management cooperation because they eliminate the inconsistency between growing labor-management cooperation in the workplace and growing labor-management conflict in the area of union organizing. Section I examines the two incentives for the development of employer neutrality agreements: the increasing need for unions to emphasize organizing activities, and the growing ineffectiveness of traditional techniques of union organizing. This section attributes the ineffectiveness of current organizing methods to intense employer opposition, the failure of the regulatory framework of the National Labor Relations Act (NLRA) to provide adequate protection for the rights of employees during organizing campaigns, and the burdensome financial costs of organizing campaigns.

Section II sets out a systematic analysis of the varied terms of many individual neutrality agreements by examining the industry-by-industry development of neutrality agreements and by exploring the general characteristics of industries in which neutrality agreements have been adopted or are likely to be adopted.

Section III investigates the two most important issues in interpreting a neutrality agreement: the meaning of "neutrality," and the scope of a neutrality pledge. It is argued that "neutrality" should be broadly

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2. This Article is only the second major analysis of the legality and desirability of neutrality agreements. It responds to many of the arguments made in Kramer, Miller & Bierman, Neutrality Agreements: The New Frontier in Labor Relations—Fair Play or Foul?, 23 B.C.L. REV. 39 (1981).

EMPLOYER NEUTRALITY

read to preclude any employer participation in an organizing campaign if the agreement does not explicitly reserve employer rights. Although neutrality agreements currently cover only production and maintenance workers on the union side, on the employer side these agreements should cover local plant management, subsidiaries, and American subsidiaries of foreign corporations.

Section IV analyzes neutrality agreements within the framework of the NLRA. This analysis finds that while neutrality agreements are likely to be considered a mandatory subject of bargaining, classifying them as a permissive subject of bargaining will not have a significant impact on their development. This section also concludes that a neutrality agreement is lawful under the NLRA because it is a form of lawful cooperation for purposes of section 8(a)(2) and a valid waiver of the employer’s free speech rights. Finally, section IV finds that a neutrality agreement may be enforced by several methods—such as informal enforcement, enforcement by the National Labor Relations Board (NLRB or the Board), and arbitration—and that injunctive relief is an appropriate and often necessary enforcement mechanism.

Section V evaluates the prospects for neutrality agreements. It concludes that their significance will greatly increase if they can be extended in the following ways: to secure other pledges of cooperation by employers in facilitating union organizing, such as recognition of the union through a “card check” procedure; to serve as an integral part of a network of job security provisions to deter relocation to the nonunion Sunbelt; and to facilitate white collar union organizing.

Section VI proposes that neutrality agreements can play a significant role in promoting labor-management cooperation, the basis of a nonadversarial model of labor relations.

I

INCENTIVES FOR THE DEVELOPMENT OF NEUTRALITY AGREEMENTS

Neutrality agreements are a response to two sets of factors. One set of factors is increasing the priority of union organizing efforts, while the other set is decreasing the effectiveness of traditional union organizing techniques.

A. Increasing Importance of Union Organizing Efforts

The most obvious factor that is increasing the relative importance of union organizing efforts is the stagnation and actual decline of union membership. The recent decline in the numerical strength of unions is
424  \textit{INDUSTRIAL RELATIONS LAW JOURNAL}  [Vol. 6:421
continuing,\textsuperscript{4} and no growth has taken place in manufacturing sector unionism since 1956.\textsuperscript{5} Certain unions have been hard hit,\textsuperscript{6} especially during the last few years.\textsuperscript{7} The decline in union membership is particularly evident in the falling proportion of workers who belong to unions.\textsuperscript{8}

The stagnation in unionism, particularly in manufacturing, is partly the result of another structural factor of special importance to union organizing efforts—the geographic shift of manufacturing employment to the “Sunbelt,” a region which remains sparsely unionized.\textsuperscript{9}

The strength of the causal relationship between the low level of unionization in the Sunbelt and the rapid growth of manufacturing in that area is uncertain,\textsuperscript{10} because companies locate, or relocate, for many legitimate economic reasons other than the presence of nonunion


\textsuperscript{6} Large unions that lost members between 1978 and 1980 include the United Auto Workers (UAW) (142,000 members, 9.5% of total membership), the International Association of Machinists (IAM) (176,000, 19.1%), and the United Rubber Workers (URW) (49,000, 24.5%). \textit{DAILY LAB. REP.} (BNA) No. 171, at B-1 (Sept. 3, 1981).

\textsuperscript{7} \textit{See Jobs: Putting America Back to Work}, \textit{NEWSWEEK}, Oct. 18, 1982, at 78; \textit{infra} note 335.

\textsuperscript{8} The proportion of the workforce belonging to unions declined from 22.3% in 1978 to 20.8% in 1980. The respective figures in the non-agricultural sector were 26.4% in 1978 and 24.5% in 1980. \textit{DAILY LAB. REP.} (BNA) No. 171, at B-1 (Sept. 3, 1981). Union membership in manufacturing, a traditional union stronghold, fell from 51.3% to 44.6% in the 1956-1976 period. Rees, \textit{supra} note 5, at 44.

\textsuperscript{9} The 10 states with the lowest proportion of union members in 1974 had a 67% increase in manufacturing employment from 1956 to 1974, while manufacturing employment in the United States as a whole grew only 16%, and actually declined by three percent in the 10 states, mostly in the Northeast and Midwest, where unionization is strongest. Rees, \textit{supra} note 5, at 47, 48. The 10 states with the lowest percentage of union membership are N.C., S.C., S.D., Miss., Fla., Tex., Va., Kan., N.M., and Ga. \textit{Id.} at 48, table 2-4. The 10 states with the highest percentage of union membership are Mich., W. Va., N.Y., Pa., Wash., Hawaii, Ill., Ind., Ohio, and Mo. \textit{Id.} at 49, table 2-5. Between 1970 and 1978, total nonagricultural employment increased 37.4% in the former group, but only 16.4% in the latter group. See Kirslov & Silver, \textit{Union Bargaining Power in the 1980's}, 32 \textit{LAB. L.J.} 480, 481 (1981). Between 1968 and 1978 manufacturing employment grew by less than 700,000, but increased by 900,000 in the South and 300,000 in the West, while declining by 800,000 in the Northeast. Rones, \textit{Moving to the Sun: Regional Job Growth, 1968 to 1978}, \textit{MONTHLY LAB. REV.}, Mar. 1980, at 12, 14. Rones also finds that creation of new firms and expansion of existing firms, rather than movement of firms from the North, accounts for most of the growth of employment in the Sunbelt. \textit{Id.} at 15. He also finds that manufacturing accounts for a relatively small part of the economic expansion of the South and West. \textit{Id.}

Further, many Southern States woo industries with aggressive campaigns that offer attractive economic incentives, a fact that even union leaders recognize. Despite the presence of these external incentives, the wage differential between both northern and southern workers and union and nonunion workers is an enormously important incentive for location and relocation. Two major reasons for the persistence of the North-South wage differential are the low level of unionization in the South and the presence of right-to-work-laws in the Southern States. That regional wage differential, however, is smaller for unionized than for nonunionized workers, especially in the manufacturing sector.

A third factor that is increasing the priority of organizing efforts is the decline of organized labor's public image and political power. Favorable public attitudes about unions have seriously eroded in the past two decades. The public's enthusiasm about the protections af-

11. Among these factors are shifting demand for a product; the presence of state or local incentives such as tax breaks, low-cost loans, and community-built plants; and the availability and cost of energy. Juris & Roomkin, supra note 10, at 198-99; see also BLS Study of Contract Provisions of Plant Closure and Relocation, reprinted in DAILY LAB. REP. (BNA) No. 166, at E-1 (Aug. 27, 1981). Many non-wage incentives are being offered by Sunbelt states, and the general population shift to the Sunbelt is causing the movement of many industries that serve local product markets. See Rees, supra note 5, at 48 (citing baking and cement manufacturing as examples); Usery & Henne, The American Labor Movement in the 1980's, 7 EMPLOYEE REL. L.J. 251, 253 (1981). Energy is more available in the Sunbelt, and the warmer climate saves energy costs. Rees, supra note 5, at 48.


16. Stamas, supra note 13, at 29 (South to North wage ratio was 95% for unionized workers, 90% for nonunionized workers, 90% for unionized manufacturing workers, and 75% for nonunionized manufacturing workers).

17. See Usery & Henne, supra note 11, at 252. Union leaders are sensitive to many polls finding that "unions rank very low in public esteem," and that labor leaders are viewed considerably less favorably than business leaders. Blik, Corrupt, Crusty, or Neither?: The Poli-lish View of American Unions, 30 LAB. L.J. 323, 323-24 (1979).
forded by unionization have been dampened in part because "labor has been a victim of its own successes."18

The decline in public support of unions and in union membership has caused a loss of political power. That loss was evident in, and exacerbated by, the bitter defeat of organized labor's effort to persuade Congress to enact the Labor Law Reform Act of 1977.19 That legislation would have facilitated union organizing by permitting greater union access to employer property, expediting union representation elections, and increasing remedies for employer delays.20 Since that defeat, labor has had little political influence, especially during the Reagan administration.21

A final factor that is increasing the emphasis on union organizing efforts is the financial condition of union organizations themselves. The financial condition of many large unions is critical because of declining membership.22 Organizing new members is now regarded as the key to financial survival by many depleted unions, such as the United Rubber Workers.23

Union leaders recognize that the above factors are increasing the importance of union organizing efforts. The AFL-CIO has decided to place more emphasis on organizing drives and has created a new unit to assist member unions in planning and conducting organizing cam-

18. See Organized Labor's Vital Signs Show Waning Political Clout; But Numbers Don't Tell All, 40 CONG. Q. WEEKLY REP. 2111 (Aug. 28, 1982). The protections already gained by unions are taken for granted, and the federal government now protects many workers' rights originally defended by unions, including wages and hours (minimum wage laws), pensions (ERISA), job safety (OSHA), and job opportunity (Equal Opportunity Employment Act).
21. Labor's "halfhearted endorsement" of President Carter, the substantial rank-and-file support for President Reagan, and the formal endorsement of President Reagan by the Teamsters are indicative of the ineffectiveness and divisiveness characterizing organized labor's recent participation in the political process.
22. See supra notes 4 & 6; see also Once-Powerful Steelworkers Union is a Casualty of Shakeout in Industry, Wall St. J., Oct. 12, 1983, at 31, col. 4.
Several large unions, including the IAM and URW, are proclaiming organizing as their top priority. Many articles and conferences are focusing on the need for a renewed organizing effort in the 1980's.

B. Failure of Traditional Organizing Efforts

These renewed organizing efforts have not been successful. That lack of success is evidenced by the steady decline in the percentage of union victories since the late 1960's. The union victory rate is even lower in the South, although the bargaining units are larger in the South. Other indications of the lack of success in union organizing efforts are the enormous increase in union decertification activity and the sharp decline in union representation elections under the Reagan

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27. In 1968 unions won 57% of their representation elections, but this rate fell below 50% for 1974, dropped to 48% for 1975 and 1976, and has bottomed out at between 45% and 46% from 1977 to 1981. See 45 NLRB ANN. REP. 270 (1980) (table 13); 44 NLRB ANN. REP. 267 (1979) (table 13); 43 NLRB ANN. REP. 267 (1978) (table 13); 42 NLRB ANN. REP. 294 (1977) (table 13); 41 NLRB ANN. REP. 236 (1976) (table 13); 40 NLRB ANN. REP. 233 (1975) (table 13); 39 NLRB ANN. REP. 223 (1974) (table 13); 38 NLRB ANN. REP. 244 (1968) (table 13). Note that these figures include decertification elections, which are usually decided against unions. See also Union Victory Rate in Representation Elections Climbed to 45.7 Percent in FY 80, NLRB Says, DAILY LAB. REP. (BNA) No. 251, (Dec. 31, 1981). From April 1981 to September 1981, the percentage of union victories (not including decertification elections) remained stable at 45.6%. NLRB Election Rep., Sept. 21, 1982, at 2.

Note that all NLRB statistics in this article are for the fiscal year.

28. Bain & Spritzer, supra note 14, at 539 (for 1977-1979 period, unions won 43.0% of representation elections in South, as opposed to 46.3% in the non-South); see 45 NLRB Ann. Rep. 280 (1980) (table 15B).

29. Union decertification, the "right to deunionize," is a procedure for employees to vote to repeal representation by a labor union that is currently their bargaining representative. See NLRA, 29 U.S.C. § 159 (1976). From 1970 to 1978, the number of decertification petitions more than doubled, while the number of decertification elections almost tripled. Decertification activity is growing faster than union membership, and voters in decertification elections overwhelmingly choose to reject the union. See Elliott & Hawkins, Union Decertification—Some Recent Trends, 5 EMPLOYEE REL. L.J. 533, 535, 537 (1979). This study found that decertification activity was increasing at a growing rate, as measured by the number of decertification petitions filed, the number of decertification elections conducted, the number of elections resulting in decertification, the number of eligible voters in decertification elections, and the number of eligible voters in elections where the union was decertified. Id. at 534. The increase in decertification activity, when adjusted for union membership, shows a growing unwillingness of employees to accept unquestioningly existing union representation. In 1978 almost 50% of the filed petitions resulted in elections, and unions lost about 75% of these elections, which is far above the 1948-1968 averages of 33% and 66%. Id. at 537.
A major argument of this article is that the ineffectiveness of traditional organizing techniques is a primary cause of the declining success of union organizing efforts. That ineffectiveness results from a wide array of factors.

1. Employer Opposition.

The first of these factors is the enormous increase in the sophistication of employer opposition to union organizing efforts, including, unfortunately, unlawful employer opposition. An important reason for that increased sophistication is the development of a new profession called the labor-management consultant. The primary role of these consultants is to manage anti-union campaigns for employers facing organizing efforts and representation elections.

Concern over corporate personnel practices and illegal activities of consultants is being expressed in many forums, including Congress.

Unions strongly believe that the emergence of labor-management consultants is a major cause of the recent failure of traditional union organizing efforts. Labor leaders believe that this "brand new industry doing a half billion dollars a year in business," "perhaps the fastest growing industry in the economy," is one of the major obstacles to union organizing under the NLRA. Consultants, from labor's perspec-


This general upward trend is being sharply reversed under the Reagan administration, and the number of union representation elections has fallen from 8,198 in 1980 to 7,659 in 1981 to 5,628 in 1982, and to 5,196 in 1983. 45 NLRB Ann. Rep. 271 (1980); Statements of NLRB Chairman Dotson and General Counsel Lubbers on Fiscal 1985 Budget Requests Before House Appropriations Subcomm. in Labor, DAILY LAB. REP. (BNA) No. 38, at D-3 (Feb. 27, 1984).

31. Some other factors that have been set forth as reasons for the decline in union victory rates in representation elections are the influx of married women into the labor force, a faster rate of increase in nonunion wages than in union wages, an increase in the adult male unemployment rate, and a decrease in the average size of the bargaining unit. See Presence of Women in Workforce Seen as Factor Hampering Union Organizing, DAILY LAB. REP. (BNA) No. 38, at D-3 (Feb. 27, 1984); Report of NLRB General Counsel Survey Fiscal 1982 Operations, reprinted in DAILY LAB. REP. No. 12 at F-1 (Jan. 18, 1983).


