PART III

# WHAT TO DO WHEN UNION ORGANIZING STARTS

## 1. BASIC NLRB ELECTION PROCEDURES

The federal law governing the manner in which a union may gain the right to be the "collective bargaining representative" of an employer's workers is set forth in the National Labor Relations Act, as amended by the Taft-Hartley Act. Under this law, a union that has been designated by a majority of the employees in an "appropriate bargaining unit" is entitled to recognition by the employer as the sole and exclusive bargaining representative of all of the employees in that unit. Once the union obtains this right to recognition, the employer is required to bargain in good faith with the union over the wages, benefits and all other working conditions of the employees in that bargaining unit.

The following are ways in which the union can achieve recognition of an employer's workers.

### A. VOLUNTARY RECOGNITION

Voluntary recognition of a union as the bargaining representative of employees can occur if an employer intentionally or unintentionally accepts evidence that a majority of the employees have signed union authorization cards or have in some other way indicated they want the union to be their bargaining representative.

Also, a special rule for the construction industry in Section 8(f) of the NLRA allows employers to recognize a union as the bargaining agent, even without proof of support from a majority of employees. This is why unions often ask construction contractors to sign "Letters of Assent." 8(f) agreements are discussed again in this chapter.

Once the employer voluntarily recognizes a union as the collective bargaining representative of its employees, the employer is bound by that act and cannot later refuse to bargain in good faith with the union.

**Does an Employer Have to Recognize a Union That Offers Evidence That a Majority of the Employees Have Signed Cards?**

An employer is not required by law to voluntarily recognize a union, even if the union offers to submit evidence that the majority of employees want it to be their representative. The employer can refuse to look at such evidence and insist that it has a "good faith doubt" about whether the majority of its employees want the union. In that case, so long as the employer does not engage in serious unfair labor practices (such as threatening employees with loss of benefits because of the union or promising them increased benefits if the union goes away), the union's only alternative is to seek a secret ballot election conducted by the National Labor Relations Board.

(This election process is discussed below).

### What is a "Pre-hire" Agreement in the Construction Industry?

Under Section 8(f) of the NLRA, construction industry employers are allowed to voluntarily recognize unions regardless of whether the union represents a majority of the employers' employees, or even before any employees are hired. Under this type of arrangement, an employer is bound to the "pre-hire" agreement signed with a union for the length of the agreement only and can repudiate the agreement and the bargaining relationship at the end of the agreement's term.

### What Should an Employer Do if a Union Seeks Voluntary Recognition?

Because the legal rules governing voluntary recognition are very complex, employers put themselves at great risk if they even talk with union representatives or their employees about voluntarily recognizing the union. This is true even if the employer thinks a union would be a good development or if he thinks his employees really want a union. An employer should seek legal counsel before undertaking any such discussions with a union.

## B. FORMAL NLRB ELECTION PROCEEDINGS

As stated above, even if the union has obtained authorization cards from a majority of employees designating the union as their bargaining representative, the employer may nevertheless refuse to voluntarily recognize the union so long as it does not engage in any serious unfair labor practices. While the union could then try to put pressure on the employer to recognize it without an election, through recognitional picketing or calling the employees out on strike, in most cases the union will seek a secret ballot election conducted by the NLRB.

### How Does the Union Get an NLRB Election?

If the union wants the NLRB to hold a secret ballot election among the employees to prove its majority status, the union must file a petition with the NLRB. In order to file a petition, the union must provide the NLRB with union authorization cards or other evidence that at least 30% of the employees have indicated they want the union to represent them. (As a practical matter, union organizers usually do not file petitions with the NLRB until they have a majority of the employees signed up. The general thinking on their part is that they ought to have a solid base of support as evidenced by signatures from a majority of unit employees before going to the NLRB).

### Does the Union Always Get an Election If It Files a Petition?

The union will not automatically obtain an election just by filing a petition with the NLRB. There may be legal issues concerning the right of the union to have an election at all or issues concerning who is eligible to vote in the election (i.e., what is the "appropriate unit of employees"). If such issues exist, a formal hearing generally will be held on these questions. You should meet with your labor counsel as soon as possible after receipt of a petition for an election in order to identify all legal issues that should be resolved through the formal hearing process if necessary.

