PART VI

OTHER UNION PRESSURE TACTICS

1. DEALING WITH UNION CORPORATE CAMPAIGNS

Recently, in the face of merit shop inroads in many formerly union-dominated sectors of the construction industry, union leaders have begun to fight back with new, sophisticated and, in some instances, illegal pressure tactics designed to coerce owners and construction managers into restricting free competition in construction. Unions have recently sponsored consumer boycotts, mass demonstrations, "greenmail" legal challenges, press attacks, coercive use of pension fund investments and legislative lobbying in order to achieve their objectives.

The single goal: intimidating public and private construction owners and managers into refusing to deal with merit shop/nonunion contractors, notwithstanding the numerous cost advantages resulting from free market bidding on construction jobs. Most of the unions' efforts have been directed toward pressuring construction users into signing so-called government-mandated project labor agreements, the preferred means by which unions seek to exclude merit shop contractors from construction jobs.

Responses to corporate campaigns vary depending on the union tactics involved. The most successful responses, however, fall into two categories: public relations and litigation.

PUBLIC RELATIONS

Many contractors have successfully responded to union attacks by engaging in more vigorous efforts to positively sell themselves, emphasizing high quality, safety and cost efficiency. ABC chapters can provide considerable assistance to members in this regard, via safety and community service awards (where merited) and via communications to construction users and members of the public.

Some contractors have adopted "counter-campaigns" against unions sponsoring false attacks on them, highlighting negative features underlying the union effort and raising issues of self-interest or falsehoods in the union materials.

LITIGATION

Usually as a last resort, litigation can be an indispensable tool for combating unfair and unlawful union corporate campaigns. The most common litigation responses include:

- Unfair labor practice charges at the NLRB (challenging unlawful secondary boycotts and unlawful interference with employees and customers).

- State court litigation (defamation, interference with contract and mass picketing injunctions).
- Federal court litigation (secondary boycott, antitrust, RICO and other damage actions). The recent case of ***Fidelity Interior Construction v. Carpenters*** (11th Cir. 2012) is a good example of how a lawsuit achieved a significant jury verdict and brought an end to a union corporate campaign.

2. CHECKLIST FOR RESPONDING TO CORPORATE CAMPAIGNS

An assault by a union-sponsored organization on your reputation can be a crisis. How you prepare for and respond to that crisis can determine whether the corporate campaign adversely impacts your profits, your employees and your reputation.

- ***Develop a crisis response team*** – Put together a team that will be responsible for strategy and tactics as you respond to campaigns against your firm. This team should include your president/CEO, key leaders of your staff or board of directors, and any communications professionals and legal counsel in your firm.
- ***Designate one spokesperson*** – In addition to singling out one spokesperson (usually the CEO/president), designate a back-up for times when this person is unavailable.
- ***Consider professional spokesperson training*** – Groups like ABC can help you find professional public relations/media relations training. Some of the tips in this guide are also helpful in preparing to be the "voice" of your firm to its varied publics, including the news media. Local public relations professionals can provide one-on-one spokesperson training as well.
- ***Devise a plan for communicating with your employees*** – Your employees will likely find out about the campaign against your firm. In fact, in some cases the union sponsors of such campaigns also run corollary campaigns to recruit away your workers. Create a plan for how to communicate with your employees on such matters.
- ***Gather positive information on your firm*** – Collect and catalogue information highlighting positive aspects of your firm, including safety statistics, information on the company safety program and any news coverage or other information on company-led community service activities.
- ***Develop a company brochure or guidebook*** – You are your own strongest advocate. Many of America's most successful construction companies have a brochure or guidebook that describes the company's identity, successes and mission. This can be a vital tool to include in client packets. If done well, it can diffuse the distorted presentation that unions or "social justice" groups provide to your clients.
- ***Do your own investigation of your firm*** – Where are your weak spots? Catalogue and list all past OSHA violations, legal cases and any other issues with regulatory agencies, personnel and the like. Prepare a defense of your firm that explains the what and why of each situation.

  Explain what your firm has done to alleviate any problems. This will provide your spokesperson with critical talking points to respond to highly specific questions that may arise from customers or members of the public as a result of the campaign against your firm.

Go online and examine your company's public record of complying with all applicable laws. DOL maintains a public database on all employers who have been the subject of OSHA investigations and similar matters at www.osha.gov.

- ***Become media relations savvy*** – Effective media relations is an ongoing process. It includes ABC National working with journalists at *Engineering News-Record*, *The Wall Street Journal*, national broadcast outlets and state and local media. It also entails each ABC chapter working with journalists for major state and local media outlets, as well as each ABC member working with local and construction trade media to let the public know about the benefits of the merit shop construction workplace.

  Journalists work on tight deadlines. They have to report on major stories in short segments on radio or television and in limited column space in the newspaper.

