

The Hotel Industry's Summer of 2006

A Watershed Moment for America's Labor Unions?

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Neutrality agreements allow labor unions to organize workers in hotels and other industries without the trouble of a secret-ballot election. UNITE HERE, which represents hotel employees in several major markets, attempted in summer 2006 to extend its reach into the industry via neutrality agreements. The union contracts expired in several markets, which meant that the hotel chains were faced with the possibility of labor strife in their major cities. In exchange for labor peace, the chains agreed to a moderate extension of organizing by neutrality agreement, but not to the extent that the union might have wished.

Keywords: neutrality; card check; elections; unions; labor peace; negotiations

Each May for the past five years, employment lawyers representing hotels and other hospitality companies attend the Center for Hospitality Research's (CHR's) annual Labor and Employment Law Roundtable. The Legal Roundtable, jointly sponsored by the CHR, Cornell University's School of Industrial and Labor Relations, and Cornell Law School, is held each year at Cornell's School of Hotel Administration. In both 2005 and 2006, one of the Legal Roundtable's topics was union negotiations in the hotel industry. As the reader may be aware, the union negotiations in summer 2006 were among the most important negotiations in recent memory. The purpose of this article is to explain, by drawing in part on insights of Roundtable participants, how the summer of

2006 was set up to be a watershed time for the union movement, what the issues were, and how the union sought to exert its power.

The State of the Labor Movement and the Merger of UNITE HERE

Once strong, union membership is in decline in the United States. In the years following World War II, the economy boomed and the labor movement attained its peak of national power. Unions organized more than half of the workforce in manufacturing.¹ At its height in the mid-1950s, organized labor represented about 35 percent of the United States's workforce.² That percentage has declined steadily since that time, sinking to 13.7 percent in 2005. Indeed, only 7.8 percent of the private workforce is now unionized; the approximate level just before the New Deal.³ A large reason for the decline in private sector union membership is the decline of heavy manufacturing in the United States. As these industries moved out of the country, union jobs simply disappeared (and many others moved out of the country).

One industry that has not disappeared or relocated, however, is the hotel industry. During the height of union organizing just before and after World War II, most of the great hotels in large American cities were organized. Even though many of these hotels have changed ownership and operators, there remains a strong union presence in such cities as Boston, Chicago, Los Angeles, New York, San Francisco, and Washington, D.C. Despite this presence, hotels were not the focus of labor organizers for many years. This was the case because hotel employees are typically not highly paid, often work for tips, and are mobile—failing to stay in bargaining-unit positions for the duration of their

careers. Since union dues are composed of a percentage of employee pay (excluding tips) and because union members who benefit the most are those who stay at the same job for long periods of time, hotel jobs did not fit the traditional union model. Instead, the union movement focused on “heavy labor.”⁴

With the days of American dominance in manufacturing long gone, unions turned to industries that cannot be relocated or outsourced overseas. Today, the hospitality industry is now not only a focus but could be the holy grail for the labor movement. That said, the labor movement faced a problem of adequate resources in its prospective plan to organize hotel employees.

One of the chief hotel unions, Hotel Employees and Restaurant Employees (HERE), had a core membership in the hotel industry. Moreover, the union had a capable, dynamic, and progressive leader, John Wilhelm. But HERE lacked sufficient monetary resources. Meanwhile, UNITE, the successor union of the International Ladies' Garment Workers' Union (ILGWU) and the Amalgamated Clothing and Textile Workers Union (ACTWU), also had a bright, dynamic leader, Bruce Raynor. In addition, because it owned the Amalgamated Bank of New York, it had substantial resources. The problem for UNITE was declining membership as U.S.-based apparel and textile manufacturing continued to decline.

On July 8, 2004, UNITE and HERE merged to create UNITE HERE, with the following goal: “Organizing the unorganized in our industries is the top priority for UNITE HERE. Over 50 percent of the new union's national budget will go toward organizing.”⁵ UNITE HERE does not, however, wish to organize in what one might consider the old-fashioned way, which was through elections monitored by the National Labor Relations Board

(NLRB). Instead, the union wishes to increase its membership via far less costly neutrality agreements and card checks. To understand the distinction, both types of union organizing are explained below.