34. Williams Address, supra note 12, at E-1.

35. Statement of AFL-CIO Director of Organization Alan Kistler Before House Labor Sub-
tive, are an "institutionalized resource to management," and "union busting" has become an "art" that is developing far beyond being "reactive to individual situations."

The most disconcerting evidence of the impact of consultants, and of strong employer opposition in general, is the alarming increase in unfair labor practice cases. From 1948 to 1980 the number of employer unfair labor practice cases rose more than tenfold. The number of such cases is falling sharply under the Reagan administration, but this is because of a "budgetary crisis of unprecedented proportions" at the NLRB. The "merit factor," the proportion of cases found to have merit, increased from 20% to 30% between 1950 and 1967, stabilized at 30% to 32% until 1976, but has been at approximately 34% each year since 1978, the highest level since that figure was calculated (1958) except for the 1965-1967 period.

A particularly disturbing trend is the huge increase in the number of 8(a)(3) charges against employers for discriminatory discharges of

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36. Bilk, supra note 17, at 329; Leftwich, supra note 26, at 486.
37. Kistler, supra note 26, at 540. One research study in the engineering industry concludes, "All the union officials interviewed believed that strong employer opposition was the major cause of union defeats." See Latta, Union Organization Among Engineers: A Current Assessment, 35 INDUS. & LAB. REL. REV. 29, 36 (1981). The study also noted, [I]t might be argued, of course, that union officials seek to blame employer opposition for defeats, both as a way of avoiding the possibility that engineers merely do not want unions and as a means of deflecting attention from the unions' shortcomings. Thus the nature of employer campaigns requires some attention.

Id.

40. See id. at F-2; Roomkin, supra note 38, at 246.
41. Section 8(a)(3) provides:
(a) It shall be an unfair labor practice for an employer—
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of
Discriminatory discharges of union supporters especially inhibit union organizing efforts because they reduce the voting strength of union backers, exclude union adherents from the workplace, and most importantly, produce a "chilling effect" on pro-union activities.

Empirical evidence on the impact of legitimate and even coercive activities by employers is scarce and very controversial. The reasonable notion that coercive employer tactics affect the outcome of representation elections has been called into question by the very influential study done by Getman, Goldberg, and Herman. Their study found that the votes of employees were determined largely by pre-campaign attitudes and that the election campaign itself had little impact. It is beyond the scope of this Article to review the extensive literature on the Getman study, but it is safe to conclude that the attacks on both the study's methodology and the authors' interpretation of the data are persuasive enough to support considerable skepticism about the study's conclusions.

Until more conclusive empirical studies are made, it is best to rely on a common sense appraisal that employers would not be hiring large numbers of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;


42. These totaled 3,213 in 1950, 6,044 in 1960, 9,290 in 1970, and 18,315 in 1980. Weiler, supra note 38, at 1780. The proportion of unfair labor practice charges against employers that the NLRB has found to have "merit," and the number of reinstatements of discharged employees have also risen dramatically. Id. at 1780 4 n.34.

43. Id. at 1778.


45. The authors concluded from a study of 31 hotly-contested elections in 1972-1973 that the votes of 81% of the employees were determined by previously formed attitudes or intentions. Id. at 62. The corollary finding was that the representation campaign had little impact on the election outcome. Id. at 72.

46. The Getman et al. study has been attacked vigorously from several perspectives. Many critics focus on the deficiencies in the study's methodology. One possibly "fundamental error" in methodology was that the authors' focus on "hotly-contested" cases left them with no control group. See Eames, An Analysis of the Union Voting Study from a Trade-Unionist's Point of View, 28 STAN. L. REV. 1181, 1182 (1976). A second criticism of the methodology was that the small sample size and the 99% test of statistical significance used by the authors disguised a more positive relationship between unfair labor practices and employer voting. Weiler, supra note 38, at 1783. A third target of criticism was that the narrow time frame of the study, the last three weeks before the election, meant that any pre-interview campaigning was measured as "disposition" by the authors. Black, Election Behavior and Union Representation Elections, 31 LAB. L.J. 627, 630 (1980); Eames, supra, at 1185. Finally, the concentration of the sample campaigns in the Midwest
numbers of consultants or increasingly violating the law if they believed that the campaign had no impact on the election results. Moreover, regardless of the findings of additional studies, neutrality agreements will still be appropriate subjects of bargaining. If unlawful employer campaign tactics do have a coercive impact on employee voting, then neutrality agreements are effective in protecting employees. On the other hand, even if the Getman findings are confirmed, and complete deregulation of the representation campaign is undertaken, employers should still have the freedom to negotiate neutrality agreements with unions who continue to believe that such agreements are necessary.

2. Ineffectiveness of the NLRB

A second factor that is decreasing the success of traditional union organizing efforts is the ineffectiveness of the NLRB. One reason for its ineffectiveness is its steadily rising caseload, which has created a "caseload crisis" that is threatening to overwhelm the agency. Although the NLRB's case intake has been cut dramatically under the Reagan administration, simultaneous budget reductions of severe proportions mean that the overload on the NLRB's operation has not been eased.

A second reason for the NLRB's ineffectiveness is the substantial delay in every procedural step for remedying employer unfair labor practices during union organizing drives. Moreover, decisions of the

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49. 1982 Report of NLRB General Counsel, supra note 30, at F-1. The NLRB's case intake for 1982 was 47,115 cases, a decline of 17% from the 56,774 cases in 1981. That included a 13.7% decrease in unfair labor practice cases. Id. Board members, however, presently have a backlog of 1300 cases, a record level. See NLRB Chairman and General Counsel Defend Agency Budget Request of $137.9 Million, Daily Lab. Rep. (BNA) No. 38, at A-5 (Feb. 27, 1984).

50. The time from filing to issuance of a complaint was 52 days in 1960, 57 days in 1970, 54
NLRB are not self-enforcing, but rather require enforcement by a circuit court. The median time for both enforcement and review from the receipt of cases to the filing of briefs was 145 days in 1982 and 149 days in 1981. Thus, the remedial process may take over two years to unfold!

Employers can use delay as a strategic weapon to sabotage the effectiveness of the Board's remedies. It is generally agreed that NLRB remedies would be more effective if there were no premium which Board respondents could enjoy by delaying their compliance with Board orders. It is also generally accepted that a diminution of the time period required to resolve an unfair practice case would increase the effectiveness of the Board's remedies. This critical defect in the Board's remedial powers is unlikely to be ameliorated in the near future.

A third reason for the NLRB's ineffectiveness is the delay in election processing. The time from the filing of an election petition to the election itself was forty-eight days in 1982. A recent study found that delay in the speed with which an election is conducted is likely to increase the probability of an employer victory because unions find it difficult to maintain the support of employees during a long election period. Loss of union support largely results because of concerted employer campaigns and turnovers in the workforce, including those resulting from discriminatory discharges. As one commentator has said, the union often will find that "an election delayed is an election

52. See Roomkin, supra note 38, at 249.
54. 1982 REPORT OF NLRB GENERAL COUNSEL, supra note 30, at F-2.
55. Roomkin & Block, Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence, 1981 U. ILL. L. REV. 75, 88. That study also found that employers are more likely to win close contests; therefore small increments of time can have a crucial effect on election outcomes. Id. at 89-90.

For other empirical evidence that delay in election processing reduces the chances for union victories, see Prosten, The Longest Season: The Union Organizing Record in the Last Decade a/k/a How Come One Team Has to Play with its Shoelaces Tied Together?, in 31 PROC. ANN. MEETING OF THE INDUS. REL. RESEARCH ASS'N (IRRA) 240 (Aug. 29-31, 1978); Roomkin & Juris, Unions in Traditional Sectors, in 31 PROC. ANN. MEETING OF THE IRRA 210 (Aug. 29-31, 1978).
56. Roomkin & Block, supra note 55, at 76.
EMPLOYER NEUTRALITY

A final reason for the ineffectiveness of the NLRB is the powerlessness of its remedies against employers who commit unfair labor practices in order to inhibit union organizing efforts. The traditional remedies for discriminatory discharges—back pay and reinstatement—are not strong deterrents to employers who perceive the benefits of breaking the law to be greater than the costs. Furthermore, the NLRB seldom uses its injunctive powers under section 10(j) to remedy employer unfair labor practices.

This analysis of the NLRB leads to the conclusion that the regulatory scheme has failed to provide an open and uncoerced environment for union organizing efforts. As Professor Weiler has stated, "[t]he core of the legal structure must bear a major share of the blame for providing employers with the opportunity and the incentives to use these tactics, which have had such a chilling effect on worker interest in trade union representation." Unless there are major changes in the regulatory framework of the NLRB, which appears increasingly unlikely in the wake of the defeat of the Labor Law Reform Act of 1978, unions will continue to look for ways of supplementing and circumventing that inadequate regulatory structure.

3. Cost of Union Organizing

A third factor decreasing the effectiveness of traditional union organizing campaigns is their cost. The nature of the organizing process is such that it is costly for unions. Organizers must be hired, or the time of present employees (usually the international representatives) must be diverted to organizing. In addition, leaflets and other literature must be printed and often distributed by mail, office space must be rented, and staff must be housed and fed. Finally, there are the legal costs involved in a representation election.

The substantial cost of organizing campaigns raises two problems. The first problem is that resource constraints on labor unions may prevent increased investments in organizing campaigns. The second

57. Id. at 97.
58. Weiler, supra note 37, at 1788-93; see also Smisek, New Remedies for Discriminatory Discharges of Union Adherents During Organizing Campaigns, 5 INDUS. REL. L.J. 564 (1983). Moreover, "[t]he usual remedy for an unfair labor practice committed by an employer during an organizing campaign—a cease-and-desist order enjoining future violations—is viewed by many employers and consultants as a mere 'slap on the wrist.'" Note, supra note 33, at 531.
60. Weiler, supra note 38, at 1770.
62. One observer calling for an increase in organizing activity admitted that "[p]recisely how
problem is that an established union will often allocate its resources to representation of its present members rather than to recruitment of new members. As one study concludes:

While virtually all union officials publicly endorse more vigorous organizing, privately a few may still prefer not to expand their union’s membership because an influx of new members might upset the internal political equilibrium. Although it could be argued that organizing funds should be considered as an investment with the potential for yielding a positive net return in dues, these negative factors make it unlikely that a much larger portion of the total resources available to unions will be allocated to organizing.

Intense employer opposition, the limited effectiveness of NLRB procedures, and the cost of organizing campaigns mean that the prospects for organizing by traditional methods remain bleak. Because legislative efforts to reform laws covering union organizing are unlikely to succeed, it is only natural that unions are beginning to explore non-traditional methods of organizing workers.

II

THE CHARACTERISTICS OF NEUTRALITY AGREEMENTS

The first neutrality agreement was not negotiated until 1976, but today many major industries have considered or are considering employer neutrality pledges. Unlike wage demands and layoffs, neutrality issues are not in the forefront of public attention, but they have been the subject of “intense but quiet preoccupation” by labor negotiators since 1976.

A complete descriptive analysis of the employer neutrality agreements that have emerged from recent negotiations is beyond the scope of this article, because each agreement contains unique terms that were drafted by the employer and union during the bargaining process. This section, therefore, briefly notes the major trends in the development of

the labor movement in general, or the AFL-CIO in particular, will mount these increased activities is not yet known.” Sandver & Heneman, supra note 24, at 114. Others feel that resource constraints in the form of shortages of qualified personnel and financial resources will mean “[i]ncreases in funding for organizing, after adjustment for inflation, are likely to be modest at best.” Leftwich, supra note 26, at 489.

63. Block, supra note 61, at 102.

64. Leftwich, supra note 26, at 489.


67. See GM-UAW Agreement, supra note 66, at C-1.
neutrality agreements, and examines the general characteristics of industries where neutrality pledges are likely to appear in the near future.

A. Development of Neutrality Agreements

1. Auto Industry

The catalyst for the development of neutrality agreements was the 1976 neutrality pledge by General Motors (GM) to the United Auto Workers (UAW). That first neutrality pledge had enormous impact because GM was considered a leader in formulating management’s response to union organizing efforts. As one report noted before the agreement,

The union officers, joined in this view by officials of other industrial unions, have expressed alarm that the continued GM resistance to UAW’s organizing efforts in Southern plants could be the trigger for vastly-expanded initiatives by U.S. industry to switch plants to the Sun Belt areas of the Southeast and Southwest on a nonunion basis.

Several presidents of major industrial unions suggested that the UAW’s failure to make substantive progress on the neutrality issue this year could presage a broad change in labor relations in U.S. industry. Continuation of the GM tactic of opposing unionization, it was argued, might well be taken by other companies as a signal that “the wars of the 1930s were on again.”

The reaction from the management bar to the GM pledge was overwhelmingly negative. One leading management negotiator commented that “[t]his is one of the worst capitulations in bargaining in years.”

The rapid spread of interest in neutrality agreements after 1976 reflects the importance of the UAW-GM neutrality pledge.

The most significant provision in the exchange of letters between GM and UAW stated:

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

68. Id. at C-2.
69. Id. at C-1.
70. The full text of the exchange of neutrality letters between GM and UAW is:

Dear Mr. Bluestone:

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

Over the years General Motors has developed constructive and harmonious relationship based upon trust, integrity, and mutual respect with the various unions which currently represent its employees. These relationships date back, in the case of the UAW, nearly 40 years. General Motors places high value on the continuation and im-
The remaining major American auto manufacturers were close behind GM in negotiating neutrality agreements with the UAW.\(^7\)

The UAW has also been successful in extending employer neutrality to other segments of the auto industry.\(^2\) Moreover, such agreements have been negotiated by other unions in the auto industry. For

prominent of constructive relationships with these unions as well as with all its employees, union and nonunion alike.

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

For its part, General Motors expects that the Union will conduct itself in such organizing campaigns in a constructive and positive manner which does not misrepresent to employees the facts and circumstances surrounding their employment.

Very truly yours,

GEORGE B. MORRIS, Jr.
Vice President

Dear Mr. Morris:

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

Sincerely,

IRVING BLUESTONE,
Vice President
Director, General Motors Department

LEONARD WOODCOCK
President


71. In the 1979 negotiations with Ford, the UAW leapfrogged the neutrality pledge by negotiating directly for application of a "transfer of operations" clause and for a private card check procedure in order to facilitate organizing in new plants. See infra text accompanying notes 240-42; DAILY LAB. REP. (BNA) No. 100, at A-8 (Sept. 29, 1980). In 1980 the American Motor Company provided a comprehensive neutrality package to facilitate organizing in new plants, including a neutrality pledge, less restrictive transfer provisions, and preferential hiring.

