

Federal Labor Laws

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Part Two: Organizing Issues and Procedures

V. Organizing Rights and Tactics

A. Practical Issues in a Union Organizing Drive

1. The relationship between the practical stages in an organizing drive and the legal framework of the Taft-Hartley Act is an important determinant of the rights of workers at any point in time.
2. The rights of a worker or group of workers are affected by the level of activity in which they are engaged. Although workers form unions as a matter of solidarity and power, not as a matter of right, their rights and the limitations on those rights can affect directly the success or failure of organizing activity.
3. Organizing drives are also important for determining the rights of workers who are already organized. Because of the intensity of activity and the lack of contractual rights of workers in an organizing drive as well as the intensity of employers' responses, a high percentage of unfair labor practice issues arise in organizing cases.
4. For purposes of establishing and enforcing legal rights, there are a number of broad stages of activity that are relevant in organizing campaigns.
 - a. When nonunion workers first begin to recognize the need for solidarity, they may be protected by § 7 in activities undertaken for their "mutual aid or protection" even though they may have no thoughts about joining or forming a labor organization.
 - b. Formal organizing campaigns begin when inside or outside organizers seek to solicit worker support for a labor organization. At this stage, workers are attempting to exercise their right to organize, as well as the right to engage in protected concerted activity for mutual aid or protection. The goal of the union in this stage is to obtain authorization from a majority of workers to act as their bargaining agent.
 - c. In many cases, the workers, union and employer must go through an election stage, during which the goal is to obtain representational rights through a Board conducted election.
 - d. After a successful election campaign, the organizing activities of the union are not finished. The next immediate

stage is the process of negotiating an agreement, but the organizing goal of developing worker solidarity continues indefinitely.

5. There are important dates involved in any campaign. Among specific dates which may be relevant in enforcing rights are:
 - a. The date on which a Board petition for representation is filed,
 - b. The date on which an election is held,
 - c. The date of Board certification of election results, and
 - d. The dates on which any actions of the employer occur that might constitute either unfair labor practices or improper campaign tactics.

B. Rights of workers engaged in concerted activity for mutual aid or protection without the formal involvement of a labor organization

1. Case V-A: Mutual Aid or Protection: The case serves as a review of the distinction between individual and concerted activity for mutual aid and protection in a nonunion setting.
 - a. Even if a person believes that coworkers would support the position taken by the individual, the Board now takes a narrow view of what constitutes concerted activity. Since Jane is complaining about the individual inequities of the system, she is probably not engaged in concerted activity. Therefore, the threat would not be unlawful under § 8(a)(1).
 - 1) However, if the concern expressed by an individual is the logical outgrowth of concerns expressed by a group, the activity may be considered concerted.¹
 - 2) Also, if other workers had encouraged Jane to take the matter to supervision, her actions would be in concert with her coworkers.²
 - b. Circulating a petition in protest of working conditions is protected activity, as long as it is done in a manner which does not interfere with the production process. (See, subsection (C) for valid employer restrictions on solicitation of coworkers).³ For example, posting a notice encouraging

¹ See, e.g., *Mike Yurosek & Son*, 306 NLRB 1037 (1992) *supplemented*, 310 NLRB 831 (1993), *enf'd*, 53 F.3d 261 (9th Cir. 1995).

² *Phillips Petroleum Co.*, 339 NLRB 916 (2003).

³ See, e.g., *Merit Contracting, Inc.*, 333 NLRB 562 (2001).

other workers to join in the protest would be concerted activity.⁴

- c. As the solicitation of signatures is both protected and concerted, the discharge probably violates § 8(a)(1). It would not violate § 8(a)(3) because no labor organization is involved. The relief sought would be a "cease and desist" order and reinstatement of Jane with back pay and benefits.