“Unite to Win” Organizing Strategy

UNITE HERE is one of a group of national labor organizations that are engaging in a novel attempt to shift strategic gears, in particular with respect to organizing. In addition to UNITE HERE, those unions are the Service Employees International Union (SEIU), the International Brotherhood of Teamsters, the Carpenters, the United Farm Workers, the Laborers International Union, and the United Food and Commercial Workers (UFCW). As stated on the Change to Win Web site, which is the seven unions' collective electronic effort, the central objective of Change to Win is “to unite the more than 50 million American workers who work in industries that cannot be outsourced or shipped overseas into strong unions that can win them a place in the American middle class—where their jobs provide good wages, good health care, good pensions, and a voice on the job.”⁶ The goal is for the Change to Win unions to integrate their organizing programs and to launch large-scale organizing campaigns, earmarking at least 50 percent of collective resources for organizing drives across the country (Unite to Win is UNITE HERE's name for its part in Change to Win). Part of the organizing strategy involves labor coalition building with the intent of bypassing traditional organizing drives in favor of applying political and economic pressure on employers to organize employees. As John Wilhelm explains on the Change to Win Web site, “What workers in this industry need, what the country needs is a permanent campaign to

do in the service sector what we did in manufacturing 70 years ago: transform low-wage work into decent jobs that give people the opportunity to make it into the middle class.” As we said, these unions seek to accomplish this goal via nontraditional organizing methods, using card checks and neutrality agreements, which we describe below. Indeed, at a recent Change to Win convention held in Las Vegas, attended by more than two thousand union organizers, the organization announced an organizing campaign in thirty-five cities. Operating under the slogan “Make Work Pay,” the drive aims to form cooperative cross-union efforts to organize workers in the target cities. One of the primary components of the Make Work Pay campaign is a national campaign led by UNITE HERE to organize workers at a large U.S. hotel chain, including distributing leaflets at the company's hotels and sponsoring rallies in many cities.

Traditional Organizing Drives

The “old-fashioned” method of organizing aims at building support for a ballot among employees at a particular establishment or company. Sometimes, unions send their members to apply for jobs with non-union employers the unions wish to organize. Once hired, these “Trojan horse” workers set about organizing the other employees. This method, referred to as “salting,” has been the subject of a U.S. Supreme Court case in which the Court held that an employer could not terminate a “salter” simply because the real reason the employee joined the company was to organize it.⁷ Another traditional method for organizing is to find existing employees who are willing to “sell” the union to their coworkers. Last, organizers may enter the property and hand out authorization cards or set up picket lines at the property's entrances and exits.

The National Labor Relations Act (NLRA) sets forth the laws regulating this form of employee organization.⁸ Under those rules, before any labor organization can be certified as the exclusive bargaining representative for any group of employees, the employees in that group, constituted as a bargaining unit, vote for or against union representation in a secret ballot election monitored by the NLRB. In most cases, the NLRB seeks to schedule such an election approximately four weeks after the union initiates the process by filing a representation petition. The time period may be extended if the employer contests the bargaining unit or if other related issues arise. Regardless, the four-week period provides both the union and the employer an opportunity to present their positions to the employees.

Under the NLRB rules, a union may request the secret ballot election only if a minimum of 30 percent of the employees in a prospective bargaining unit have signed authorization cards. As a practical matter, however, most national unions will not file a petition unless at least 60 percent of the employees have signed cards.⁹ To prevail in the election, the union needs a simple majority only of those who actually vote, rather than a majority of those who would be represented in the bargaining unit.

Both sides are free to “campaign” prior to the election. Indeed, the period between the time the petition is filed and the election is held is often referred to as the “critical period.” During that time, employers may not threaten, interrogate, make promises to, or engage in surveillance of employees. In addition, employers may not solicit grievances or confer benefits. If the employer violates these rules, the NLRB may either order the election to be rerun or issue a bargaining order.¹⁰