  If a corporate campaign against your company becomes high profile, you must let the media know you're there, and that you have something to say. Someone must be assigned to handle this area, just as one would be assigned to handle matters of safety, manpower and training, education, labor and so forth.

  A series of "no comment" responses to the media in response to questions about charges against your company will often build suspicion and negative publicity against your firm. Email rapidresponse@abc.org for media relations assistance and guidance from ABC National.

CORPORATE CAMPAIGNS AND THE LAW

False statements about commercial products or services have been held to violate several different state laws across the country. Legal actions for such misstatements are usually brought as claims for defamation or "trade libel," injurious falsehood, interference with contract or prospective contract relations, or "false light."

Most of these claims, depending on each state's laws, require a showing that the defendant's statements have been false, and that the plaintiffs have been specially "damaged." Some states have enacted consumer protection or unfair business practice laws that are actionable even without a showing of outright falsity, where the statements are deceptive or misleading. A minority of states also recognize an action based upon statements that put someone in a false light (i.e., the statements are true but distorted or out of context).

If a union-sponsored group can be shown to have made knowingly false and defamatory statements resulting in the loss of a contract(s), an action for defamation should be available in state court. In addition, some states have enacted a Deceptive Trade Practices Act, which creates liability against anyone who "disparages the goods, services, or business of another by false representation of fact." This law further states that the defendant need not be a competitor in order to create potential liability.

Federal law also protects businesses from being disparaged by competitors, under the Lanham Act (15 U.S.C. § 1125). Finally, 18 U.S.C. § 1341 makes it a federal crime to make false representations in support of a scheme through the U.S. mail. While there may be a question as to whether a corporate campaign group is acting for a commercial or competitive purpose under the Lanham Act, it may be possible to demonstrate a fraudulent scheme for purposes of 18 U.S.C. § 1341. Finally, the Federal Trade Commission Act (15 U.S.C. § 45) prohibits "unfair or deceptive acts or practices in or affecting commerce," and empowers the FTC to investigate alleged offenders.

3. JOB TARGETING PROGRAMS

Another questionable tactic of unions and some unionized contractors around the country has been to establish so-called job targeting programs, whereby payroll deductions are used to subsidize higher union wages and underbid merit shop contractors.

DOL has held that it is unlawful for unionized contractors to accept rebates of wages paid on public projects covered by the federal Davis-Bacon Act in the form of job targeting subsidies. This ruling has been upheld by two federal courts in ***Building Trades v. Reich*** (D.C. Cir. 1994) and ***IBEW v. Brock*** (9th Cir. 1994). In another case, ***Kingston Electric*** (2002), the NLRB held that it is an unfair labor practice for unions to collect job targeting dues assessments from members in violation of the Davis-Bacon Act. Unfortunately, the NLRB has otherwise deemed job targeting programs to be protected by federal labor law, even if they conflict with state prevailing wage laws. Nevertheless, in ***American Steel Erectors v. Ironworkers*** (1st Cir. 2011) a U.S. Court of Appeals upheld a "secondary boycott" claim against a union that combined job targeting subsidies with other forms of intimidation of neutral companies in order to shut merit shop contractors out of the construction market. Contractors and chapters that learn of improper collection of job targeting funds by unions should consider filing appropriate charges with either the NLRB or the DOL. Further guidance on this issue is available from ABC National.

Ultimately, defeating or surviving job targeting efforts has proved to be a matter of educating construction users about the inherent unfairness of such programs and demonstrating their adverse impacts on competition, while working harder to overcome unfair advantages conferred by job targeting subsidies. It also has proven to be difficult for unions and multi-employer union organizations to maintain the necessary coordination and consistency to obtain full control over construction markets. Nevertheless, in some parts of the country, job targeting programs have adversely impacted competition to the detriment of construction users, merit shop contractors and employees.

4. SUING UNIONS: THE RISKS AND REWARDS

Employers that have tried to challenge unlawful union actions in the courts once confronted a major roadblock in the form of the NLRB. Under a misinterpretation of a Supreme Court case known as ***Bill Johnson's Restaurants v. NLRB*** (1983), the NLRB found a variety of good faith, but unsuccessful, employer suits against unions to violate the law, merely by being litigated. This policy had a distinctly chilling effect on employers that were considering filing suit against union misconduct, as few legal actions are guaranteed of success in the courts.

The Supreme Court addressed this issue in ***BE&K Construction v. NLRB*** (2002). The Court declared invalid the former NLRB standard that had chilled employers' rights to challenge union activities in courts. Since the ***BE&K*** decision, the standard for what will be a "legal" lawsuit against unions remains unclear, and the NLRB has in recent decisions attempted to narrow the protections of the ***BE&K*** ruling. Employers should take care that any litigation filed against a union or its supporters is well supported by facts and law, based on the opinion of experienced labor attorneys. Nevertheless, employers should no longer be punished under the NLRA merely because a lawsuit they have filed in good faith against a union is not successful.