

EMPLOYER RIGHTS WHEN THE UNION TRIES TO ORGANIZE YOUR PLANT

SUMMARY

Sooner or later almost any contract tooling or machining plant shop owner may be faced with a union organizing drive and may find it necessary to go through a National Labor Relations Board election and perhaps even contract negotiations. Therefore, it is most important that you know your rights as an employer, the rights of the union, and the rights of your employees.

This BMA is designed to help you avoid trouble by understanding these rights and by learning what you may say and do — and what you should avoid saying and doing. Emphasis will be given to some of the pitfalls into which you may fall either as the result of your own lack of knowledge of the subject or because of the skillful maneuvering of the union representative.

THE ARRIVAL OF A UNION ORGANIZER - AND YOUR REACTIONS

The arrival of a union organizer often rattles even the most experienced manager. But panic is an invitation to trouble. The most important action you can take at this point is to *retain an experienced and able labor lawyer* - an attorney without experience in this field may do you more harm than good. Without such counsel, you could easily stumble into actions that might bring a charge of unfair labor practice. And when an employer is found guilty by the NLRB of a union charge of unfair labor practice, penalties may be imposed, such as cease-and-desist orders or the nullification of an election. But worst of all, if the NLRB finds an employer guilty of an unfair practice, the Board can, under certain circumstances, order the employer to begin bargaining with the union even if the employer wins the election. A case in point would be an employer's attempt to reduce the union's strength by discharging union sympathizers between the time the union has signed a majority of your employees to "authorization cards" (cards authorizing the union to represent the signatory employee) and the holding of the election.

The key to holding mistakes to a minimum is to remain calm, hold your temper and have a rough *advance plan* ready when the organizer arrives. Often, the plant owner may not be aware that an organizer is at work. This individual may make an initial approach at a lunchroom or nearby tavern or bowling alley where your employees congregate. Your only signal may be that more of your employees are going out to lunch together, or congregating in small groups talking

quietly at lunch or coffee breaks. Other tell-tale signs of union activity are employees gathering on the parking lot after work, surliness of some employees, or even the inability of some employees to look you in the eye when you talk to them. Of course, there is no longer any question that a union organizer is working on your employees if there is a distribution of leaflets at employee exits, "authorization cards" scattered around the plant, or a picket line placed around the plant for purposes of organizing your employees.

But do not overlook the distinct possibility that one of your own employees is organizing the rest of your plant from the inside and is being paid by the union for his or her efforts. Organizing from the inside is an extremely effective method because it appears to employees that their fellow workers are seeking unionization rather than a union seeking them.

Today, unions are getting their organizers into non-union plants posing as employees. This practice, known as "salt-ing", is very effective and has been blessed by the Supreme Court!

WHAT THE PLANT OWNER MAY AND MAY NOT DO

The plant owner has certain rights and these rights should be exercised to the fullest extent. You *shouldn't* stand by and do and say nothing. Here are some pertinent questions you should ask yourself before acting to stop a union organizing effort. Knowing the answers may save you a lot of trouble and worry:

Should you attempt to investigate any changes in lunch-hour or after-hour group habits? If an off-premises activity by your employees has a union context, there are very few times

when you *won't* have some hint of what's going on. But surveillance by a foreman or others is very risky and could lead to findings of illegality by the NLRB.

Suppose an employee offers to keep you informed about what's going on? This is an extremely delicate matter, both from the standpoint of common sense and legal consideration. If an employee insists on telling you something, you can hardly avoid not hearing. But even with old and trusted employees, you would be wise to make clear that what your employees do on their own time is their own business. But you are legally free to listen!

Can you prevent distribution of union literature outside your plant? You have a right to protection against trespass on company property, and union organizers can't violate any municipal codes with respect to littering, etc. But, normally, distribution of literature from a public sidewalk is an activity that can't be stopped. Of course, in some cases the presence of an organizer could result in an incitement to violence, and a clear and present danger of trouble brewing would warrant police intervention.

WHAT THE PLANT OWNER SHOULD NOT SAY OR DO

As a plant owner, you may find yourself charged with unfair labor practice if you threaten to discharge, discipline, close the plant, or retaliate in any way if your employees choose the union. You cannot promise your employees wage hikes or improved working conditions if they will decide to vote against the union. Also, it is very dangerous to give raises during a union organization effort or while negotiating, except perhaps for routine merit increases. You may not ask a job applicant about his or her view on unions or hint that you prefer to hire non-union employees. It is illegal to discriminate against pro-union employees in job assignments, etc. You may not fire anyone for violation of disciplinary rules unless you can prove that the penalty follows established precedents before the union arrived.