### When, Where and How Are Elections Held?

Assuming the NLRB does not find a basis for dismissing the union petition, it will direct that a secret ballot election among the employees in the "appropriate unit" be held at a specified time and place—usually at the employer's place of business. The NLRB will officiate at the election.

In 2014-2015, the NLRB changed its election rules to speed up the process. Among other changes, the NLRB now requires employers to post an official NLRB notice of employee rights within two business days of receiving

notice of the union petition from the NLRB. A notice of hearing will also be sent by the NLRB to address issues relating to the election. By noon on the seventh calendar day following receipt of the NLRB notice of hearing, the employer is required to file a detailed statement of position regarding the union petition. Failure to file the statement of position can result in waiving important rights to present evidence. The statement of position must also be accompanied by a list of names of employees covered by the petition, and potential other employees who might be included in an appropriate bargaining unit, along with their location and shifts.

A hearing on any questions concerning representation will normally be held on the eighth calendar day following receipt of the official NLRB Notice, absent special circumstances or a stipulated election agreement between the employer and the union. The NLRB may schedule the election within as little as 11 to 20 days following receipt of the official NLRB notice of the petition, though sometimes more time is needed to resolve pre-election issues.

IT IS STRONGLY RECOMMENDED THAT EMPLOYERS OBTAIN EXPERIENCED LABOR COUNSEL TO ADVISE THEM IMMEDIATELY UPON RECEIVING A UNION PETITION BEFORE RESPONDING TO ANY REQUESTS FOR INFORMATION FROM THE UNION OR THE NLRB.

### How Many Votes Does the Union Have to Get to Win the Election?

In order to win the election, the union must obtain the votes of a simple majority of the eligible voters who cast ballots. Either the union or the employer can exercise the right to object to the results of the election on the grounds that it was not conducted fairly or that unlawful activity by the victor occurred before or during the election.

### What are the Advantages of an NLRB Election, As Opposed to a "Card Check" Process?

An NLRB election requires a secret ballot vote among employees in an appropriate unit for bargaining. A secret ballot election has the advantage of providing employers with time to tell employees about the other side of the "union label," and it ensures that employee choices will be made in an atmosphere free of the type of coercion that typically occurs when the union attempts to get employees to sign union authorization cards. Employees frequently sign these authorization cards just to get rid of bothersome or bullying union organizers of fellow employees. Moreover, statistics show, unions that have secured a showing of interest through signed union authorization cards even from as many as 50% or more of the employees very often lose secret ballot elections when the employees have a free secret choice and the employer has taken the time to show employees the other side of the union label.

# 2. WHY NOT A UNION

During the time of a union organizational campaign, the union may portray itself as a cure-all for the employees' needs. Employers should be aware of the basic facts about union membership that are not in the best interest of the employees. Here are a few examples:

### DUES/FINES-ASSESSMENTS

The amount the employee pays monthly in union dues either through a dues check-off or other means can be substantial. Most union constitutions also provide for the international and/or local union to impose special financial assessments against union members.

### LOSS OF INDIVIDUALITY

The most significant psychological impact on the employee is losing the freedom to think and act as an individual. Because the union contract must be written for an entire group, individual needs are often not considered.

### STRIKES

The only real weapon the union has to force an employer to agree to its demands is to take the employees out on strike. Strikes are a constant threat to the rank and file union member and can seriously affect earnings. Even those individuals who do not want to strike may lose pay if the union calls a strike. Failure to respect union picket lines can lead to union fines. In an economic strike, the employer has the right to maintain its operations and can permanently replace striking employees.

### INTERNAL UNION POLITICS

Unions, by their very nature, are political. Rivalry for union leadership positions can cause division and favoritism, and internal rivalries often lead to ineffective union leadership and dissatisfaction in the union ranks.

### UNION COURTS RULES AND REGULATIONS

Few employees realize the power and control a union can have over them. Almost all the union constitutions and bylaws provide for union trials or courts. A union member can be fined, disciplined or expelled from the union for violation of any provision or rule of the unions' constitution and bylaws. Fines levied by such union courts are enforceable in a court of law.