Employers may, however, engage in numerous legitimate campaign activities

to convince employees to vote against the union by raising issues with the lawful intent of informing employees of their rights and the consequences of voting in favor of the union.¹¹ According to several Roundtable labor lawyers, one of the key strategies in this regard is to examine what the union is selling and explain to the employees the ways in which the costs would outweigh the benefits. These Roundtable participants suggest that one problem for the unions is that organized labor does not always have much to sell. For example, one lawyer discussed a union organizing drive in which the union represented to employees that it would demand that the employer implement the union’s health insurance plan if it were elected. The union extolled the fact that it would insist that the employer pay 100 percent of the cost of the plan, as opposed to the current plan under which the employees paid a portion of the cost. The employer held a meeting in which it compared the two plans. While the union plan was fully paid, the coverage was clearly so inferior that the employees concluded that they were better off with the employer’s plan and voted against the union. Employers contend that this insurance issue is a typical example of the current state of union organizing: at first the union pitch sounds great, but after close examination the employees do not want to buy what the union is selling. This is why, employers argue, companies are able to defeat the union in elections.¹²

Not surprisingly, unions present a different view of campaigns. Union advocates claim that during most campaigns employers illegally threaten, intimidate, and terminate employees who favor the union. According to a 2005 report by the University of Illinois at Chicago’s Center for Urban Economic Development, when faced with organizing drives, 30 percent of

employers fire prounion workers, 49 percent threaten to close a worksite if the union prevails, and 51 percent coerce workers into opposing unions with bribery or favoritism.¹³ Unions point to the numerous unfair labor practice charges filed against employers as well as anecdotal evidence of outrageous employer behavior.

While the above arguments need to be presented, they may be moot. UNITE HERE no longer wishes to organize under the traditional NLRB election rules. In fact, as one HERE organizer stated, "We will never go to an NLRB election again."¹⁴ Instead, as part of the above-described Unite to Win coalition, UNITE HERE's strategy is to organize using card-check neutrality agreements.

Neutrality Agreements

Although neutrality agreements come in several forms, the common denominator for all is that employers agree to stay neutral with regard to the union's attempt to organize the workforce.¹⁵ Some agreements simply state that the employer will remain neutral with no other language, while other agreements contain more specific provisions.¹⁶ For example, under UNITE HERE's standard agreement employers pledge that they "will not communicate opposition" to the union's efforts.¹⁷

Neutrality agreements commonly provide the union with access to employees in the form of a list of their names and addresses (and, sometimes, telephone numbers), as well as permission to come onto company property during work hours for the purpose of collecting signed authorization cards. This differs from the guidelines set up by the NLRB and the courts, under which an employer has no obligation to provide the union with access and may actually be prohibited from doing so.¹⁸

Finally, most neutrality agreements also include a "card-check" provision, which

requires the employer to recognize the union if a majority of the bargaining-unit employees sign authorization cards. Under a card-check agreement, the employees do not vote for the union in a secret ballot election monitored by the NLRB. Instead, the employer recognizes the union if it presents the company with the requisite number of signed authorization cards.

The Effect of Neutrality Agreements

Neutrality agreements change the landscape of union organizing. A study by Eaton and Kriesky conducted in the late 1990s examined 170 campaigns where the employer and the union agreed to neutrality with a card-check provision. With the aid of such agreements, unions prevailed 78.2 percent of the time.¹⁹ Comparing this result to the 46 percent union success rate in contested NLRB elections, the authors concluded that while neutrality arrangements improve a union's chances, the results are not nearly as stark as those in the public sector where unions won 85 percent of secret-ballot elections in 1995.

We believe that the authors dismissed their results too quickly. We say this because of unions' policy of petitioning for an election only when they are certain of having more than 50 percent support of the unit's members. This implies that in the 54 percent of the elections that unions lost, the unions went into the election with majority support, but did not get all of those votes. This means that if there had been a card check instead of a ballot, those unions would likely have been recognized.

The following example contrasts the effectiveness of neutrality agreements for organizing with that of contested elections. Say that a union is targeting workers at two hundred different employers. One hundred of the employers sign a neutrality agreement with a card check, while the

