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Section 302: Drawing The Line For Employers, Unions

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Section 302 of the Labor Management Relations Act (LMRA) is, and always has been, an odd law. Its bare terms — which make it unlawful for an employer to "pay, lend or deliver" money or any "other thing of value" to a labor union or official, or for a union to "request, demand, receive or accept" the same from an employer — can be read expansively. Its most commonly cited proscriptions carry nothing more than a general intent requirement, suggesting that one can violate its provisions inadvertently.

Yet its legislative history suggests that the statute was passed with a narrow set of behaviors in mind. As many courts have recognized, U.S. Congress passed Section 302 to "prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers." See Turner v. Int'l Bhd. of Teamsters, 604 F.2d 1227 (9th Cir. 1979).

But while extortion and bribery each carry about as specific an intent requirement as may be found in criminal law, proving the commission of such offenses is not necessary to make out a violation of Section 302. How then is one to draw the line between appropriate employer-union interaction and potentially criminal collusion under Section 302?

The debate around the appropriate reach of Section 302 has focused recently on union-employer organizing rights arrangements. These agreements facilitate successful union organizing without the use of secret ballot voting. While such agreements come in different forms, most involve employer neutrality, recognition of a union on the basis of a card check or other alternative recognition process, and avoidance of the National Labor Relations Board election and litigation process.

In return for such concessions, unions have agreed to confine their organizing to predetermined employer locations, slow their efforts to expand into other employer facilities to a pace more acceptable to the employer and even lobby for legislation favorable to the employer or its industry.

In other instances, unions offer nothing, opting instead to use corporate campaign tactics to force a targeted employer into organizing concessions. In either case, some in the business community have pushed back against the prevalence of organizing rights agreements by challenging their legality under Section 302. Their argument is that because organizing rights agreements clearly carry "value" for a campaigning union, it is unlawful for a union to "demand," or for an employer to "pay, lend or deliver," such concessions under Section 302.

This theory has met with mixed success. Most recently, the U.S. Court of Appeals for the Eleventh Circuit held that an organizing rights agreement between an employer and union could constitute a "thing of value" under Section 302. Mulhall v. Unite Here Local 355, Case No. 11-10594 (11th Cir. Jan. 18, 2012).

In that case, the plaintiff, an employee of Hollywood Greyhound Track, had alleged that his employer entered an agreement to remain neutral during co-defendant Local 355's organizing drive, to provide the union with access to nonpublic work areas during the campaign and to give the union a list of unit employees and their job classifications. In exchange, Local 355 agreed to lobby on the company's behalf regarding a state casino gaming ballot initiative.

Reversing a lower court ruling granting the defendants' motion to dismiss, the court ruled that organizing assistance could constitute a "payment" if "its performance fulfills an obligation" and noted that "innocuous [organizing] ground rules can become illegal payments if used in a scheme to corrupt a union or to extort a benefit from an employer." The relevant factor, according to the court, was whether an employer offers organizing assistance "with the intention of improperly influencing a union."

In reaching this ruling, the court read into the statute a specific intent requirement that is not there. Some, including the United States — which urged unsuccessfully as amicus for a rehearing en banc — have criticized the court for this apparent error. But the result almost certainly would have been the same had the court required no specific intent; indeed, the analysis could have ended once the court concluded that the agreement may have constituted a "payment" under Section 302.

Such a result would imply that virtually all organizing rights agreements are "illegal" under Section 302. This cannot be the case, as the number of federal courts upholding voluntary organizing agreements under Section 301 of the LMRA are legion.

The Eleventh Circuit's decision highlights what is perhaps Section 302's central flaw: Read literally, it criminalizes behavior that Congress itself suggested it was not meant to reach. Some courts have tried to navigate around this logical dilemma by focusing on a different question altogether: Is an organizing rights agreement really a "thing of value?"

In Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., 390 F.3d 206 (3d Cir. 2004), the Third Circuit held that an employer did not violate Section 302 by agreeing, pursuant in part to a local contracting ordinance, to a card check and arbitration dispute procedure with a union. The court opined:

> "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." Id. at 219.

More recently, in Adcock v. Freightliner LLC, 550 F.3d 369 (4th Cir. 2008), the Fourth Circuit ruled that the employer did not provide a prohibited "thing of value" to a union by agreeing to abide by the results of a card check, to require its employees to attend a presentation about the procedure and to grant the union access to its facilities. In reaching this ruling, the court noted:

> "A vacuum salesman who is permitted by a company to make a sales pitch to employees does not receive a thing of value from the company. So, too, is the case of a company that allows a union access to its employees during an organizing campaign. In such situations, no 'thing[s] of value' are delivered by the company." Id. at 374.