WHAT THE PLANT OWNER MAY SAY

Here are a few actual examples of the type of things that you can say and these statements have been approved by the NLRB. However, keep in mind that it may have been the particular situation under which the remarks were made that caused the NLRB to approve them. Any proposed statements you wish to make to your employees should be checked with your attorney.

You are free to express your opinion of labor unions to your employees. You can say something like this, "Unions are objectionable because they cause trouble for employees through strike, and production slowdowns. Don't let anyone tell you that unions don't strike — that is the way their leaders make their living."

You may praise your wage policies and your employment practices." I'm sure you have all read the booklet furnished you in which I set forth the various benefits you have by working for this company. I know you all appreciate the insurance plan, hospitalization, paid holidays, paid vacations, etc. It required no union to get these benefits for you,

and it won't require any union to keep them for you. The company will always be willing to do for you voluntarily what it would do for you through any union."

You may answer union arguments. "The union is telling you that if you don't join the union, you won't have a job. That is not true, etc." You may discuss union dues and the check-off system, "Under union conditions you do not receive the full earnings of your labor; we may be bound to deduct YOUR union dues from your check and give it to the union official. And how about possible increases in dues and assessments and fines? Have the union leaders mentioned those?"

You may express your desire to deal with your employees as individuals. "The company prefers to deal directly with you as it has in the past, rather than through any outsider who is a stranger to us both." You may argue that it is to your employees' best interests to vote against the union.

ORGANIZERS MAY HAVE RIGHTS ON YOUR PREMISES

There are circumstances where organizers are even legally allowed to station themselves on your property. For instance, if you own the bed of a street or driveway that public traffic is ordinarily allowed to use, you would have difficulty barring union organizers. However, parking lots and similar enclosed areas present a different situation. Normally, you don't have to let strangers past your gates — provided all strangers are treated alike. But, if you have permitted social, civic or other commercial groups to use your parking lot to hand out leaflets or petitions to your employees, then you can't bar union organizers. To do so would be illegal discrimination against legitimate organizing efforts. But you are *completely free to enforce privacy or anti-litter rules* to the extent that you enforce them against everyone.

To gain entrance to your property legally, the organizer may try to prove to the NLRB that there is no other practical way in which to contact your employees. For example, if all employees commute by car and don't stop at any point where organizers could offer their literature while standing on public property, and if employees' homes are spread over a large residential area then the union will be able to get an NLRB order directing you to allow the organizer on your parking lot. This is a rare possibility and a vigorous protest may keep them off your property.

BARRING UNION ORGANIZERS FROM YOUR PLANT

Your right to bar union organizers from your plant itself is normally unquestioned, except to the extent that you permit itinerant salesmen or strangers into the plant.

Seldom, however, does this rule discourage the union representative. In smaller plants, particularly, this individual may ask for a chance to come in and talk to the workers or distribute union literature. To support this request, the organizer may quote from the law on employee rights — he or she has nothing to lose by trying. And, if you are not experienced, you may not understand that there is a difference between the rights of an outside organizer and those of a union-minded employee who takes on the job of signing up fellow employees. The outside organizer can and

should be kept out of your plant if you don't ordinarily allow strangers.

In many small plants, organizers may just walk in the back door or the employee entrance if they want to talk to your workers. You don't have to be hesitant at all about asking such persons to leave, and you'll very seldom have any trouble because organizers are usually well aware of the limits of their legal rights. If your request to leave is ignored, you can deal with this individual on the same basis as you would with any other intruder, including the use of reasonable force or police assistance, if necessary. *Don't hesitate to enforce your rights. Unions look upon kindness as a sign of weakness.*

UNION ACTIVITY BY EMPLOYEES ONLY PERMITTED DURING "NON-WORKING TIME"

Employees have certain rights to engage in union activity on your property and the employer also has certain rights in this area. The NLRB has formulated certain rules which balance interests between employee and employer rights. Here are some of those rules:

Employees have a right to solicit on behalf of a union on company property, but only during non-working time. By non-working time, the Board means before and after work, lunch periods and employee free time, such as coffee breaks. Even though you pay for the time, such as a paid coffee break, it is considered to be non-working time. However, you are legally entitled to prohibit any and all union activity by employees during working time. "Working time is for work" and an employee may be disciplined for engaging in union activity during working time. The NLRB has upheld notices on the bulletin board forbidding employees to solicit for unions during working time. You should consult your lawyer about the advisability of such a notice.

THE AUTHORIZATION CARD

In today's rapidly changing world, unions try to get a majority of employees to sign so-called "authorization cards" and, when fortified with these cards, they will demand recognition from the employer without holding a Labor Board election.