72. For instance, the UAW-Dana Corporation agreement states:

Our Corporate position regarding union representation is as follows:

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

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

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

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

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

example, the 1976 agreement between the International Union of Electrical Workers (IUE) and GM includes a neutrality pledge by GM identical to the one negotiated between the UAW and GM.\textsuperscript{73}

2. \textit{Other Industries}

Since 1976, neutrality agreements have been adopted by several major industries. For example, the basic element of remaining "neutral" by agreeing to "neither discourage or encourage" union organization efforts is contained in the 1979 contract between B.F. Goodrich Tire & Rubber Company and the United Rubber Workers (URW).\textsuperscript{74} That neutrality pledge was included in the pattern settlement for the rubber industry and was accepted by Firestone and Uniroyal, but not Goodyear.\textsuperscript{75}

Neutrality agreements also are a recent development in the steel


\textsuperscript{74} The text of the B.F. Goodrich-URW neutrality agreement is as follows:

\textit{Attachment E}

\textit{Memorandum of Agreement Between B. F. Goodrich and United Rubber, Cork, Linoleum and Plastic Workers of America}

1. Organizing Neutrality

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

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

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

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

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

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

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

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


\textsuperscript{75} The URW's 1982 bargaining platform continued to emphasize neutrality agreements as
industry, but in that industry the focus of the agreements is the elimination of "active opposition" by the employer. Recently, there has been a "second wave" of neutrality agreements, the most significant of which have occurred in the tobacco industry. The 1979 Philip Morris-Tobacco Workers neutrality agreement provides:

Philip Morris U.S.A. agrees that in the event that the Bakery, Confectionery and Tobacco Workers International Union, A.F.L.-C.I.O., C.L.C. attempts to organize classifications of employees whom they represent in organized facilities in any facility of the Company which is presently unorganized, the Company will remain neutral to such organizing activity providing the Union conducts itself in a manner a goal. Rubber Workers Chief Says He Will Resist Contract Concessions, DAILY LAB. REP. (BNA) No. 46, at A-6 (Mar. 9, 1982).

76. The first neutrality agreement in the steel industry, an "organizing letter" contained in the three-year basic steel settlement in 1977, states:

The companies have agreed that they will not actively oppose the Union's attempts to organize production and maintenance employees at any basic steel-producing operations which they may hereafter contract.

See Summary by Steelworkers of Three-Year Basic Steel Settlement, reprinted in DAILY LAB. REP. (BNA) No. 70, at D-6 (Apr. 11, 1977).

The emphasis in the steel industry on eliminating "active opposition" by the steel companies was developed further in the 1982-1983 steel negotiations. The rejected 1982 basic steel agreement contained a "neutrality letter" stating:

Each company pledges to refrain from actively opposing the Steelworkers in campaigns to organize production and maintenance employees of virtually all Specialized Unit facilities. This agreement is conditioned on the Union's not ridiculing the company in its campaign communications. Also, the Company reserves its free speech right to communicate fairly and factually to employees.


The Steelworkers will continue to press for the elimination of employer opposition to union organizing efforts in all facilities. The resoluteness of this intention is reflected in the 1983 policy statement of the Steelworkers, which states: "Any company which asks us for consideration must abandon opposition to our organizing efforts at new or unorganized facilities..." Statement of United Steelworkers' Basic Steel Industry Conference, reprinted in DAILY LAB. REP. (BNA) No. 24, at D-3 (Feb. 3, 1983).

The 1983 Steelworkers settlement with the Wheeling-Pittsburgh Steel Corporation contains an appendix entitled "Company Neutrality Toward Organizing By Union and Agreement for Voluntary Recognition," which states:

The Company has agreed (1) to remain neutral in Steelworker organizing drives, and (2) to voluntarily recognize the Union at units where a majority of employees sign cards authorizing Steelworker representation. The Agreement covers both new and existing facilities, but excludes the Duvall Center, the administrative offices in Wheeling, and the Executive Offices in Pittsburgh.

The agreement forbids the Company from taking any position on whether employees should select the Union as their bargaining representative. If the Company violates this prohibition, the Union may seek any injunction without first going through the grievance and arbitration procedure. For its part, the Union agrees not to ridicule or demean the Company during organizing drives.

If the Union collects signed authorization cards from a majority of employees in a bargaining unit, and a third party verifies the majority, the Company will grant the Steelworkers voluntary recognition.

which neither demeans the Corporation as an Organization or its representatives as individuals. The term “neutral” or “neutrality” shall not be construed to limit the Company’s right to discuss with its employees any benefits which the Company provides to its employees.\textsuperscript{77}

\textbf{B. “Fertile Ground” for Neutrality Agreements}

A study of the industry-by-industry development of neutrality agreements supports the following generalizations concerning the characteristics of industries where neutrality agreements have appeared.\textsuperscript{78} First, the industry is likely to contain large corporations with multiple plants. The presence of organized and unorganized facilities in a firm gives a union the incentive to use its leverage in the organized sector of the firm to promote union organizing in the firm’s nonunion facilities.

Second, the industry is likely to be dominated by a few firms, all of which have a strong union tradition. A strong union presence in an industry means that corporations in that industry are likely to be less concerned with resisting unionization and to be more concerned with maintaining an ongoing relationship with the union that traditionally has represented its employees. It also means that actions by an individual corporation to facilitate union organizing will have a lesser impact on inter-firm labor cost differentials, and thus a lesser impact on the competitive position of the company. Neutrality agreements are likely to spread among firms in a concentrated industry once such an agreement has been accepted by one firm because of both increased pressure from unions for firms to match the “industry standard” and a recognition by each employer that acceptance of a neutrality agreement will not harm its competitive position relative to other employers in the industry.\textsuperscript{79}

Third, there is likely to be a dominant union or small group of unions in the industry. The dominance of one or two unions in an industry gives the union or unions the bargaining power to negotiate a neutrality agreement. Thus increasing concentration in union structure, which is resulting from the record-setting pace of union mergers in recent years, will encourage the further development of neutrality agreements.\textsuperscript{80} Large industrial unions are likely to have an institu-

\textsuperscript{77}. Neutrality Agreement of June 6, 1979 between Philip Morris, U.S.A. and Local #16-T of the B.C.T.W.I.U., reprinted in Kramer, Miller & Bierman, supra note 2, at 47.


\textsuperscript{79}. This latter generalization may not be true if firms have differing proportions of unorganized facilities.

tional incentive to press for neutrality agreements in response to the recent decline in their memberships. Moreover, employers are becoming more concerned with promoting cooperative relationships with unions that are firmly entrenched in particular industries.

Fourth, centralized bargaining by firms in the industry is a prerequisite to the negotiation and implementation of a neutrality agreement. The employer and union must have the authority to enter into a contractual relationship that will bind unorganized subunits of the corporation. Negotiations with a major firm in an industry often will produce a pattern settlement that is accepted by other firms in the industry.

Fifth, neutrality agreements are more likely to appear in industries where unions have been increasingly frustrated in their recent organizing efforts because of employer opposition or relocation of plants to anti-union areas. Finally, neutrality agreements are more likely to be present when both unions and employers are willing to accept union benefits in non-economic areas in exchange for union restraint or union concessions on wages and benefits.

These characteristics are helpful in predicting which industries are likely to have negotiations over neutrality agreements in the near future. One commentator used a similar set of characteristics to conclude that “candidates for the emergence of the neutrality issue in the near future include primary aluminum, glass products, fabricated metals, pulp and paper products, petroleum refining, meat products, and perhaps plastics and synthetics.”

III
INTERPRETATION OF NEUTRALITY AGREEMENTS

Despite the difficulties in generalizing about employer neutrality pledges, two issues that consistently arise in interpreting those agreements are the meaning of “neutrality” and the scope of an employer neutrality pledge.

Trends in Union Structure: An International Comparison, 35 INDUS. & LAB. REL. REV. 43 (1981) (union structure became more concentrated from 1957-1958 to 1977-1978). The AFL-CIO is encouraging the trend of its affiliates to merge. See DAILY LAB. REP. (BNA) No. 250, at A-1 (Dec. 30, 1981). One reason for that encouragement is that merged unions have greater resources for organizing. See Leftwich, supra note 26, at 490. Another reason that union leaders are encouraging mergers is to maintain or to increase the bargaining power of unions. See Unions to Get Bigger to Maintain Bargaining Parity, Finley Says, DAILY LAB. REP. (BNA) No. 196, at A-2 (Oct. 9, 1981); but see Chaison, Union Growth and Union Mergers, 20 INDUS. REL. 98, 99 (1981) (no statistically significant relationship found between mergers and membership changes in absorbing or absorbed unions).

EMPLOYER NEUTRALITY

A. The Meaning of Neutrality and "Reserved Rights"

A crucial issue in interpreting a neutrality agreement is defining "neutrality." Deriving a precise meaning of neutrality is difficult because that concept is formulated differently in a large number of neutrality pledges. Oddly enough, neutrality is not specifically defined in any neutrality agreement, even though it is the most important term in every neutrality agreement. Some neutrality agreements impose a "posture of neutrality," some require "strict neutrality," while still others totally avoid the term "neutrality" by seeking to limit "active opposition" by the employer. Until now these differences in the expression of neutrality have not been thought important enough to distinguish or even to discuss, possibly because neutrality agreements are in an early stage of development and have not been subject to extensive judicial scrutiny.

The issue as to what constitutes neutral conduct is illuminated somewhat by the presence of various "reserved rights" for employers in several neutrality agreements. The broadest reserved right allows the employer "to communicate fairly and factually to employees." A reserved right of this type means neutrality is little more than a protection against misrepresentation by the employer. Another reserved right allows the employer to communicate in a "pro-company" manner. A third employer right that is specifically reserved in several neutrality agreements is the employer's right to respond to "provocative" or "demeaning" union attacks against the company. Finally, some proposed neutrality agreements are expressly "conditioned on the Union's not ridiculing the Company in its campaign communications."

The remedies that neutrality agreements make available to employers in response to objectionable union statements also illuminate the meaning of "neutrality." For example, some neutrality agreements explicitly provide mechanisms to remedy "demeaning" statements by the union. The GM-UAW neutrality letter states that such a charge by the company will be investigated by the UAW's National General Motors Department, and that the union will be given the opportunity to

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82. 1982 Rejected Basic Steel Agreement, supra note 76, at D-5.
83. The UAW-Dana neutrality agreement allows the company to communicate to employees in a "positive pro-Dana manner," but not in "an anti-UAW manner." See UAW-Dana Corp. Neutrality Agreement, supra note 72; see also Tobacco Workers-Philip Morris Neutrality Agreement, supra note 77.
84. In the UAW-Dana agreement the employer reserves the "right to speak out in any manner appropriate when undue provocation is evident in an organizing campaign." See UAW-Dana Neutrality Agreement, supra note 72. The Tobacco Workers-Philip Morris agreement gives the employer a strong conditional right to disavow the neutrality agreement if the union "demeans the Corporation as an Organization [or] its representatives as individuals." See Tobacco Workers-Philip Morris Neutrality Agreement, supra note 77.
85. 1982 Rejected Basic Steel Agreement, supra note 76.
“remedy the situation” before the Company can “communicate with its employees on this matter.” There is no implication that GM has a general right to respond or to abrogate the neutrality agreement.

Other neutrality agreements provide arbitration as a mechanism for an employer to use in order to counter demeaning union statements. The URW-B.F. Goodrich agreement allows either party to charge violations of the neutrality agreement before the American Arbitration Association, which, after investigating, can require the violating party to issue a public disclaimer. And at least one agreement, in the steel industry, makes the neutrality agreement subject to the grievance and arbitration procedures of the basic steel agreement.

A crucial issue is the extent to which “reserved rights” are retained by the employer when the agreement requires “neutrality,” but is silent concerning which rights are reserved. The presence of explicit reserved rights implies that “neutrality,” alone, would preclude the employer from participating in any way in the election campaign. This is directly contrary to the position of management attorneys, some of whom would interpret “neutrality” in the following way:

[T]he company retains the right to give employees factual information concerning the company and the union. So long as the information given to employees is couched in a straightforward, unbiased and frank manner, without the interjection of the employer’s opinions, it would appear to come within the parameters of being “neutral.” Providing such information would constitute neither employer discouragement or encouragement of the union efforts to organize its employees.

Besides being contrary to a logical interpretation of the role of explicit reserved rights, this position would allow employers to manipulate “neutrality” to defeat the purpose of their own contractual agreement. The often fuzzy distinction between fact and opinion could be used to eliminate many of the benefits that the union expected to receive from the neutrality agreement. This would be especially true if the union has the burden of proving the breach of contract, as some management attorneys suggest. Even the frankest factual statement has the potential to violate a neutrality agreement by introducing the “chilling effect” of perceived employer opposition.

Neutrality agreements may be silent about the employer’s right to

86. UAW-GM Neutrality Letters, supra note 70.
87. URW-B.F. Goodrich Neutrality Agreement, supra note 74 (arbitration, however, is not an exclusive remedy).
90. Id.
respond to “demeaning” or “provocative” union statements. In this case, it would defeat the purpose of neutrality agreements to allow employers to interpret what is “demeaning” and unilaterally to violate the agreements. Moreover, the presence of mechanisms in many neutrality agreements for adjudicating what is “demeaning” implies that a neutrality agreement that is completely silent on this subject should not give the employer a carte blanche right to respond. It is uncertain, of course, whether an arbitrator or a court would set limits on the nature of union statements based on the intent of the parties or on a standard of reasonableness.

There are several conclusions that can be made regarding the meaning of neutrality. First, close attention must be paid to specific contractual provisions of individual neutrality agreements, although presently there is no sharp differentiation between terms such as “neutrality” and “strict neutrality.” Second, the presence of explicit reserved rights implies that “neutrality” is an expansive concept that limits all participation by the employer in the organizing campaign. The employer, therefore, has no implicit reserved right to participate in the organizing campaign if it does not specifically reserve those rights when it agrees to remain neutral. Finally, it is uncertain how the tenor of union statements in the campaign will affect the validity of the neutrality agreement. In the absence of a specific provision which states that “demeaning” statements by the union permits the employer to exercise his right to respond or to invoke the arbitration provisions of the general contract, the employer who has signed a neutrality agreement appears to have no right to respond to any union statements if those statements do not violate any provision of the NLRA.

B. The Scope of Neutrality Agreements

The two main issues concerning the scope of a neutrality agreement are: What types of workers will be covered by neutrality agreements? What parties on the employer's side will be required to remain neutral toward union organizing efforts?

Neutrality pledges thus far cover narrowly defined groups of workers. Almost all the existing pledges are limited to production and maintenance employees. Some neutrality agreements, such as the UAW-GM agreement and the basic steel agreement of 1977, explicitly limit their application to “production and maintenance employees.”

91. Currently there are no neutrality agreements that are silent about the employer's right to respond to “demeaning” union statements. But this issue is important because it potentially may arise and because it sets up an analytical framework for interpreting those agreements that do provide for such a right.

92. The UAW-GM agreement is limited to “production and maintenance employees traditionally represented by the Union elsewhere in General Motors.” UAW-GM Neutrality Letters,
The URW-B.F. Goodrich neutrality agreement goes one step further by limiting its coverage to “production and maintenance employees in a plant in which a major product is tires.”\textsuperscript{93} Other neutrality agreements indirectly limit their coverage to specific types of workers by restricting the agreement’s coverage to classes of workers already represented by the union.\textsuperscript{94} In many industries, the practical effect of that type of restriction is to limit coverage to production and maintenance employees.\textsuperscript{95}

The employer’s incentive for pressing to restrict neutrality pledges to production and maintenance employees is to minimize “the cost and competitive implications” and the “direct threat to those beyond traditional blue collar units.”\textsuperscript{96} A union usually is willing to accept that limitation in its first neutrality agreement in order to make the agreement more palatable to the employer. Thus the current limitation of neutrality agreements to production and maintenance workers should be viewed as a bargaining outcome that may be altered in the future rather than as an inherent limitation on the scope of neutrality agreements.

