

THE DEVELOPING LAW OF NEUTRALITY AGREEMENTS

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In many industries, the concept of a neutrality agreement is becoming a familiar one at the bargaining table. Collective bargaining agreements in the telecommunications, automobile, steel, hotel, and gaming industries (among others) include neutrality agreements in various forms. Their provisions range from a basic card-check recognition agreement to a comprehensive, private process which entirely supplants the National Labor Relations Board's representation procedures. A comprehensive neutrality agreement may include many of the following provisions, in addition to the basic agreement to recognize the union by card check rather than a Board-supervised secret ballot election:

- Limitations or a “gag order” on employer communications to employees about the union.
- An agreement to extend preferential hiring rights at unorganized facilities.
- An agreement to meet promptly with the union to discuss issues such as appropriate unit, supervisory employees, and excluded employees.
- An agreement to provide the union with an early list of the names and addresses of employees in the agreed-to unit.
- Union access to the facilities of the target employer to distribute union literature and meet with employees.
- An agreement to include the employees in the extant collective bargaining unit.
- An agreement to start contract negotiations for the newly-organized unit within a specified (and short) time frame, and to submit open issues to binding interest arbitration if no agreement is reached within that time frame.
- An agreement to extend coverage of the neutrality agreement to affiliates of the signatory company.
- An agreement to refrain from creating another entity in the same industry without ensuring that it adopts the neutrality agreement.

The law is still catching up to what is occurring at the bargaining table, but significant progress has been made in the last few years. The issue of whether a neutrality agreement is a

mandatory subject of bargaining was considered by the Board and the D.C. Circuit in *Pall Biomedical Products Corp.*, 331 NLRB 1674 (2000), *enf. denied*, 275 F.3d 116 (D.C. Cir. 2002).

The issue of whether the Board will defer to a neutrality agreement when a representation petition is filed was considered in a series of cases in 2001. These cases are discussed below, following a brief review of the state of the law prior to the year 2000.¹

I. The Board's Interpretation of Recognition Agreements under *Kroger* and *Lone Star Steel*

The seminal Board case regarding recognition agreements is *Kroger Co.*, 219 NLRB 388 (1975). In that case, the Board considered a provision in two collective bargaining agreements which obligated the employer, Kroger, to recognize the Retail Clerks and Meat Cutters unions as the representative of employees in all of the stores operated by Kroger's Houston Division in the State of Texas. The case arose when Kroger refused to recognize the unions as the representative of employees in certain Texas stores which were transferred from Kroger's Dallas Division to its Houston Division (the division which was party to the collective bargaining agreements). Both unions offered to submit proof of card majorities at the stores in issue. Kroger rejected that offer. The unions charged that Kroger's refusal to honor the recognition clauses violated Section 8(a)(5) of the Act.

The Board found that the recognition clauses amounted to a waiver of the Kroger's right to insist upon a Board election before recognizing the unions. *Id.* at 389. Even though the recognition clauses contained no explicit requirement that the unions demonstrate majority

¹ For a more generalized view on neutrality agreements, and particularly how they aid union organizing efforts, see Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, *The Labor Lawyer* (Fall, 2000). For a comprehensive analysis of governmentally imposed neutrality agreements, see Roger C. Hartley, *Preemption's Market Participant Immunity – A Constitutional Interpretation: Implications for Living Wage and Labor Peace Policies*, 5 *U. Pa. J. Lab. & Emp. L.* 229 (Winter, 2003).

support before seeking recognition, the Board read that requirement into the clauses as a matter of law, in order to preserve their validity. *Id.* The Board also found that, since an employer may agree to recognize a union based on a check of authorization cards, there is no reason why an employer cannot enter into such an agreement before the union begins its organizing campaign. *Id.* The Board concluded that Kroger violated Section 8(a)(5) of the Act by refusing to honor the recognition clauses, a conclusion which implies that such a recognition agreement is a mandatory subject of bargaining.

Two years later, in *Mine Workers (Lone Star Steel)*, 231 NLRB 573 (1977), the Board considered whether an “application of contract” clause is a mandatory subject of bargaining. The case involved a Section 8(b)(3) charge against the United Mine Workers for striking in order to gain the employer’s acceptance of an “application of contract” clause which would have applied the collective bargaining agreement to any facility owned or acquired by the employer, Lone Star Steel, or a subsidiary or affiliate of the employer. It was understood that this clause would apply only if the union was recognized by the employer or certified by the Board to represent the affected employees. *Id.* at 574.