The Supreme Court has ruled that an employer has an absolute right to an NLRB secret ballot election and need not recognize a union because the union possesses authorization cards. However, you must not look at the authorization cards even if the union tries to show them to you, because, if you do, the NLRB can force you to recognize the union if the union has authorization cards from over half of your employees.

You should *consult legal counsel as soon as the cards make their appearance.*

Generally speaking, the first time a union makes a propaganda pass out (handbills, flyers, etc.), they will attach a postcard to the handbill. That postcard contains writing which often makes the employee who signed the card either a member of the union or designates the union the bargaining agent of the employee, or the card may simply seek the employee's support for an NLRB election. Sometimes the card

is for the "dual purpose" of designating the union as the employee's bargaining representative as well as authorizing the union to seek a Labor Board election.

Very simply stated, an authorization card might say no more than that the employee authorizes the union to file a petition at the Labor Board in order to get an election. Such a card can only be used for the purpose stated: an NLRB election. *These cards are rare*, simply because a union cannot use them to force itself on an employer. However, a card authorizing the union to represent an employee can be used by the union to obtain an NLRB election, to seek recognition from the employer voluntarily, or to overturn an NLRB election lost by the union if the employer has committed serious unfair labor practices. The card used for the dual purpose of representing employees as well as seeking an NLRB election will also suffice to force recognition by the employer, if the employer commits serious unfair labor practices.

In over-simplified terms, a signed authorization card, in the eyes of the law, can validly designate a union as bargaining representative with the same force as does an election by secret ballot.

EMPLOYERS CAN BE FORCED TO RECOGNIZE UNIONS

If an employer refuses to recognize the union voluntarily and thus forces the union to go through a Labor Board election which the union loses, the employer may still be required to recognize the union. This will happen where: (1) the union does in fact have a majority of the employees signed up, and (2) the employer commits unfair labor practices of such a nature as to make an employee's free choice impossible. The rationale for such a Labor Board order is that the employer who wins an election after committing serious unfair practices will not be permitted to reap the fruits of his or her wrongful acts.

Again, as an oversimplification, discriminatory discharges and significant statements of dire consequences if the union wins the election are the types of conduct that could result in unwittingly getting a union.

WHAT TO DO WHEN AUTHORIZATION CARDS ARE BEING PASSED OUT

Once a union begins to pass out blank authorization cards, it should be a signal to every employer that trouble is brewing. The best way to head off the trouble is with the cards themselves. Obviously, if the union cannot get a majority of your employees to sign the cards, then you will not be faced with a demand for recognition or forced recognition by the Labor Board if you win an election but commit serious unfair labor practices. So, start by attacking the cards.

You have a right to communicate with your employees when a union is passing out cards, and you can tell your employees the disadvantages of these cards. For example, you can point out to your employees that signing the cards could subject them to union fines and discipline. You can also point out that employees lose the chance to hear both sides of

the story and vote intelligently if they sign such cards. In short, these cards can be just as detrimental to the interests of employees as they are to employers.

During this same period you can discuss with employees the benefits they now receive without a union as well as the consequences of joining a union. On advice of counsel, you may find it appropriate to discuss some of the traditional problems which may accompany union participation, such as strikes and lockouts. You also might discuss some of the shops that have lost business, had serious layoffs, closed up for good, or were forced to move after a union organized them and made excessive demands. This approach — of hitting the union hard, right from the beginning — has two disadvantages. First, there are numerous legal pitfalls unless you know what to say and how to say it legally. Secondly, you may be firing all your ammunition too early in the game. This is a decision that should be weighed very carefully.

As a result of your communications with employees, some of them may ask you what they can do to get their cards back. You may tell them that all they need to do is request the return of the cards. If they make such requests in writing and keep copies, even if the union refuses to return them, the validity of the card is destroyed. But caution should be exercised because the employer cannot be actively involved in any way in getting the cards back or even helping get them back. This must be voluntary on the part of the employees and they must seek the return of the cards themselves.

Usually, the union organizer — if successful in getting a majority of employees signed up — walks into the employer's office with the cards. By this approach, this individual hopes to frighten the employer into recognizing the union voluntarily by offering to show the employer the cards and telling him or her that a Labor Board election would be useless. With this approach, the organizer also puts the employer on notice as to which employees signed the cards (if the employer is foolish enough to look at the cards), thus making certain there is refrain from discharging one of the signers for fear of committing an unfair labor practice.

If one of these organizers does appear at your office, *do not look at the cards*. Tell this person that you believe people have a right to vote in secret. Also tell the organizer to “go to the Labor Board for an election” if there's a wish to represent your employees. In fact, you can give any reason you choose — or no reason at all — just so long as you *refuse* to recognize the union and tell the organizer to go to the Labor Board.

Then call for legal counsel!

