AS ORIGINALLY PUBLISHED IN EMPLOYEE RELATIONS LAW JOURNAL

SUMMER 2013

Can Something Intangible Be a "Thing of Value"?

The Permissibility of Neutrality Agreements under The Labor Management Relations Act

By Howard S. Lavin and Elizabeth E. DiMichele

Does an employer offer a "thing of value" to a union when it agrees not to oppose a union organizing campaign? The circuit courts are split. The Third and Fourth Circuits have held that a neutrality agreement is not a thing of value, and is therefore permissible under Section 302 of the Labor Management Relations Act (LMRA). However, the Eleventh Circuit recently held that such an agreement may be a thing of value, and unlawful under Section 302 if it is entered into by the employer with the intent to improperly influence a union. Although the U.S. Supreme Court may consider the issue in the upcoming months, until it does, the ability of an employer to enter into a neutrality agreement turns, in part, upon geography.

Background

The employer-union relationship is regulated by, among other provisions, Section 302 of the LMRA. Section 302 provides that an employer may not "pay, lend, or deliver, or agree to pay, lend, or deliver, any money or *other thing of value*" to any employee representative or union (emphasis added).[1] As the Supreme Court explained in *Arroyo v. United States*, Congress enacted Section 302 in order to curb those practices "which Congress considered inimical to the integrity of the collective bargaining process."[2] Most problematic was corruption of the collective bargaining process through bribery and extortion of union representatives, as well as potential abuse of power by union officers.[3]

The question at issue is whether the concessions offered in exchange for employer neutrality and access to the employees constitute providing a "thing of value" for purposes of Section 302. In 2004, the Third Circuit became the first appellate court to address the issue in *Hotel Employees & Restaurant*

Employees Union, Local 57 v. Sage Hospitality Resources, LLC.[4] It held that because a neutrality agreement involves no payment, loan or delivery, such an agreement did not violate Section 302.

Four years later, in *Adcock v. Freightliner LLC*,[5] the Fourth Circuit was presented with a similar issue and arrived at the same conclusion. It found that a neutrality agreement simply establishes ground rules for an organizing campaign, and did not constitute the type of corruption or bribery targeted by the LMRA.

Finally, this past January, the Eleventh Circuit examined the same question and rejected the conclusion of its sister courts. In *Mulhall v. UNITE HERE Local 355*,[6] it held that a neutrality agreement *might* violate Section 302 if the agreement is intended to constitute a form of consideration in exchange for an improper benefit. Unless and until the U.S. Supreme Court reviews the question (the defendant in *Mulhall* has petitioned for *certiorari*) the legality of neutrality agreements will remain in question.

The Third Circuit's Decision In *Sage Hospitality*

In *Sage Hospitality*, the defendant-employer (Sage), signed a neutrality agreement with the petitioner-union (Local 57) pursuant to its obligations under a city bond program. Sage promised to recognize Local 57 as its employees' union if a majority of employees signed authorization cards, known as a "card check procedure." In return, Local 57 promised, among other things, not to picket. The parties further agreed that any disputes would be resolved through arbitration.[7] After a majority of employees failed to select Local 57 as their bargaining representative, Local 57 sought to arbitrate the outcome and requested a second card count. Sage refused both to hold a second card count and to arbitrate, claiming that the neutrality agreement was void. Local 57 filed a complaint in District Court for the Western District of Pennsylvania, and Sage responded, in relevant part, that the agreement violated Section 302 of the LMRA. Both parties moved for summary judgment. The district court ruled in Local 57's favor, holding in part that the agreement's card check provisions did not constitute payment of a thing of value.[8]

On appeal, the Third Circuit determined that the purpose and text of Section 302 did not render this neutrality agreement unlawful. Section 302, it explained, was enacted to help eliminate bribery and corruption from collective bargaining.[9] Indeed, whereas the statutory text specifically prohibits agreements to "pay, lend, or deliver…any money or other thing of value," Sage's neutrality agreement involved neither a payment, nor a loan, nor a delivery.[10] The mere fact that the neutrality agreement made the organizing drive cheaper and more efficient for both parties did not "transform it into a payment or delivery of some benefit."[11] Finally, the Third Circuit observed that courts regularly uphold labor-management agreements containing arbitration clauses, and that invaliding the instant agreement would undermine the "carefully balanced structure of the laws governing recognition of and bargaining with unions."[12] Thus, the Third Circuit upheld the district court and ordered the parties to arbitrate.

