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The Court ponders labor neutrality: More Justice Kennedy scale-tipping?

On Wednesday, the Court heard oral arguments in *Unite Here Local 355 v Mulhall*, in which the Justices are considering whether a so-called neutrality agreement between a union and employer is a thing of "value" within the meaning of Section 302 of the NLRA and thus prohibited as a felony.

The Court was reviewing a decision by the Eleventh Circuit, which had reversed the district court's dismissal of a complaint alleging a Section 302 violation. The court of appeals held that agreed-upon groundrules in organizing campaigns were permissible, but it remanded the dispute to the district court for it to ascertain the motive for the agreement in question. This ruling conflicted with decisions of two other courts of appeals. (My preview of the oral argument is available here.)

Under the agreement between the union and Mardi Gras, Mardi Gras was required to remain neutral in a union organizing campaign. The agreement also granted the union access to private property as well as employee lists, prohibited union strikes and picketing, provided a card check procedure through which union recognition disputes could be resolved, and contained an arbitration clause to resolve disputes relating to its meaning.

If one can discern an outcome from the oral argument, the case could well depend upon the vote of Justice Anthony Kennedy. Perhaps significantly, at one point Kennedy remarked to William Messenger, counsel for respondent Martin Mulhall, that Mulhall's position seemed to be at odds with "well accepted practices and understandings" — *i.e.*, presumably the practice of neutrality agreement negotiation along with Supreme Court precedents approving of compulsory union recognition when a secret ballot box election was not present. Both Justices Kagan and Scalia questioned Richard McCracken, representing the union, on the history, origin and incidence of such agreements; Justice Scalia asked whether they had indeed only emerged in the nineties, as Mulhall had asserted. McCracken, although careful to state that there are no official statistics on the incidence or prevalence of such agreements, answered that they had their beginnings in the 1970s, alluding to the relationship between the United Auto Workers and the Dana Corporation and judicial precedent enforcing their agreement. In response to questions by Chief Justice Roberts, McCracken noted the prevalence of such arrangements in industries like hotels, casinos, and the like, and he asserted that generally such neutrality arrangements contained so-called card check procedures obliging an employer to recognize the union on the basis of majority support manifested through signed authorization cards.

In fact, no one really knows whether this is the case — just as the incidence of such agreements and union success under them are unknown. And although the Bureau of Labor Statistics has surveyed labor-management contract clauses, it has not addressed this matter. (McCracken did, however, cite an academic article which contained some empirical research.) Frequently, the procedures may culminate in either a privately conducted election or one under the auspices of the National Labor Relations Board itself. (I acted as an independent monitor for a British multinational employer of 80,000 employees that was committed to neutrality and union access beyond NLRA protections and the question of recognition was resolved by NLRB elections.)

In what could be a telling exchange with Deputy Solicitor General Michael Dreeben, Chief Justice Roberts focused on, and expressed hostility to, the card-check portion of the neutrality agreement. The Chief Justice pressed Dreeben to "concede that they're more coercive than a secret ballot? . . . [T]he union organizer comes up to you and says, well, here's a card. You can check I want to join the union, or .. I don't want a union. Which will it be? And there's a bunch of your fellow workers gathered around as you fill out your card?" At this point, Justice Scalia added, to laughter from the audience, "[a]nd he's a big guy."

Dreeben responded at length, telling the Court that some would argue that employers also have big guys and it's very coercive to have your employer in there on the factory floor reminding employees daily that they're very anti-union and that there are a lot of costs to joining a union. And so the—the process here is one in which, yes, the parties can go to the National Labor Relations Board and have an election. But this Court in the Gissel packing case, backed up by decades of Board law, has validated that card check agreements are perfectly legitimate and may facilitate the employees' free exercise of their choice to have a union.