other one hundred do not do so. Applying Eaton and Kriesky's results for this example, the union would organize seventy-eight of the "neutral" employers. The union then attempts to organize the other one hundred employers using secret ballots instead of neutrality agreements. Of these one hundred companies, the employees in twenty companies do not want a union. Because fewer than 50 percent of those employees sign authorization cards, the union walks away. The union gets more than 50 percent of the employees to sign cards at the remaining eighty companies. Note that under a card-check agreement, the matter would end there and *all eighty* of these companies would be unionized. Because there is an election, however, the employer tells its story (or intimidates the employees) during the campaign period. Again applying Eaton and Kriesky's percentages, the union prevails in thirty-seven elections (46 percent of the elections). A casual reading of this example would conclude that neutrality with a card check yielded a 78 percent union recognition and election yielded just under a 50 percent union success rate. That conclusion, however, omits the effects of the twenty cases where the union did not even attempt an election. Thus, the result when employers declined a neutrality agreement and insisted on elections was just under 40 percent union success, given that twenty companies are not in the election data set. What this means for managers is that when there is enough employee interest to warrant an election, (1) the company's chances of becoming unionized are less than 50 percent under the NLRB's election procedures, but (2) a unionized bargaining unit is nearly guaranteed under a neutrality agreement with a card-check provision.

We are certain that employers are aware of the logic found in the above example.

Why, then, would an employer ever accede to a neutrality agreement in the first place? As we explain next, the answer is external factors.

Why Sign?

The short answer to the question of why sign is that an employer will sign a neutrality agreement when the employer believes the agreement is in its best interests. Employers or observers who believe that unionization is never in the employer's best interest might be puzzled by this argument, but we have identified situations when signing is in the employer's best interest. First, some municipalities have instituted labor-peace agreements that required neutrality if employers want to obtain building permits or even operate.²⁰ Second, in the hotel industry it is not unheard of for a union to buy a hotel and make a neutrality agreement a condition for any operator wishing to manage the property. Third, sometimes unions can help an employer staff a property. Finally, an employer might sign a neutrality agreement because the union is selling something that the employer wishes to buy. For example, in Las Vegas, at least one HR director contends he could have never opened on time without the help of HERE. Similarly, Southern Bell Corporation (SBC) signed a nationwide neutrality agreement with the communications workers in exchange for that union's agreement to lobby on behalf of SBC with regard to potential antitrust violations.

Indeed, unions can offer the important gift of labor peace. To sell peace, though, a union needs the ability to cause labor strife. In the past several years, UNITE HERE has forged a strategy that will allow it to wage war against the hotel industry and thereby afford it the opportunity to peddle peace. The union had the ability to start this war in summer 2006.

The Summer of 2006

Most unionized hotels in the major cities in the United States and Canada are part of employers' associations that bargain as a group. The contract that emerges from these negotiations is referred to as an area agreement and covers all the properties in the association. In addition, many properties in the vicinity that are not part of the multiemployer group sign what are referred to as "me-too agreements." These agreements simply mean that these properties that are not part of the employer group will be bound by the terms of the area agreement. In the past, the union agreed to contracts in various major cities that expired in different years. Because UNITE HERE represented properties in all the major cities, it would take too many resources to negotiate on several fronts at the same time. When the hotels, on the other hand, were independently owned and operated, there was no advantage or disadvantage to negotiating separately each year. As hotels came to be operated by large chains, the companies encountered the same issue as the union—namely, it was too cumbersome to juggle simultaneous negotiations in several cities. For the most recent set of negotiations, however, UNITE HERE changed its strategy and sought to have the contracts in a number of large cities expire simultaneously. In the past several years, UNITE HERE has either insisted on short contracts or refused to agree to any new contract to ensure that in summer 2006 contracts would be open in Boston, Chicago, Honolulu, Los Angeles, New York, San Francisco, and Toronto.

According to John Wilhelm, the reason for UNITE HERE's altered strategy was the change in the industry.²¹ Rather than deal piecemeal with local management, the union wants to negotiate with corporate executives. While this argument

sounds fine in principle, we wonder which corporate executives will be able to negotiate in seven places at once. If the union seeks to negotiate with the corporate director of labor relations, it seems that having seven simultaneous negotiations would make it impossible to have that person at the table. Moreover, Wilhelm cannot believe that CEOs or COOs will come to the table because CEOs and COOs typically hire experts in labor relations to negotiate on their companies' behalf. By the same token, the union's negotiators are experts in negotiations.

Another problem with this reasoning involves the question of what party should negotiate with the unions. The corporate executives to whom Wilhelm refers work for hotel operators, who are often not the hotel's owners. If the owner is the negotiating party, then national bargaining makes no sense. If the operator negotiates, the owner is in an awkward position.