The Board in *Lone Star Steel* referred to its decision in *Kroger*, and found that the basis for the Section 8(a)(5) violation in *Kroger* was that the “after acquired stores” clause was a mandatory subject of bargaining. *Id.* at 576 (“such a finding is permissible only because the clause itself was deemed to involve a mandatory subject of bargaining”). The Board held that the “application of contract” clause in *Lone Star Steel* was also a mandatory subject, because it “serves to protect the jobs and work standards of bargaining unit employees . . . by removing economic incentives which might otherwise encourage Lone Star to transfer such work to other mines under its control.” *Id.* Therefore, the Board held that the Mine Workers did not violate

Section 8(b)(3) of the Act by striking in support of their demand to include the “application of contract” clause in the parties’ agreement.

On petition for review, the Tenth Circuit reversed the Board’s conclusion that the “application of contract” clause was a mandatory subject. *Lone Star Steel Co. v. NLRB*, 639 F.2d 545 (10th Cir. 1980). The court rejected the Board and the union’s argument that the clause protected the jobs and working conditions of bargaining unit employees, and therefore should be deemed a mandatory subject of bargaining:

This application of contract clause reaches all new operations and is much broader than necessary to accomplish the legitimate Union goal of protecting employees against a shift of production to another mine to evade standards and wages at the [bargaining unit] mine. The clause even requires that the agreement be put into effect in toto elsewhere, including the non-economic provisions having no bearing on the unit employees.

Id. at 558. Given the overbreadth of the “application of contract” clause in addressing the purported concerns of the bargaining unit employees, the court held that the Board erred in concluding that the clause was a mandatory subject of bargaining. *Id.* at 559. Therefore, the court held that the union violated Section 8(b)(3) of the Act by striking in support of its demand to include the clause in the parties’ collective bargaining agreement. *Id.*

II. The Mandatory/Non-Mandatory Issue Revisited – *Pall Biomedical*

More than two decades after its decisions in *Kroger* and *Lone Star Steel*, the Board revisited the issue of whether a recognition agreement is a mandatory subject of bargaining in *Pall Biomedical Products Corp.*, 331 NLRB 1674 (2000). A Board majority consisting of Chairman Truesdale and Members Fox and Liebman held that the recognition agreement was a mandatory subject, but the D.C. Circuit ultimately reversed. *Pall Corporation v. NLRB*, 275 F.3d 116 (D.C. Cir. 2002).

As was the case in *Kroger* and *Lone Star Steel*, the recognition agreement at issue in *Pall Biomedical* was not a typical neutrality agreement. The agreement provided that the employer would extend recognition to the union “in the event that it employs one (1) or more employees performing bargaining unit work at the Employer’s facility in Port Washington, NY....” *Pall Biomedical*, 331 NLRB at 1674. The agreement also provided that, after extending recognition, “the Employer and Union will meet to discuss the terms and conditions of employment for such employees.” *Id.* Unlike many modern neutrality agreements, however, this agreement did not contain any restrictions on the employer’s conduct during the organizing campaign or any specific provision describing the recognition process. Indeed, like the “after acquired stores” clause in *Kroger*, the agreement in *Pall Biomedical* did not explicitly condition recognition on a demonstration of majority support for the union.

As in *Kroger*, the Board majority in *Pall Biomedical* overcame the absence of an explicit card check requirement by reading such a requirement into the recognition agreement as a matter of law. *Id.* at 1676. The Board majority also followed its decisions in *Kroger* and *Lone Star Steel* in holding that the recognition agreement was a mandatory subject of bargaining. In so holding, the Board majority found that the recognition agreement was more limited than the “application of contract” clause in *Lone Star Steel*, because it only pertained to one facility as opposed to all other facilities owned or acquired by the employer. *Id.* at 1676. Yet, the Board majority also acknowledged that the recognition agreement did not go as far as the “after acquired stores” clause in *Kroger*, because it did not seek to bring the Port Washington facility into the existing bargaining unit; instead, the Port Washington facility would constitute a separate bargaining unit. *Id.* In any event, the Board majority concluded that the recognition agreement was a mandatory subject of bargaining because:

If the Respondent began performing bargaining unit work at Port Washington, the Union would be in a position to protect the interests of the existing unit employees by achieving recognition as the bargaining representative of the Port Washington employees and negotiating terms and conditions of employment similar to those enjoyed by the [existing unit] employees.