Case V-A: Mutual Aid or Protection

Jane Smith is a lab technician for Megalomania Industries at its Showmeville Rubber and Plastic Products Complex. Her job consists of running standard stress tests on plastic compounds. Workers in the lab have been very upset with the recently announced policy of the company to require quarterly productivity reviews by the lab foreman. Knowing that everyone in the department is concerned with this development, Jane decides to go see R.P. Megalomania, Corporate Vice President for Production to complain. She tells R.P. that the nature of her work is so variable that any productivity comparisons would be irrelevant. R.P. gets very agitated at Jane's complaint and says, "If I hear one more work out of you about this, I will see to it that you never work for this corporation again!" The lab technicians are nonunion.

Questions:

- a. Is Jane engaged in protected concerted activity for purposes of mutual aid or protection?
 - b. After leaving R.P.'s office, Jane prepares and circulates a petition among the lab technicians calling for an end to the productivity reports. Seven technicians sign the petition. Is Jane engaged in protected activity?
 - c. Jane now takes the petition back to R.P., who responds by saying, "I told you I didn't want to hear any more of these complaints. You are fired!" What rights, if any, does Jane have now? What relief should she seek?
2. The most significant obstacle facing nonunion workers in this type of mutual aid is the common lack of understanding or appreciation of the scope of the law.
 - a. Because the NLRB is a passive agency, the employer is initially free to take action. The legality of that action is an issue only if one or more workers protest it through an unfair labor practice charge. If people do not know what rights exist

⁴ See, e.g., *Vons Grocery Company*, 320 NLRB 53 (1995).

and how to enforce those rights, no violation will be remedied.

- b. Even if a worker pursues his or her rights successfully, the violation will never be fully remedied. An order granting reinstatement with back pay to an illegally discharged worker a year or more after the discharge will not make the worker whole.

C. Limitation on the employer’s right to make and enforce “no-solicitation” and other rules during organizing campaigns.

1. A number of cases have dealt with the validity of employer rules concerning employee solicitation and other limitations on potential concerted activity during active organizing campaigns. These issues may arise as general unfair labor practice matters, based on allegations that the rules interfere with employees’ Section 7 rights, or they may arise as alleged objectionable conduct during an election campaign.
 - a. Factors that will be relevant in determining whether employer rules may serve as the basis for objections in an election campaign include such matters as when the rule was implemented, whether the rule was ever enforced or enforced during the organizing campaign, how close the vote was in the ensuing election, and when and how the union challenged those rules.⁵
 - b. Over the years, fairly clear guidelines have developed over the solicitation of support and distribution of literature on and near the employer’s property.
2. Issues concerning the protection extended to workers or union organizers who solicit support or distribute literature begin with employer efforts to restrict such activity through the enforcement of rules attempting to limit the solicitation or distribution. The legality of such employer rules depend upon several factors:
 - a. The distinction between solicitation and distribution of literature or other forms of publicizing the union,
 - b. Whether the employer’s rules concerning solicitation and distribution apply to employees, off-duty employees, off-site employees or non-employee organizers,
 - c. The pattern of enforcement of any rules,
 - d. The nature and location of the employer's business.

⁵ *Jurys Boston Hotel*, 356 NLRB No. 114 (2011). See, also, *Delta Brands, Inc.*, 344 NLRB 252 (2005) and *Safeway, Inc.*, 338 NLRB 525 (2002), in which such rules were not accepted as the basis for objections, and *Pacific Beach Hotel*, 342 NLRB 646 (2004) in which they were.

3. General guidelines concerning employer rules restricting solicitation and distribution are:
- a. Employee solicitation is the activity enjoying the broadest legal protection. An employer may enforce only non-discriminatory rules restricting solicitation in working areas during actual working times.
 - 1) The general rule is that if workers are permitted to discuss other issues, they cannot be prohibited from discussing union issues.⁶
 - 2) Actual enforcement of a rule is not necessary for a violation. A no-solicitation rule may be challenged if the rule would reasonably tend to chill employees' willingness to engage in protected, concerted activity, if the employer has enforced or attempted to enforce the rule with respect to protected activity, or if the rule was promulgated in response to protected activity.⁷
 - b. Employee distribution of literature may be prohibited in working areas of the plant even during non-working times, as long as the employer can find a legitimate business interest in restricting the distribution (e.g., the desire to keep the plant clean). The employer may not prohibit distribution of union literature in non-working areas during non-working times.⁸
 - c. Off duty employees have a limited right of access to the employer's property for purposes of solicitation and distribution. A rule restricting off-duty employees access to the employer's property, except when justified by business reasons, is valid only if it limits access solely with respect to the interior of the facility or other working areas, is clearly disseminated to all employees, and applies to all off-duty employees seeking access for any purpose.⁹
 - d. Off-site employees, or employees of the same employer primarily employed at a different location, also have a limited right of access to the employer's property for organizational purposes. In determining whether an employer has a

