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Protecting Employees from Quid Pro Quo Neutrality Arrangements

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PROTECTING EMPLOYEES FROM QUID PRO QUO NEUTRALITY ARRANGEMENTS

ABSTRACT

Throughout the past several decades, union density in the United States has declined dramatically. One of the primary causes of this decline is staunch opposition to unionization by employers throughout the country.

To unionize a group of employees, the union must win an election. Union elections are supervised by the NLRB. To get the NLRB to order an election, the union must first convince 30% of the employees to sign union authorization cards. Once the NLRB certifies that this requirement has been met, it orders that a secret ballot election be held. Typically, about two months pass between card certification and the actual election. During this time period, the union and the employer actively campaign for and against unionization.

To win the election, the union must convince more than 50% of the employees to vote for unionization. If the union successfully does so, it is certified as the exclusive bargaining representative of the employees. The union then begins negotiating the "first contract" between the employer and the employees, which dictates the terms of employment.

Employers typically prefer that their employees not join a union. Employers have developed several effective tactics for defeating attempts to unionize their employees. These tactics include (1) vehemently opposing unionization throughout the two-month campaign period and (2) taking advantage of some of the weaknesses of the NLRB union elections process to delay and ultimately derail the union campaign. These two tactics have been very effective, resulting in steadily decreasing union density.

In response to the trend of decreasing union density, unions have developed alternative means of unionizing new groups of employees without using the NLRB elections process. Specifically, unions have begun convincing employers to sign "neutrality agreements."

The typical neutrality agreement contains two primary provisions designed to help the union win the right to represent a group of employees. First, the agreement contains a provision obligating the employer to remain neutral to

unionization throughout the campaign period. Second, the agreement contains a card check provision. A card check provision has two parts. First, the employer waives its right to demand an NLRB-supervised secret ballot election. Second, the employer agrees to automatically recognize the union as the bargaining representative of its employees if a majority of those employees sign union authorization cards. These provisions are very effective at counteracting the employers' antiunion tactics. In fact, neutrality agreements with these two provisions are so effective that they can virtually guarantee that the union will be successful in unionizing a group of employees.

Because neutrality agreements can virtually guarantee unionization, employers typically will not sign one. There are, however, two ways to get an employer to sign a neutrality agreement. First, employers can be coerced. Employers can be coerced in many ways, including through the use of public opinion campaigns or as part of a settlement in litigation. Second, a union can bargain for a neutrality agreement. Employers will sign neutrality agreements if they are given something of great value in exchange. Bargained-for neutrality agreements are the focus of this Comment.

When bargaining for neutrality agreements, what might the union offer the employer? Recently, unions have begun trading substantive first-contract concessions, which are highly valuable to employers, for neutrality agreements. A union that has not been recognized as the bargaining representative for a group of employees meets with the employer before the two-month election campaign takes place. The union tells the employer that if it signs a neutrality agreement, the union will contractually agree in advance to certain provisions that the employer wants in its contract with its employees. Once the union wins the election, it honors the contractual promise it made and allows those provisions to become part of the first contract between the employer and its employees, whom the union now represents.

Essentially, the employer is able to ensure that if the union successfully unionizes its employees, the union will be contractually bound to act in the interests of the employer. Thus, the employer is able to mitigate, to some extent, the effects of unionization. Because this type of neutrality agreement creates the potential for corruption, many have argued that it should be barred by section 302 of the Labor and Management Relations Act, which is supposed to prevent corruption.

Third and Fourth Circuit decisions in 2004 and 2008 addressed this issue and held that neutrality agreements cannot violate section 302 of the LMRA

despite a variety of contrary arguments. However, in 2012, the Eleventh Circuit split with the Third and Fourth Circuits, holding that in some situations these agreements can violate section 302.

This Comment first discusses this circuit split and points out numerous problems with the arguments set forth in the Third and Fourth Circuit opinions. Then, this Comment argues that because of these problems, as well as the potential for corruption created by the Third and Fourth Circuit decisions, the Eleventh Circuit's decision is correct. Finally, this Comment proposes changes to the LMRA and the National Labor Relations Act that would serve as a solution to the problems created by neutrality agreements. These changes would also make the need for judicial review of future agreements under the Eleventh Circuit framework less necessary.

INTRODUCTION

The recent Eleventh Circuit decision in *Mulhall v. UNITE HERE Local 355* has created a split between the Eleventh Circuit on one side and the Third and Fourth Circuits on the other.[1] At issue in the split is a dispute over the correct interpretation of section 302 of the Labor and Management Relations Act (LMRA). Subsection (a) of section 302 makes it unlawful for an employer to

> pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value . . . to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer.[2]

Section 302 also makes it illegal for a union or union representative "to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)."[3] The courts are split over whether organizing assistance given to a labor union by an employer in the form of a pre-recognition "neutrality agreement" constitutes a "thing of value" within the meaning of section 302.[4]

But what is a neutrality agreement? When a union wants to unionize a new group of employees, it must first convince at least 30% of the employees to sign authorization cards.[5] If the union successfully does so, the union then submits the cards to the NLRB for certification.[6] If the NLRB certifies that the union has secured cards from 30% of the employees, it orders that a secret ballot election be held where the employees vote on whether to unionize.[7] Typically, about two months pass between the time the NLRB certifies the cards and the time that the election actually takes place.[8] During these two months, the union and the employer actively campaign for or against unionization.[9] At the election, if a majority of employees vote to unionize, then

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1 *See* 667 F.3d 1211, 1214 (11th Cir. 2012); *see also* Adcock v. Freightliner LLC, 550 F.3d 369, 374 (4th Cir. 2008); Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC, 390 F.3d 206, 219 (3d Cir. 2004).

2 Labor Management Relations (Taft-Hartley) Act § 302(a), 29 U.S.C. § 186(a) (2012); *see also Adcock*, 550 F.3d at 374.

3 29 U.S.C. § 186(b)(1).

4 *See Mulhall*, 667 F.3d at 1214.

5 Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-organization Under the NLRA*, 96 HARV. L. REV. 1769, 1775 (1983).

6 *See id.*

7 *Id.*

8 *See id.* at 1777.

9 *Id.* at 1775.

the NLRB recognizes the union as the sole bargaining representative of the employees.[10] The employer is then required by statute to bargain in good faith with the union to negotiate the "first contract" between the employees and the employer.[11] This employment contract determines the terms and conditions for all employees represented by the union.[12]

Neutrality agreements are a relatively new tool being used by unions to ensure their success in the union election process.[13] Neutrality agreements are agreements between the union and the employer.[14] They are made *before* the union begins soliciting authorization cards to submit to the NLRB for certification.[15] The provisions of these agreements, discussed in more detail in Part II, overcome the weaknesses of the NLRB elections process that cause unions to fail. For reasons discussed in Part II, neutrality agreements can virtually guarantee that a union will be successful in its campaign to unionize a new group of employees.[16]

New union members pay anywhere from thirty to fifty dollars per month in member dues, which can potentially result in hundreds of thousands of dollars in dues per month for the union depending on the number of employees.[17] Because of the value of neutrality agreements to the unions in securing new union members, unions are willing to pay for them.[18] In *Mulhall*, for example, the union agreed to spend money to lobby in support of legislation favorable to the employer.[19] The union ultimately spent over $100,000 on lobbying efforts.[20] Accordingly, in *Mulhall* the Eleventh Circuit held that a neutrality

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10 *Id.*

11 *See id.* at 1775, 1810, 1819. Section 8(d) of the National Labor Relations Act (NLRA), as amended by the LMRA, imposes a duty on the employer to bargain in good faith with the union selected by its employees. *See* National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (2012); *see also* Weiler, *supra* note 5, at 1775 n.17 (citing section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), which makes it an unfair labor practice to refuse to bargain collectively with the union).

12 *See* Weiler, *supra* note 5, at 1775.

13 Neutrality agreements began being widely used as part of "union organizing strategy" in the 1990s. Roger C. Hartley, *Non-legislative Labor Law Reform and Pre-recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 378 (2001).

14 *Id.* at 372.

15 *See id.*

16 Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 HASTINGS L.J. 695, 722–23 (2012).

17 *Id.* at 730.

18 *See, e.g.*, Mulhall v. UNITE HERE Local 355, 667 F.3d 1211, 1213 (11th Cir. 2012).

19 *See id.*

20 *Id.*

agreement can constitute a "thing of value" within the meaning of section 302 of the LMRA in certain situations.[21]

This Comment argues that the Eleventh Circuit's interpretation in *Mulhall* is correct, but that section 302 should nevertheless be amended to make it better at achieving its purpose: "curb[ing] abuses that Congress felt were 'inimical to the integrity of the collective bargaining process.'"[22]

This Comment suggests three reasons why the Eleventh Circuit's decision in *Mulhall* is more appropriate than the decisions of the Third and Fourth Circuits in *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC* and *Adcock v. Freightliner LLC*, respectively. First, the reasoning in the *Hotel Employees* and *Adcock* decisions is unsound. The weaknesses of these opinions are detailed in Part IV.

Second, this Comment suggests that the *Mulhall* decision was correct in determining that a neutrality agreement can be considered a "thing of value" within the meaning of section 302 because neutrality agreements are, in fact, valuable. They are valuable because they can virtually guarantee that the union will be successful in unionizing new groups of employees, who are then required to pay substantial sums of money in dues to the union.[23] Thus, under the plain language of section 302, a neutrality agreement could be considered a "thing of value."[24]

Third, this Comment argues that because neutrality agreements are valuable to unions, their existence yields a potential for corruption, which section 302 of the LMRA was designed to prevent.[25] Unions have recently found a way to get neutrality agreements for free.[26] Rather than agreeing to pay for neutrality agreements with money, unions have begun conceding employees' contract

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[21] *See id.* at 1215.

[22] Adcock v. Freightliner LLC, 550 F.3d 369, 375 (4th Cir. 2008) (quoting Arroyo v. United States, 359 U.S. 419, 425 (1959)).

[23] Eigen & Sherwyn, *supra* note 16, at 722–23, 730.

[24] *See* Labor Management Relations (Taft-Hartley) Act § 302(a), 29 U.S.C. § 186 (2012); *see also Adcock*, 550 F.3d at 374.

[25] *See Arroyo*, 359 U.S. at 425–26 (noting that congressional concern for corruption garnered popular support for passing section 302 of the LMRA).