Id. at 1677. Because the recognition agreement was thus found to be a mandatory subject of bargaining, the Board majority concluded that the employer violated Section 8(a)(5) and (1) of the Act by revoking it. *Id.*

Member Hurtgen dissented, and raised two significant criticisms of the majority's decision. First, he disagreed with giving the recognition agreement a "*Kroger* gloss" because, unlike in *Kroger*, the recognition agreement in *Pall Biomedical* had a specific requirement for recognition which "has nothing to do with majority status" (the employment of one or more employees performing bargaining unit work.). *Id.* at 1681. Second, Member Hurtgen found that the recognition agreement should not be considered a mandatory subject of bargaining even if it could be read to contain a majority showing requirement. He found that the recognition agreement did not address the union's stated concern about the transfer of bargaining unit work: "It does not forbid or even limit transfers. Nor does it provide that the contract will apply to Port Washington so as to take away the economic incentive to transfer work there. Rather, the clause simply mandates recognition." *Id.*

The D.C. Circuit agreed with Member Hurtgen's view, and denied enforcement of the Board's decision. The court held that the recognition agreement was a non-mandatory subject because, even assuming the transfer of bargaining unit work to Port Washington would "vitaly affect" bargaining unit employees, the recognition agreement was not a "direct frontal attack" on that problem:

Even if a card count would substantially expedite recognition, the Union would still have to negotiate a CBA, which might or might not equalize labor costs between the new and the old plants. Thus, even expedited recognition is only the first step toward equalizing labor costs and thereby preventing the transfer of work. For this reason, we conclude that prescribing the manner of recognition at a new facility is not “a direct frontal attack” upon the problem of transfer of work facing employees at already organized facilities....

Pall Corporation v. NLRB, 275 F.3d at 343 (citations omitted). Yet, this reasoning suggests that an “application of contract” agreement would be considered a “direct frontal attack” on the problem of transfer of work out of the bargaining unit, and thus might constitute a mandatory subject of bargaining. *See id.* at 342 (“We think the modest reach of the 1990 Agreement goes to the heart of the matter.”).

Although the recognition agreement at issue in *Pall Biomedical* was not a typical neutrality agreement, the D.C. Circuit’s reasoning would apply equally to a typical neutrality agreement. Like the recognition agreement in *Pall Biomedical*, a neutrality agreement generally does not guarantee equal wages, benefits, and terms and conditions of employment across all of an employer’s facilities. A neutrality agreement only facilitates union organizing and recognition at non-union facilities. While some neutrality agreements limit the time period for bargaining and/or allow recourse to interest arbitration, even such regulation of the bargaining process does not guarantee equal terms and conditions of employment at a newly recognized facility. Therefore, like the recognition agreement in *Pall Biomedical*, a neutrality agreement does not “vitaly affect” the terms and conditions of employment of employees in the existing bargaining unit.

III. Board Deference to Neutrality Agreements

Even if a neutrality agreement is considered to be a non-mandatory subject of bargaining, it still may be enforced in federal court pursuant to Section 301 of the Labor-Management Relations Act. The Second, Sixth, and Ninth Circuits have held that it is appropriate for a federal court to enforce a neutrality agreement under Section 301, even though the agreement intrudes upon the Board's exclusive jurisdiction over representation matters. *See International Union, United Automobile, Aerospace, & Agricultural Implement Workers v. Dana Corp.*, 278 F.3d 548 (6th Cir. 2002); *Hotel & Restaurant Employees Union Local 217 v. J. P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993); *Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464 (9th Cir. 1992).

While these court decisions are not necessarily new law, the Board had not, until recently, indicated a willingness to cede its jurisdiction over representation matters to privately negotiated recognition procedures. Three recent cases issued during the twilight months of the Clinton Board set an uncertain path toward deference to neutrality agreements.

In *Central Parking System*, 335 NLRB No. 34 (August 27, 2001), the employer filed an RM petition after refusing the union's demand for recognition at a facility subsequently acquired by the employer. The union contended that the employer was subject to an "after-acquired clause" in the parties' collective bargaining agreement, but the employer disagreed. The union filed a grievance, referred the matter to arbitration, and filed a complaint in federal district court to compel arbitration.

The Board majority of Members Liebman and Truesdale held that "the Union's demand for recognition based on an alleged contractual 'after-acquired' clause does not entitle the Employer to demand an election under Section 9(c)(1)(B)." *Id.*, slip op. at 1. Therefore, the

Board majority dismissed the employer's RM petition and deferred to arbitration the issue of whether the collective bargaining agreement contained an "after acquired" clause requiring recognition of the union upon a showing of majority status. *Id.*, slip op. at 2. Chairman Hurtgen dissented, finding that the union had made a demand for recognition under Section 9(c)(1)(B). Accordingly, he would have processed the RM petition and not deferred a representation issue to arbitration. *Id.*, slip op. at 2-4.