The scope of the coverage of neutrality agreements on the employers’ side has a crucial impact on the practical implementation of neutrality agreements. Three employer parties to consider are local plant management, subsidiaries, and American subsidiaries of foreign corporations.

1. Local Plant Management

The conduct of local plant management can effectively stifle any employer neutrality pledges that are negotiated at corporate headquarters. In the South there is substantial community pressure on management to be anti-union, and “industry is actively discouraged if the community feels its management is insufficiently antiunion.”\textsuperscript{97} Thus, neutrality agreements may create serious frictions between a corporation and its local plant management.\textsuperscript{98} Indeed, opposition by local


\textsuperscript{93} \textit{Daily Lab. Rep.} (BNA) No. 134, at D-3 (July 11, 1979). The agreement does not define “major product” or tell by whom that term will be defined.

\textsuperscript{94} See, e.g., the Tobacco Workers-Philip Morris Neutrality Agreement, \textit{supra} note 77.

\textsuperscript{95} Other neutrality pledges, however, such as the UAW-Dana Corp. agreement, are not explicitly limited to production and maintenance employees. See, e.g., UAW-Dana Corp. Neutrality Agreement, \textit{supra} note 72.

\textsuperscript{96} Craft, \textit{supra} note 78, at 758.

\textsuperscript{97} Axelrod, \textit{supra} note 12, at 148.

\textsuperscript{98} An example is the UAW-GM neutrality agreement, which created considerable resentment among GM managers in the South, who felt that they had been encouraged to oppose the
plant management led to the only court order enjoining the continuation of employer opposition in violation of a neutrality pledge. In *UAW v. Dana Corp.*, violations of a neutrality agreement by local plant management were remedied against the corporation by a $10,000 award of damages to the union by an arbitrator for loss of the benefits of its organizing campaign, and a contempt judgment of $250 per day by the district court after local plant management failed to obey an injunction against continued violation of the neutrality agreement. This suggests that neutrality agreements are enforceable against local plant management, and that employers will be responsible for violation of neutrality agreements by local plant management.

2. *Subsidiaries*

The issue whether neutrality pledges will apply to a corporation’s wholly-owned but independent subsidiaries has been raised by those who are eager to limit the scope of these pledges. The argument is that an independent subsidiary is a “separate employer” that should not be bound under a neutrality agreement entered into by its parent corporation. That argument runs counter to the intent, purpose, and understanding of neutrality agreements. First, in existing neutrality agreements the parties have clearly intended to cover the independent subsidiaries of the corporation. Those agreements require neutrality from the corporation’s management and its agents or its representatives. The statutory term “employer” includes “any person acting as an agent of an employer, directly or indirectly.” Moreover, neutrality agreements generally are part of a master labor agreement between the union and the corporation. Present neutrality agreements contain

100. *Id.* at 54.
no language indicating that they do not apply to all of the corporation's agents or facilities.

Second, the primary purpose of a neutrality agreement, facilitating union organizing in a corporation's unorganized plants, could be defeated if employers were able to avoid the bargained-for terms of the agreement by hiding behind a "paper mountain" of subsidiaries. Employers potentially could create "double-breasted" or "dual company" operations, each with its own "independent" control over labor relations, in order to impede the development or implementation of neutrality agreements.\(^\text{106}\)

In addition to the twin pillars of intent and purpose, the position that a neutrality agreement applies to a corporation's subsidiaries rests on the common understanding of these agreements by the parties and by the courts. No corporation has ever proposed that the neutrality agreement does not apply to its subsidiaries. Furthermore, the only judicial interpretation of a neutrality agreement applied the agreement to an independent subsidiary without even questioning that the subsidiary was bound.\(^\text{107}\)

Even if the intent, purpose, and understanding of neutrality agreements are ignored, it is not evident that the "single employer" test supported by those seeking to insulate subsidiaries is the proper test for determining whether the subsidiary should be allowed to escape the contractual agreement of its parent. That test focuses on four factors: interrelation of operations, common management, centralized control over labor relations, and common ownership.\(^\text{108}\) But that test traditionally has been used where several nominally separate businesses integrate their operations to gain bargaining power over employees.\(^\text{109}\) If the employer forms a subsidiary to escape its contractual obligations under a neutrality agreement, the "alter ego" doctrine should be applied to make the "new independent" corporation responsible for the parent's existing labor obligations.\(^\text{110}\)

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109. United Tel. Workers, 571 F.2d 668, 670 (Bazelon, J., dissenting).
110. See id. at 669 (citing see, e.g., NLRB v. Southport Petroleum Co., 315 U.S. 100 (1942); NLRB v. Herman Brothers Pet Supply, Inc., 325 F.2d 68 (6th Cir. 1963); NLRB v. Ozard Hard-
Finally, even if the "single employer" test is applied, most corporations that sign a neutrality agreement will have a sufficient degree of operational integration to bind their subsidiaries.\textsuperscript{111} For instance, a decision by an employer and its subsidiary that the subsidiary would operate nonunion has been considered a "very substantial qualitative degree of centralized control over labor relations," even if the subsidiary makes its own day-to-day labor relations decisions.\textsuperscript{112} The Board will look at all the circumstances of the case, and will find that the corporation and the subsidiary are a single employer if there is not an arm's length relationship among nonintegrated companies.\textsuperscript{113}

3. American Subsidiaries of Foreign Corporations

The final issue regarding the scope of neutrality agreements is whether they can be negotiated with American subsidiaries of foreign corporations. Apparently that application raises no special problems, for Honda of America has pledged neutrality in union organizing efforts,\textsuperscript{114} and Volkswagen of America is maintaining a "strictly neutral posture" towards UAW organizing efforts.\textsuperscript{115}

IV
ANALYSIS OF NEUTRALITY AGREEMENTS UNDER THE NATIONAL LABOR RELATIONS ACT

A. Mandatory or Permissive Subject of Bargaining

The NLRB has yet to address the question whether a neutrality agreement is a mandatory, permissive, or illegal subject of bargaining. The question has been addressed by several commentators, who conclude that a neutrality pledge is at most a permissive subject of bar-

\textsuperscript{111} In Gerace Constr. Co., 193 N.L.R.B. 645, 650 (1971), the most important factor was the degree of centralized control of labor relations by the parent corporation. The ability of a corporation to negotiate a neutrality agreement to cover all of its unorganized facilities and all of its agents evidences a significant degree of control. See also Canton, Carp's, Inc., 125 N.L.R.B. 483 (1959) (Board found single employer status to be justified by common ownership and management, even in absence of a common labor relations policy); Welcome-American, 443 F.2d at 21 (operational integration supports treating separate concerns as single employer).


\textsuperscript{113} Id. at 1046-47.

\textsuperscript{114} DAILY LAB. REP. (BNA) No. 79, at A-6 (Apr. 23, 1982).

\textsuperscript{115} Volkswagen Workers Approve UAW Representation Overwhelmingly, DAILY LAB. REP. (BNA) No. 113, at A-15 (June 12, 1978). An important factor in facilitating unionization efforts at Volkswagen was its willingness, unlike some southern plants at GM, (see infra note 231 and accompanying text) to hire former union members. See id.; Auto Workers File for Representation Vote at Volkswagen in Pennsylvania, DAILY LAB. REP. (BNA) No. 96, at A-2 (May 17, 1978).
gaining. Even union leaders are uncertain about the status of a neutrality agreement as a subject of bargaining, as was reflected in the 1979 rubber industry negotiations.

I. Neutrality Agreements as a Mandatory Subject of Bargaining

A strong argument can be made that neutrality agreements are a mandatory subject of bargaining under the "vitaly affects" test of Allied Chemical & Alkalai Workers v. Pittsburgh Plate Glass. That test is used for determining whether matters involving third parties outside the employment relationship are mandatory or permissive subjects of bargaining. The crucial factor of that test is "not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitaly affects the terms and conditions of employment." In Pittsburgh Plate Glass, the Supreme Court referred to Teamsters Union v. Oliver for examples of third-party concerns that vitally affect the terms and conditions of employees in the bargaining unit. In Oliver, the Court held that the union's proposal for a minimum rental to be paid to truck drivers who drove their own vehicles in the carriers' service was a mandatory subject. The term was held to be mandatory because it was "a direct frontal attack

119. Id. at 179. In Pittsburgh Plate Glass, the Court concluded that benefits for retirees were not a mandatory subject of bargaining because "the benefits that active workers may reap by including retired employees under the same health insurance contract are speculative and insubstantial at best." Id. at 180. The effect of unorganized plants on the job security of workers in organized plants clearly makes the benefits of neutrality agreements more than "speculative and insubstantial."
120. 358 U.S. 283 (1959).
121. 404 U.S. at 178-79.
upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining agreement." In *Lone Star Steel Co. v. NLRB*, the Tenth Circuit interpreted *Oliver* and *Pittsburgh Plate Glass* as setting out a two-prong requirement for determining whether subjects dealing with matters outside the bargaining unit are mandatory: the subject "must vitally affect the terms and conditions of employment or the job security of unit employees and must represent a direct frontal attack on the problems threatening such interests."  

The *Lone Star* court, however, misapplied its test in finding that an "application of the contract" clause was not a mandatory subject of bargaining. Such clauses require an employer to apply the terms of the national agreement to new operations acquired during the life of the contract upon recognition of the union as the bargaining representative of the employees at the new facility. The NLRB had found that the clause vitally affected the terms and conditions of employment of the unit employees because it protected their jobs and work standards by eliminating the incentives for Lone Star to transfer its work to other mines.

*Lone Star* is nevertheless consistent with the position that neutrality agreements are mandatory subjects of bargaining. The court acknowledged that there is a "legitimate Union goal of protecting employees against a shift of production to another mine to evade standards and wages at the Starlight mine." The court relied most heavily on the finding by the administrative law judge (ALJ) that the clause was overbroad because the same interest in job security could have been protected by extending only the wage portions of the contract to the newly organized facility. The court noted, but did not rely upon, the ALJ's finding that the clause did not "vitally affect" the terms and conditions of employment because its primary purpose was to facilitate organizing.

Thus a neutrality agreement will satisfy the two-prong test of *Lone Star* because the presence of organized and unorganized facilities in the same corporation gives the employer an incentive to transfer work to the unorganized facility, thereby affecting the job security of the unit employees.

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122. 358 U.S. at 294; see also United States v. Drum, 368 U.S. 370, 382 n.26 (1962) (The minimum rental in *Oliver* was "integral to the establishment of a stable wage structure for clearly covered employee-drivers.").
123. 639 F.2d 545, 558 (10th Cir. 1980), cert. denied, 450 U.S. 911 (1981).
124. *Id.* at 559.
125. *Id.* at 556-57.
126. *Id.* at 549.
127. *Id.* at 558.
128. *Id.*
129. *Id.* at 557.
employees. The neutrality agreement is a "direct frontal attack" on this problem because it facilitates the organization of the plants, producing a uniform wage. The fact that unions are willing to assign high priority to neutrality agreements and to accept these agreements in exchange for economic concessions also supports the position that neutrality agreements are a mandatory subject of bargaining.

2. Neutrality Agreements as a Permissive Subject of Bargaining

Even if neutrality agreements are found to be permissive subjects of bargaining, such a finding will not have a significant impact on bargaining over neutrality agreements for several reasons.

First, employers and unions are free to discuss permissive subjects, and an agreement on a permissive subject may be incorporated into a binding collective bargaining agreement. Employers who are eager for union concessions in other areas, such as wages and benefits, will discuss neutrality agreements. Employer interest, of course, will vary from industry to industry depending on whether employers perceive neutrality agreements as a low-cost or significant concession.

Second, unions may attempt to hide their demands for neutrality agreements behind demands over mandatory subjects. As one commentator suggests, "it would not take a high degree of creativity for a union to strike or threaten to strike over 'economic' issues with an understanding that it might be willing to compromise on them if the neutrality pledge were offered as part of the settlement." That strategy, however, is unlawful, because a party is not permitted to insist on a nonmandatory subject of bargaining as a condition or prerequisite to an agreement on a mandatory subject.

Third, while a simple neutrality clause may be a permissive subject of bargaining, negotiations concerning additional methods by which management can facilitate union organizing, such as the application of "transfer of operations" clauses or "card check" clauses, may be negotiated within the context of plant relocation. The subject of plant relocation has been considered mandatory by several courts.

130. *Borg-Warner*, 356 U.S. 342 (1958); NLRB v. Massachusetts Nurses Ass'n, 577 F.2d 894, 897, 899 (1st Cir. 1977); see Kramer, Miller & Bierman, *supra* note 2, at 50.

131. *Craft, supra* note 78, at 759.


133. See *infra* notes 240-46 and accompanying text.

The status of relocation as a bargaining subject, however, is more uncertain because of the Supreme Court's decision in *First National Maintenance v. NLRB* (FNM),135 which held that an employer has no duty to bargain over a decision to close part of its business. The Court expressly chose to "intimate no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts."136

The Board is choosing to interpret the *FNM* holding very narrowly. Guidelines from the NLRB General Counsel in 1981 state:

> [D]ecisions to relocate a plant, to subcontract unit work, to eliminate unit jobs through automation, or to consolidate operations are not "akin to [a] decision whether to be in business at all." That is, the employer does not plan to withdraw from business activity, either wholly or partially. Instead, the employer intends to remain in the same business, albeit elsewhere (relocation) . . . or at one location rather than several (consolidation).137

The Board makes the sharp distinction that "[t]he issue in *First National Maintenance* was whether a decision to go partially out of business is a mandatory subject, not whether a decision to close a plant is a mandatory subject."138 Regional Directors will be required to perform an analysis on a case-by-case basis by applying the *FNM* balancing test to determine whether the benefit for labor-management relations and the collective bargaining process outweighs the burden on unencumbered management decisionmaking on the conduct of the business.139 In performing this analysis, "the Region should focus on whether the employer's decision was based on labor costs or other factors that would be amenable to the bargaining process."140

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136. *Id.* at 686 n.22.
138. *Id.* at E-1 n.11.
139. *Id.* at E-1. Burdens on the decisionmaking of the employer would be present if there was a "great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies." *First Nat'l Maint. Corp.*, 452 U.S. at 682-83.
140. Guidelines, *supra* note 137, at E-1. The Board's position on relocations of work from a unionized plant to another facility during the term of a collective bargaining agreement shifted dramatically in the *Illinois Coil Spring* cases. In Milwaukee Spring Division of Illinois Coil Spring Company, 265 N.L.R.B. No. 28 (Oct. 22, 1982), the Board held that it was an unfair labor practice under section 8(d) for an employer to relocate bargaining unit work during the life of a collective bargaining agreement without union consent, if the reason for that relocation was to escape the labor costs of the agreement. That decision was reversed by the Board in Milwaukee Spring Division of Illinois Coil Spring Company, 268 N.L.R.B. No. 87 (Jan. 23, 1984), where the Board held that § 8(d) requires an employer to obtain a union's consent before implementing a mid-term relocation only if the change is in a mandatory term or condition "contained in" the
A more straightforward approach, adopted by a District Court that enjoined a relocation, is to distinguish FN M and to hold that Fibreboard Paper Products v. NLRB is controlling: "While an employer has the right to close its business without bargaining, it may not relocate or subcontract the bargaining unit work without first negotiating to impasse in good faith."\(^{141}\) Thus there is a strong possibility that neutrality agreements will be a mandatory subject of bargaining whenever an employer attempts to transfer his operations to a new location.