### RESTRICTIONS ON ADVANCEMENT

Just as union contract seniority provisions affect management decisions, they also adversely affect ambitious, capable and hardworking, but less senior, employees. An employee who does not want to wait for seniority will find that he must leave the company to advance.

### COMPULSORY UNION MEMBERSHIP

With the exception of states with right-to-work laws, the union is free to negotiate a "union shop" clause in the contract. Such a clause compels every employee to join the union no later than 30 days (seven days in the construction industry) after the beginning of the employment relationship or the effective date of the collective bargaining agreement, whichever is the latter, or lose his job. This union shop clause, along with an automatic union dues check off from the employees' paychecks, are key items unions want in every contract. To get these, the union may be willing to take a strike and sacrifice wage and benefits items of greater interest to the rank and file employee.

### JOB "INSECURITY" IN THE UNIONIZED CONSTRUCTION INDUSTRY

Employees who are not union members or do not meet union journeymen standards should be concerned with how a union hiring hall would affect them. They may find they are not referred to their former employer or are not referred for union work at all due to hiring hall discrimination or the union's qualification requirements. Finally, job security may suffer if their employer is made uncompetitive and loses work due to union wage demands, strikes or work rules, as has happened throughout the construction industry.

## 3. DO'S AND DON'TS FOR SUPERVISORS

The NLRA specifically gives employers the right of free speech on labor matters. Employers therefore do have the right to talk to their employees about unions and to express their views on why a union would not be in the employees' best interest. In general, so long as you do not threaten workers either directly or by implying you will take reprisals in the event they organize, and so long as you do not promise them any benefits for rejecting a union, you have a pretty free hand in telling your firm's story. You can state facts and give your opinion on unions in general or in particular. You can present your arguments on why a union is not necessary in your firm.

Further, employers have the right to continue running their business as normal. As a practical matter, it is advisable to consult with labor counsel before taking any action that would adversely affect a pro-union employee. This is because you may have to prove that the action was not taken because of the employee's union activities.

### THE DO'S

Following are some of the key things an employer ***can*** and ***should*** do in communicating with employees about the union.

- You ***can*** and ***should*** talk with employees individually or in groups at any time in any public place or open working area where you would normally talk with employees, but not in any private management office.
- You ***can*** and ***should*** tell employees about any bad experiences you or others you know have had with unions.
- You ***can*** and ***should*** talk about what harm you believe (or can show) unions have done in the nation, your geographic region, other divisions of your own operations and other specific firms.

- You ***can*** and ***should*** state what you believe (or can show) to be the answer to any union propaganda, argument or claim.
- You ***can*** and ***should*** say you think employees should vote no in a union election. Following are some of the specific things an employer might want to communicate to employees:
  - If a majority of employees select the union (an outside organization), the firm will have to deal with it on all their daily problems involving wages, hours and other conditions of employment. Advise them that the firm would prefer to continue dealing with employees directly on such matters.
  - In negotiating with the union, the firm does not have to agree to any of the union's economic demands that it believes are not in the best interest of the business.
  - If the union gets in, whatever benefits the employees receive will have to be negotiated with the firm. The benefits employees receive after the union gets in could be more than they now receive; but they also could be the same or less.

### THE DON'TS

Employers do ***not*** have the right to threaten, intimidate or coerce employees into adopting the employer's view on unions, or to interrogate or spy on employees to find out about their union activities or how they feel about the union.

An easy way to remember the things employers and supervisors ***cannot*** do or say during a union organizing attempt is to think of the word "***TIPS***," which cover most of the pitfalls you can get into until you receive professional guidance:

- ***"T" means Threaten.*** You ***cannot*** threaten individuals participating in union activities with reprisals such as reducing employee benefits, firing the employee or retaliation of any kind, and, of course, you cannot take such reprisals.
- ***"I" means Interrogate.*** You ***cannot*** interrogate employees about whether they signed any union card or whether they are supporting the organizing activity, how they intend to vote, or what they think about union representation.
- ***"P" means Promise.*** You ***cannot*** promise wage or benefit increases, promotions, or any other future benefit to employees for opposing the union, nor can you give such benefits for this reason.
- ***"S" means Spy.*** You ***cannot*** spy on union activities to determine who is attending union meetings, or who is signing union cards or supporting the union. This applies to both work time and non-work time, on and off the firm's premises.