[26] *See, e.g.*, Eigen & Sherwyn, *supra* note 16, at 730–31 (discussing how unions bargain using employees' contract rights).

rights in exchange for neutrality agreements *before* even being recognized as the representative of those employees.[27]

Before soliciting authorization cards from employees, the union approaches the employer and asks the employer to sign a neutrality agreement.[28] To get the employer to sign the agreement, the union includes provisions in the agreement that guarantee that the first contract between the employer and employees will adhere to certain guidelines or contain certain provisions favorable to the employer.[29] For example, the neutrality agreement might contain a provision that states that any collective bargaining agreement reached between the union and the employer on behalf of the employees will contain a provision allowing the employer to impose mandatory overtime.[30]

With the help of the neutrality agreement, the union then wins the election campaign and becomes the exclusive bargaining representative of the employees.[31] Then, when the union goes to negotiate a contract with the employer on behalf of the employees, it honors the promises it made in exchange for the neutrality agreement by allowing the agreed-upon provisions to become part of the first employment contract.[32] This results in contract terms favorable to the employer. Thus, the employer is able to mitigate, to some extent, the effects of unionization by binding the union to specific, favorable contract terms before the union even unionizes the employees.

This is a great arrangement for the union and the employer. The union gets a group of new members who are required to pay it large sums of money in member dues.[33] The employer does not have to worry about the union making costly demands on behalf of the newly unionized employees because it has already negotiated for favorable contract terms in exchange for the neutrality agreement. Everyone wins except for the employees, whose rights were sacrificed by the union in exchange for the neutrality agreement before they even joined the union.

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[27] *See, e.g.*, Dana Corp., 356 N.L.R.B. No. 49, 2010 WL 4963202, at *1 (Dec. 6, 2010). Among other things, the union in *Dana Corp.* agreed to the inclusion of a mandatory overtime provision in any future employee contract. *See id.* at *3.

[28] *See* Eigen & Sherwyn, *supra* note 16, at 730–31.

[29] *See, e.g.*, *Mulhall*, 667 F.3d at 1215.

[30] *See Dana Corp.*, 2010 WL 4963202, at *2–3.

[31] *See* Eigen & Sherwyn, *supra* note 16, at 722–23.

[32] *See id.* at 731.

[33] *Id.* at 730.

Should unions be allowed to concede the rights of employees they do not yet represent in exchange for a neutrality agreement? That question was addressed in the 2010 NLRB decision *Dana Corp.*[34] In *Dana Corp.*, the NLRB held that the answer in many cases is yes, but that it depends on the specific provisions of each agreement.[35] Thus, under *Dana Corp.*, this type of quid pro quo agreement between the unions and the employers could be perfectly legal.[36] Then came the 2012 *Mulhall* decision, in which the Eleventh Circuit held that such an agreement was unlawful if it were being used as "valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer."[37]

This Comment argues that the *Mulhall* decision is correct because it takes into account the potential for corruption inherent in this type of neutrality agreement and creates an appropriate standard for reviewing neutrality agreements in the future. However, judicial review of every questionable neutrality agreement to determine its legality is time consuming and expensive. Thus, Part V of this Comment proposes changes to both the LMRA and the National Labor Relations Act (NLRA) that will help eliminate the potential for corruption as well as reduce the need for judicial review of neutrality agreements to determine their legality.

I. SECTION 302 OF THE LABOR AND MANAGEMENT RELATIONS ACT (TAFT-HARTLEY ACT)

Section 302 of the Labor and Management Relations Act, also known as the Taft-Hartley Act,[38] makes it illegal for an employer to "agree to pay, lend, or deliver, any money or other thing of value" to a union, or an officer or employee of a union who represents or *seeks* to represent its employees.[39] It also makes it illegal for a union or union officer to "request, demand, receive, or accept . . . any payment, loan, or delivery of any money or other thing of value."[40] The penalty for violation of the statute depends on the value of the

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[34] 2010 WL 4963202, at *3–4.

[35] *See id.* at *11.

[36] *See id.* at *12.

[37] Mulhall v. UNITE HERE Local 355, 667 F.3d 1211, 1215 (11th Cir. 2012).

[38] The LMRA/Taft-Hartley Act was an amendment to the NLRA. *See* Arroyo v. United States, 359 U.S. 419, 425 (1959).

[39] Labor Management Relations (Taft-Hartley) Act § 302(a), 29 U.S.C. § 186(a) (2012). The statute includes a list of exceptions without which it would be overly broad. These exceptions are outside the scope of this Comment.

[40] *Id.* § 186(b)(1).

illegal transaction.[41] If the value of the transaction is greater than $1,000 and the violation is performed willfully and with intent to benefit oneself or others, the offense is a felony and the guilty party is subject to a fine of up to $15,000 and up to five years in prison.[42] If, however, the value of the transaction is $1,000 or less, the offense is a misdemeanor and the guilty party is subject to a fine of up to $10,000 and up to one year in prison.[43]

Though the language of the statute is vague,[44] its purpose is clear—to prevent bribery and corruption in the context of the collective bargaining process.[45] In *Arroyo v. United States*, the Supreme Court stated that Congress passed section 302 of the LMRA to curb abuses "inimical to the integrity of the collective bargaining process."[46] In this light, the Second Circuit has held that whether something is a "thing of value" within the meaning of section 302 depends on the circumstances of the case, stating that "[v]alue is usually set by the desire to have the 'thing' and depends upon the individual and the circumstances."[47]

II. NEUTRALITY AGREEMENTS AND COLLECTIVE BARGAINING

A. Background

Neutrality agreements are tools that are increasingly being used by unions to help them organize new groups of employees.[48] A neutrality agreement is an agreement between an employer and a labor union, and it is made when the

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41 *See id.* § 186(d)(1).

42 *Id.*

43 *Id.*

44 What is a "thing of value?"

45 *See* Arroyo v. United States, 359 U.S. 419, 425–26 (1959); *see also* Mulhall v. UNITE HERE Local 355, 667 F.3d 1211, 1214 (11th Cir. 2012); Adcock v. Freightliner LLC, 550 F.3d 369, 375 (4th Cir. 2008); Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC, 390 F.3d 206, 218–19 (3d Cir. 2004).

46 359 U.S. at 425. The Court in *Arroyo* stated that "[t]hose members of Congress who supported [section 302 of the LMRA] were concerned with corruption of collective bargaining through bribery of employee representatives." *Id.* at 425–26. The court cited Senator Byrd saying that section 302 "would prevent an employer from paying a royalty to the representative of a union. [The employer] would be clearly liable, under the provisions of [section 302], if he paid a royalty or other money to the representative of a labor union, the purpose of which was to bribe that representative." *Id.* at 426 n.7 (quoting 92 CONG. REC. 4,893 (1946)).

47 United States v. Roth, 333 F.2d 450, 453 (2d Cir. 1964) (holding that "a loan may reasonably be included within the wording of the statute and that the Congress so intended").

48 Ralph M. Silberman, *Understanding Card Checks and Neutrality Agreements*, EMP. ALERT, May 26, 2005, at 1 ("80% of 400,000 new unionized workers were organized through card checks and neutrality agreements.").

labor union decides it wants to try to unionize the employer's employees.[49] To unionize a group of employees, the union must win the right to represent them in their dealings with the employer by achieving the support of a majority of the employees.[50] The purpose of a neutrality agreement is to make it easier for the union to do so.[51]

Neutrality agreements are made *before* a union begins the campaign to unionize the employees.[52] Most neutrality agreements contain two primary provisions. First, the employer agrees to remain neutral to the union's efforts to unionize its employees rather than campaigning against unionization.[53] This neutrality provision is why they are called "neutrality agreements." Second, the employer will typically agree to card check recognition.[54] "[B]y agreeing to card-check recognition," the employer is waiving its right to demand an NLRB-supervised secret ballot election[55] and agreeing that it will automatically recognize the union as the exclusive bargaining representative of its employees if a majority of its employees sign union authorization cards.[56]

B. The Value of Neutrality Agreements

Neutrality agreements have been extremely effective at helping unions unionize new groups of employees because they circumvent some of the primary problems with the NLRB elections process.[57] These problems include

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[49] *See* Hartley, *supra* note 13, at 372; *see also* Joseph A. Barker, *Keeping Neutrality Agreements Neutral*, MICH. B.J., Aug. 2005, at 33, 34.

[50] *See* Hartley, *supra* note 13, at 383 n.72.

[51] *See, e.g.*, Weiler, *supra* note 5, at 1775 (discussing the "elaborate" formal procedure for achieving union representation).

[52] *See, e.g.*, Hartley, *supra* note 13, at 372.

[53] *See id.* at 379 (noting that neutrality provisions impose one of two degrees of neutrality on the employer: either (1) "employers waive their right to communicate their views about the union—a pledge of complete neutrality," or (2) employers agree to only a "partial waiver of their right to communicate with employees during the organizing period").

[54] *See id.* at 382–83 & n.72.

[55] *Id.* at 383; *see* Silberman, *supra* note 48. In the absence of a card check arrangement, the only way for a union to win the right to represent a group of employees is to win greater than 50% of the vote in an NLRB-supervised secret ballot election.

[56] *See* Hartley, *supra* note 13, at 383 & n.72 ("Card check recognition agreements are now a standard provision in neutrality agreements. . . . There are variations in the form that card-check agreements take, of course. One of the most important is the requirement that a union possess a super-majority showing of support, often 65 percent, before the obligation to recognize the union attaches. A super-majority precondition to card-check recognition is neither unprecedented nor particularly onerous for unions." (footnote omitted)). For a general description of the union organizing campaign and card check process, see Silberman, *supra* note 48.

[57] *See* Hartley, *supra* note 13, at 372–73.

"employer intimidation . . . and inability to secure a first contract."[58] Until recently, these problems resulted in a very low union success rate in NLRB-supervised representation elections.[59]

1. Employer Intimidation and Antiunion Speech

With the NLRA, also known as the Wagner Act, Congress created a formal procedure by which unions could unionize new groups of workers, securing the right to bargain with their employer on their behalf.[60] To obtain that right, a union must first get at least 30% of the employees in a bargaining unit[61] to sign authorization cards.[62] Once 30% of the employees in the unit have signed cards, the union submits a petition for certification to the NLRB.[63] If the NLRB concludes that the conditions for an election to take place have been satisfied, a secret ballot election takes place in which the employees vote to decide whether to join the union.[64] Typically, about two months pass between the time the union submits its petition and the time the election takes place.[65] During this time, the employer has the opportunity to campaign against unionization.[66]

The NLRA contains provisions designed to prevent the employer from intimidating employees into voting against unionization.[67] These provisions attempt to do so by regulating the employer's conduct during the campaign.[68] However, these provisions have not been effective in the past.[69]

For example, it is a violation of section 8(a)(3) of the NLRA for an employer to discourage unionization by firing employees during the campaign period leading up to the election.[70] However, the remedy for violation of section 8(a)(3)—reinstatement of the employee with backpay—is not an

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58 *Id.* at 372.