Finally, "effects bargaining" over the decision to close or to relocate a plant gives considerable opportunity for discussion of methods of facilitating union organizing.\(^{142}\) The Supreme Court stated in FN M that a union may achieve "valuable concessions" through "effects bargaining," including contract clauses providing for interplant transfers and relocation allowances.\(^{143}\)

In sum, the mandatory/permissive distinction between subjects of collective bargaining is likely to have a minimal effect on bargaining over neutrality agreements. Such an agreement is likely to be considered a mandatory subject of bargaining by itself or as part of the discussion of another mandatory issue. Even if it is considered a permissive subject of bargaining, it will be discussed seriously.

B. Attacking the Legality of Neutrality Agreements Under Section 8(a)(2)

The attack on the legality of neutrality agreements as "unlawful support" in violation of section 8(a)(2) is made by management attorneys, led by Andrew Kramer, in law review articles and seminars,\(^{144}\) but the issue has not been considered by any court. Section 8(a)(2) makes it an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization contract. The majority of the Board found it unnecessary to decide whether work relocation was a mandatory subject of bargaining. Decision of NLRB in Milwaukee Spring Division of Illinois Coil Spring Co., Daily Lab. Rep. (BNA) No. 16, at G-1, n.5 (Jan. 25, 1984). Furthermore, the parties had stipulated that the employer had satisfied its obligation to bargain with the union and was willing to engage in effects bargaining with the union. Id. at G-1. Therefore, the Illinois Coil Spring cases do not affect the determination that plant relocation is a mandatory subject of bargaining.


142. For instance, the selling of a plant would place the employer under a duty to bargain about preferential hiring provisions and interplant transfer clauses, both of which can greatly facilitate unionization efforts at unorganized plants. See 452 U.S. at 681 ("There is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the "effects" bargaining mandated by § 8(a)(5).")

143. Id. at 682.

144. Kramer, Miller & Bierman, supra note 2; Kramer, supra note 89.
EMPLOYER NEUTRALITY

or contribute financial or other support to it.” The “critical question” posed by opponents of neutrality agreements is “where on the continuum between lawful cooperation and unlawful support neutrality agreements fall.” Although they concede that there is “nothing wrong per se” with employers agreeing to waive traditional management rights, such as the right to speak out against a union during an organizing drive, the critics of neutrality agreements assert that such agreements represent unlawful assistance or support because they interfere with the rights of rival unions and individual employees.

The basic thrust of the argument that neutrality agreements violate the rights of rival unions is that acceptance of a neutrality agreement by an employer confers a “certain status” on the signatory union. That status allegedly “derives from the employer’s actions in accepting the union’s capacity to enter into an agreement applicable to a facility in which it has not won a representation election,” and thus gives an unfair and continuing advantage to the “favored union.”

That argument is not only misleading, but also is inconsistent with recent trends in the law regarding employer conduct towards rival unions. First, it is undisputed that an employer lawfully can make a non-coercive declaration of preference for one union and can maintain silence during an organizing campaign. There are no convincing reasons for believing that the “certain status” conferred by neutrality agreements “far exceeds” a public declaration of support for a union by the employer. Second, employer preference for one union is considered unlawful support only where the employer engages in discriminatory conduct such as soliciting authorization cards for one union or using a lockout or other coercive means to force employees to join a union. There is no evidence that neutrality agreements have been or will be applied discriminatorily.

Third, and most important, the NLRB has abandoned its longstanding efforts to extend the Midwest Piping doctrine to impose strict neutrality on employer conduct when rival unions are attempting to organize. In 1982, the requirement of strict neutrality for employers

146. Kramer, Miller & Bierman, supra note 2, at 64.
147. Id. at 64-65.
148. Id. at 66.
149. Id.
150. Id. at 65 (citing Rold Gold of Cal., Inc., 123 N.L.R.B. 285, 286 (1959)).
151. But see id. at 66.
152. Id. at 65.
153. Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945). The Board will continue to apply the “strict neutrality” doctrine of Midwest Piping where there are two or more labor unions with pending petitions. Abraham Grossman, 262 N.L.R.B. No. 955, 957 n.13 (1982). But several circuit courts have rejected Midwest Piping completely. E.g., NLRB v. Inter-Island Resorts, Ltd., and ILWU Local 142, 507 F.2d 411 (9th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); Suburban
was eliminated in two situations: where rival unions are in initial organizing campaigns, and where an incumbent union and a rival outside union have competing representation petitions. In *Abraham Grossman*, the Board held that “we will no longer find 8(a)(2) violations in rival union, initial organizing situations when an employer recognizes a labor organization which represents an uncoerced, unassisted majority, before a valid petition for an election has been filed with the Board.” The Board’s reasoning was that “[m]aking the filing of a valid petition the operative event for the imposition of strict neutrality in rival union, initial organizing situations will establish a clearly defined rule of conduct and encourage both employee free choice and industrial stability.” In a companion case, *RCA del Caribe, Inc.*, the Board held that

[T]he mere filing of a representation petition by an outside, challenging union will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union. Under this rule, an employer will not violate Section 8(a)(2) by postpetition negotiations or execution of a contract with an incumbent, but an employer will violate Section 8(a)(5) by withdrawing from bargaining based solely on the fact that a petition has been filed by an outside union.

The policy of promoting industrial stability also supports the legality of neutrality agreements. If an employer can recognize a union on the basis of authorization cards in the face of another union’s organizing efforts, it should be able to agree to remain neutral towards one union’s organizing efforts when another union has not even begun organizing efforts.

The concern of some management attorneys for the rights of rival unions blinks at reality and assumes gullibility. Most of the unions that have negotiated neutrality agreements, such as the UAW and Steelworkers, have long-standing relationships with the signatory employer and well-defined jurisdictions. Moreover, inter-union rivalries usually do not play a large role in representation elections because there are a low number of “two-union” elections, and these elections are over-
The attack on the legality of neutrality agreements under section 8(a)(2) also has been clothed as a defense of the rights of individual employees. The basic issue is whether neutrality agreements violate employees' section 7 rights to a "free and unfettered choice" of their bargaining representative. Cooperation, such as that manifested by neutrality agreements, does not violate section 8(a)(2) "so long as the acts of cooperation do not interfere with the freedom of choice of the employees." Mere cooperation of the employer with the union with respect to organizing does not constitute unlawful assistance under section 8(a)(2). One of the major purposes of the NLRA was to promote industrial stability by encouraging cooperation between labor and management.

It is difficult to see why neutrality agreements are more inhibiting to employees in their choice of bargaining representatives than public declarations of support, voluntary silence, or vigorous opposition by the employer. Showing some "deference to the union" is not unlawful, and certainly does not approach the problem of financial and material assistance associated with "company unions." The assertion that neutrality agreements would lead to a situation where "employees unwilling to incur the wrath of their employer may feel compelled to vote for the favored union" is a misleading twist on the "company union" problem. In reality, neutrality agreements have not inhibited the freedom of choice of employees, as is evidenced by the willingness of employees to form anti-union groups and to reject the "favored union" despite a neutrality agreement.

From a more general perspective, the use of section 8(a)(2) to attack the legality of neutrality agreements is a fundamental misrepresentation of the legislative purpose of that section. The problem that led to the adoption of section 8(a)(2) was the prevalence of the "com-

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159. In 1980, there were 7,745 one-union elections, 424 two-union elections, and 29 three-or-more union elections. 45 NLRB ANN. REP. 269-70 (1980) (Table 13). Unions won 74.5% of the two-union elections and 86.2% of the three-or-more union elections, but only 43.9% of the one-union elections. Id.


163. See Continental Distilling Sales v. NLRB, 348 F.2d 246 (7th Cir. 1965); Chicago Rawhide Mfg. v. NLRB, 221 F.2d 165 (7th Cir. 1955).

164. Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974), cert. denied, 423 U.S. 875 (1975); NLRB v. Magic Slacks, Inc., 314 F.2d 844 (7th Cir. 1963); Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165 (7th Cir. 1955).

165. Kramer, Miller, & Bierman, supra note 2, at 68-69.

166. See infra note 235 and accompanying text.
pany union," as is clearly stated throughout the legislative history.\(^\text{167}\) Section 8(a)(2) was enacted as part of the original Wagner Act of 1935, which was interpreted at that time to require complete employer neutrality.\(^\text{168}\) The main purpose of section 8(a)(2) was to protect workers by encouraging the employer to "refrain from any action which will place him on both sides of the bargaining table."\(^\text{169}\) Employer domination of a union was considered harmful to the interests of individual employees because it undercut the bargaining power of the union. By contrast, neutrality agreements pose no danger that companies will dominate or interfere with the union. In fact, neutrality agreements are proof that unions have strong bargaining power. Thus, the attempt to use section 8(a)(2) to attack neutrality agreements ignores that section's legislative history and distorts its legislative purpose.

A second omission in the 8(a)(2) attack on neutrality agreements is the failure to distinguish between employer domination and illegal assistance. The former, the "company union" problem, is remedied by disestablishing the union. Where only illegal assistance is found, the NLRB will order that union recognition be withheld until it has certified the union and the election results.\(^\text{170}\)

A third aspect of labor law ignored by the 8(a)(2) attack of neutrality agreements is the strong policy in favor of upholding freely negotiated contractual commitments between unions and employers.\(^\text{171}\) As the Supreme Court has stated, "One of the fundamental policies [of the NLRA] is freedom of contract."\(^\text{172}\) Such contractual commitments are upheld as a form of labor-management cooperation and are expected to have an impact on the rights of individual employees.\(^\text{173}\) The


\(^{169}\) NLRB v. Mt. Clemens Metal Prods., 287 F.2d 790, 791 (6th Cir. 1961); Nassau & Suffolk Contractors Ass'n, 118 N.L.R.B. 174 (1957).

\(^{170}\) R. Gorman, supra note 159, at 197.

\(^{171}\) Andrew Kramer recognized in his address to the National Association of Manufacturers that

Whether or not neutrality agreements will, in fact, be found by the [NLRB] to violate section 8(a)(2) . . . is questionable. The NLRB has exhibited a distinct predilection toward upholding contractual commitments between unions and employers even where such agreements tend to directly impinge on the rights of individual employees.

Kramer, supra note 89, at D-6. This point was not mentioned in his law review article. See Kramer, Miller & Bierman, supra note 2.


\(^{173}\) The NLRB has upheld contractual agreements where the union promised not to attempt to organize certain groups of employees. See Allis-Chalmers Mfg. Co., 179 N.L.R.B. 1 (1969); Briggs Indus. Corp., 63 N.L.R.B. 1270 (1945). A union's no-strike pledge also was enforced despite its effect on the rights of individual employees to strike. See Boys Markets, Inc. v. Retail
clear import of these policies is that an employer’s contractual waiver of its free speech rights will not constitute “illegal assistance,” because such a waiver does not unlawfully violate the freedom of choice of employees.

C. Neutrality Agreements and Free Speech

An employer is guaranteed the right to exercise, or not to exercise, its freedom to speak out during union organizing campaigns. The employer’s first amendment right to free speech is protected by section 8(c) of the NLRA, which states:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of 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.

Thus, section 8(c) limits the employer’s first amendment rights in the labor relations context: the employer’s exercise of its free speech rights cannot interfere or coerce employees in their exercise of their rights to choose whether to unionize. Hence, coercive employer speech is unlawful whether or not it is in violation of a neutrality agreement.

Everyone agrees that employers are not required to speak out during union organizing campaigns, but instead are free to refrain voluntarily from exercising their free speech rights. The issue in contention is whether the employer can legally commit itself to refrain from exercising its free speech rights by executing a waiver of its statutory and constitutional free speech rights.

There is a high standard for inferring a waiver of constitutional rights, but neutrality agreements are very likely to meet this standard. The standard that will be applied to validate an employer’s waiver of its free speech rights is that the waiver be “voluntarily, intelligently, and knowingly” made, “with full awareness of the legal

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175. See NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (“[a]ny assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting”); Florida Steel Co. v. NLRB, 587 F.2d 735, 752 (5th Cir. 1979).

176. See Gissel, 395 U.S. at 617.

177. Kramer, Miller & Bierman, supra note 2, at 73.
The waiver standard of Overmyer will be applied strictly. As a preliminary matter, the existence of a waiver must be clearly demonstrated by specific contractual language. The NLRB has found that waivers of statutory rights like the right to strike "will not be readily inferred, and there must be a clear and unmistakeable showing that waiver occurred." Moreover, waivers of first amendment rights are inferred only when there is "clear and compelling" evidence of a waiver, and such voluntary waivers will be narrowly construed.

Despite that strict standard, it should be quite easy to infer that a neutrality agreement is a valid waiver of an employer's statutory and constitutional free speech rights. The only court to consider that issue found "clear and compelling, even undisputed" evidence of a valid waiver in the fact that a corporation had voluntarily signed a neutrality agreement with a union.

Several other factors, however, also are important in determining whether there is "clear and compelling" evidence of a waiver. Those factors, set out in *D.H. Overmyer Co. v. Frick Co.*, reflect judicial concern that waivers may be the result of a coercive bargaining process.

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180. *Overmyer* held that an execution of a cognovit provision, which allows a creditor to obtain a judgment without notice or hearing, was a valid waiver of the debtor's due process rights. 405 U.S. at 187. The Court found the standard for waiver in a corporate-property-right case to be the same as in a criminal proceeding. *Id.* at 185 (citing Illinois v. Allen, 397 U.S. 337, 342-43 (1970); Brady v. United States, 397 U.S. 742, 748 (1970); Miranda v. Arizona, 384 U.S. 436, 444 (1966); Fay v. Noia, 372 U.S. 391, 439 (1963); Johnson v. Zerbst, 304 U.S. 458, 465 (1938)). Some commentators have assumed that the *Overmyer* standard applies in all noncriminal proceedings. See L. Tribe, *American Constitutional Law* § 10-17, at 556-57 (1978). Others believe that because *Overmyer* was confined to a waiver of due process rights to notice and hearing before civil judgment, the Court "did not decide whether a lower standard could be applied in civil cases." Auto Workers v. Dana Corp., 110 L.R.R.M. (BNA) at 2527.

181. Fuentes v. Shevin, 407 U.S. 67, 95 (1970) ("We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver."); Brady v. Maryland, 397 U.S. 742, 748 (1970) (admission in open court required for guilty plea).


183. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967); Auto Workers v. Dana Corp., 110 L.R.R.M. (BNA) 2519, 2527 (6th Cir. 1982); Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686, 690 (6th Cir. 1981); *In re* Halkin, 598 F.2d 176, 189 (D.C. Cir. 1979). In the due process area, the Supreme Court has said that courts should "indulge every reasonable presumption against waiver." *See* Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); *see also* L. Tribe, *supra* note 173, at 556.


between parties with unequal bargaining power. The Overmyer court hedged its finding that a valid waiver existed by stating:

Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue. 185

The application of those factors to the UAW-Dana Corporation neutrality agreement by the Sixth Circuit in Auto Workers v. Dana Corp. 186 was an appropriate analysis that should serve as a model for future examinations of the waiver issue in neutrality agreements.

The court in Dana Corp. emphasized that the neutrality agreement was part of the collective bargaining contract. 187 Both parties to a collective bargaining pact understand that its provisions are enforceable under section 301(a) of the Labor-Management Relations Act. 188 The collective bargaining process thus ensures that there is no lack of awareness or understanding of the legal effect of the waiver contained in a neutrality agreement. In addition, the formalized process of collective bargaining between a large corporation and a large union minimizes the possibility that a neutrality agreement is a contract of adhesion or a result of a disparity in bargaining power. It also ensures that there is sufficient consideration for the neutrality agreement, because employers can demand concessions in other areas before the waiver is executed. Finally, the employer is not rendered defenseless by a neutrality agreement, because there are often provisions for arbitration or for a right to respond when there are “demeaning” union statements. 189

In response to such an analysis, opponents of neutrality agreements assert that an employer’s waiver of its free speech rights contravenes the NLRA’s statutory policy of encouraging “free debate,” and that a union’s policy of favoring neutrality agreements is therefore “misguided and paternalistic.” 190 Those opponents flout their own assertions by seeking to restrict the freedom of contract of unions and employers in the collective bargaining process. Moreover, employers who accept neutrality agreements receive benefits in return, often in the form of a no-strike clause in the labor contract. The Dana Corp. court recognized the potential inequities of not enforcing a valid waiver executed by the employer, stating:

185. Id. at 188.
186. 110 L.R.R.M. (BNA) 2519.
187. Id. at 2528.
189. See supra notes 120-25 and accompanying text.
190. Dana Corp., 110 L.R.R.M. (BNA) 2519, 2531 (Martin, J., dissenting); see Kramer, Miller & Bierman, supra note 2, at 73-74.
The strong public policy of this nation, as expressed repeatedly by Congress in favor of the free association of employees and collective bargaining, does not permit this court to enforce the First Amendment waiver implicit in a no-strike clause but not that of a corporate promise of neutrality.\footnote{191}{110 L.R.R.M. (BNA) at 2528. Even Judge Martin’s dissent “agree[s] in principle that, under appropriate circumstances, a company may validly waive its First Amendment rights and agree to remain neutral in the face of union organizing efforts, as a matter of corporate policy.” Id. at 2530.}

A further argument propounded by those opposing an employer’s freedom to waive its free speech rights is that such a waiver violates the right of employees to vote in free and open elections.\footnote{192}{Kramer, Miller & Bierman, supra note 2, at 75.} It is wholly unreasonable to think that neutrality agreements unlawfully affect the right of employees to make an uncoerced choice on union representation, especially in light of the presence of “reserved rights” for employers in many neutrality agreements. Neutrality agreements are consistent with the established policy of upholding contractual commitments between unions and employers even though there may be a great impact on the right of individual employees to unionize.\footnote{193}{See supra notes 233-37 and accompanying text.} Employers have no standing to assert the first amendment rights of their employees to listen to their communications.\footnote{194}{The established rule is that “one may not claim standing to vindicate the constitutional rights of some third party.” Barrows v. Jackson, 346 U.S. 249, 255 (1953); Dana Corp., 110 L.R.R.M. (BNA) at 2528.} Finally, the view that employees are legally entitled to information from the employer is, of course, inconsistent with the employer’s freedom to refrain voluntarily from participation in the election campaign, either pursuant to an informal corporate policy or a formal neutrality agreement. In sum, a neutrality agreement is a valid waiver of an employer’s free speech rights that should be supported by appropriate enforcement mechanisms, which are the next subject of discussion.

\section*{D. Enforcement of Neutrality Agreements under the National Labor Relations Act}

Neutrality agreements will be effective only if strong remedies are used to enforce them. Several methods of enforcing neutrality agreements have been developed. This section will evaluate the appropriateness and effectiveness of each of these enforcement measures.

\subsection*{1. Informal Enforcement}

A neutrality agreement between an employer and a union that have an open and mature relationship may be enforced through informal means. For instance, the UAW and GM have held special meet-
ings during contract negotiations to discuss alleged violations of their employer neutrality agreement.¹⁹⁵ Such informal attempts at enforcement will be particularly effective atremedying violations resulting from the actions of local plant management personnel who are not aware, do not understand, or choose to disobey an employer's policy of remaining neutral during union organizing drives.¹⁹⁶

There are, however, several disadvantages to informal enforcement efforts. Many unions, unlike the UAW, do not possess sufficient bargaining power to press for an informal discussion on enforcement of neutrality agreements.¹⁹⁷ Moreover, local plant management may resist even the strongest signal from the company that they should remain neutral.¹⁹⁸ In Southern communities the local plant management may face considerable community pressure to resist unionization.¹⁹⁹ Finally, if informal enforcement efforts fail, the union organizing effort may be severely hampered before other methods of enforcement can be pursued.

2. Enforcement by the NLRB

The NLRB has broad remedial powers to correct abuses during organizing campaigns.²⁰⁰ The Board has the power to create novel remedies that meet the unique circumstances of each case.²⁰¹ Further, judicial review by the United States courts of appeals will be very limited; great deference is given to the Board as long as its remedies are rationally related to the purposes of the NLRA.²⁰²

¹⁹⁶. See supra notes 133-35 and accompanying text.
¹⁹⁷. See Sheinkman, supra note 12, at 6.
¹⁹⁸. For instance, the president of a subsidiary of Dana Corporation delivered an hour-long coercive speech the day after a temporary restraining order was issued by a federal district court to enjoin his violations of a neutrality agreement between the parent corporation and the union. See Auto Workers v. Dana Corp., 110 L.R.R.M. (BNA) 2519, 2522 (6th Cir. 1982).
²⁰¹. The federal courts will not substitute their judgment for the NLRB's judgment in determining how best to remedy unfair labor practices. See NLRB v. Link-Belt Co., 311 U.S. 584, 600 (1941); Int'l Ass'n of Machinists, Lodge 35 v. NLRB, 311 U.S. 72, 82 (1940). As the Supreme Court has stated that, "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress." NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 348 (1938).
²⁰². See, e.g., NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953) (limited review consistent with congressional intent to grant the Board exclusive remedial authority); Int'l Ass'n of Machinists, Lodge 35 v. NLRB, 311 U.S. 72, 82 (1940) (Board's "expert judgment"); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945) ("experienced officials with an adequate appreciation of the complexities of the subject"); Amalgamated Local Union 355 v. NLRB, 481 F.2d 996, 1006 (2d Cir. 1973) ("deference paid by reviewing courts when such choices have been delib-
The NLRB has used its remedial powers, albeit infrequently, to address violations of employer neutrality pledges. In one instance, an NLRB hearing officer who found evidence to support UAW charges that GM had violated its neutrality pledge invalidated the results of an election and ordered another election. In addition to making the validity of the election depend on adherence to a neutrality pledge, the NLRB could also apply remedial measures similar to those it uses in remediating coercive employer speech. Such measures might include requiring public reaffirmations of neutrality by company officials, the posting of notices reaffirming neutrality on bulletin boards, and providing union officials with equal access to employees.

One disadvantage of relying on the NLRB to enforce neutrality agreements is that the agency may be reluctant to take strong action to enforce a contract term that is subject to arbitration. Furthermore, the severe reductions in the NLRB’s budget may result in an unwillingness to devote scarce resources to enforcement efforts in new areas such as neutrality.

3. Enforcement by Arbitration

Neutrality agreements generally are enforceable through grievance and arbitration provisions. Some agreements specifically provide for arbitration if violations of the neutrality pledge are alleged. Courts may provide for arbitration by ruling that a violation of a neutrality agreement is “on its face a breach of an agreement between [the union and employer] and thus is arbitrable under the terms of the applicable

erately and rationally made”). The Board’s remedies, however, must be rationally related to carrying out the policies of the Act. See Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943) (remedies “which can fairly be said to effectuate the policies of the Act”); H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) (“The Board’s remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of the fundamental policies is the freedom of contract.”).


204. Some precedent for these remedies is present in the Dana Corp. case, where the remedies for Dana’s contempt in refusing to obey a temporary restraining order included: (1) sending a written communication to each employee repudiating the president’s statements and reaffirming the neutrality agreement; (2) giving equal access to the plant for the union to address the employees; and (3) clearing the bulletin boards of anti-union literature and reserving half the space for union use. See UAW v. Dana Corp., 104 L.R.R.M. (BNA) 2687 (N.D. Ohio 1980), aff’d, 110 L.R.R.M. (BNA) 2519 (6th Cir. 1982); see also Kramer, Miller & Bierman, supra note 2, at 60 n.133.

The issue whether violations of a neutrality pledge could support a bargaining order is uncertain.

205. See, e.g., URW-B.F. Goodrich Neutrality Agreement, supra note 74, at D-3 (¶ 6 of the memorandum of agreement); Steelworkers-Wheeling-Pittsburgh Steel Corp., supra note 102, at D-2. But the latter agreement also gives the union the right to get an injunction without first going through the grievance and arbitration provision. Id. at D-5.
NEUTRALITY agreements may also provide special arbitration procedures for adjudicating and remedying alleged violations of a neutrality pledge. For instance, the URW-B.F. Goodrich neutrality agreement provides for an expedited arbitration procedure, and empowers the arbitrator "to direct the offending party to make an immediate public disclaimer of the offense and state that such actions are in violation of the agreement." 207

An arbitrator has very broad remedial powers to correct violations of a neutrality agreement. In Dana Corp., the only arbitration decision to address violations of a neutrality agreement, the arbitrator devised a broad array of remedies, including a letter by the president repudiating his conduct and pledging neutrality; a company pledge to remain neutral and to remove all anti-union material; equal access for the union to respond to the president's speech; and a money award of $10,000 for lost benefits of the organizing campaign. 208

An arbitrator's decision on relief for alleged violations of a neutrality agreement is subject to limited judicial review. A labor arbitration decision must be upheld if the award "draws its essence from the collective bargaining agreement" and is not an abuse of discretion. 209

Even though arbitration may be a very effective mechanism for post-election enforcement of neutrality agreements, it has several shortcomings as a pre-election enforcement device. First, the employer can refuse or can delay response to the union’s demands for arbitration. Second, if the employer refuses to accept an arbitrator's decision, then enforcement proceedings will produce further delay. Most importantly, arbitration is ineffective as a way to cure neutrality violations that occur immediately before an election. In Dana Corp., the most egregious violations of neutrality by the employer occurred between ten and two days before the election. The union withdrew its election petition when the company refused to postpone the election, despite

207. URW-B.F. Goodrich Neutrality Agreement, supra note 74, at D-3 ($ 6 of memorandum of agreement).
209. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). Kramer raises the issue of whether an arbitrator will rule on the legality of a neutrality agreement, but this seems to be an unimportant issue now that courts have accepted the legality of such agreements. See Kramer, Miller & Bierman, supra note 2, at 62.
210. This is exactly what happened in the Dana Corp. case, where the corporation canceled one arbitration hearing and refused to respond to a later union request for arbitration a week before the election. See Auto Workers v. Dana Corp., 110 L.R.R.M. (BNA) at 2521-22.
requests by the union and the district court. The arbitration process was not completed until eight months later.

4. Injunctive Relief Pending Arbitration

The ineffectiveness of arbitration as an enforcement mechanism for neutrality agreements raises the issue of the appropriateness and effectiveness of injunctive relief as a pre-election means of enforcing neutrality agreements.

The leading case of *Auto Workers v. Dana Corp.* presents several strong arguments that injunctive relief is a proper and necessary remedy for violations of a neutrality agreement. The facts of *Dana Corp.* demonstrate that injunctive relief may be the only appropriate remedy for violations of a neutrality agreement.

In December 1979, the UAW petitioned for an election at Wix Corporation and informed Dana, Wix's parent corporation, that it was expecting compliance with the UAW-Dana Corp. neutrality agreement during the campaign leading up to the June 12, 1980 election. In April 1980, the president of Wix sent a letter to the employees telling them that Dana was opposed to unionization and warning them about the effects of unionization. The UAW protested, and Dana reaffirmed its neutrality, but continued disagreements between the UAW and Dana led the UAW to appeal for arbitration. Dana cancelled the May 16 arbitration hearing, and the parties postponed the May 24 hearing upon Dana's reassurance that it would remain neutral.

On June 2, the president of Wix sent a letter to employees which opened with "Are you willing to take a risk that we will have a vicious union strike here at Wix in the next year?," and threatened strikers with the loss of jobs "forever" because "we have every intention of exercising our right to replace strikers to keep these plants in operation." On June 5, the union received that letter and demanded immediate arbitration, but received no response from Dana. On June 9, the union obtained a temporary restraining order prohibiting Dana from making "anti-union and anti-UAW" statements. The very next day the president of Wix gave an hour-long speech to each shift of employees, in which he said "unions, particularly the UAW, were no better than communists, and that he would prefer Russia to a union plant," made a series of threats, and concluded "Keep these threats in mind when you sign the authorization card and vote this union in."

211. *Id.* at 2523.
212. See supra note 208.
214. See 110 L.R.R.M. (BNA) at 2521-23.
On June 11, the UAW filed a motion for a district court order for Dana to show cause why it should not be held in contempt. The hearing was set for June 12, the same day as the election. The union and district court asked Dana to agree to postpone the election, but the company refused. The UAW then withdrew its election petition. The district court entered a contempt judgment against Dana on June 20 and a preliminary injunction on June 27. Those orders were affirmed by the United States Court of Appeals for the Sixth Circuit in June 1982.

The arbitration award previously discussed was not made until February 1981, and the UAW still had to threaten federal court action to get the award enforced. The ironic end to the case was that the UAW lost the representation election at Wix Corporation in late August 1981.

The issue whether to grant injunctive relief in cases such as Dana Corp. requires fitting neutrality agreements into the special legal framework governing the use of injunctions in a labor dispute. The Norris-LaGuardia Act reacted to the use of injunctions against union strikes by explicitly withdrawing the jurisdiction of federal courts to issue any type of injunction in cases arising from or involving labor disputes. The Taft-Hartley Act, without repealing the Norris-LaGuardia provisions, allowed injunctions to enforce collective bargaining contracts.

Those two statutory provisions were reconciled in Textile Workers Union v. Lincoln Mills, where the Supreme Court held that federal courts have jurisdiction to enforce agreements to arbitrate pursuant to a collective bargaining agreement. The policy of protecting the arbitration procedure was further advanced in Boys Market, Inc. v. Retail Clerks Local 770, where the Court held that a strike over an arbitrable grievance could be enjoined. However, that exception was intended to be a "narrow one":

A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides

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215. See supra note 208 and accompanying text.
219. See 29 U.S.C. § 185(a) (1976), which provides that:
Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract does have that effect; ... Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.222

The requirement that the strike be enjoined over a grievance which the parties had agreed to arbitrate is an important one. The Supreme Court adopted that requirement in Buffalo Forge Co. v. United Steelworkers,223 which held that the Norris-LaGuardia Act prohibits a federal district court from enjoining a sympathy strike, despite the presence of arbitration provisions and a no-strike clause in the collective bargaining agreement.