⁶ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 65 S.Ct. 982 (1945); Compare, *Jensen Enterprises, Inc.*, 339 NLRB 877 (2003) (discriminatory enforcement of a legitimate rule), and *U-Haul of California*, 347 NLRB No. 34 (2006) (strict enforcement of a neutral rule).

⁷ *Lafayette Park Hotel*, 326 NLRB 824 (1998).

⁸ *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); *TeleTech Holdings, Inc.*, 333 NLRB 402 (2001).

⁹ *Tri-County Medical Center*, 222 NLRB 1089 (1976).

legitimate business reason for restricting access by off-site employees, the heightened security interests and other factors may represent business justifications that would not apply to local off-duty employees.¹⁰

- e. Non-employee organizers may be prohibited on company property in most cases. However, the rule barring union organizer access to company property must be a non-discriminatory rule.¹¹
 - 1) Non-employee solicitation on private property, including store parking lots, is permissible only when a union can meet the substantial burden of proving that there is no other reasonable means (e.g., signs, public picketing, phone canvassing) of reaching employees or that the employer's access rules discriminate against the union by allowing other organizational solicitation.¹²
 - 2) An employer may eject non-employee organizers from the employer's property, including property (such as snack counters) otherwise accessible to the public. In restricting access to parking lots, sidewalks, and other public areas, the employer must have a sufficient interest in the property to establish the right to exercise control over that property.¹³
- f. An employer may also restrict the use of its property for solicitation. An employer may enforce non-discriminatory rules prohibiting use of its property (email, bulletin boards, telephones, etc.) for non-job-related solicitations. In determining whether a rule is enforced in a discriminatory manner, restrictions imposed on use of the property for union solicitation is compared to other forms of commercial or organizational solicitation. Use of the property for charitable solicitations is regarded as qualitatively different and not comparable, so the employer is permitted to allow charitable solicitations and not union solicitations.¹⁴
- g. If a rule restricting solicitation is presumptively invalid, the burden is on the employer to show that it did not intend to

¹⁰ *Hillhaven Highland House*, 336 NLRB 646 (2001), *enf'd*, *Hillhaven Bakersfield v. NLRB*, 344 F.3d 523 (6th Cir. 2003).

¹¹ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679 (1956).

¹² *Lechmere v. NLRB*, 502 U.S. 527, 112 S.Ct. 841 (1992).

¹³ *Farm Fresh, Inc.*, 326 NLRB 997 (1998).

¹⁴ *Register Guard*, 351 NLRB No. 70 (2007).

enforce the rule in a way that interferes with protected activity.¹⁵

- h. To undo the effects of an improper rule, the employer must clearly and unmistakably repudiate the improper conduct. The repudiation must be timely, unambiguous, specific in nature and free from other illegal conduct.¹⁶

- 4. **Case V-B: Solicitation and Distribution:** The case illustrates the application of the rules governing solicitation and distribution in a variety of circumstances:

Case V-B: Solicitation and Distribution

During an organizing drive at Megalomania Industries by the Extrusion Workers Union of North America, the following incidents occur. What will be the legal outcome of each incident:

- a. The company posts a rule barring the solicitation of workers while on the job during actual working time.
- b. While Rule (A) is in force, workers who have joined the Independent Workers Association of Megalomania Industries are permitted to discuss upcoming association meetings, but supporters of the Extrusion Workers Union are reprimanded for asking coworkers to sign authorization cards.
- c. The company posts a rule barring the distribution of literature during paid breaks.
- d. Employee supporters of the Extrusion Workers Union hold a rally in the company parking lot which begins ten minutes before the end of one shift and continues ten minutes into the beginning of the next. No workers are late for work and no traffic is blocked. The company sends guards out to ask the workers to leave.
- e. Fred Ames is suspended for violating Rule (A) because he is caught wearing an Extrusion Workers Union button while working at his job as a grinder operator.
- f. Does it matter that it is later discovered that Fred Ames is a salt? He is a full-time employee of the Extrusion Workers Union who was hired unknowingly by the company.
- g. The company through its supervisors distributes "No Union" buttons to workers in the shop.

¹⁵ *Ichikoh Mfg.*, 312 NLRB 1022 (1993).

¹⁶ *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

- a. This is an example of a legitimate no-solicitation rule. It confines the restriction to actual working times and places.
 - b. The valid Rule (A) must be enforced in a non-discriminatory manner. The company must either prohibit the Independents from soliciting or allow the EWUNA to solicit.¹⁷
 - c. Rules attempting to restrict union distribution in break areas are improper. It does not matter whether the break is paid or not, employees may both solicit support and distribute literature during non-working times in non-work areas.
 - d. A rally in the parking lot would be protected activity as long as the people participating are employees. Ten minutes before or after the shift would not be sufficient passage of time to cause the workers to be considered outsiders. The company could remove any outside organizers from the private property.
 - e. The company cannot outlaw the wearing of union insignia, hats, etc. unless there is an overwhelming justification. If the button caused safety or other significant problems, the company could probably force its removal, but not if the removal is directed only against union buttons.¹⁸ In some industries (see, Subsection 4, *below*) the employer could enforce broader restrictions.
 - f. As long as Fred was hired legitimately and is on the payroll, he has the same rights as other workers.¹⁹ Of course, he may later be fired for falsifying an application, but until that happens, he has the rights of a worker rather than the lack of rights of an outside organizer.
 - g. The company cannot distribute its buttons, because it would constitute a form of interrogation. Workers would be forced to reveal their positions by accepting or rejecting the buttons.²⁰
4. Special rules governing solicitation and distribution in unusual circumstances:

¹⁷ See, *Marathon LeTourneau Co. v. NLRB*, 699 F2d 248 (5th Cir. 1983).

¹⁸ *North Hills Office Services*, 346 NLRB 1099 (2006); *Brandeis Machinery & Supply Co.*, 342 NLRB 530 (2004); *National Steel & Shipbuilding Co.*, 324 NLRB 1114 (1997).

¹⁹ *NLRB v. Town & Country Electric*, 516 US 85, 116 S.Ct. 450 (1995).

²⁰ *Charles V. Weise Co.*, 133 NLRB 765 (1961).

- a. In retail establishments, solicitation can be prohibited in public areas of the store.²¹
 - b. In hospitals, a rule outlawing solicitation in immediate patient care areas can be enforced.²² Outside patient care areas, solicitation may be restricted during non-work time only if it is necessary to avoid disruption of patient care or disturbance of patients. For example, a hospital employer could not enforce a general rule prohibiting wearing of union buttons, although wearing the buttons in patient care areas could be restricted.²³ However, the employer could prohibit employees from wearing union insignia on uniforms in non-patient care areas, since it would be impractical to remove the uniform when entering patient care areas.²⁴
6. The right to solicit cannot be waived by a collective bargaining agreement, because the right extends to dissidents and rival unions as well as the certified bargaining agent.²⁵

D. Recognition campaigns in which the union seeks bargaining rights without using NLRB election procedures

1. It is legal for an employer to recognize a union as the exclusive bargaining agent of a unit of workers as long as the employer has proof of the union's majority status and as long as the employer is unaware that another union has petitioned for representation under NLRB procedures.²⁶
 - a. Voluntary recognition of a minority union as the exclusive bargaining agent for a unit is unlawful even if extended in good faith. There must be objective evidence that the union has majority support.²⁷
 - b. If two or more unions are both attempting to organize the same workforce, it may be legal for the employer to recognize one of the competing unions as long as the

²¹ *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1952).