Definitions of unlawful threats, interrogation, promises and/or spying are subjects of highly complex legal rules and decisions that are too complicated and numerous to list here. You should remember, however, that all of the circumstances surrounding a particular conversation or act are considered in determining whether it amounted to illegal threats, promises, spying or interrogation, and that implied threats or promises are just as illegal as direct ones.

Finally, employers should never ***discriminate*** against employees based on their support for a union or based on union opposition.

## TEST OF "SUPERVISOR" STATUS

In order to implement TIPS, it is important for an employer at an early stage to determine who is on the management team (i.e., which management personnel are considered by the NLRB to be supervisors under the NLRA). Supervisors, as defined by the NLRB, are not eligible to vote, and can commit unfair labor practices as agents of management.

## PRIMARY TESTS

Analysis of the statutory definition of supervisor reveals that Congress has set up 12 specific criteria in the nature of types of authority under the Labor Management Relations Act of 1947, also known as the Taft-Hartley Act. These test "authorities," to be exercised upon other employees and in the interest of the employer, are the authority (1) to hire, (2) to transfer, (3) to suspend, (4) to lay off, (5) to recall, (6) to promote, (7) to discharge, (8) to assign, (9) to reward, (10) to discipline, (11) responsibly to direct by exercising independent judgment rather than routine or clerical in nature and (12) to adjust grievances.

By adding the words "or effectively to recommend such action," Congress in effect doubled the 12 specific tests. To the authority to hire, for example, is added the further authority "effectively to recommend" hiring, and so on down the list of specific authorities listed above.

An employee must possess only one of the specific responsibilities in the statutory definition to be classified as a supervisor. However, the exercise of such authority must not merely be routine or clerical in nature, but rather require the use of independent judgment. The NLRB clarified its definitions of "assigning" and "directing" work and "independent judgment" in its ***Oakwood Health Care*** (2006) decision.

## SECONDARY TESTS

In many borderline cases, the character of the employee as a supervisor is not immediately clear when measured against the statutory definition. In such cases, the NLRB and the courts have looked into various secondary tests of supervisory status.

Factors that have been regarded as weighing in favor of supervisory status include: (1) the employee's designation as a "foreman" or "supervisor," (2) the fact that he/she is regarded by himself/herself or others as a supervisor, (3) his/her exercise of privileges accorded only to supervisors, (4) attendance at instruction sessions or meetings held for supervisory personnel, (5) responsibility for a shift or phase of operations, (6) receipt of orders from management officials rather than from other supervisors, (7) authority to interpret or transmit the employer's instructions to other employees, (8) responsibility for inspecting the work of others, (9) instruction of other employees, (10) authority to grant or deny leaves of absence to others, (11) responsibility for reporting rule infractions, (12) keeping time records on other employees, (13) receipt of weekly or monthly salary, rather than hourly production wages, (14) receipt of substantially greater pay than other employees, not based solely on skill, (15) failure to receive overtime pay, (16) lack of requirement to punch time clock, (17) nonparticipation in regular production work, (18) wearing different work clothes than other employees, (19) assignment of overtime work and (20) percent of time spent in bargaining unit work. Conversely, the absence of these various tests or existence of their opposites tends to weigh in favor of nonsupervisory status.

# 4. CHECKLIST FOR RESPONDING TO UNION ORGANIZING

When contacted by a member company that thinks it has a union organizing problem, chapter staff should first tell the member to contact the chapter attorney or other labor counsel. Staff also may suggest that the following responses be considered, subject to the attorney's advice.

### CONTACTS WITH THE UNION

Employers should keep the following best practices in mind if a union organizer comes to the premises or telephones to talk with the employer about unionizing workers.