The argument against the use of injunctive relief to remedy violations of neutrality agreements rests on that requirement. The argument is:

In Dana the court was not faced with a Boys Market situation of a strike precipitated by an alleged contractual violation. The facts of Dana presented instead only an alleged violation of the neutrality agreement itself. Under such circumstances, the controlling precedent is Buffalo Forge, and the appropriate remedy is not to enjoin the alleged breach of contract but rather simply to compel the parties to arbitrate the dispute.224

That argument is deceptively simple, and clearly false. The arguments for injunctive relief to enjoin violations of a neutrality agreement in a case such as Dana Corp. are very strong. Unless injunctive relief is permitted, the subsequent arbitration becomes a "hollow formality."225 The damage to union organizing efforts has been done; the election is over. The union, in addition, will lose all the benefits of its bargain (the neutrality agreement) if the employer is allowed to violate the agreement up to the election. Finally, denying injunctive relief would frustrate the arbitration process. The employer would have the incentive to delay or to reject the arbitration process until after the election occurs or the union withdraws its petition.

The main point of Boys Market was that a strike over a dispute

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222. Id at 254 (quoting Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting)).
that the parties had agreed to arbitrate would deprive the employer of his bargain, namely the union's promise not to strike, and would frustrate the arbitration process.\textsuperscript{226} It should be no surprise that employer self-help measures which similarly undermine the arbitration process should be enjoined.\textsuperscript{227} Moreover, the sympathy strike in \textit{Buffalo Forge} was not called as a result of a grievance that the union had with the employer. A sympathy strike to support another union is not an issue which the parties have agreed to submit to arbitration, and thus is not an effort to avoid an obligation to arbitrate. By contrast, parties to a neutrality agreement expressly agree to submit any disputes regarding the agreement to arbitration, and employer self-help before the election is an effort to avoid arbitration, which becomes a "hollow formality"\textsuperscript{228} after the election.

V

\textbf{PROSPECTS FOR NEUTRALITY AGREEMENTS}

Neutrality pledges will be increasingly effective in facilitating union organizing efforts, and of far-reaching significance to labor-management relations, if they can be developed and extended in three ways. First, neutrality pledges can serve as a catalyst to secure other pledges by management to facilitate union organizing, such as employer pledges to adopt preferential hiring practices, to apply interplant transfer provisions to new plants, or to recognize the union through a majority of signed authorization cards. Second, neutrality agreements and other management pledges to facilitate union organizing will be much more effective if they are integrated into a network of job security provisions that restrict management's rights to relocate its plants to nonunion areas in the Sunbelt. Third, extending neutrality agreements to facilitate white-collar organizing efforts could greatly increase both the strength of unions in many industries and the utility and desirability of neutrality agreements.

\textbf{A. Extending Neutrality Agreements to Secure Other Management Pledges to Cooperate in Union Organizing}

Neutrality agreements may be a major first step in persuading management to render additional cooperation in facilitating union organizing of new plants or relocated plants that are not organized. Additional cooperative measures may include preferential hiring

\textsuperscript{226} 398 U.S. at 249 ("Indeed, the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures.").

\textsuperscript{227} \textit{See} Auto Workers v. Dana Corp., 110 L.R.R.M. (BNA) at 2524.

\textsuperscript{228} \textit{Id.} at 2525.
agreements, “transfer of operations” clauses that give automatic recognition to the union in new plants, and agreements to recognize the union through a majority of signed authorization cards. Those possible extensions of the simple neutrality agreement will be reviewed in the context of the UAW-GM negotiations of 1976 to 1983, which provide an excellent case study of how a neutrality agreement can lead to additional agreements by management to facilitate union organizing.

The UAW’s neutrality strategy was a response to General Motor’s “Southern Strategy”—“moving existing plants to the South and targeting southern states for future expansion.”\(^{229}\) During the 1976-1979 period, both the UAW and the IUE consistently accused GM of deterring organizing efforts in the South.\(^{230}\) The unions specifically charged that GM facilities in the South would not hire people with union backgrounds or sympathies.\(^{231}\)

The UAW’s great success in organizing GM’s southern plants following the 1976 UAW-GM neutrality letter agreement demonstrates that a neutrality pledge can be very effective in facilitating union organizing. During 1979 the UAW won at least eight representation elections, mostly in the Sunbelt,\(^{232}\) including elections at the last unorganized assembly plant\(^{233}\) and at a plant that had withstood organizing efforts since 1954.\(^{234}\) The only losses for a UAW organizing drive at a southern plant since the 1976 neutrality agreement were three consecutive defeats at a steering plant in Alabama.\(^{235}\)

Part of the UAW’s success in organizing GM’s southern plants is attributable to a “preferential consideration” agreement, which was GM’s first extension of employer neutrality beyond the neutrality agreement. Preferential hiring clauses were sought by the UAW and IUE as extensions of the 1976 neutrality clause because GM had allegedly deterred organizing efforts by not hiring people with union sympathies.\(^{236}\)

\(^{229}\) Axelrod, supra note 12, at 148.


\(^{232}\) See Employees at General Motors Plant in Virginia Choose Representation by United Auto Workers, DAILY LAB. REP. (BNA) No. 175, at A-1 (Sept. 7, 1979) (GM facilities in Tuscaloosa, Ala., Albany, Ga., Broadview, Ill., Shreveport, La., Three Rivers, Mich., and Oklahoma City, Okla.).

\(^{233}\) Auto Workers Win NLRB Representation Election at New General Motors Plant in Oklahoma, DAILY LAB. REP. (BNA) No. 141, at A-7 (July 20, 1979).


\(^{235}\) UAW Fails in Third Attempt to Organize General Motors Workers at Alabama Plant, DAILY LAB. REP. (BNA) No. 19, at A-1 (Jan. 29, 1981); see Auto Workers Fail in Bid to Represent General Motors’ Largest Nonunion Plant, DAILY LAB. REP. (BNA) No. 130, at A-12 (July 3, 1980).
The UAW preferential hiring provision, negotiated in 1978, gives UAW workers at existing GM plants priority in transferring to new nonunion facilities. The agreement allows UAW employees to apply for transfer while in their current positions, to carry over their pensions and benefits to the new plants, and to receive a travel allowance to visit the new plant. The main benefit of a preferential hiring provision for union organizing efforts is that it provides a "potential core" of union members inside the nonunion plant, which greatly increases the chances of victory in a representation election.

The next major concession by GM that facilitated union organizing was the application of the "transfer of major operations" clause, one of the interplant transfer provisions in the general agreement, to give automatic recognition to the union in new facilities. That extension of neutrality is especially important because interplant transfer provisions have become a common feature in recent bargaining agreements.

A third extension of employer neutrality to facilitate organizing is an agreement by management to accept recognition of the union through a majority of signed authorization cards. Although elections are more favored than authorization cards as a method for demonstrating majority support, an employer may agree to rely upon a card check to recognize the union and to enter into a collective bargaining relationship. An employer's freedom to accept a majority of authoriza-

236. BLS Report, supra note 231, at F-2; IUE Says General Motors has Agreed to Permit Transfers to Southern Plants, DAILY LAB. REP. (BNA) No. 216, at A-7 (Nov. 7, 1978).
238. Craft, supra note 78, at 763.
239. Id.
240. Approximately 35% of the collective bargaining agreements examined by the Bureau of Labor Statistics in 1980-1981 had some provision allowing for interplant transfer to some or all plants of a company or between companies. BLS Study of Contract Provisions on Interplant Transfer Rights, ch. 3, Interplant Transfer Rights and Preferential Hiring Arrangements, reprinted in DAILY LAB. REP. (BNA) No. 167, at D-1 (Aug. 28, 1981). Provisions for interplant transfer applied to 3.4 million (49 percent) of the 6.9 million workers involved. Of 769 manufacturing agreements, 283 (37 percent) contained interplant transfer provisions, covering 1.8 million workers. These provisions were most prevalent in the food; primary and fabricated metals; nonelectrical machinery; transportation equipment; and stone, clay, and glass industries; and were rare or nonexistent in tobacco, apparel, and furniture.

In nonmanufacturing, 269 (33 percent) of 824 agreements had interplant transfer provisions applying to 1.6 million workers. These clauses were frequently found in transportation, communications, utilities, and wholesale and retail trade, industries in which the nature of the operations and changes in demand for services often necessitate frequent transfers of employees.

tion cards as a basis for recognizing the union implies that it has the power to negotiate a provision in a collective bargaining agreement binding it to do that.

"Card-check agreements" are becoming increasingly popular among unions as a way of ensuring employer neutrality towards union organizing efforts. In several cases, such agreements were a logical extension of a neutrality agreement between the union and employer. For instance, GM agreed in 1982 that it would recognize the UAW at any southern plant where the union obtained signed authorization cards from a majority of the plant's production workers.242

Card-check agreements are also starting to appear in contracts where the union and employer do not have a neutrality agreement. The 1981 agreement between Armour & Co. and the United Food and Commercial Employees (UFC) provides for recognition of the UFC wherever a majority of the employees in the bargaining unit has signed authorization cards.243 The Armour agreement seems to have been inspired by the neutrality agreements in other industries, and "serves as a useful example of how today's austere bargaining climate can cause management to modify its strong opposition, raised in recent years, to clauses for abetting union organizing."244

Any attempt to extend neutrality agreements to card-check clauses can be expected to generate considerable employer opposition because of the intense controversy over whether the signing of an authorization card is a reliable indication that an employee favors the union. Management consultants who argue that authorization cards are unreliable cite recent empirical evidence of a large fall-off between the number of employees who sign cards and the number who vote for the union in the representation election.245 Union supporters believe that fall-offs

242. That card-check procedure has been used successfully by the UAW in three organizing efforts, including a campaign at GM's largest nonunion facility, an Alabama steering plant that had resisted unionization attempts for six years. Auto Workers Organize Alabama GM Plant, Ending Six-Year Campaign, DAILY LAB. REP. (BNA) No. 173, at A-6 (Sept. 7, 1982); UAW Gains Bargaining Rights for 300 at General Motors Plants in Georgia, DAILY LAB. REP. (BNA) No. 165, at A-3 (Aug. 25, 1982).

244. Id.
245. See J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 101 (1976) (in the 32 elections surveyed, only 72% of the employees who origi-
result from employer opposition, especially unfair labor practices.\textsuperscript{246}

This case study of the 1976 - 1983 UAW-GM negotiations demonstrates that neutrality agreements may initiate or inspire a progression of more extensive agreements for employer cooperation in facilitating union organizing efforts. Today only two small plants of 141 GM plants remain nonunion.\textsuperscript{247}

\textbf{B. Relationship of Neutrality Agreements to Job Security}

The effectiveness and influence of neutrality agreements will greatly increase if they can be integrated into a network of job security provisions. Because employment in industries such as automobiles and steel is at an historic low,\textsuperscript{248} job security is likely to be the most crucial topic in bargaining negotiations during the rest of this decade.\textsuperscript{249} The effect of neutrality agreements on job security is often overlooked because the most obvious role of neutrality agreements is to facilitate union organizing, and the effect of neutrality agreements on job security is more indirect than is the effect of prohibitions on plant closings or subcontracting.

But neutrality agreements and other methods of ensuring neutrality are closely related to job security provisions in several ways. First, the success of unions in negotiating job security issues will depend on the strength of unions, which in turn will depend on the success of union organizing efforts.\textsuperscript{250} Second, if the employer agrees not to oppose union organizing efforts, thus increasing the success of those effetually signed authorization cards voted for the union in the representation elections); Sandver, \textit{The Validity of Union Authorization Cards as a Predictor of Success in NLRB Certification Elections}, 28 LAB. L.J. 696, 701 (1977) (Union's chances for success are greater in cases where it has majority of cards than where it does not, but unions still lose about 28% of elections where they have authorization cards from 100% of the employees.).

\textsuperscript{246} See Eames, supra note 46, at 1181.

\textsuperscript{247} \textit{Auto Workers Organize Alabama GM Plant, Ending Six-Year Campaign}, DAILY LAB. REP. (BNA) No. 173, at A-6, A-7 (Sept. 7, 1982); \textit{Auto Workers Seeking to Organize Last Remaining Nonunion GM Plants}, DAILY LAB. REP. (BNA) No. 108, at A-11 (June 4, 1982) ("The union's success at organizing all but four of the GM's production facilities is attributable partly to a series of gains made during the last three rounds of national negotiations, beginning with a 1976 pledge from the firm to remain neutral in drives among blue collar workers and including, most recently, a commitment to recognize the union at any southern plant where it obtains signed authorization cards from a majority of workers.").


\textsuperscript{250} Conference Board, supra note 249.
forts, then the employer's wage incentive for moving to the Sunbelt or for "double-breasting" operations with a union and nonunion division is eliminated.\textsuperscript{251} Third, certain contractual provisions, such as the application of the "transfer of major operations" clause to new plants in the UAW-GM contract,\textsuperscript{252} may serve both to facilitate union organizing and to protect job security for employees by allowing transfers to new plants. Management attorneys are worried about the linkage of neutrality agreements with job security provisions and plant closure legislation. As Andrew Kramer has said before the National Association of Manufacturers, The loss of union membership has been linked with the movement of industry to the South and Southwest and labor's inability to wage successful campaigns there. Thus the second prong of organized labor's attempt to reverse these trends can be found in recent plant closure legislation introduced both in Congress and in several Northern states. While neutrality agreements make it easier to organize plants in the South and Southwest, plant closure legislation is intended to stem the tide of industry relocation.\textsuperscript{253}

The greater the extent to which neutrality agreements are regarded as job security provisions, the greater the likelihood that they will be adopted as a part of a standard network of job security provisions. This potential of neutrality agreements will increase their priority on the agendas of labor unions.

\section*{C. Possibilities for Extending Neutrality Agreements to White Collar Organizing Efforts}

The possibilities for extending neutrality agreements to white collar organizing efforts are as uncertain as they are important. The recent emphasis on white collar organizing by major industrial unions is not surprising. The greatest growth in union membership is occurring among white collar employees, and unions generally fare better in representation elections in white collar units.\textsuperscript{254} Both the Steelworkers\textsuperscript{255} and the UAW\textsuperscript{256} have mounted intense campaigns to organize white collar employees. See supra note 240 and accompanying text.  

\textsuperscript{252} See supra note 240 and accompanying text.  
\textsuperscript{253} Kramer, supra note 89, at D-1.  
\textsuperscript{255} \textit{Steelworkers Will Launch All-Out Campaign for White Collar Workers, Conference Told}, Daily Lab. Rep. (BNA) No. 116, at A-7 (June 16, 1982). Leon Lynch, Steelworkers Vice-President for Human Affairs, said that, "The Steelworkers will pursue white collar organizing with a vengeance." Id. The Steelworkers represent more than 40,000 salaried office workers. Id.  
\textsuperscript{256} \textit{UAW Targets GM Salaried Workers for All-Out Organizing Campaign}, Daily Lab. Rep.
collar workers in their industries.