These decisions, while premised on slightly different analysis, reach results that are just as logically unsettling as the result reached in Mulhall. Regardless of one's personal point of view — pro-employer or pro-labor — it is hard to argue with the premise that a union derives profound "value" out of an employer's agreeing to forego a secret-ballot NLRB election, to waive its right under Section 8(c) of the National Labor Relations Act to speak out against unionization and to allow a union physical access to its employees on company property.

Indeed, unions invest millions of dollars in organizing campaigns, all for the purpose of convincing employees of the benefits of unionization. Alternatively, they invest even greater resources in corporate pressure campaigns aimed at bludgeoning employers into providing the same concessions. Either way, it is readily apparent that shutting the employer out of the debate around the relative merits of unionization brings value to the union, which may then fill the employer's silence with additional communications of its own.

But neither the Third nor Fourth Circuits accepted this premise, most likely because of the uncomfortable policy implications of doing so: If an organizing rights agreement is a "thing of value," and no specific intent is required in order illegally to "deliver" it, aren't all organizing rights agreements — even voluntary ones — "unlawful?"

Neither court was willing to reach that result. So they found a way to sidestep the question or to cite the congressional intent as an afterthought, once the heavy lifting of invalidating the plaintiffs' claims was finished.

But what, then, of involuntary agreements forced upon unwilling employers only after lengthy and damaging corporate campaigns? Some employers have argued successfully that union corporate campaigns aimed at obtaining organizing concessions are akin to extortion under the federal racketeering laws.

See, e.g., Sodexo Inc. v. Service Employees Int'l Union, Case No. 1:11-cv-276 (E.D.Va. 2011); Smithfield Foods Inc. v. United Food and Commer. Workers Int'l Union, 585 F.Supp.2d 789 (E.D.Va. 2008); but see Cintas Corp. v. Unite Here, 601 F.Supp. 2d 571, 577-78 (S.D.N.Y. 2008), aff'd 355 Fed. App'x 508 (2d. Cir. 2009).

These cases suggest that compelled organizing agreements implicate precisely the policy concerns Congress sought to curb in enacting Section 302. But if, according to the Third and Fourth Circuits, such agreements are not "thing(s) of value" in the first place, the distinction between voluntary and involuntary agreements becomes irrelevant.

This suggests that these courts would similarly refuse to criminalize involuntary organizing rights agreements, despite the fact that they may have been the product of extortion or other improper union behavior. How could they, without contradicting their earlier analysis? A neutrality agreement either is, or is not, a "thing of value" under the statute. Whether it was extorted or handed over freely — or in exchange for union concessions — should play no role in the statutory interpretation. To read such a requirement into the statute would be do precisely what the Mulhall court was criticized for: reading a specific intent into a statute where none exists.

Thus, all of these cases, and the illogical results they suggest may derive from their application to future circumstances, highlight the difficulty of applying Section 302 in this area of labor relations. Some view Mulhall as having leveled the playing field in terms of the budding circuit split on the question of the legality of organizing rights agreements.

In fact, it has done no such thing. Mulhall, like Adcock and Sage before it, is probably wrongly decided in terms of the manner in which the court interpreted and applied the law. All three cases were decided not based on the language of the statute, but based on the courts' respective interpretation of congressional policy.

In Mulhall, the plaintiff alleged facts suggesting the union and employer reached their organizing agreement for "improper" reasons. In Adcock and Sage, there was no evidence of "improper" behavior. Unfortunately, Section 302 forces courts to make precisely this kind of value judgment. As long as that is the case, the results will continue to vary.

In that regard, when it comes to the question whether organizing rights agreements are "illegal" under Section 302, there is no circuit split. There may be one in terms of the results, but not in the imperfect manner in which each court applied the law to the facts before it.

And it may be unwise of the employer community to press for a final determination — perhaps from the U.S. Supreme Court — as to the "legality" of organizing agreements under Section 302. If the facts of any such test case do not sound in the "improper" behavior Congress sought to eradicate from labor relations when it enacted the statute, employer advocates are not likely to get the answer they want.

Kurt Larkin was a member of the legal teams that represented Smithfield Foods Inc. and Sodexo Inc. in the litigation referenced in this article.