Given that national bargaining seems to be logistically difficult, we need to examine why the union worked so hard to get the contracts to expire at the same time.

Roundtable participants suggested that the answer comes back to labor peace, labor war, and UNITE HERE's priorities. Wilhelm's observation that the sixty-year-old bargaining structure "doesn't work any more" makes sense. The development of large chains has seriously hampered the union's ability to cause labor strife in any given city. If New York is on strike and its hotels lose conventions as a consequence, the New York properties can rebook their conventions in other properties managed by the same brand in another city. This practice would be no consolation to the owner in the short run, but that New York owner knows that eventually New York will win the rebooked conventions when the pressure is on in another city. Thus, while the sixty-year-old structure does not

work for UNITE HERE, it works well enough for the hotels. Indeed, this structure put the union at a serious disadvantage. Next, we consider whether the new structure simply levels the playing field or will give the union a substantial bargaining advantage. In that regard, Roundtable participants explained what the UNITE HERE wants and what it can do.

With the expiration of numerous contracts, UNITE HERE's strategy became clear: it would conduct corporate campaigns. Instead of negotiating with one market's employer association, UNITE HERE would negotiate with operators controlling properties throughout the country. For example, UNITE HERE exercised its contractual right to exclude a specific operator from employer associations by excluding Hilton from the multiemployer bargaining associations in each of the seven cities. This separation caused turbulence among the operators. Hilton was forced to negotiate on its own, while the employer associations were left to decide whether to wait to see what would come out of the Hilton negotiations or to try to cut a deal before UNITE HERE's Hilton negotiations got messy. Meantime, the union could call or threaten to call strikes against Hilton in all seven cities—or even on several operators. If the union was restive in several markets, the chains could not redirect conventions to other, presumably peaceful cities because the union could disrupt operations wherever the conventions went. Moreover, the operators could not bring in members of management from other cities to do hourly work because all the hotels were preparing for a strike. None of this is to say that the union wanted to call strikes. Indeed, the union's ability to wage war allowed it to sell peace—at a price. In this case, the price went beyond the traditional bargaining subjects of wages, hours, and work rules.

Given UNITE HERE's focus on organizing and the fact that UNITE HERE does not wish to organize with NLRB elections, one could see that the union's goal was to convince the hotel chains to sign nationwide neutrality agreements. Since neutrality agreements are merely permissive subjects of bargaining (as opposed to mandatory subjects), UNITE HERE could not have insisted that the hotels discuss this form of organizing at the bargaining table. The law does allow the union, however, to package neutrality with scaled-back demands for wage and benefit increases. Thus, hotels were faced with an option: buy peace or face labor unrest.

This complex decision was made more complicated by the sometimes competing interests of the hotel operators and the hotel owners. Not only that, but the interests of short-term real estate investor owners differ from those who are planning to hold the hotel over the long term. Roundtable participants did not know whether the operator could sign a neutrality agreement that bound several properties held by different owners because the contracts are unclear and the law unsettled. Our subsequent research revealed no definitive answer to this question. Thus, the hotels negotiated during summer 2006 without really knowing the answer to questions that are vital to their rights and responsibilities. This uncertainty was, however, a classic double-edged sword. The union could insist that the operators agree to neutrality at properties that they manage even though those hotels did not have owners in common, while management could argue it could not make such a commitment. Management's refusal to expand neutrality to the chain's nonunion properties would not, however, end the discussion. Because unions have the right to engage in recognition-related picketing at the nonunion properties, the union could pull those owners into the negotiations—if

only to rid themselves of pickets. Seeing the strength of the union strategy, management looked to the courts and the government for help. Management hoped that either the legislature or the courts would outlaw neutrality. At least for summer 2006, such relief was not forthcoming.

Neutrality Agreements the Subject of Court Scrutiny

The argument against neutrality agreements can be couched as one that supports an employee's right either to be a part of a labor organization or to abstain from such membership (guaranteed under Section 7 of the NLRA). Management lawyers note the irony when unions, whose purpose, in part, is to empower employees, publicly decry a secret ballot (democratic) election process in favor of a "backroom deal" that results in recognition. Interestingly, a poll conducted by Zogby International in June 2004 of 704 randomly chosen union members living in the United States revealed that 66 percent of those polled disagreed that it should be legal for a company and a union to sign a neutrality agreement.²² Perhaps, then, it is not surprising that a group of antiunion employees brought a recent lawsuit against their employer and a union alleging that the neutrality agreement the two had signed violated Section 302 of the LMRA. Section 302 prohibits unions and employers from giving each other a "thing of value" to avoid the situation of unions and employers exchanging favors so that their loyalty would be to each other at the expense of the employees.