On the same day as it issued its decision in *Central Parking System*, the Board decided *Verizon Information Systems*, 335 NLRB No. 44 (August 27, 2001). That case concerned a broad neutrality and card check recognition agreement. The union sought to organize employees at various Mid-Atlantic locations and, pursuant to the neutrality agreement, the employer provided information about employees in those locations. The parties disagreed, however, over the scope of the bargaining unit; the union sought single location units, whereas the employer argued in favor of one area-wide unit. The union referred the unit scope issue to arbitration under the neutrality agreement, and a hearing date was ultimately scheduled. After agreeing to a hearing date, but before the hearing was held, the union filed a representation petition with the Board seeking an election among a unit of employees at three offices in New Jersey. The employer requested that the Regional Director hold the representation petition in abeyance pending arbitration of the unit scope issue under the neutrality agreement. The Regional Director denied the employer's request, and so the employer sought review by the Board.

The Board held that the union was estopped from filing the representation petition because it had already invoked the neutrality agreement and obtained information from the employer pursuant to that agreement. Thus, the issue was one of estoppel:

[T]he issue is whether the Petitioner – having elected to proceed under the Agreement and derived benefits from it – should be

permitted to pick and choose which provisions it wishes to invoke and which it prefers to avoid.

Id., slip op. at 4. However, the Board noted that “[h]ad the Petitioner instead chosen to file a representation petition with the Board initially, and never invoked the Agreement, we would not find that the Agreement bars the petition.” *Id.*, slip op. at 3 (footnote omitted). Member Walsh dissented on the grounds that the neutrality agreement did not contain a “clear and unmistakable” waiver of the union’s right to file a representation petition with the Board. *Id.*, slip op. at 4-5.²

In *Raley’s*, 336 NLRB No. 30 (Sept. 28, 2001), the Board considered a recognition clause which was similar to the clause in *Kroger*, in that it applied to all employees working in the employer’s retail food stores in a defined geographic area. As in *Kroger*, the Board majority in *Raley’s* held that the recognition clause waived the employer’s right to demand a Board election, even though the stores at which recognition was demanded were not “after acquired” – they were preexisting stores. The Board majority of Members Liebman and Truesdale acknowledged that this was a difference from the situation in *Kroger*, but held that it was “a difference without significance.” *Id.*, slip op. at 3.³ Chairman Hurtgen dissented on this point, finding it to be the “decisive fact” of *Kroger*, and therefore finding that the recognition clause in *Raley’s* could not be construed to waive the employer’s right to demand a Board election with respect to preexisting stores. *Id.*, slip op. at 8.

² Subsequently, in *Tweddle Litho, Inc.*, 337 NLRB No. 102 (June 13, 2002), the Board distinguished its decision in *Verizon Information Systems* when an employer filed a UC petition after the union sought to grieve the issue of whether employees in a new facility should be included in the bargaining unit. The Board held that the union’s grievance did not raise an issue of estoppel with respect to the employer’s UC petition. Member Liebman dissented.

³ However, the Board did not find that the employer violated Section 8(a)(5) by refusing to recognize the union, because the parties did not litigate the issue of whether the union, in fact, had majority support at the time the demand for recognition was made. *Id.*, slip op. at 5.

IV. Conclusion

This review of the developing decisional law in this area demonstrates that neutrality agreements present challenging and contentious legal issues which have not yet been fully and coherently resolved. A strong dissenting opinion has been issued in almost every Board decision which has issued on the subject of card check or recognition agreements. Furthermore, there is clear disagreement between the Board and the courts on the key issue of whether neutrality agreements are a mandatory subject of bargaining. These issues are likely to remain high on the agenda of the Bush Board.

It remains to be seen whether the Bush Board will adopt the view of the D.C. Circuit and reverse the decision of the Democratic majority in *Pall Biomedical*. It also remains to be seen whether the Bush Board will allow its representation procedures to take a back seat to neutrality agreements and, if so, how it will reconcile prior precedent in doing so. The issue of deference is one which can cut both ways, and therefore a consistent and coherent rule is needed in order to resolve the issue with some level of predictability for the parties.

While the law remains in flux, the negotiation and implementation of neutrality agreements continues at full steam. Whether the law eventually catches up to the bargaining table, or whether the parties are able to resolve these issues without recourse to the Board, it is clear that neutrality agreements present a formidable challenge to the Board's role in modern labor relations.