²² *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978).

²³ *Enloe Medical Center*, 345 NLRB 874 (2005).

²⁴ *Casa San Miguel*, 320 NLRB 534 (1995).

²⁵ *NLRB v. Magnavox Corp.*, 415 U.S. 322, 94 S.Ct. 1099 (1974).

²⁶ *Bruckner Nursing Home*, 262 NLRB 955 (1982).

²⁷ *ILGWU [Bernhard-Altmann Texas Corp.] v. NLRB*, 366 U.S. 1603 (1961).

recognized union has an uncontested majority, the employer has not provided assistance to the union, and no petition for a representation election has been filed.²⁸

2. From 2007 until 2011, if an employer voluntarily recognized a union, the employer was required to post a notice informing all employees of the recognition. The notice triggered a window period of forty-five days during which a petition for an NLRB representation election would be timely.²⁹
 - a. In 2011, the Board overruled the *Dana* decision and returned to the concept of a “recognition bar,” under which an employer that voluntarily recognizes a union for purposes of collective bargaining has an obligation to negotiate with that union for a reasonable period of time.³⁰
 - b. Based on the circumstances of each case, a “reasonable period of time” for purposes of bargaining in circumstances of voluntary recognition is at least six months but no more than one year.
3. The customary manner to establish a union's majority status in a recognition case is through a card check. This is possible as long as the union has used single purpose recognition cards.³¹
 - a. Card checks are usually done by selecting a neutral third party. The company provides the neutral with a payroll list, and the union provides the signed authorization cards.
 - b. Confidential polls of employees and secret ballot elections conducted by state agencies³² or other neutrals³³ are also potential methods for establishing a union's majority status.
3. Limitations on the ability of the employer to recognize a union:

²⁸ *Bruckner Nursing Home*, *supra*, note 25.

²⁹ *Dana Corp.*, 351 NLRB No. 28 (2007).

³⁰ *Lamons Gasket Co.*, 357 NLRB No. 72 (2011); *Smith's Food & Drug Centers, Inc.*, 320 NLRB 844 (1966).

³¹ *John S. Barnes Corp.*, 180 NLRB 911 (1970).

³² *We Transport, Inc.*, 198 NLRB 949 (1972) compare with, *Albert Einstein Medical Center*, 248 NLRB 63 (1980).

³³ *San Clemente Publishing Corp.*, 167 NLRB 6 (1967).

- a. If two or more unions each claim majority status and have demanded recognition, the employer cannot recognize either.
 - b. Recognizing one union after another has filed a representation petition is illegal. The employer must be aware of the petition.
 - c. If the employer signs an agreement with an unlawfully recognized union, the contract is void.
 - d. In some cases, it is legal for an employer to recognize a union and sign a pre-hire agreement in the construction industry.³⁴ In the absence of showing that a new facility is an accretion to an existing bargaining unit, pre-hire agreements in other industries are generally illegal.³⁵
 - e. An employer that operates a chain that allows for recognition by card check in individual stores upon proof of majority status does not necessarily waive its right to petition for an NLRB election in a particular store.³⁶
4. Voluntary recognition will generally bar a petition initiated by another organization for representation or a decertification petition for a reasonable period of time of at least six months but no longer than one year.³⁷

E. Election campaigns during which the goal of the union is to seek Board certification as a bargaining agent

- 1. If a petition for representation is filed with the NLRB, the Board takes a more active role in the regulation of the conduct of the parties.
 - a. While unfair labor practices may be committed at any time, only activities which occur after a petition is filed and before the election is complete can serve as bases for objecting to the outcome of a Board election.³⁸

³⁴ See p. 104, Chapter 9, § 211 "Prehire Contracts" in *An Outline of Law and Procedure in Representation Cases*, Office of the General Council, NLRB (Sept. 1995) Washington, D.C.: GPO citing *John Deklewa & Sons*, 282 NLRB 1375 (1987).