59 *See id.* at 372–73.

60 *See* Weiler, *supra* note 5, at 1775.

61 The term "bargaining unit" means "[a] group of employees authorized to engage in collective bargaining on behalf of all the employees of a company or an industry sector." BLACK'S LAW DICTIONARY 170 (9th ed. 2009).

62 Weiler, *supra* note 5, at 1775.

63 *See id.*

64 *Id.*

65 *Id.* at 1777.

66 *Id.*

67 *See id.* at 1777–78.

68 *See id.*

69 *See id.* at 1777.

70 *See* National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3).

effective deterrent.[71] Once fired, the employee no longer has the right to vote in the election and by the time he is reinstated, the election will have long since passed.[72] The only thing the employer risks by firing the employee is having to pay the employee backpay.[73]

Moreover, firing pro-union employees "gives a chilling edge to the warning that union representation is likely to be more trouble for the employees than it is worth."[74] Econometric research has shown that an antiunion campaign coupled with discriminatory firings in violation of the NLRA has a profoundly negative effect on the union's ability to win the election.[75] Not surprisingly then, "[u]nion leaders regard employer anti-union speech as a leading cause of union organizing failure."[76]

The weaknesses of the NLRB-supervised election process resulted in decreasing union election success rates from the period between 1950 and 1985.[77] Success rates in representation elections fell from 74% in 1950 to just 48% in 1980.[78] Union success rates had only climbed back to 50% by 2000.[79] As a result, as of 2012, union members account for only 11.8% of the total workforce and just 6.9% of the private workforce.[80]

However, unions have found that they can dramatically increase their chances of a successful unionization campaign by bypassing the NLRB

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[71] Weiler, *supra* note 5, at 1788–89 ("[T]he traditional remedies for discriminatory discharge—backpay and reinstatement—simply are not effective deterrents to employers who are tempted to trample on their employees' rights." (footnote omitted)).

[72] *See id.* at 1788.

[73] *See id.*

[74] *Id.* at 1778.

[75] *See id.* at 1786 (citing W. Dickens, Union Representation Elections: Campaign and Vote (Oct. 1980) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology)) (commenting on an empirical study by William Dickens that found that unions would have won 53%–75% of the elections sampled had the employers not campaigned, versus only 3%–10% "if every employer had campaigned with the highest intensity and greatest illegality identified in the sample," and noting that "[a] protracted representation campaign, punctuated by discriminatory discharges and other reprisals against union supporters, can have a pronounced effect on the ultimate election verdict").

[76] Hartley, *supra* note 13, at 379.

[77] *See* 50 NLRB ANN. REP. 11–15 (1985); Hartley, *supra* note 13, at 370–71; Weiler, *supra* note 5, at 1776–77; Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 352–53 (1984).

[78] *See* Weiler, *supra* note 5, at 1776 tbl.1.

[79] 65 NLRB ANN. REP. 13 (2000).

[80] Sam Hananel, *Union Membership Up Slightly, Outlook in Doubt*, USA TODAY, http://usatoday30.usatoday.com/money/workplace/story/2012-01-27/union-membership-growing/52817346/1 (last updated Jan. 27, 2012).

elections process altogether through the use of a neutrality agreement with a card check provision.[81] The card check provision allows the union to avoid the prolonged, two-month campaign period leading up to the NLRB-supervised election by avoiding the election altogether.[82] And, during the relatively short period of time in which the union will be trying to get employees to sign authorization cards, the neutrality provision of the agreement prevents the employer from engaging in antiunion speech.[83] Due to their effectiveness, neutrality agreements emerged as a "fixture" of union organizing strategy in the 1990s.[84]

A study published in 2001 found that in the 1990s, where union organizing campaigns employed neutrality agreements with card check provisions, they had a 78% success rate.[85] During the same time period in which these data were collected, the overall union success rate in NLRB elections hovered around 47%.[86] This is a 31% difference.

More importantly, the 78% success rate actually understates the effectiveness of neutrality agreements.[87] Recall that 30% of a company's employees must sign authorization cards before an NLRB election can be held.[88] However, in nearly every case where a union solicits enough cards to allow the NLRB to order an election, more than 50% of the employees ultimately sign authorization cards.[89] Thus, in nearly every case in which an NLRB election is held, the union would have been able to automatically gain recognition without having an election if it had secured a neutrality agreement with a 50% card check provision.[90]

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81 *See* Eigen & Sherwyn, *supra* note 16, at 722–23; *see also* Hartley, *supra* note 13, at 379.

82 *See* Eigen & Sherwyn, *supra* note 16, at 722.

83 *See id.* at 721–22.

84 Hartley, *supra* note 13, at 378.

85 *See* Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 45, 52 (2001); *see also* Silberman, *supra* note 48.

86 *See* NLRB ANN. REP., *supra* note 79, at 13; Eaton & Kriesky, *supra* note 85, at 45 (noting that data for the study were collected in 1997 and 1998).

87 Eigen & Sherwyn, *supra* note 16, at 722–23.

88 Weiler, *supra* note 5, at 1775; *see also* Eigen & Sherwyn, *supra* note 16, at 722.

89 Eigen & Sherwyn, *supra* note 16, at 722–23.

90 *Id.* at 723. Union success rates are the focus of groups involved with formulating U.S. labor policy. *See id.* This focus stems from the belief on one side that union density is better for everyone, and on the other that the opposite is true. Much of the political discourse related to unions is centered on policies designed to either increase or decrease union density. *See, e.g.*, Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 2. The Employee Free Choice Act (EFCA) is an excellent recent example. Had it been passed, the EFCA would have altered the NLRB elections process, mandating that the NLRB certify a union as the exclusive bargaining representative of the unit if a majority of the employees in the unit signed authorization cards. *Id.* Essentially,

2. First Contract

Once a union has won the right to represent a group of employees, the union still has a long way to go. Winning the right to represent the employees "gives the union no more than the right to sit across the bargaining table from the employer."[91] The union must still successfully negotiate a "first contract" with the employer that will dictate the terms of the employer/employee relationship.[92]

Section 8(d) of the NLRA imposes a duty on the employer to bargain in good faith with the union.[93] However, this duty has been interpreted extremely narrowly by the Supreme Court.[94] As a result, the employer can still force an impasse in its negotiations with the union. The only defense a union has against a savvy employer determined to force an impasse is the threat of a strike.[95] However, this tactic has its own set of limitations.[96] As a result, new unions fail to achieve a first contract in approximately 40% of cases.[97]

Unions can circumvent this problem in advance by using neutrality agreements with provisions designed to help it achieve a first contract.[98] First, they could include provisions that require "[i]nterest arbitration of unresolved first-contract issues if negotiations are not satisfactorily concluded by a time [to be made] certain following recognition."[99] For reasons not germane to this Comment, these types of provisions are uncommon.[100] Second, unions can attempt to contractually bind employers to specific contract terms or guidelines in the neutrality agreement that will govern first-contract negotiations once the

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it takes away the secret ballot election and mandates card check recognition for all union campaigns. *See id.* Because swapping to card check recognition dramatically increases the unions' success rates in representation elections, the effect of the EFCA would probably have been to increase union density.

91 Weiler, *supra* note 77, at 352.

92 *See id.*

93 National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (2012).

94 The Court's rationale being that the principle of freedom of contract governs the relationship between the employer and the union selected to represent the employer's employees. *See* Weiler, *supra* note 77, at 357–60. Moreover, the statute itself states that this duty "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). To top it off, in the unlikely event that the NLRB finds that the employer violated its duty, the only real remedy available is an NLRB order for the employer to comply with the duty in the future. Weiler, *supra* note 77, at 360.

95 Weiler, *supra* note 77, at 361–62.

96 *See id.*

97 Hartley, *supra* note 13, at 386.

98 *See id.* at 386–87.

99 *Id.* at 386 n.94.

100 *See id.*

union wins the election.[101] These types of neutrality agreements, discussed in Part III below, were authorized by the NLRB's decision in *Dana Corp.* and are the focus of this Comment.[102]

Because neutrality agreements can dramatically increase the union's chance of successfully gaining recognition, as well as help it achieve a first contract, they are clearly of *some* value to a union seeking to organize a new group of employees. Despite their apparent value, the Third and Fourth Circuits have held that under no circumstances can a neutrality agreement constitute a "thing of value" within the meaning of section 302 of the LMRA.[103] Their reasoning, discussed in Part IV, was extremely flawed.

III. PERVERSE INCENTIVES (*DANA CORP.*)

Because neutrality agreements are valuable to unions, they are willing to pay for them. In exchange for a neutrality agreement, the union might offer any number of things. For example, the union might offer political influence in support of legislation favorable to the employer,[104] or bargaining concessions effective when the union achieves recognition.[105] Of particular interest to this Comment are situations where the union agrees to the latter. It is this type of neutrality agreement where the potential for corruption exists.[106] This type of neutrality agreement was the subject of a recent major NLRB decision, *Dana Corp.*[107]

Dana Corp. involved a recent trend whereby unions have begun trading contract concessions for neutrality agreements.[108] Before beginning a

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[101] *See generally, e.g.*, Eigen & Sherwyn, *supra* note 16 (arguing that the parties could contract to behave ethically).

[102] Dana Corp., 356 N.L.R.B. No. 49, 2010 WL 4963202 (Dec. 6, 2010).

[103] *See* Adcock v. Freightliner LLC, 550 F.3d 369, 374 (4th Cir. 2008); Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC, 390 F.3d 206, 219 (3d Cir. 2004).

[104] For example, the union in *Mulhall* agreed to help campaign in support of legislation favorable to the employer and eventually spent $100,000 on campaign efforts. Mulhall v. UNITE HERE Local 355, 667 F.3d 1211, 1213 (11th Cir. 2012).