While there is limited case law on what the term "thing of value" means under Section 302, it seems that the term covers fairly minor matters. In *U.S. v. Schiffman*, for instance, the question before the court was whether the union's request for a reduced room rate constituted a thing of

value and thus violated Section 302.²³ In that case, a union official who represented a bargaining unit at a Hyatt property in Florida requested that an Atlanta Hyatt provide the official with a room rate that was just more than half of Hyatt's corporate rate. The court found that the room rate reduction was a "thing of value" and that the requested favor violated Section 302.

Similarly, in *U.S. v. Boffa*, the court found that an employer unlawfully provided a thing of value when it provided a union official with the use of a car without charge for a four-month period.²⁴ This seemingly broad definition of "thing of value" in Section 302 is consistent with the judicial interpretation of the same term when it is found in other statutes.²⁵

Based on these cases, one could argue that a neutrality agreement constitutes a thing of value. Indeed, neutrality agreements almost always require the employer to provide at least four things that could be characterized by the courts as things of value. To review, those things are (1) access to the hotel's premises so the union can speak to the employees, (2) a list of employees (often with addresses), (3) a card-check provision, and (4) exclusivity to one union. If any of those benefits constitute a thing of value, the typical neutrality agreement would violate Section 302 of the LMRA.²⁶

Armed with these arguments, the employees of Heartland Industries in Ohio sought to have a neutrality agreement signed by their employer declared unlawful. These employees did not, however, prevail. In *Patterson v. Heartland Industrial Partners, LLP*, the Northern District Court in Ohio, relying on the Third Circuit's reasoning in *Hotel Employees Local 57 v. Sage Hospitality*, ruled that the neutrality agreement was not a "thing of value" under Section 302 and accordingly granted the defendants' summary judgment motion to

dismiss the action.²⁷ The agreement at issue in that case provided that the employer would cooperate with the union during its organizing campaign by providing the union with employee names and addresses and access to the workplace and by pledging not to speak negatively about the union. The agreement also described the terms of a first contract in the event that the union's campaign was successful.²⁸

The *Patterson* case does not end the legal debate over neutrality agreements, and there is a chance that with the current NLRB (made up of a majority of George W. Bush appointees) or the conservative-leaning Supreme Court could, in fact, make neutrality agreements unlawful in the future. While it is impossible to predict that long-term viability of neutrality agreements, the Roundtable participants all agreed that it was unlikely that there would be any legal impediments to UNITE HERE's neutrality plans during summer 2006.

Competing Pending Federal Legislation on Card-Check Recognition

Two bills currently pending before Congress propose directly opposite treatment of card-check recognition. In an effort to end check-offs, the Secret Ballot Protection Act mandates an NLRB-supervised secret ballot election in all union organizing campaigns.²⁹ A competing bill championed by the AFL-CIO, the Employee Free Choice Act, would *require* the board to certify a union as the bargaining representative through a card-check process.³⁰ The latter proposed act also provides for mandatory mediation and arbitration should the union and employer not agree on terms of a first collective bargaining agreement within one hundred days of the card-check recognition. The bill further seeks to increase penalties

imposed on employers for NLRA violations during organizing campaigns.

Had either of these bills been enacted, the campaign of summer 2006 would have been moot. Moreover, either bill would radically change the union organizing landscape in this country. As of this writing, neither bill had been made into law, and we believe that neither bill will be made into law in the near future.

We see no hope for the labor-backed bill because the composition of Congress is even more conservative than when Bill Clinton, who was elected with strong labor support, attempted to reward labor interests for their support. Unions wanted Congress to overturn the 1938 case *McKay Radio*, which allowed employers to permanently replace strikers.³¹ Clinton could not find the support to pass this legislation.