³⁵ See, e.g., *United States Steel Corp.*, 280 NLRB 837 (1986).

³⁶ *Shaw's Supermarkets*, 343 NLRB 963 (2004).

³⁷ See, *Lamons Gasket Co.*, note 30, supra.

³⁸ *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961).

- b. While unfair labor practices committed after a petition has been filed and before the NLRB election are generally grounds for setting aside the election, there are exceptions. If the unlawful activity has only a marginal impact on the election, the results of the election may stand despite the unfair labor practices.³⁹
 - c. Certain types of conduct that do not constitute unfair labor practices may still serve as grounds for objecting to the outcome of an election. This is particularly common in free speech cases.
2. Employer Anti-Union Speeches and Publications:
- a. The free speech provisions of § 8(c) have important implications in organizing cases. While non-threatening, non-coercive speech cannot be used as the basis for an unfair labor practice, the Board has taken the position that this limitation does not apply in representation elections. The central issue in representation cases is whether the laboratory conditions under which an election is to be conducted have been sufficiently disrupted.
 - b. Certain forms of speech can serve as the basis for objecting to the outcome of a Board election, even though that same speech would be protected by § 8(c).⁴⁰
3. Statements, which constitute a threat or promise, are not protected by § 8(c). In the case distinguishing between protected and unprotected speech, the Supreme Court stated:
- [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. . . . [T]he prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion⁴¹

³⁹ See, e.g., *Gold Shield Security & Investigations*, 306 NLRB 20 (1992); *Airstream, Inc.*, 304 NLRB 151 (1991).

⁴⁰ *General Shoe Corp.*, 77 NLRB 124 (1948).

⁴¹ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-619, 89 S.Ct. 1918 (1969).

4. Case V-C: Threats, Promises or Predictions: Limitations on speech and the distinction between objections and unfair labor practices during election campaigns are illustrated in these examples.
- a. This would be considered a threat, at least to the extent that the transferring of potential bargaining unit jobs to a temporary service is a veiled threat to terminate active employees. It is clearly within the control of the employer. Comments about how the union would treat salary workers are probably permissible.
 - b. The Board held that this constituted an unlawful threat, but the circuit court refused to enforce its order, because the employer stated only what it has a legal right to do.⁴²
 - c. This is the famous "fist inside the velvet glove" case, in which the Court ruled that an announcement of a well-timed benefit was a coercive promise. The clear message is that what the company can give, it can take away.⁴³

⁴² *NLRB v. Herman Wilson Lumber Co.*, 355 F.2d 426 (8th Cir. 1966).

⁴³ *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 84 S.Ct. 457 (1964).

Case V-C: Threats, Promises and Predictions

During the organizing drive at Megalomania Industries, J.Q. Megalomania delivers the following speeches to selected groups of employees. Which, if any, constitute unlawful threats or promises:

- a. At a meeting of office clericals, J.Q. states:

This company has always been good to its salaried personnel. We treat you as individuals and provide the best conditions we can afford. If you join a union, you will lose your special status. Your interests will be shunned aside by the big unit. What difference will it make to several hundred factory workers if a couple of secretaries are replaced by a temporary service?

- b. At a meeting with plastics plant operators, J.Q. changes his line, saying:

I will fight the union in every legal way possible. If the union calls an economic strike, you place your job on the line. You can be permanently replaced. You can lose your job. In dealing with the union, I'll deal hard with it - I'll deal cold with it - I'll deal at arm's length with it.

- c. At a meeting of rubber plant operators, J.Q. announces:

As you all know, this company has provided an additional floating holiday each year for the past seven. I am pleased to announce that this year's floating holiday will be granted on Monday, December 28, to allow you to spend more time with your family over the holidays. Moreover, next year we are planning to give you a choice of taking the holiday on your birthday or at the Christmas season.