[105] Hartley, *supra* note 13, at 390. Professor Hartley notes, however, that doing so "would be unavailable following a successful, but contentious, organizing campaign." *Id.* Such concessions might include promises from the union "to refrain from picketing, boycotting, striking, or undertaking other economic activity against [the employer]" if recognized as the exclusive bargaining representative of the employees. *Mulhall*, 667 F.3d at 1213. Alternatively, an employer might be required to have signed a neutrality agreement to bid on some government contracts or receive some benefit from the government. *See Hotel Emps.*, 390 F.3d at 208–09.

[106] *See* Eigen & Sherwyn, *supra* note 16, at 730–31.

[107] 2010 WL 4963202, at *1.

[108] *See id.*; Eigen & Sherwyn, *supra* note 16, at 730–31.

campaign to unionize the employees, the union approaches the employer and requests that it enter into a neutrality agreement.[109] In exchange, the union agrees that, should it successfully unionize the employees, any employment contract it negotiates on their behalf will contain certain provisions favorable to the employer.[110] With the help of the neutrality agreement, the union then unionizes the employees, who are required to pay the union large sums of money in dues.[111] Once unionized, the union honors the promise it made in exchange for the neutrality agreement and allows the agreed-upon provisions to become part of the first employment contract.[112] The question is, under the NLRA, can the union agree to specific, substantive contract provisions with the employer before it has even unionized the employees?

Sections 8(a)(2) and 8(b)(1)(A) of the NLRA make it illegal to negotiate a full, binding collective bargaining agreement before the union has achieved majority support of the employees it is trying to unionize.[113] Thus, neutrality agreements that contain pre-recognition bargaining concessions are subject to challenge based on the argument that they constitute a full collective bargaining agreement.[114] While neutrality agreements can contain guidelines as to what the full collective bargaining agreement will eventually look like should the union secure recognition, the neutrality agreement must fall short of being a complete collective bargaining agreement.[115] And, even if the neutrality agreement only contains guidelines, it might still be subject to a challenge that it goes too far to confer premature legitimacy onto a union that has not achieved majority support of the employees.[116]

The line between what is permissible and what is a violation of the NLRA is not clear. Prior to 2010, the only NLRB case that addressed this issue was *Majestic Weaving Co.*[117] In *Majestic Weaving*, the employer prematurely recognized a union as the exclusive bargaining representative before the union

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109 *See* Eigen & Sherwyn, *supra* note 16, at 730–31.

110 *See id.* In *Dana Corp.*, for example, the union agreed that once it unionized the employees, it would allow the employer to include a mandatory overtime provision in its contract with the employees. 2010 WL 4963202, at *2–3.

111 Depending on the size of the bargaining unit, the union might receive "[h]undreds of thousands of dollars per month" in new member dues. Eigen & Sherwyn, *supra* note 16, at 730.

112 *See id.* at 731.

113 Barker, *supra* note 49, at 35 (discussing the boundaries of permissible pre-recognition contract negotiations).

114 *See id.*

115 *See id.*

116 *See id.*

117 147 N.L.R.B. 859 (1964).

had secured the signatures of a majority of the employees.[118] The employer also entered into a full collective bargaining contract with the "minority union."[119] Some of the employees sued, alleging that the employer's conduct violated the NLRA.[120] The NLRB ruled in favor of the plaintiffs, holding that an employer may not lawfully reach a collective bargaining agreement with a union "whose majority support comes after, and follows from, the agreement itself."[121] The NLRB reasoned that by forming a binding agreement with the union before the campaign, the employer was conferring a "deceptive cloak of authority" on the union, giving it an advantage in securing the votes of the employees.[122]

In 2010, the NLRB addressed the issue of pre-recognition bargaining concessions again with its decision in *Dana Corp*.[123] In *Dana Corp.*, the employer and the union entered into a neutrality agreement with a card check provision.[124] In this agreement, the employer and the union agreed that if the union were to successfully unionize the employees, any future collective bargaining agreement the union might reach with the employer would

> (a) be at least four years in duration, (b) include health insurance cost-sharing, (c) address the importance of attendance to productivity and quality, (d) include a minimum number of classifications, (e) incorporate team-based approaches and continuous improvement, (f) have flexible compensation policies, and (g) provide for mandatory overtime when necessary.[125]

The agreement also included two other important provisions. The first was a provision by which the terms of the collective bargaining agreement would be decided at arbitration if the parties reached an impasse in their negotiations.[126]

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118 *See id.* at 860.

119 *See id.* at 861.

120 *See id.*

121 *NLRB Approves Prerecognition Employer–Union Bargaining*, MORGAN LEWIS 2 (Dec. 9, 2010), http://www.morganlewis.com/pubs/LEPG_LF_NLRBApprovesPrerecognitionEmployer-UnionBargaining_09dec10.pdf.

122 Barker, *supra* note 49, at 35 (quoting Int'l Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 736 (1961)) (internal quotation marks omitted); *see NLRB Approves Prerecognition Employer–Union Bargaining*, *supra* note 121, at 2.

123 356 N.L.R.B. No. 49, 2010 WL 4963202 (Dec. 6, 2010). *Dana Corp.* was a 2–1 decision, with the dissenting member arguing that the majority was overruling the precedent set by *Majestic Weaving*, despite the fact that NLRB precedent cannot be overruled without the support of less than a three-member majority. *See id.* at *14 (Hayes, Member, dissenting).

124 *NLRB Approves Prerecognition Employer–Union Bargaining*, *supra* note 121, at 1.

125 *Id.*

126 *Id.*

And the second was a no-strike/no-lockout clause.[127] Although the employees were informed of the existence of a neutrality agreement between their employer and the union prior to the union election campaign taking place, they were not informed of the specific terms of the agreement.[128] Thus, the employees were unaware that if they voted to unionize, they would be subjecting themselves to mandatory overtime.

Several employees sued after the union won recognition, arguing that the agreement violated Sections 8(a)(2) and 8(b)(1)(A) of the NLRA.[129] The NLRB issued a 2–1 decision, holding that the agreement did not violate the NLRA because it "did no more than create a framework for future collective bargaining, if . . . the [union] were first able to provide proof of majority status."[130] The NLRB distinguished the facts of *Dana Corp.* from those of *Majestic Weaving*, where the employer had officially recognized a union that had not achieved majority support from the employees.[131] However, the NLRB noted that whether a given pre-recognition agreement is lawful "depend[s] on the context in which [the] agreement is adopted and the conduct that accompanies it."[132] As such, the legality of these types of pre-recognition agreements must be determined on a case-by-case basis.[133]

With the *Dana Corp.* decision, the NLRB has limited its holding in *Majestic Weaving* to situations in which an employer recognizes a union before it achieves majority support.[134] As a result, employers and unions can more freely enter neutrality agreements that dictate the provisions of any future collective bargaining agreement they might reach.[135] This is beneficial to the unions because it gives them more to bargain with when attempting to persuade an employer to enter into a neutrality agreement.[136] Rather than paying for the neutrality agreement with its own resources, the union can pay for the agreement with a contractual promise to cede certain employee rights[137]

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127 *Dana Corp.*, 2010 WL 4963202, at *2.

128 *NLRB Approves Prerecognition Employer–Union Bargaining*, *supra* note 121, at 2.

129 *Id.*

130 *Dana Corp.*, 2010 WL 4963202, at *8.

131 *See id.*; *see also* Jonah J. Lalas, Recent Cases, *Taking the Fear Out of Organizing:* Dana II *and Union Neutrality Agreements*, 32 BERKELEY J. EMP. & LAB. L. 541, 541–42 (2011).

132 *NLRB Approves Prerecognition Employer–Union Bargaining*, *supra* note 121, at 2.

133 *Id.*

134 *See* Lalas, *supra* note 131, at 541.

135 *See id.*

136 *See id.*

137 For example, the employees' right to refuse to allow a mandatory overtime provision to be included in the contract.

once it wins the right to represent those employees with the help of the neutrality agreement.

Before, negotiations related to the organizing campaign had to be kept separate from negotiations related to the actual substance of the contract between the union and the employer, with the latter taking place *after* the union had achieved recognition.[138] After *Dana Corp.*, the union and the employer can mix the substantive contract negotiations with negotiations over the organizing campaign, at least to a certain extent.[139] That is, unions can make concessions related to the rights of the employees in exchange for the employer's pledge of neutrality. The extent to which the union can make such concessions is unclear after the *Dana Corp.* decision. What is clear, however, is that in at least some circumstances, the union can make significant, binding concessions, such as agreeing to a mandatory overtime provision, prior to unionizing the employees.[140]

This presents a problem. The ability of a union to concede the rights of employees it does not represent in exchange for a neutrality agreement that will help it secure that very right creates perverse incentives for the union and the employer. The employer can reduce and potentially eliminate the effects of unionization by using a neutrality agreement to bind the union to favorable contract terms before the unionization campaign even begins.[141] In return, the union gets the neutrality agreement, which virtually guarantees its success in unionizing the employees.[142] The victory means a new group of members must pay union dues, which can be substantial.[143] If it is true that a neutrality agreement can ensure that the union is successful in unionizing the employees, then it follows that the agreement is worth to the union whatever it gains in new member dues.[144] Despite the apparent value of neutrality agreements to unions, and despite their potential for corruption, which section 302 of the

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138 *See* Dana Corp., 356 N.L.R.B. No. 49, 2010 WL 4963202, at *7–8 (Dec. 6, 2010).

139 *See id.* at *12.

140 *See id.* at *2–3. Other examples of concessions made in exchange for neutrality agreements include (1) agreeing that "there would be no provisions for severance pay . . . in the event of a layoff or plant closure," (2) agreeing that "there would be no strikes during the term of any collectively bargained agreement," and (3) agreeing that "there would be no wage adjustments provided at any newly organized facility prior to" a certain date. Adcock v. Freightliner LLC, 550 F.3d 369, 372 (4th Cir. 2008) (omission in original) (internal quotation marks omitted).

141 *See* Eigen & Sherwyn, *supra* note 16, at 730–31.

142 *Id.* at 722–23.

143 *See id.* at 730.

144 *See id.* at 730–31.