Given the Republican power in Washington, the Secret Ballot Protection Act seems to be in a better position to become law than the competing union bill. Still, we believe its passage is unlikely. With President Bush contending with low approval ratings, the war in Iraq, tax reform, social security reform, and the midterm elections, it seems unlikely that either he or the Republican leadership will push for a bill that will benefit a relatively small percentage of their base while giving the Democrats' strongest ally a rallying cry for the upcoming elections. What this means is that unless the courts become involved, the issue of neutrality will continue to be resolved at the bargaining table for the immediate future.

Conclusion

The summer of 2006 was watershed for unions and management. It was UNITE HERE's opportunity to implement its new Unite to Win strategy. It was also the hotel operators' chance to continue to push

unions into further decline. At the time of this writing, Hilton had settled nationwide, New York settled, and some operators in Chicago have settled. The other cities were still negotiating. Based on our initial readings, the union did achieve many of its goals. The hotels and the union agreed to card check neutrality for new properties and for a limited number of existing properties. For those not covered, it is business as usual. Alternatively, managers of covered properties must adjust to a new world. The key to avoiding unionization for covered properties will be analysis and communication. Unions will be allowed on property, and recognition can happen as soon as enough check-off cards are signed, often without time for the employees or the employer to digest the issues. To avoid this prospect, managers of covered properties need to make sure that their wages and benefits are similar to or better than those of unionized hotels. While this may be expensive, it will be less costly than facing the work rules of an area agreement. Second, management must ensure that morale does not dip so low that employees will buy the unions' promise of voice and empowerment. Strong human resources practices, where decisions are deemed fair and transparent, are the best way to keep morale high. Competitive wages and fair employment practices are vital, but not sufficient, unless these ideals are communicated to the employees. The employees need to know that their wages are as good as that of unionized hotels. Fair decisions can be deemed unfair if their basis is not communicated. Covered employees must work with communications experts to make sure that employees are informed of, and understand, the benefits that the employer provides before the union begins its organizing. If this does not happen, unionization could be a given.

Endnotes

1. B. E. Kaufman, *The Origins and Evolution of the Field of Industrial Relations in the United States* (Ithaca, NY: ILR Press, 1993).
2. *Ibid.*, 46.
3. B. T. Hirsch and A. D. Macpherson, Union Membership and Coverage Database from the Current Population Survey, 2004, updated at www.unionstats.com/, where Hirsch and Macpherson's updated statistics may be found; see also www.bls.gov/news.release/union2.t03.htm.
4. *Ibid.* Overall, employment in U.S. manufacturing industries fell by 1.8 million jobs between January 1997 and December 2001, but a disproportionate share of those lost jobs were concentrated among unions, which lost nearly 10 percent of their manufacturing sector membership in that five-year period. The decline of the American manufacturing is reflected in the union membership statistics.
5. www.unitehere.org/.
6. www.changetowin.org/.
7. *N.L.R.B. v. Town & Country Elec. Inc.*, 516 U.S. 85 (1995).
8. See www.nlr.gov/nlr/legal/manuals/rules/act.asp for the full text of the National Labor Relations Act (NLRA).
9. Interview with Richard Hurd, professor of labor relations, Cornell University School of Industrial and Labor Relations, June 28, 2001. This estimate is conservative based on conversations with union officials. Some assert that the percentage of employees the union considers supporters (based on authorization card signatures) is between 75 and 90 percent.
10. A bargaining order is a National Labor Relations Board (NLRB) mandate requiring a company to "cease and desist from their unfair labor practices, to offer reinstatement and back pay to the employees who had been discriminatorily discharged, to bargain with the union on request, and to post the appropriate notices." *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575, 585 (1969).
11. Employers typically raise some or all of the following issues, based in part on advice from counsel and from their unique circumstances, and industry and employee demographics:
 - whether unions can "guarantee" increased pay, benefits, or anything else;