- d. Finally, in a meeting with lab technicians, J.Q. says:

If I am required by the court to bargain with this union, whenever that may be, I will bargain in good faith, but I will have to bargain on a cold-blooded business basis. You may come out with a lot less than you have now. Why gamble because agitators make wild promises to you? If I am required to bargain and I cannot agree, there is no power on earth that can make me sign a contract with this union, so what will probably happen is the union will call a strike. I will go right along running this business and replace the strikers. There has been a lot of talk about your being skilled workers. You only do one operation and in a short period I can train anybody to do any of these operations, as we trained most of you. I am not afraid of a strike. It won't hurt the company, I will replace the strikers. They will lose all of their benefits. The union won't pay your wages. The union has nothing to lose. You do all of the losing. No employee is so important that he or she cannot be replaced.

- d. The Board did rule that this was a threatening speech, although this is only a small excerpt of the complete message. This case also established that such coercive speeches during an election campaign would be grounds for

setting aside an election. The Board has allowed similar statements as long as they are not quite as intense in the prediction of dire economic consequences.⁴⁴

5. Captive audience speeches: The Board prohibits any speech by the employer (or union) on company time during a 24 hour period immediately preceding an election.⁴⁵ This rule is strictly enforced, with such a captive audience speech being recognized as grounds for setting aside an election.
 - a. For purposes of setting aside an election, it does not matter whether the captive audience speech that violates the 24 hour rule is coercive.
 - b. The speech could not be grounds for an unfair labor practice charge unless the contents constituted a threat or promise.⁴⁶
 - c. The captive audience rules apply only to speeches made to massed assemblies of workers. The rules have been extended to sound truck broadcasts that can be heard by workers on the job,⁴⁷ but not to the display of posters or the electronic broadcast of text messages to workers driving company vehicles.⁴⁸

6. Another form of questionable, but non-coercive, speech is the lie, or as the Board and Courts may refer to it, a "substantial misrepresentation of fact." In election cases, the rules on lying have changed in recent years.
 - a. For many years, substantial misrepresentation of fact could be grounds for setting aside an election, unless the party against whom the lies were directed had sufficient opportunity to correct the misstatements.⁴⁹
 - b. To illustrate the dynamics of the law, the above rule was reversed in 1977 in a decision (*Midland National Life*) which held that substantial factual misrepresentations would be grounds for setting aside an election only if fraudulent documents were used or if the Board processes were impugned. The 1977 decision was reversed in 1978, with a

⁴⁴ *Dal-Tex Optical Co., Inc.*, 137 NLRB 1782 (1962).

⁴⁵ *Peerless Plywood Co.*, 107 NLRB 427 (1953).

⁴⁶ *Gissel Packing Co.*, *supra* note 39.

⁴⁷ *Purolite*, 330 NLRB 37 (1999) (involving a union violation of the captive audience rules).

⁴⁸ *Virginia Concrete Corp.*, 338 NLRB 1182 (2003).

⁴⁹ *Hollywood Ceramics*, 140 NLRB 221 (1962).

new Board returning to the original rule. The 1982 Board reestablished the 1977 decision.⁵⁰

7. If either the union or employer involved in an election campaign attempts to create the impression that the Board favors one side or another, it is grounds for setting aside the election. An example would be the use of sample ballots which resemble Board ballots on which a choice is indicated. However, even this use of sample ballots will probably not be a violation if the identity of the party distributing the sample is clearly noted.⁵¹
8. An election was overturned for a supervisor's pro-union comments and solicitation of cards even though the employee was not determined to be a supervisor until after the vote.⁵² However, pro-union comments made by supervisors to shifts or departments other than their own may not be objectionable.⁵³
9. Other "objectionable" campaign strategies:
 - a. As a general rule, employer unfair labor practices committed after a representation petition has been filed and before an election is complete can also be grounds for objecting to the outcome of the election. Specific examples of unlawful activity that might be experienced in an organizing campaign are discussed in Outlines X, XI and XII.
 - b. The anti-union activities of groups other than the employer may also constitute grounds for setting aside an election if the employer instigated the activities, supported them, or in unusual cases, if the activities make it impossible to conduct a fair election.⁵⁴ In some cases, the employer may also be liable for unfair labor practices committed by third parties.⁵⁵
 - c. Appeals to racial, sexual or ethnic prejudices, by either the employer or the union, may, depending on the