LMRA was designed to prevent, the Third and Fourth Circuits have held that under no circumstances can a neutrality agreement violate section 302.[145]

IV. THE SPLIT

A. Third Circuit

The Third Circuit was the first to address whether neutrality agreements can violate section 302 of the LMRA in *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*.[146] In that case, a labor union sued an employer to enforce a neutrality agreement that the two parties had previously executed.[147] The neutrality agreement contained three relevant provisions: (1) a binding arbitration provision; (2) a card check provision, by which the employer agreed to recognize the union as the exclusive bargaining representative of its employees if a majority of the employees signed authorization cards; and (3) a promise by the union to refrain from picketing, striking, or boycotting the employer.[148]

After soliciting authorization cards from employees, the cards were counted.[149] The initial count revealed that less than a majority of employees had signed authorization cards.[150] The union attempted to contest the initial card count in arbitration, but the employer refused to comply.[151] The plaintiff filed suit to compel arbitration.[152] The defendant argued that the neutrality agreement containing the arbitration provision was illegal as a violation of section 302 and was thus void.[153]

The trial court held for the plaintiff, stating that

> (1) both parties were within their rights to reach a private agreement to provide an alternative method of deciding union representation and that such chosen method . . . was not illegal under federal law; [and] (2) the Agreement's provisions for card check procedures did not

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145 *See Adcock*, 550 F.3d at 375; Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC, 390 F.3d 206, 218–19 (3d Cir. 2004).

146 *See* 390 F.3d at 207, 210.

147 *Id.* at 209–10.

148 *Id.* at 209.

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.* at 209–10.

153 *Id.* at 210.

> constitute payment of 'things of value' prohibited by section 302 of the Labor Management Relations Act.[154]

On appeal, the Third Circuit affirmed the judgment of the trial court.[155] The court's reasoning was circular. First, the court framed the issue by stating,

> When Congress enacted section 302, it was "concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." . . .
>
> Not surprisingly, [the defendant] is unable to provide any legal support for the remarkable assertion that entering into a *valid labor agreement* governing recognition of a labor union amounts to illegal labor bribery.[156]

By framing the defendant's argument in this way, the court was trying to imply that the argument was absurd. However, the court unfairly framed the issue by stating that the neutrality agreement was a "valid labor agreement."[157] Of course there is no support for the argument that a valid labor agreement is invalid. The validity of the agreement was the very issue the court was supposed to be deciding. The court's reasoning was remarkably circular.

Second, the court stated that because section 302 bars agreements to "pay, lend, or deliver . . . any money or other thing of value," the neutrality agreement at issue did not amount to illegal bribery because it did not involve the "payment, loan, or delivery of anything."[158] The court's reasoning is problematic because it opens a tremendous hole in the statute. Essentially, it allows employers to circumvent the purpose of the statute—the prevention of corruption—by bribing the union with something intangible, like a neutrality agreement, even though the intangible is of tremendous value.[159]

Finally, the court stated that "[t]he 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

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154 *Id.*

155 *Id.* at 219.

156 *Id.* at 218–19 (emphasis added) (quoting Arroyo v. United States, 359 U.S. 419, 425–26 (1959)).

157 *Id.* at 219.

158 *Id.* (omission in original) (quoting Labor Management Relations (Taft-Hartley) Act § 302(a), 29 U.S.C. § 186(a)) (internal quotation marks omitted).

159 *See supra* Part II.B.

benefit."[160] This statement begs the question: why not? "Efficiency and cost savings" are both benefits. In any event, the neutrality agreement delivers much more than "efficiency and cost saving" to the union.[161] It delivers new members, who are required to pay dues to the union.[162] These dues can be substantial, depending upon the size of the bargaining unit.[163]

B. Fourth Circuit

The question of whether a pre-recognition neutrality agreement can be considered a "thing of value" within the meaning of section 302 of the LMRA was next addressed by the Fourth Circuit in *Adcock v. Freightliner LLC*.[164] In *Adcock*, four employees sued alleging that two agreements made between the employer and the union violated section 8(a)(3) of the NLRA and section 302 of the LMRA.[165] The first agreement was a neutrality agreement with a card check provision, by which the employer agreed to

> forego a National Labor Relations Board election if a majority of the bargaining unit employees chose the Union as their exclusive bargaining representative by signing authorization cards. . . . [and] to: (1) require some of its employees to attend, on paid company time, Union presentations explaining the Card Check Agreement; (2) provide the Union reasonable access to nonwork areas in company plants to allow Union representatives to meet with employees; and (3) refrain from making negative comments about the Union during the organizing campaigns.[166]

The employees alleged that this neutrality agreement violated section 302.[167] In exchange for this neutrality agreement, the union signed a "preconditions agreement" in which it made the following pre-recognition bargaining concessions:

> (1) there would be "separate consideration in terms and conditions of employment for each Business Unit because of industry differences (trucks, parts, busses, fire and rescue, chassis) including competitive wage and benefits packages within comparative product markets";

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160 *Hotel Emps.*, 390 F.3d at 219.
161 *See id.* at 209, 219; Eigen & Sherwyn, *supra* note 16, at 730.
162 Eigen & Sherwyn, *supra* note 16, at 730; *see supra* Part III.
163 Eigen & Sherwyn, *supra* note 16, at 730.
164 *See* 550 F.3d 369, 371 (4th Cir. 2008).
165 *See id.* at 371–73.
166 *Id.* at 371.
167 *Id.* at 373.

> (2) there would be "no guaranteed employment or transfer rights between Business Units or Plants"; (3) *there would be "no provisions for severance pay . . . in the event of a layoff or plant closure"*; (4) *there would be "no strikes during the term of any collectively bargained agreement"*; (5) *there would be "no subcontracting prohibitions, provided economics reflect non-competitiveness"*; (6) future "benefits cost increases, in excess of normal inflation, will be shared between the Company and the employees proportionately at a rate to be determined between the Company and its employees"; and (7) *in consideration of Freightliner's financial turnaround objectives, there would be "no wage adjustments provided at any newly organized facility prior to mid-2003."*[168]

The employees argued that this preconditions agreement violated section 8(a)(3) of the NLRA.[169] Prior to the case reaching the Fourth Circuit, the NLRB determined that by executing the preconditions agreement, the union and employer violated section 8(a)(3) by "bargaining and entering into an agreement regarding employee terms and conditions of employment prior to the [Union] enjoying the support of a majority of employees."[170] The unfair labor practices charges were settled, with the parties agreeing not to honor the preconditions agreement.[171] Note that this case was decided in 2008, two years before the *Dana Corp.* decision.[172] Following the *Dana Corp.* decision, it is unclear whether the preconditions agreement in *Adcock* would be considered a violation of section 8(a)(3).

As to the neutrality agreement, the trial court dismissed the suit for failure to state a claim, holding that execution of the neutrality agreement did not violate section 302 of the LMRA because it did not constitute the delivery of "things of value to the Union" by the employer.[173]

On appeal to the Fourth Circuit, the employees argued that "a 'thing of value' means anything that has subjective value to the Union."[174] And thus, the plaintiffs argued, the neutrality agreement constituted a thing of value because it "benefited the Union's organizing efforts."[175] This argument is consistent

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168 *Id.* at 372 (omission in original) (emphasis added).
169 National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (2012); *Adcock*, 550 F.3d at 373.
170 *Adcock*, 550 F.3d at 373 (internal quotation marks omitted).
171 *Id.*
172 *See* Dana Corp., 356 N.L.R.B. No. 49, 2010 WL 4963202 (Dec. 6, 2010).
173 *Adcock*, 550 F.3d at 373 (internal quotation marks omitted).
174 *Id.* at 374.
175 *Id.*

with the Second Circuit opinion in *United States v. Roth*, where it stated that "[v]alue is usually set by the desire to have the 'thing' and depends upon the individual and the circumstances."[176]

The Fourth Circuit disagreed and affirmed the judgment of the trial court.[177] The court based its holding on three different rationales. First, the court said that the promises made by the employer simply "involve permitting the Union access to employees during an organizing campaign," and that this type of concession did not involve the payment, loan, or delivery of anything.[178] However, with this argument the court neglected to address the promise by the employer to remain neutral by "refrain[ing] from making negative comments about the Union during the organizing campaigns."[179] This is problematic because the neutrality provision is one of the most important provisions of a neutrality agreement.[180] As discussed in Part II.B, research suggests that employer opposition to unionization is a major predictor of a union loss in the NLRB-supervised elections process.[181] As such, requiring an employer to remain neutral is extremely valuable to a union trying to organize new groups of employees.

The second rationale offered by the court was that its interpretation of section 302 was consistent with the purpose of the statute, which is "to curb abuses that Congress felt were 'inimical to the integrity of the collective bargaining process.'"[182] The court cited *Arroyo v. United States*, in which the Supreme Court stated that Congress enacted section 302 of the LMRA because it was "'concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control.'"[183] The court held that the specific facts of this case "[did] not involve bribery or other corrupt practices" of the kind section 302 was enacted to prevent.[184]

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176 333 F.2d 450, 453 (2d Cir. 1964) (holding that "a loan may reasonably be included within the wording of the statute and that Congress so intended").

177 *Adcock*, 550 F.3d at 375, 377.

178 *Id.* at 374.

179 *See id.* at 373.

180 *See infra* Part III; *see also* Hartley, *supra* note 13, at 379 ("Union leaders regard employer anti-union speech as a leading cause of union organizing failure, particularly when orchestrated by labor-management consultants.").

181 Hartley, *supra* note 13, at 379.

182 *Adcock*, 550 F.3d at 375 (quoting Arroyo v. United States, 359 U.S. 419, 425 (1959)).

183 *Id.* (quoting *Arroyo*, 359 U.S. at 425–26).

184 *Id.*

In reaching this conclusion, the court relied on two facts. First, the court relied on the fact that in this case "no representative of the Union personally benefited from these concessions."[185] While this may be true, it is irrelevant under the plain language of the statute. The plain language of the statute bars payments of "things of value" to both representatives of the union as well as the union itself.[186] There is simply no requirement that a union employee personally benefit for the statute to be implicated. Where the court came up with this requirement is unclear.

Second, the court relied on the fact that the concessions made by the employer "serve[d] the interests of both [the employer] and the Union, as they eliminate the potential for hostile organizing campaigns in the workplace. . . . [And thus, they] certainly [were] not inimical to the collective bargaining process."[187] This also does not make sense. The fact that something makes an organizing campaign run more smoothly does not mean that it cannot be "inimical to the bargaining process." Smoothing over negotiations is the exact purpose of bribery. That is why bribery is referred to as "greasing the wheels." And yet, bribery is a corrupt practice considered inimical to the bargaining process.[188] Furthermore, the plain language of section 302 makes it clear that its purpose is to prevent bribery.[189] That is why it is concerned with payments made to unions by employers, or vice versa.