Employers that have negotiated neutrality agreements generally are free to oppose white collar organizing efforts because neutrality agreements usually are limited to production and maintenance workers.\(^{257}\) Employer opposition is particularly influential in white collar organizing campaigns because there is a large turnover rate among these employees, the range of salaried jobs is broad, and elections are held at individual plant locations.\(^{258}\)

The prospects for extending neutrality agreements to white collar organizing efforts are uncertain because of strong employer opposition.\(^{259}\) Yet there are several factors that make such an extension more likely than it was when neutrality agreements were first negotiated. First, some white collar unions, such as the Communications Workers of America (CWA), are beginning to adopt both neutrality agreements and automatic recognition clauses as bargaining goals.\(^{260}\) Second, as industrial unions expand beyond their traditional jurisdictions and give higher priority to white collar organizing, there will be greater pressure on the employer to compromise. Finally, as white collar workers become more concerned about wage and benefit concessions and job security,\(^{261}\) they may be more likely to begin to organize. Employers then may be willing to accept a neutrality clause rather than an increasingly intense battle that could destroy their long-term relationship with their respective unions.

VI

Neutrality Agreements and a Nonadversarial Model of Labor Relations

Neutrality agreements are an integral part of a growing effort to reshape American labor-management relations by moving from an adversarial to a nonadversarial model of industrial relations. This section sets forth the proposition that labor-management cooperation cannot be successful unless management respects the right of labor unions to exist.

\(^{257}\) See supra notes 92-96 and accompanying text. Even General Motors, which was amenable to a neutrality agreement for blue-collar workers, takes the position that "[w]e vigorously oppose any organization of salaried employees." UAW Targets, supra note 256, at A-2. Opposition by GM was an influential factor in a long string of UAW defeats in recent elections among GM's salaried employees. See Clerical Workers at Ohio GM Plant Reject Auto Workers Representation, DAILY LAB. REP. (BNA) No. 238, at A-2 (Dec. 10, 1982).

\(^{258}\) See Clerical Workers, supra note 257, at A-2; UAW Targets, supra note 256, at A-2.

\(^{259}\) Craft, supra note 78, at 763.


\(^{261}\) UAW Targets, supra note 256, at A-1, A-2.
A. The Traditional Adversarial Relationship Between Labor and Management

The traditional model of labor relations is based upon the premise that labor and management should view each other as adversaries. The development of the adversary principle as a basic assumption of American labor law can be explained in several ways. The adversarial nature of collective bargaining can be partly explained as a product of its origins. As one commentator explained,

The process of unionization in this country, not halfway complete even today, has been fought tooth and nail by the nation’s major employers. To recite the names from America’s industrial past is to recall the mood of hostility, violence and confrontation...

Out of this past, American labor relations has been and continues to be characterized by confrontation—the “hate the boss” and “keep the Union in its place” syndromes.262

From these origins the adversary principle was adopted as a leading principle of an “American ideology of labor relations.”263 A related explanation is that the adversary principle has developed because “this is how the parties seem to want it.”264 Management traditionally believed that an adversary relationship with labor would preserve its authority and the firm’s efficiency. Unions saw adversarial conflict as a way to strengthen their role as a bargaining organization.265 Union support of a narrow scope of conflict was an outgrowth of the “business unionism” of the early labor movement, which narrowly focused on improving wages, hours, and working conditions for its members rather than on developing a larger role for unions in political and corporate governance.266 Another explanation is that the adversary principle was reinforced by its institutionalization in the NLRA. An adversary relationship seemed natural because “that is what collective bargaining is...

There were Big Bill Haywood, and the Wobblies’ One Big Union, Joe Hill, Tom Girdler, the Mohawk Valley Formula, Eugene V. Debs, John L. Lewis, the Pinkertons, the Molly McGuire, the “yellow dog contract”, the Haymarket bomb outrage, the “Memorial Day Massacre”, and the fire at the Triangle Waist Company—clearly, the history of American labor relations is one of conflict and hostility.
Id. Schlossberg also notes that employers could count on the “establishment” to crush unions, so that the “very essence of the relationship” was controlled by legal considerations instead of mutual interests or principles of human relations. Id.
264. Barbash, supra note 263, at 454.
265. Id.
Moreover, the NLRA's framework envisioned a limited union role of bargaining over wages, hours, and conditions of employment.\textsuperscript{268}

Nowhere has the adversary principle been more embraced than in the area of union organizing. The main problem with the application of the adversary principle to union organizing efforts is that it has no limiting principle, except possibly a willingness to obey legal regulations. Justifying hostility as an inherent part of the collective bargaining process or of the American ideology of labor relations proves too much, for even proponents of these justifications decry the "staggering magnitude" and sophistication of recent management hostility to union organizing efforts.\textsuperscript{269} As one commentator acknowledged,

This "spirit of moderation," however, has had minimal impact in deescalating the harshly adversarial reaction of business to recent union organizing efforts.

\textbf{B. The New Need for Labor-Management Cooperation}

At the same time that the labor-management relationship is deteriorating in the area of union organizing, the need for labor-management cooperation in other areas is increasing dramatically. The declining health of American industry, rapid technological change, and the pressures of foreign competition have forced political, business, and labor leaders to recognize the need for a more cooperative and less adversarial relationship between labor and management. As Senator Quayle (R-Ind.) has stated:

In order to cut production costs, to increase productivity, and to save jobs, both labor and management support a "significant tilting towards

\begin{thebibliography}{9}
\bibitem{267} Wynn, \textit{The Outlook for Collective Bargaining: Accommodation or Confrontation?}, 31 LAB. L.J. 459, 461 (1980).
\bibitem{268} McCormick, \textit{supra} note 162, at 227-45.
\bibitem{269} Wynn, \textit{supra} note 267, at 460.
\bibitem{270} Barbash, \textit{supra} note 263, at 454.
\end{thebibliography}
mutualism" in their relationship. This change in attitude is exemplified by the "statement of purpose" of a new high-level Labor-Management Group: "The national interest requires a new spirit of mutual trust and cooperation, even though management and organized labor are, and will remain, adversaries on many issues."

This new spirit of cooperation is resulting in historic joint efforts by labor and management in two areas—increasing productivity and quality in the workplace, and cutting production costs. The success of those efforts may determine whether large segments of American industry will remain competitive—or even survive.

A new spirit of cooperation in the workplace is essential because greater employee participation in workplace decisionmaking is necessary in order to increase productivity and quality. Studies have found that "a rising degree of 'polarization' in the relationships between labor and management is a prime factor in the country's serious shortfall in productivity." Increases in productivity are essential for maintaining the competitive position of American industry in the "global economy". Such increases would, of course, also generate profits and justify wage increases. The new "worker participation" efforts recognize that productivity and a cooperative labor-management relationship are closely linked. The willingness of unions to cooperate is the single most important factor that will determine whether "participation teams" and "quality circles" will be successful in solving production problems that lower quality and reduce productivity.

A second area in which a new spirit of cooperation is emerging is

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274. J. Holusha, G.M.-Labor Spirit: Present and Past, N.Y. Times, Sept. 16, 1983, A13, col. 1 ("'Working together' has become a theme . . . . [L]eaders for both Ford and G.M. and the union say cooperative work programs will have to replace the acrimony of the past if the American automobile industry is to survive against overseas competition.").

275. See, e.g., Donovan's Report on Cooperative Programs Calls for Changed Labor, Management Attitudes, Daily LAB. REP. (BNA) No. 215, at A-3 (Nov. 5, 1982) (Labor Department symposium participants agreed "that organizations which have adopted cooperative programs tend to become more profitable because of improved management techniques, better information on which to base decisions, stronger employee commitment to the company's goals, and an improved labor relations climate."); Uncertain Picture of Labor Relations Emerging as Results of Technologi- cal, Economic Changes, Daily LAB. REP. (BNA) No. 211, at A-2 (Nov. 1, 1982) ("Essence of modern collective bargaining" is that the "old adversarial relationship between labor and management is giving way to an attempt by both sides to identify and solve problems.").


in efforts to lower production costs. Employers want wage and benefit concessions in order to remain competitive with foreign producers and nonunion employers, while employees want job security guarantees. The UAW has been willing to renegotiate unexpired contracts with all four major automakers, and the wage and benefit concessions to GM and Ford alone totaled almost six billion dollars between 1979 and 1982. The willingness of a union to cooperate, however, depends on management's sensitivity to the union's sacrifices. For example, it was only natural that the UAW reacted bitterly to GM's demands for wage concessions when the corporation attempted to increase opportunities for executive bonuses on the same day that the new wage agreement was signed. Again, the willingness of unions to accept wage and benefit concessions is being explicitly linked to management's willingness to treat the union with respect.

C. The Strong Linkage Between Labor-Management Cooperation and Management's Response to Union Organizing Efforts

There is a fundamental inconsistency between an employer's desire for union cooperation in joint efforts to increase productivity and to lower production costs and a hostile management response to union organizing efforts in its nonunion facilities. A union will not be eager to participate in "quality circles" and similar cooperative projects if management regards the union as a partner in those projects, but as an enemy in the union's organizing campaigns in the employer's unorganized facilities.

278. Schlossberg, supra note 262, at D-5. The magnitude of those sacrifices is impressive. UAW members at Chrysler accepted a contract settlement lower than the auto pattern three times, which involved concessions totaling $203 million in November 1979, $243 million in January 1980, and $622 million in February 1981. See Auto Workers Accept More Pay Concessions to Enable Chrysler Corporation to Survive, DAILY LAB. REP. (BNA) No. 21, at A-8 (Feb. 2, 1981).


280. Schlossberg, supra note 262, at D-8. That resentment was reflected by the narrow victory margin for the UAW-GM agreement, while the UAW-Ford agreement received 75% approval. See Early UAW Settlement at General Motors Wins Membership Approval by Narrow Margin, DAILY LAB. REP. (BNA) No. 69, at A-6 (Apr. 19, 1982); Auto Workers Ratify New Agreement with Ford, DAILY LAB. REP. (BNA) No. 40, at A-5 (Mar. 1, 1982).

281. As the IUE President stated at the beginning of the 1982 negotiations with GE: "To use a phrase from the foreign policy area: We believe in linkage. IUE and GE cannot be respectful
If management insists on opposing unionization efforts at its unorganized facilities plants in the Sunbelt, it cannot expect union cooperation in its organized plants in the North. Union resentment of that contradiction is reflected by the following statement of a Steelworkers official in Atlanta:

We've been talking about better working relationships between the industry and the union. We've been talking about the threat of foreign imports and what we might jointly do on that and other issues.

But it's going to be awfully difficult to cooperate with people who are putting the knife in your back at the same time. I am afraid that you will be seeing, as a result of recent events, a much stronger adversary role by the unions than has been seen for some time.283

Unions tend to distrust cooperative programs as a ploy to undercut unionization and to decrease union influence "when some companies deal with unions in some locations but oppose them in others."284 As one commentator said, "The acceptance by management of the union is as basic to [mutual trust] as is acceptance by the union of the management and their joint need for profitability of the enterprise."285

Moreover, the consequence of management's failure to appreciate the linkage between attempting to secure union cooperation in joint programs in the workplace and accepting the union in unorganized facilities may be especially potent because worker participation programs and renegotiation of unexpired contracts are permissive subjects of bargaining.286 The permissive status of those subjects, which have been termed "nontraditional bargaining,"287 forces management negotiators to focus on meeting the concerns of the union rather than solely on fulfilling legal requirements. In particular, management must give "full acceptance" and job security guarantees to the unions in exchange for worker participation and wage concessions.288 In addition, management must accept "a basic change in operating philosophy" by recognizing that cooperative programs mean decisionmaking on the plant partners in one situation, and bitter—I would even say vicious—enemies in another." Statement of IUE President Fitzmaurice at Opening of 1982 Contract Negotiations with General Electric Company, reprinted in DAILY LAB. REP. (BNA) No. 86, at F-1 (May 4, 1982).


286. Schlossberg, supra note 262, at D-5.

287. Id.

floor is no longer their "exclusive domain." 289

Finally, the "partnership projects" are inconsistent with continued resistance to union organizing efforts because the success of worker participation programs requires "strong and stable unions." 290 Security is the unions' main incentive for accepting "quality circles" and wage concessions. The security needed and demanded by unions has several dimensions: job security, security for the enterprise, and institutional security for the union. 291 Thus management, for the first time, has an institutional self-interest in strong unions with a broad base, rather than fragmented and partially established unions.

D. The Role of Neutrality Agreements in Building Labor-Management Cooperation

Neutrality agreements can be a vital link in the chain of labor-management cooperation that characterizes a nonadversarial model of labor relations because they promote the following values:

1. **Mutual Trust.** A neutrality agreement builds trust by assuring a union that an employer will not combine worker participation programs and demands for wage concessions with vigorous opposition at unorganized facilities in order to challenge the very legitimacy of the union. A neutrality agreement also may increase the trust of the employer by assuring it that the union will be a strong and trusting partner who will participate with good faith in quality and cost control programs. Even if wage and benefit concessions are required, a neutrality agreement will allow the union to negotiate on those issues without fear that its willingness to compromise will be used maliciously against it in an organizing campaign in the employer's nonunion facilities.

2. **Maturity.** A neutrality agreement is evidence that the employer accepts the union's legitimacy, and therefore is willing to permit its unorganized employees to decide for themselves whether or not to be represented by the union. As a mature relationship develops between a union and a corporation from their joint efforts to improve a business, a neutrality agreement is a logical step in further improving their relationship. In a mature relationship, the decision of employees whether to accept union representation should not be controlled by legal battles between the employer and union, which simply delay the decision and cause the relationship between the employer and union to deteriorate.

3. **Sensitivity.** A neutrality agreement is a recognition by man-

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agement that it is inconsistent to expect union cooperation in some areas while denying the union's right to exist. Such an agreement demonstrates the sensitivity of the employer to the facts that union members remember the bitter history of unionization and that unions are democratic political institutions that must respond to their members' beliefs.

4. *Fairness and Even-Handedness.* A neutrality agreement promotes fairness because it eliminates inconsistency in the treatment of unions. If a union is accepted and treated with respect when its cooperation is needed, then it should not be treated with contempt when it seeks to represent the corporation's unorganized workers.

5. *Compromise.* Neutrality agreements are evidence that management is willing to accept measures that provide respect and security to unions if unions are willing to accept greater responsibility for increasing productivity and restraining labor costs. Neutrality agreements are therefore an important item on a "noneconomic agenda" that employers may be willing to adopt in exchange for union concessions on economic terms.\(^{292}\)

**Conclusion**

American labor relations are at a crossroads. The position advocated by hard-line management advisors and disenchanted unionists would lead us back to the confrontational days of the 1930's. Those with a vision of a brighter future for labor relations see the recent cooperative efforts between labor and management as the first step toward a nonadversarial model of labor relations. Neutrality agreements can broaden the possibilities for building the labor-management cooperation that is essential for revitalizing American industry.

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