⁵⁰ *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), *overruling*, *General Knit of California, Inc.*, 239 NLRB 619 (1978) and *Hollywood Ceramics, supra*, readopting *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977).

⁵¹ *Brookville Healthcare Center*, 312 NLRB 594 (1993) *overruling*, *SDC Investment*, 274 NLRB 556 (1985).

⁵² *Harborside Healthcare Inc.*, 343 NLRB 906 (2004).

⁵³ *SNE Enterprises, Inc.*, 344 NLRB 673 (2005).

⁵⁴ *Universal Mfg. Co.*, 156 NLRB 1459 (1966).

⁵⁵ *D.G. Real Estate*, 312 NLRB 999 (1993) citing *Dentech Corp.*, 294 NLRB 924, 925 (1989) quoting from *Service Employees Local 87*, 291 NLRB 82 (1988).

circumstances, constitute grounds for setting aside an NLRB election.⁵⁶

- d. Bribes and incentives to encourage votes, whether made by the employer or union, may also be grounds for objections.
- 1) Waiver of the union initiation fee for anyone who joins prior to an election is unlawful. However, the union can offer to waive the initiation fee for anyone who joins prior to the ratification of a first contract.⁵⁷
 - 2) Payment of lost wages to off-duty workers to vote in an NLRB election is objectionable.⁵⁸ However, reimbursement of travel expenses is permissible.⁵⁹
 - 3) Raffles or door prizes offered as incentives to get people to organizing meetings (either by the employer or union) are legal as long as the value of the prizes does not constitute improper incentives. Determining what constitutes a prize of sufficient value to constitute an improper incentive has proven difficult. At various times and under various circumstances, the Board has upheld objections to raffles of trips to Hawaii, television sets, and cash, but they have permitted raffles of cash, television sets, and video cameras.⁶⁰ At times, the Board appears to evaluate the raffles on the basis of the value of the prizes awarded while at other times, it appears that it is the value of the raffle ticket that determines whether the raffle is an improper incentive.⁶¹
 - 4) The Board now enforces a ban on election day raffles. A raffle is objectionable if the employer or union announces a raffle, distributes raffle tickets, identifies raffle winners or awards raffle prizes at any time during a period beginning 24 hours before the

⁵⁶ *Sewell Mfg. Co.*, 138 NLRB 66 (1962), compare appeals to racial prejudices to those of racial pride, e.g. *Hood Furniture Mfg. Co.*, 941 F2d 325 *reh'g, en banc, denied*, 946 F2d 893 (5th Cir. 1991).

⁵⁷ *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 82 S.Ct. 2085, note 4 (1973).

⁵⁸ *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995).

⁵⁹ *B & D Plastics*, 302 NLRB 245 (1991).

⁶⁰ For a good summary of raffle cases, see, *Atlantic Limousine, Inc.*, 331 NLRB 1025 (2000).

⁶¹ *Arizona Public Service*, 325 NLEB 723 (1998).

scheduled opening of election polls and ending with the closing of the polls.⁶²

F. Post-election campaigns during which the goal of the union is to get the employer to the bargaining table to negotiate an agreement

1. As an important practical matter, it should be noted that the organizing drive is not complete when an election is won.
2. Organizing is a constant process that is critical for the development and maintenance of union economic power throughout the bargaining process.
3. A remarkably high percentage of union victories in organizing drives are followed by an inability to obtain a first contract. Some employer anti-union drives are aimed both at the organizing process and at resistance in negotiations.

⁶² *Atlantic Limousine, Inc.*, *supra* at note 58.