The agreement in this case doesn't recognize the union. All the agreement does is establish a perfectly lawful process, which Respondent concedes would be a thing of value, but he then has to carve it out from Section 302, a voluntary recognition agreement. And the access that is given to the property, which is something that employers lawfully can do—it's their property, they have the right to do it—they provide it so that the employees can get information from the union about unionization. And the employee list serves the same thing."

It is possible that the Chief Justice and Justice Scalia – along with Justice Thomas (who remained silent, as is his practice, but has emphasized that the NLRA is designed to protect employees, rather than unions, in organizational campaigns) may find a way to invalidate either card check or the agreement itself. Both McCracken and Dreeben pointed out that Section 302 is designed to prohibit union corruption and bribery, which would benefit union officials instead of employees. Perhaps it would not be much of a stretch for these Justices to view neutrality agreements, particularly one which has a card-check procedure, as a benefit to a union rather than employees.

Another vote that could be also lost to the union is that of Justice Alito, who seemed to view the access to property provided to the union by this neutrality agreement as a thing of "value," notwithstanding the union's vigorous attempt to convince the Court that it did not possess property which was marketable. Justice Kennedy regarded the right to waive exclusion from property as a "property right . . . it can become so when I . . . charge for it." McCracken responded that the union simply had the right to be on the property but "not to any exclusive area . . . your property right to exclude remained in your hands." At the same time, Justice Kennedy suggested that "[t]t's hard to think that one really pays or lends or delivers, which is are statutory words, neutrality of speech."

Justice Scalia, like the Eleventh Circuit, seemed concerned with the fact that the union had made a promise to the employer that it would devote its financial resources to campaign for a referendum which would allow for the installation of slot machines – a benefit, McCracken said, for both employees and the employer in that it would produce jobs. McCracken pointed out, in a discussion with Justice Sotomayor, that nothing in Section 302 prohibited a union from "paying money to an employer" and that, in any event, the union here had simply spent $100,000 "of time of its staff knocking on doors exercising its speech and petition rights in order to get this legislation passed so that the employer could get into business."

In its totality, the argument was dominated by Justices Kagan and Breyer. Justice Kagan in particular emphasized that unions negotiate many benefits which promote unions as well as employees — *e.g.*, grievance-arbitration machinery to resolve disputes. She emphasized that negotiated benefits would benefit both unions and employees, but Messenger countered that grievance-arbitration machinery helps employees, not the union.

But this line of thought represented Messenger's overriding theme: that the National Labor Relations Act's thrust was to preclude "double dealing" by unions. This meant, he said, that specific authorization to negotiate a subject had to be found in the NLRA for it to be compatible with federal labor policy.

This assertion produced considerable skepticism, particularly from Justice Kagan and Breyer, both of whom emphasized the need for wide-open bargaining between the parties and were critical of Messenger's argument that the NLRA would have to specifically authorize the bargaining in question for it to be lawful and not prohibited by Section 302. With regard to union organizing itself, Messenger took the position that only a unilateral decision by the employer to allow the union to organize would be lawful under Section 302. Producing what must have been puzzlement throughout the entire Court, Messenger went on to allude to 1959 amendments relating to "union organizing."

The extreme nature of Mulhall's position seemed to take the Justices aback, with Justice Ginsburg noting that Mulhall's position was at odds with even the Eleventh Circuit, which views some kinds of organizing agreements as lawful.

In closing, McCracken emphasized the presence of an arbitration clause in the agreement and the Court's solicitude for this process — a process that he described as the most important part of the 1947 amendments to the NLRA. In this regard, the National Academy of Arbitrators, the blue-ribbon organization of North America's most experienced impartial neutrals, had filed an *amicus* brief supporting the position of the union and the federal government.

Finally, neither McCracken nor Dreeben contested Mulhall's standing to sue under Article III of the Constitution. In response to Justice Alito's query Mr. Dreeben said "..we have not drilled deeply enough into it [the standing issue] to have a position on that question." Thus, given the fact that no other Justice expressed interest in this subject, it appeared as though that the Court would consider this matter on its merits.

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