Third, the court noted that its decision was consistent with the approach taken by the Third Circuit in *Hotel Employees*.[190] The court agreed with the Third Circuit, specifically quoting the Third Circuit's argument that the fact that a neutrality agreement benefits both parties "does not transform it into a payment or delivery of some benefit."[191] Like the Third Circuit, the Fourth Circuit declined to say *why* it is not "transformed."

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185 *Id.*

186 It is a violation of the LMRA "to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value . . . *to any labor organization*, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer." Labor Management Relations (Taft-Hartley) Act § 302(a), 29 U.S.C. § 186(a) (2012) (emphasis added).

187 *Adcock*, 550 F.3d at 375.

188 *See Arroyo*, 359 U.S. at 425.

189 *See* 29 U.S.C. § 186.

190 *Adcock*, 550 F.3d at 375.

191 *Id.* at 376 (quoting Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC, 390 F.3d 206, 219 (3d Cir. 2004)).

Based on these three rationales, the court upheld the decision of the district court, ruling for the defendants.[192]

C. Eleventh Circuit

The Eleventh Circuit recently addressed whether a neutrality agreement can violate section 302 in *Mulhall v. UNITE HERE Local 355*.[193] In *Mulhall*, the plaintiff's employer entered into a neutrality agreement with the defendant labor union UNITE HERE.[194] Per the neutrality agreement, the employer promised to "(1) provide union representatives access to non-public work premises to organize employees during non-work hours; (2) provide the union a list of employees, their job classifications, departments, and addresses; and (3) remain neutral to the unionization of employees."[195] In return, the union promised two things. First, it promised to provide political support for legislation favorable to the employer.[196] The union went on to spend over $100,000 in support of the legislation.[197] Second, the union promised that if it were successful in obtaining recognition as the exclusive bargaining unit of the employees it would "refrain from picketing, boycotting, striking, or undertaking other economic activity against [the employer]."[198]

Opposed to being unionized, the plaintiff filed suit to enjoin enforcement of this agreement, alleging that it violated section 302.[199] The trial court dismissed the suit for failure to state a claim because it concluded that the organizing assistance promised in the neutrality agreement could not constitute a "thing of value" under section 302.[200]

On appeal, the Eleventh Circuit reversed the decision of the trial court, holding that a neutrality agreement *can* constitute a thing of value within the meaning of section 302 "if demanded or given as payment."[201] In reaching this

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192 *Id.*

193 667 F.3d 1211, 1213 (11th Cir. 2012).

194 *Id.*

195 *Id.*

196 *Id.* The employer in *Mulhall* was Mardi Gras Gaming, a company that operated casinos and greyhound racetracks. *See id.* Mardi Gras enlisted the help of the union, UNITE HERE, to lobby in support of proposed casino gambling initiatives. *Id.*

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.*

201 *Id.*

conclusion, the court relied on "common sense," simply stating that "[i]t seems apparent that organizing assistance can be a thing of value."[202]

However, the court made it clear that not all neutrality agreements are violations of section 302.[203] Rather, it is only when these agreements are "used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer" that they become illegal.[204]

The court stated that the Fourth Circuit's conclusion that intangible organizing assistance cannot be paid, loaned, or delivered, and could not therefore constitute a "thing of value" under section 302, was incorrect because such assistance *can* be "paid."[205] The court stated that

> [w]hether something qualifies as a payment depends not on whether it is tangible or has monetary value, but on whether its performance fulfills an obligation. If employers offer organizing assistance with the intention of improperly influencing a union, then the policy concerns in § 302—curbing bribery and extortion—are implicated.[206]

Essentially, the court believed that the Fourth Circuit's holding was too broad because it meant that no neutrality agreement could ever constitute a thing of value, even if the agreement was a part of "a scheme to corrupt a union or extort a benefit from an employer."[207]

The court specifically stated that it need not address the question of whether something must have monetary value to be considered a "thing of value" under section 302, because in this case the union spent $100,000 on a political cause as consideration for the neutrality agreement.[208]

Finally, the court addressed concerns that its interpretation of section 302 would force employers to "actively oppose unionization in order to avoid

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202 *Id.* at 1215.

203 *See id.* (explaining that "an employer does not risk criminal sanctions simply because benefits extended to a labor union can be considered valuable").

204 *Id.*

205 *See id.*

206 *Id.*

207 *See id.*

208 *Id.* at 1215–16. This statement is unusual, however, considering its earlier statement that "[w]hether something qualifies as a payment depends not on whether it is tangible or has monetary value, but on whether its performance fulfills an obligation." *Id.* at 1215. Based on this earlier statement, if the Eleventh Circuit had addressed this question, it likely would have concluded that something does *not* need to have more than nominal monetary value to be considered a "thing of value."

criminal sanctions under § 302."[209] The court stated that this was not a concern, as employers were free to enter into neutrality agreements, or oppose unionization, as they saw fit.[210] Only when an employer enters into a neutrality agreement as an improper payment for contract concessions does it violate section 302.[211]

The Eleventh Circuit declined to specify when a neutrality agreement reaches the level at which it becomes improper influence. It simply held that the plaintiff had stated a claim, and then remanded the case to the lower court to decide based on the facts whether this specific neutrality agreement constituted an improper payment in violation of section 302.[212]

V. ARGUMENT

A. Why the Eleventh Circuit Was Correct

Of the two competing interpretations of section 302 of the LMRA, the Eleventh Circuit's interpretation is correct for three reasons. First, the arguments made by the court in the Third and Fourth Circuit opinions are unconvincing at best. As Professors Eigen and Sherwyn put it in their 2012 piece, *A Moral/Contractual Approach to Labor Law Reform*, the "analysis is woefully lacking in an understanding of the relevant case law and of the nature of labor relations."[213] For the specific weaknesses of these opinions, see Part III above.

Second, section 302 makes it illegal for an employer to pay any "thing of value" to a union, and makes it illegal for a union to receive any "thing of value" from the employer.[214] As previously discussed, neutrality agreements are extremely valuable to the unions because they can virtually guarantee the union's success in unionizing new groups of employees.[215] These new union members must pay monthly dues to the union, which can add up to substantial sums depending on the number of employees in the bargaining unit.[216] Neutrality agreements are of concrete monetary value to the union.

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209 *Id.* at 1216.
210 *See id.*
211 *Id.*
212 *Id.*
213 *See* Eigen & Sherwyn, *supra* note 16, at 730.
214 Labor Management Relations (Taft-Hartley) Act § 302(a)–(b), 29 U.S.C. § 186(a)–(b) (2012).
215 *See supra* Part III.
216 Eigen & Sherwyn, *supra* note 16, at 730.

The fact that unions are willing to spend substantial amounts of money on efforts to obtain neutrality agreements underscores this point. In *Mulhall*, for example, the union agreed to lobby in support of legislation favorable to the employer.[217] The union ended up spending over $100,000 on its lobbying efforts.[218] This fact alone indicates that the neutrality agreement was a "thing" that the union valued at over $100,000.[219] Thus, a neutrality agreement could logically be considered a "thing of value" within the meaning of section 302 based on the plain language of the statute.[220]

This obvious argument was not addressed directly by either the Third or Fourth Circuit in their respective opinions.[221] In fact, the Fourth Circuit did not even address the neutrality part of the neutrality agreement, which is one of the parts that make these agreements so valuable to unions.[222] The court simply stated that signing the agreement did not constitute "payment or delivery of a 'thing of value'" because "[t]he concessions provided by Freightliner all involve permitting the Union access to employees during an organizing campaign."[223] While the agreement in question did have provisions to this effect, the heart of the agreement was the neutrality provision, which the court ignored.[224]

However, the Fourth Circuit did indicate that concessions like those made in the agreement "[did] not involve the delivery of either tangible or intangible items to the Union."[225] Thus, even if the Third and Fourth Circuits had

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[217] Mulhall v. UNITE HERE Local 355, 667 F.3d 1211, 1213 (11th Cir. 2012). Recall that in *Mulhall* the court stated that it need not address whether something must have monetary value to be considered a thing of value under section 302 of the LMRA because in that case the neutrality agreement did have monetary value. *Id.* at 1215–16. The court cited the fact that the union spent $100,000 on lobbying assistance as consideration for the agreement as support for this assertion. *Id.*

[218] *Id.* at 1213.

[219] The neutrality agreement is valuable to the employer as well. Imagine, for example, that the employer were able to bind the union to a mandatory overtime provision with a neutrality agreement. It follows that the agreement is worth as much to the employer as the additional business generated by the employer's ability to force its employees to work overtime.

[220] "In determining the meaning of a statute, we examine the statute's plain language." Adcock v. Freightliner LLC, 550 F.3d 369, 374 (4th Cir. 2008) (citing United Seniors Ass'n, Inc. v. Soc. Sec. Admin., 423 F.3d 397, 402 (4th Cir. 2005)).

[221] *See generally Adcock*, 550 F.3d 369; Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC, 390 F.3d 206 (3d Cir. 2004).

[222] *See generally Adcock*, 550 F.3d 369. Recall that unions consider employer intimidation and antiunion speech one of the principal reasons that unions often fail to organize new bargaining units. *See supra* notes 57–84 and accompanying text.

[223] *Adcock*, 550 F.3d at 374.

[224] *See id.*

[225] *Id.*

addressed the argument that the neutrality provisions of neutrality agreements are extremely valuable, they likely would have dismissed it on the overly formalistic grounds that pledging to remain neutral is still a "concession," and since concessions cannot be paid, loaned, or delivered[226] according to the court, they are not covered by section 302.

Finally, the Eleventh Circuit's interpretation of section 302 is more closely in line with the purposes of the statute. The purpose of section 302 is to prevent bribery and corruption in the context of the collective bargaining process.[227] The recent NLRB decision in *Dana Corp.* has created the potential for neutrality agreements to be used as part of corrupt quid pro quo arrangements between unions and employers.