- The employer should ***not*** look at anything the union wants to show, especially signed union authorization cards, to the employees.
- The employer should ***not*** discuss any labor contract proposals or any personnel benefits or policies of the firm with the union representative.
- Tell the union representative the following magic words and ***nothing more*** and ask him to leave: "I have good faith doubt that your union represents a majority of my employees in an appropriate bargaining unit. I insist on holding a properly conducted secret ballot election administered by the NLRB before recognizing your union as their bargaining representative."
- If the employer receives a letter from a union, ***do not*** open it if it appears thick enough to contain union authorization cards. Instead, call your labor lawyer immediately.
- If the letter is opened by mistake and cards are present, ***do not*** look at them. Call another member of management in as a witness, tell them what has happened and that you have not looked at the cards, replace the cards in the envelope and seal it, and call your labor lawyer immediately.
- If the letter does not contain cards or other evidence that your employees have designated the union as their bargaining representative, but merely contains the union's claim that the union represents them, you should respond in writing to the union expressing your good faith doubt in its claim after consulting with your labor lawyer on how to word the letter.

### CONTACTS WITH EMPLOYEES

- The employer's senior management group should meet to try to find out why the union is attempting to organize employees and exactly what organizing activity they are aware of to date. Chances are some of them will know facts that the chief executive does not know.
- The employer should call a meeting of its supervisors and others who exercise frontline authority for management, usually with labor counsel present, making sure not to include any borderline non-supervisory staff, such as lead people who might conceivably be legally entitled to inclusion in the bargaining unit with other employees eligible to vote. Brief this group on the situation and find out what they know about it. In addition to group meetings, supervisors should be talked to individually to ascertain exactly what they know of the union activity.
- The employer should clearly state to all supervisors its position with respect to the union drive. Let them know that there is no need for the employees to be represented by a labor union if the management

team does its job properly, and that the employer intends to make every legitimate effort to encourage employees not to sign union cards and to vote against the union if and when an election is held.

- Both the supervisors and the members of the senior management team should be instructed as to the legal dos and don'ts discussed in this handbook. They should be told to immediately increase their personal contacts with workers in their operations and to engage in informal conversations with them at every opportunity. Once they have been properly briefed, supervisors should make a point of talking to everyone they supervise on at least a daily basis if possible. Whoever is in charge of management's union response campaign should be kept fully informed on anything that the supervisors learn about the organizing attempts or of any changes in attitudes, indications of union coercion, employee huddles, rumors, etc.
- The employer should set up a method for the senior management team and supervisors to report regularly and promptly what they find out in their conversations with employees. All leads and tips should be immediately followed up in this hotline communication network.
- After proper briefing by labor counsel, the employer should set up a series of small group meetings with employees during which a member of high-level management discusses the union organizational drive and the reasons why the employees do not need a union.
- These meetings should be followed with additional discussions and with letters to the home and other communication vehicles (posters, buttons, flyers, payroll stuffers, movies, displays, etc.) as deemed necessary and appropriate.
- The employer should meet regularly (at least once a week) with the entire management team during this period in order to determine how well your campaign is succeeding and the issues that need to be covered with employees during the remainder of the campaign.

## CONTACTS WITH THE NLRB

Because the NLRB's new election rules have sped up the process from petition to election, it is important for employers to have in place an immediate response plan. ***Before*** the legal case is discussed with the NLRB agent and ***before*** the employer fills out any NLRB information forms, a labor lawyer should be contacted. ABC's rapid response toolkit is a helpful resource for employers to use in responding to union organizing.

## ROLE OF CHAPTER STAFF

ABC staff should be familiar enough with the disadvantages of unionization and the NLRB election procedures, both of which are described above, to be able to answer the employer's most immediate questions. In this way, members can be prevented from making costly mistakes prior to obtaining counsel. Chapter staff should not purport to give legal advice, however, but should refer members to experienced labor attorneys. Each chapter should have a relationship with an experienced chapter labor attorney to whom members can be referred on an emergency hot line basis for immediate consultation in the event of union organizing or a petition for election.

One final word of caution to chapter staff: The law requires that detailed public financial reports must be filed if anyone other than the employer or the employer's supervisors speaks directly to employees in order to persuade them on the subject of unions. Therefore, chapter staff normally should limit their activities to advising employer members as to what can be said or written by the employer himself.