DOUBLE CHECK THE ATTITUDES OF YOUR EMPLOYEES

When a union claims 50% or more of your employees have signed up and demands the right to bargain, you can either tell the organizer that an election will be consented to after the union files a petition with the NLRB, or you can withhold consent and require the union to follow the procedure necessary to have the NLRB order an election to be held. The main difference between these two approaches is one of timing — the first will produce a decision from the NLRB in about a month or less, the second some months later.

A union must have 30% or more of your employees signed up before the NLRB will hold an election.

Even though the union says they have authorization cards representing 30% or more of your employees, you will no doubt want to double check the attitudes of your employees because some may have signed the card simply to escape criticism from co-workers. Call your supervisors together and discuss the matter with them. Find out from your supervisors — who as good supervisors should know the true feelings of your employees — whether they think your employees want a union.

If your investigation should indicate definitely that the majority of your employees really don't want a union, your best bet would be to give your consent for an election and get it over with. Either the plant owner or the organizer can file an election petition with the regional office of the NLRB. Generally, the union files.

On the other hand, if your supervisors are unsure, then request a hearing so that you will have sufficient time within which to get all the facts before your employees.

WHICH EMPLOYEES WILL BE INCLUDED?

One of the most important jobs you will face is that of meeting with the union representatives and an NLRB field examiner to determine which employees will be included in the bargaining unit. Plant owners should recognize the fact that choosing the unit often can play a major role in deciding who wins the election. Normally, the union will press for the inclusion of as many employees as possible, except for those apt to oppose unionization.

NLRB and Taft-Hartley rules exclude foremen and supervisors. Guards and watchmen are permitted to organize but they can't belong to the unit that includes other employees. Office workers are generally excluded from units of plant people, and professional employees must be permitted to decide for themselves whether they want to be included in the unit. Generally, craft workers, such as your tool and die makers, can have representation by craft union separate from any production workers unit.

TAKE ACTIVE PART IN THE ELECTION CAMPAIGN

Once an election date has been set, the plant owner doesn't have to sit quietly by and let the union tell only its side of the story. Within certain limits, *management can and should wage an active, aggressive campaign of its own*. But great care should be taken not to go beyond the legal limits. You should have continuous guidance from an experienced and astute labor lawyer.

As a plant owner you can make any statement you wish to make to your employees as long as it does not contain threats of reprisal, or force, or a promise of benefits - and you don't have to give the union working time or plant facilities so that they can make a reply. Remember SPIT — you cannot Spy, Promise benefits, Interrogate employees, or Threaten employees, but you certainly can tell employees the facts about unionization.

HOW YOU CAN MAKE YOUR VIEWS KNOWN

You are legally free to make your views known through letters addressed to your employees at their homes, by pamphlets or flyers distributed in the plant or posted on your bulletin boards or even by ads in newspapers. You may hold conversations with small groups of your employees (not within the four walls of your own office) or you may give speeches to your employees during working hours. The best place to talk to your employees is at their work stations. But you must abide by the NLRB's "twenty-four hour" rule. Basically, it provides that the NLRB will set aside an election where an employer or union makes election speeches on company time to assemblies of employees within twenty-four hours before the election is scheduled to begin.

It is important to note that the rule does not prohibit speeches within the twenty-four-hour period on or off the company's premises if attendance is voluntary and if the speech is made during the employees' own time. Nor does it prohibit distribution of literature or posting of notices.

To protect yourself, whenever you make a speech to a group of employees, use a prepared talk or have a stenographer or tape recorder take down what you say. This will provide evidence in case the union should later charge you with making threats or promises. Also, you should brief your supervisors thoroughly on their conduct and responsibility under the law. If a supervisor does or says anything that might be regarded as an unfair labor practice, you should inform your workers at once that it does not represent management's position. Your supervisors are your agents, and you are responsible for their acts.

THE ELECTION

It is nearly always in the interest of the plant owner to encourage all employees to vote. The law provides that a majority of those voting will determine the result. In a unit of 40 employees, for instance, if only 10 vote, six votes for the union would put the entire unit into the union regardless of the wishes of the non-voters. *In the case of a tie vote, the union loses.*

Obviously, a union organizer will try to get all the pro-union voters to the polling place, and won't urge hostile voters to turn out. Management usually should urge everyone to vote, since the pro-union employees are almost sure to vote anyway, and it's most important to have all the opponents vote. Recent statistics show that unions are being turned down in more and more elections. *In 1958 unions won 62% of the elections held. In 1995 unions won only 48% of the elections.*

Additional material is available from NTMA if you get to the point of making preparations to negotiate your first labor contract. NTMA has on file copies of many of the contracts now in effect in the industry. Any member may borrow some of these from the office to check wordings and clauses or to draft their own contract.

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