As discussed above, the *Dana Corp.* decision allows unions to make substantive contract concessions in exchange for neutrality agreements.[228] The precise extent to which they can do so is left unclear by the *Dana Corp.* decision.[229] However, in *Dana Corp.* the union conceded that the first contract between the union and the employer would contain a provision requiring mandatory overtime for employees when customers demanded it.[230] The NLRB said that this substantive concession was totally within the bounds of permissible, pre-recognition negotiations.[231]

Additionally, the union made substantial concessions in *Adcock*.[232] The concessions included the following:

> (2) there would be "no guaranteed employment or transfer rights between Business Units or Plants"; (3) there would be "no provisions for severance pay . . . in the event of a layoff or plant closure"; (4) there would be "no strikes during the term of any collectively bargained agreement" [(a common provision)]; . . . and (7) in consideration of Freightliner's financial turnaround objectives, there

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226 Labor Management Relations (Taft-Hartley) Act § 302(a), 29 U.S.C. § 186(a) (2012).

227 *See* Arroyo v. United States, 359 U.S. 419, 425–26 (1959); *see also* Mulhall v. UNITE HERE Local 355, 667 F.3d 1211, 1215 (11th Cir. 2012); *Adcock*, 550 F.3d at 375; Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC, 390 F.3d 206, 218–19 (3d Cir. 2004).

228 *See* Dana Corp., 356 N.L.R.B. No. 49, 2010 WL 4963202 (Dec. 6, 2010).

229 *See id.*

230 *Id.* at *2–3.

231 *See id.* at *12.

232 *See Adcock*, 550 F.3d at 372, 376.

> would be "no wage adjustments provided at any newly organized facility prior to mid-2003."[233]

In that case, the NLRB had previously adjudicated the issue of whether these concessions violated section 8(a)(2) of the NLRA.[234] The NLRB held that the parties did violate section 8(a)(2) with this agreement by "bargaining and entering into an agreement regarding employee terms and conditions . . . prior to the [Union] enjoying the support of a majority of employees."[235] However, this case was decided in 2008, two years before the NLRB's decision in *Dana Corp*. This Comment argues that the preconditions agreement in *Adcock*, which was illegal in 2008, would be legal under the current standard for pre-recognition concessions set by *Dana Corp.* in 2010.

As a result of the *Dana Corp.* decision, a union can concede the rights of employees whom it does not yet represent in exchange for an agreement with the employer that helps the union gain the right to represent those employees. By trading contract concessions for the neutrality agreement, the union is getting the neutrality agreement for free rather than having to pay for it. The neutrality agreement then allows the union to successfully unionize the new group of employees, resulting in substantial amounts of money being paid to the union in the form of dues from the new members.[236] In return, the employer protects itself from the adverse effects of unionization by binding the union to favorable contract terms before it has unionized the employees.

As Professors Eigen and Sherwyn point out, it is exactly this type of arrangement that section 302 was designed to prevent.[237] In 2012 they wrote,

> [A] neutrality agreement granting exclusive collective-bargaining rights to one union could result in dues of $35 to $50 per month from thousands of employees. Hundreds of thousands of dollars per month seems like a thing of value. Would a union, for example, give up its demands for increases in wages or health and safety measures in exchange for that kind of money and power? Of course it would.[238]

They go on to point out that UNITE HERE made exactly this deal in 2006 when it agreed to concede the demands of the employees it already represented

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233 *Id.* at 372 (first omission in original).
234 *See id.* at 373.
235 *Id.* (second alteration in original) (internal quotation marks omitted).
236 Eigen & Sherwyn, *supra* note 16, at 730.
237 *Id.* at 730–31.
238 *Id.* at 730.

in exchange for a neutrality agreement that would help it organize new employees at a different facility.[239] In a situation like this, the union makes money, signs up a new group of employees, and the employer gets the concessions it wants. Everybody wins except for the employees, who are the very people both the NLRA and the LMRA were designed to protect. This situation is exactly what section 302 was designed to prevent.[240]

The Eleventh Circuit's decision in *Mulhall* most accurately reflects the purpose of section 302 because it recognizes the potential for neutrality agreements to be used in these types of corrupt arrangements, and it allows the trial court to find violations of section 302 if the court feels that the agreement is being used as part of a scheme to corrupt the union.[241]

Of course, sometimes it might very well be in the employees' best interest to unionize even if that means sacrificing some rights in the short term so that the union can obtain the neutrality agreement. The Eleventh Circuit decision in *Mulhall* is sensible because it takes this fact into account. Under *Mulhall*, a neutrality agreement does not *necessarily* constitute a section 302 violation.[242] *Mulhall* states that "[e]mployers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement[,] [b]ut innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer."[243] The court followed up this sensible, albeit vague pronouncement with another vague statement, saying that a neutrality agreement "does not constitute a § 302 violation unless the assistance is an improper payment."[244] Essentially, if the court determines that the neutrality agreement is being used in a way that it considers corrupt, it can find a section 302 violation.

The Eleventh Circuit has simply recognized the obvious fact that following the *Dana Corp.* decision it is possible for an employer to use a neutrality agreement to contractually bind a union to favorable terms before the election campaign.[245] In return, it promises to remain neutral to the union and agrees to

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239 *Id.* at 730–31.
240 *See* Arroyo v. United States, 359 U.S. 419, 424–26 (1959).
241 *See* Mulhall v. UNITE HERE Local 355, 667 F.3d 1211, 1215 (11th Cir. 2012).
242 *See id.*
243 *Id.*
244 *Id.* at 1216.
245 *See* Eigen & Sherwyn, *supra* note 16, at 731.

card check recognition.[246] These promises then ensure that the union will be successful in winning the election.[247] Thus, the employer can use a neutrality agreement to mitigate the effects of unionization by ensuring that, if it is unionized, it is unionized by a union that is contractually bound to give it what it wants. The union is essentially being bought off. The best part about this arrangement for the employer is that it does not even have to use its own money; the employees foot the bill with their membership dues.[248]

B. An Alternative Framework

For the aforementioned reasons, this Comment argues that the Eleventh Circuit's decision in *Mulhall* was correct.[249] The NLRB's decision in *Dana Corp.* allows employers to use neutrality agreements to bind unions to favorable contract terms at the expense of employees it does not yet represent.[250] The neutrality agreement then ensures that the union will be successful in unionizing those employees, binding them to the concessions it made to the employer.[251] By binding the union to favorable terms in advance, the employer is able to mitigate the effects of unionization. In return, the union adds a new group of employees to its membership rolls.[252] These new employees must pay dues, which can be substantial.[253] The Eleventh Circuit decision allows the courts to put a stop to these types of quid pro quo arrangements by finding that they violate section 302 of the LMRA.[254] The Eleventh Circuit was thus correct in *Mulhall*, and, if heard by the Supreme Court, the *Mulhall* decision should be upheld.

Upholding the decision would mean that courts would have the power to examine the arrangement, determine whether it is benign or corrupt, and, if a court determines that it is a corrupt quid pro quo arrangement, to then find a violation of section 302.[255] This outcome is much more sensible than the outcome under the Third and Fourth Circuit's decisions, where neutrality agreements cannot violate section 302 of the LMRA.

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246 *Id.* at 721–22.
247 *Id.* at 722.
248 *See id.* at 730.
249 *See Mulhall*, 667 F.3d at 1215.
250 *See* Dana Corp., 356 N.L.R.B. No. 49, 2010 WL 4963202, at *1–2 (Dec. 6, 2010).
251 *See supra* Part 0.
252 *See* Eigen & Sherwyn, *supra* note 16, at 730.
253 *Id.*
254 *See Mulhall*, 667 F.3d at 1215.
255 *See id.*

Despite its virtue, the framework created by the Eleventh Circuit is cumbersome because it requires judicial review of every questionable neutrality agreement to determine whether there is a section 302 violation. This Comment suggests that a better system exists whereby neutrality agreements would be perfectly legal, as they are now, *and* there would not be as much need for judicial review of a neutrality agreement to determine whether it is being used as an instrument in a scheme to corrupt a union at the expense of the employees.

1. Structure

First, the *Dana Corp.* decision should be codified as part of section 8(a)(2) of the NLRA. This would prevent the decision from being overturned by future Board appointees who may disagree with it. Under the framework provided by the *Dana Corp.* decision, the union and the employer can reach some level of agreement regarding what the first contract negotiations will look like after the union achieves recognition.[256] They can even agree to some specific, substantive provisions, such as the mandatory overtime provision in *Dana Corp.*[257]

However, how far the union and employer can currently go in agreeing to specific provisions without violating section 8(a)(2) is unclear.[258] The NLRB in *Dana Corp.* "[left] for another day the adoption of a general standard for regulating prerecognition negotiations between unions and employer[s]."[259] The NLRB stated only that determinations as to whether a pre-recognition agreement violated the NLRA would have to be made on a case-by-case basis, and that in that case, the parties had "[done] no more than create a framework for future collective bargaining."[260] Thus, the *Dana Corp.* decision should not only be codified in a statute to allow it to withstand changes in board membership, it should also be clarified. Articulation of a concise standard for review of pre-recognition neutrality agreements is beyond the scope of this Comment. This Comment merely suggests that section 8(a)(2) should be amended to expressly make it legal for the employer to bind the union to some specific concessions in exchange for signing a neutrality agreement. By

256 *See* Dana Corp., 356 N.L.R.B. No. 49, 2010 WL 4963202, at *5–6 (Dec. 6, 2010).
257 *See id.* at *2–3.
258 *See id.* at *5.
259 *Id.*
260 *Id.* at *8.

codifying the *Dana Corp.* decision in an amendment to section 8(a)(2), future boards will not be able to reverse the decision.

As previously discussed, the *Dana Corp.* decision creates the potential for corruption. Thus, second, this Comment argues that section 302 of the LMRA should be amended to require the union and the employer to disclose the material provisions of the neutrality agreement to employees prior to the representation election.[261] This way, the employees can simply view the agreement and then vote on whether they want the union, with the knowledge of how their rights will be affected if the union wins. If the employees believe that the union is unfairly conceding their rights to their employer because the union is after more membership dues, they can vote against unionization. Thus, employees, rather than judges, will determine which agreements are corrupt and which are legitimate.

Under this system, the NLRB would be free to develop rules of procedure for disclosing the terms of the agreement to the employees. The precise nature of the disclosure rules would best be determined by experts. However, this Comment suggests that the disclosure rules should, at minimum, require that the parties hire a third party, such as a private mediator, to explain the terms of the agreement to the employees.

This is a better system because the employees are better equipped to determine whether concessions made by the union are in their best interest than a federal judge who is far removed from the facts of the case. However, should the union win the election, aggrieved employees could still resort to challenging the agreement in federal court as violating the *Dana Corp.* rule, now codified as part of section 8(a)(2) of the NLRA.