- how collective bargaining really works;
 - what it costs to be a union member in terms of dues and initiation fees, where that money goes, how it is used, and by whom;
 - whether the union's leaders are trustworthy and capable;
 - the employer's record of responsiveness to employee issues; and
 - the fact that employees will be paying someone to do what they may have been able to do (represent themselves) for free.
12. Surveys of union organizers and employees who have been through NLRB election campaigns seem to confirm this trend at least indirectly. For example, see American Rights at Work survey (2006), www.americanrightsatwork.org/press/press.cfm?pressReleaseID=33.
 13. *Ibid.*
 14. Michael Hughlett, "Hotel Worker's Union in St. Paul Minn., Plans New Tack in Organizing," *Hotel Online*, www.hotel-online.com/neo/news/2001_June_22/k.SPH.993243589.html, June 20, 2001 (quoting Jaye Rykunyk, head of Hotel Employees and Restaurant Employees [HERE] Local 17).
 15. While most agreements define neutrality, the definitions vary widely. HERE agreements prohibit the employer from communicating any opposition to the union. Less typical definitions declare that management will make an affirmative statement to their employees that it welcomes their choice of a representative. See Adrienne E. Eaton and Jill Kriesky, "Union Organizing under Neutrality and Card Check Agreements," *Industrial and Labor Relations Review* (October 2001): pp. 8-9.
 16. Agreements may state that (1) the employer will not attack or demean the union; (2) the employer will not refer to the union as a third party; (3) the parties will strive to create a campaign free of fear, hostility, and coercion; (4) the parties will campaign in a positive manner; (5) the parties will keep their statements procompany or pronoun; and (6) the employer will not state that it is corporate policy to avoid unionization. See Eaton and Kriesky, "Union Organizing," 9.
 17. *Ibid.*, 8.
 18. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). See also *Phelps Dodge Corp.*, 177 NLRB 531 (1969).
 19. Eaton and Kriesky, "Union Organizing," 15.
 20. See *Aeroground, Inc. v. City and County of San Francisco*, N.D. Cal., No. C-01-1628VRW, injunction granted July 9, 2001. Where the city established a labor peace rule that required any employer that leased, subleased, contracted, or subcontracted with the San Francisco International Airport to agree to a card-check authorization procedure with any union that initiated a representation request. The union had to register with the airport director also.
 21. www.changetowin.org/.
 22. See www.mackinac.org/article.aspx?ID=6806. The actual text of the question at issue is as follows: "Some companies and union organizers want to make a special agreement to unionize the workers if at least half of the workers sign their names on cards saying they want a union, rather than letting all the workers vote in a secret-ballot election overseen by the government. Do you agree or disagree that it should be legal for a company and union organizers to make this special agreement to bypass the normal secret-ballot process to determine whether to unionize the workers?" Twenty-six percent of those polled agreed with the statement and 8 percent were not sure.
 23. 552 F.2d 1124 (5th Cir. 1977).
 24. 688 F.2d 919, 936 (3rd Cir. 1982).
 25. Title 18 Section 201, Bribery of Public Officials and Witnesses (8 U.S.C. 201), defines two crimes, bribery and illegal gratuity.
 26. In unrelated holdings, the courts have found the following to be things of value: promises of future employment, shares of stock with no commercial value, and the companionship of one's spouse or significant other during an overseas trip.
 27. *Patterson v. Heartland Industrial Partners, LLP*, 225 FRD 204 (ND Ohio 2004); *Hotel Employees Local 57 v. Sage Hospitality*, 3rd Cir. 299 F. Supp 2d 461 (2004).
 28. The Court cited the Third Circuit's reasoning in *Hotel Employees Local 57 v Sage Hospitality*, 3rd Cir. 299 F. Supp 2d 461 (2004), which it found persuasive: "The agreement here involves no payment, loan, or delivery of anything. The fact that a Neutrality Agreement—like any other labor arbitration agreement—benefits both parties with efficiency and cost saving does not transform it into a payment or delivery of some benefit. Furthermore, any benefit to the union inherent in a more efficient resolution of recognition disputes does not constitute a thing of value within the meaning of the statute."
 29. S. 1173, H.R. 874, introduced by Senator Jim DeMint (SC) along with five Senate cosponsors, and by Representative Charles Norwood (GA) and ninety-one House cosponsors.

30. S. 842, H.R. 1696, introduced by Senator Edward Kennedy (MA) and 42 Senate cosponsors, and Representative George Miller (CA) and 215 House cosponsors.
31. Under *McKay Radio*, an employer who hired replacements to work during a strike does not

have to terminate the replacements in favor of returning strikers after settlement. The threat, and the reality of permanent replacements, hurts unions in negotiations and in organizing.



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