One might be inclined to take this proposition further and say that in addition to allowing the union and the employer to set guidelines,[262] section 8(a)(2) should be amended to make it perfectly legal for the union and the employer to negotiate a *full* employment contract prior to recognition, so long as it is conditioned on the union winning the election. This proposition, however, would undermine the purpose of section 8(a)(2), which "was to eradicate company unionism, a practice whereby employers would establish and control in-house labor organizations in order to prevent organization by

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[261] Or prior to the solicitation of authorization cards if the agreement contains a card check provision.

[262] *E.g.*, *Dana Corp.*, 2010 WL 4963202, at *1.

autonomous unions."[263] This Comment suggests that expanding the *Dana Corp.* decision this far is a bad idea even if one also requires that the terms of a pre-recognition agreement be disclosed to employees before they vote or sign cards. Anything that makes it easier for an employer to establish a company union should be avoided.

Third, section 302 of the LMRA should also be amended to address situations where a union already represents employees at one of the employer's facilities, but wants to unionize employees at a different facility.[264] In 2006, UNITE HERE was attempting to organize employees at nonunion hotels owned by a hotel company.[265] UNITE HERE already represented employees at some of the company's hotels.[266] To convince the hotel company to sign a neutrality agreement, UNITE HERE agreed to concede some of the demands of the employees it already represented.[267]

The statutory changes laid out above do nothing to address this situation because those changes rely on the employees to vote the union down if their rights are being unfairly conceded. In this situation, the union is conceding the rights of employees it already represents in exchange for an agreement that will help it unionize new employees at one of the employer's other plants. Thus, the employees voting on unionization are not the ones whose rights are being sacrificed by the agreement. As a result, the concessions made by the union are unlikely to concern them.

One solution to this issue would simply be to make it a violation of section 302 for a union to concede the rights of current members in exchange for a neutrality agreement that helps it unionize new members. This is a bad solution, however, as it may very well be in the employees' best long-term interest for the union to make such a deal. A better solution would be to add a provision to section 302 that forces unions to allow existing members to approve concessions made to obtain a neutrality agreement if those members would be affected by the concessions. Thus, the employees will decide for themselves whether it is in their best interest for the union to concede their rights to their employer in exchange for a neutrality agreement. This result is

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263 *Id.* at *5 (quoting 1 THE DEVELOPING LABOR LAW 418–19 (John E. Higgins, Jr. et al. eds., 5th ed. 2006)) (internal quotation marks omitted).

264 *See, e.g.*, Eigen & Sherwyn, *supra* note 16, at 730–31.

265 *See id.*

266 *See id.*

267 *Id.*

desirable because employees know what is in their best interest better than a federal judge who is far removed from the facts of the situation.

2. Enforcement

The *Dana Corp.* decision left open the question of enforcement. If the union wins the election, what happens if it then refuses to abide by the terms of the agreement it reached with the employer before the election?[268]

Pre-recognition bargaining agreements could be enforced in several ways. First, the employer could enforce the agreement with a suit for breach of the collective bargaining agreement under section 301 of the LMRA.[269] Second, the agreement could be enforced with a state law breach of contract suit.[270] Third, the agreement could be enforced with a suit "for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act."[271] The first option does not make sense because the union and the employer have not executed a full collective bargaining agreement. The second option seems inadequate because the NLRA, a federal statutory scheme, governs labor relations in the United States. Therefore, it seems appropriate to provide the employer with a remedy in federal court. Thus, this Comment suggests that option number three is the most appropriate. The union's refusal to honor the agreement should be enforced with a suit for breach of the union's duty of fair representation, which should be augmented to require that a union honor any contractual promises made as part of a pre-recognition neutrality agreement.[272]

3. Benefits of Proposed Changes

The statutory changes laid out by this Comment carry with them several benefits. First, they grant both unions and employers enhanced freedom of contract. The Supreme Court has stated that the principle of freedom of contract governs the relationship between the employer and the union selected

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268 *NLRB Approves Prerecognition Employer–Union Bargaining*, *supra* note 121, at 3.

269 *See* Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185(a) (2012); *see also, e.g.*, DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164 (1983).

270 *See NLRB Approves Prerecognition Employer–Union Bargaining*, *supra* note 121, at 3.

271 *DelCostello*, 462 U.S. at 164; *see NLRB Approves Prerecognition Employer–Union Bargaining*, *supra* note 121, at 2.

272 *See DelCostello*, 462 U.S. at 164; *NLRB Approves Prerecognition Employer–Union Bargaining*, *supra* note 121, at 2.

to represent its employees.[273] Under the NLRB's decision in *Dana Corp.*, unions and employers are free to negotiate *some* substantive first-contract provisions before the union has even begun its election campaign.[274] These provisions would apply to the first employment contract negotiated between the union and the employer if the union wins the election. The ability to enter into this type of agreement benefits the union because it gives it more to bargain with when attempting to secure a neutrality agreement from the employer. This ability also benefits the employer because it lets the employer mitigate some of the uncertainty associated with unionization.[275] And, by codifying the *Dana Corp.* decision as an amendment to section 8(a)(2) of the NLRA, this right would be immune to reversal by future Board appointees. Thus, some degree of certainty will be introduced into this rapidly shifting area of law.

The changes proposed by this Comment also protect employees by requiring that the union disclose the terms of any pre-recognition agreement it reaches with their employer in exchange for a neutrality agreement. Thus, employees will be able to vote on the union with full knowledge of what union victory will mean for their rights. This is beneficial because employees are much better equipped than federal judges to determine whether the employer is using the neutrality agreement "as valuable consideration in a scheme to corrupt [the] union."[276] Additionally, should the union win, aggrieved employees would still be able to challenge the agreement in federal court.

CONCLUSION

The NLRB's decision in *Dana Corp.* allows unions to make substantive contract concessions affecting the rights of employers it does not represent.[277] Unions agree to these concessions in exchange for neutrality agreements, which virtually guarantee that it will be successful in obtaining the right to represent those employees.[278] Once the union successfully unionizes the employees, it honors the promise it made to the employer to include certain

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273 *See* Weiler, *supra* note 77, at 357–61.

274 Again, the standard governing how far these negotiations can go should be codified as part of section 8(a)(3) of the NLRA. This is a policy issue. As such, this Comment leaves it up to the legislature to determine the precise standard that should govern.

275 *See NLRB Approves Prerecognition Employer–Union Bargaining*, *supra* note 121, at 1.

276 Mulhall v. UNITE HERE Local 355, 667 F.3d 1211, 1215 (11th Cir. 2012).

277 *See* Dana Corp., 356 N.L.R.B. No. 49, 2010 WL 4963202 (Dec. 6, 2010).

278 Eigen & Sherwyn, *supra* note 16, at 722–23.

bargaining concessions in the first employment contract.[279] Despite the potential for corruption inherent in these types of agreements, the Third and Fourth Circuit decisions in *Hotel Employees* and *Adcock* have made these agreements immune to challenge under section 302 of the LMRA, the statute designed to guard against corruption in the collective bargaining process.

Mulhall, the Eleventh Circuit decision splitting with the Third and Fourth Circuits, correctly recognizes the potential for corruption by holding that in certain circumstances, these agreements can violate section 302. This holding is consistent with the plain language of section 302 and the purpose of section 302. Accordingly, should the *Mulhall* case reach the Supreme Court, it should be upheld.

However, the legal framework created by the Eleventh Circuit decision is cumbersome because it requires judicial review of every neutrality agreement to determine whether it is a violation of section 302. This Comment suggests simple changes to section 302 of the LMRA and section 8(a)(2) of the NLRA that would achieve the same equitable result as the Eleventh Circuit decision, but would reduce the need for judicial review of questionable neutrality agreements.

First, the *Dana Corp.* decision should be codified as part of section 8(a)(2) of the NLRA. Thus, section 8(a)(2) would make it legal for the union and the employer to agree to guidelines for negotiating the first contract, and even agree to some specific contract provisions, prior to the unionization campaign. By codifying the rule from the *Dana Corp.* decision, it protects the rule from being overturned by future NLRB members who disagree with the *Dana Corp.* decision. The ability of unions to make contract concessions prior to the unionization campaign makes it easier to acquire neutrality agreements from employers, which makes it easier for them to win elections. This ability also benefits employers because it allows them to mitigate, to some extent, the effects of unionization.[280] Preventing the NLRB from changing the *Dana Corp.* rule preserves these benefits and introduces some stability to the dynamic labor relations process.

Second, unions and employers should be forced by statute to disclose all material provisions of such an agreement to the voting employees prior to the

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279 *See id.* at 731.

280 At the very least, employers can eliminate some of the uncertainty that comes with unionization.

beginning of *all* campaign activities.[281] No one is better suited to determine whether a potential contract is in the employees' best interest than the employees themselves. Allowing the employees to review the agreement and determine its validity with their vote on the issue of union representation is a much more efficient system for screening neutrality agreements for corruption than leaving it exclusively to litigation in federal court. However, the changes proposed by this Comment still allow aggrieved employees to challenge the neutrality agreement in federal court should the union ultimately win the election. Thus, the courts act as a failsafe, rather than the primary mechanism by which corruption is detected and eliminated.

Third, unions should be forced by statute to bring concessions to a vote by the affected employees if those concessions are made for a neutrality agreement governing another, nonunion facility.

These changes will bring about the same equitable results as the Eleventh Circuit's decision. However, they create a much more efficient framework than that of the Eleventh Circuit opinion. By codifying the holding of the NLRB in *Dana Corp.* in section 8(a)(2) of the NLRA, future Board members who disagree with *Dana Corp.* will not be able to overrule its holding. Thus, employers can rely on their ability to bind unions to some degree of favorable contract terms before the unionization campaign. Doing so allows them to mitigate some of the negative effects of unionization. In return, the unions' ability to trade substantive contract concessions for neutrality agreements will enhance their ability to enter these agreements, which will lead to a higher union election success rate. Finally, requiring the employers and unions to disclose the material provisions of these agreements to the employees ensures that the employees' interests will be protected.

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[281] I.e., before any authorization cards have been signed.

* J.D. Candidate, Emory University School of Law. I would like to thank the staff and editors of the *Emory Law Journal* for all of their hard work. I especially want to thank Elizabeth Dunn and Joel Langdon, both of whom devoted their time and talent to making this Comment worthy of publication. I wish them all the best.