The Fourth Circuit's Decision In *Adcock V. Freightliner, LLC*

Questions surrounding "things of value" arose again in *Adcock v. Freightliner LLC*.[13] After several manufacturing plants owned by the defendant-employer (Freightliner) became the target of a union organizing campaign, Freightliner negotiated ground rules with the union. Freightliner agreed to:

1. Recognize the union if a majority of employees signed authorization cards;

2. Require employees to attend union presentations explaining card-check agreement;

3. Give the union to access non-work areas in company plants; and

4. Refrain from making negative comments about the union during the campaign.[14]

In return, the union agreed to make certain concessions in any resulting collective bargaining agreement.[15] Thereafter, five Freightliner employees filed a class action suit against their employer, alleging that the card-check agreement violated Section 302.[16] The district court for the Western District of North Carolina dismissed the complaint for failing to allege that Freightliner delivered "things of value" to the union.

The Fourth Circuit upheld the district court. First, it reviewed the statutory text and determined that Section 302 did not prohibit the agreement at issue. Rather, the card check agreement merely permitted access to employees during an organizing campaign, akin to "[a] vacuum salesman who is permitted by a company to make a sales pitch to employees…"[17] This, the court explained, did not constitute "the delivery of either tangible or intangible items to the union."[18]

Second, it determined that the purpose of Section 302 was not served by invalidating the agreement in question. Citing the U.S. Supreme Court's decision in *Arroyo v. United States*,[19] the Fourth Circuit explained that Section 302 was enacted to eradicate bribery and extortion from the collective bargaining process. Here, the court contrasted, Freightliner's concessions did not involve corruption or bribery—they instead served the interests of both parties by reducing the possibility of an acrimonious organizing campaign.[20]

Third, the court found that the structure of the statute counseled against invaliding the card check agreement. It explained that actual value of the "thing of value" is a factor when determining a penalty for violating the LMRA. This suggests that Congress intended that a thing of value would have some specific monetary value.[21] By contrast, the card check agreement had no such value.[22] The Fourth Circuit ultimately affirmed the district court's ruling.

The Eleventh Circuit's Recent *Mulhall* Decision

In *Mulhall v. UNITE HERE Local 355*,[23] the Eleventh Circuit departed from the Third and Fourth Circuits by concluding that Section 302 may prohibit neutrality agreements as unlawful "things of value." At issue was a Memorandum of Agreement (MOA) entered into by Hollywood Greyhound Track d/b/a Mardi Gras (Mardi Gras) and defendant-union, UNITE HERE Local 355 (UNITE HERE). In the MOA, Mardi Gras promised that it would (1) give union representatives access to non-public work areas during non-work hours; (2) provide the union with a list of employees; and (3) remain neutral during the unionizing drive. In return, UNITE HERE promised to lend financial support to a ballot initiative regarding casino gaming. It also guaranteed that it would refrain from picketing, boycotting, striking, and undertaking other economic activity adverse to Mardi Gras.

One Mardi Gras employee who objected to joining a union, Martin Mulhall, filed a complaint arguing that the MOA violated Section 302. When the District Court for the Southern District of Florida dismissed the complaint on the grounds that the assistance promised in the MOA could not constitute a "thing of value," Mulhall appealed.[24]

The Eleventh Circuit began its analysis by discussing the use of the phrase "thing of value" within the circuit. Citing *United States v. Nilsen*,[25] the court explained that "Congress' frequent use of 'thing of value' in various criminal statutes has evolved the phrase into a term of art which the courts generally construe to envelop both tangibles and intangibles."[26] In this regard, a "thing of value" has been found to include testimony proffered by a government witness. Simply, "monetary worth is not the sole measure of value."[27]

The court then turned to the Third and Fourth Circuits. It acknowledged that in *Sage Hospitality*, the Third Circuit found that organizing assistance does not qualify as a payment, loan, or delivery, that the added benefit of a more efficient resolution to the labor dispute is not a thing of value, and that invalidating the neutrality agreement would be too disruptive to the legal structure governing labor relations.[28] Similarly, the court recognized that in *Adcock*, the Fourth Circuit concluded that the organizing assistance at issue had "no ascertainable value" and therefore could not be construed to violate Section 302.[29]

Observing that no other circuits had analyzed the phrase "thing of value" in the context of a neutrality agreement, the Eleventh Circuit then examined other decisions which had at least discussed the phrase's general meaning. For example, in *United States v. Douglas*,[30] the Sixth Circuit found that the offer of a high-paying job was a thing of value, despite the fact that a job offer is "not money or some other tangible thing."[31] And in *United States v. Roth*,[32] the Second Circuit commented that "value is usually set by the desire to have the 'thing' and depends upon the individual and the circumstances."[33] Nevertheless, the *Roth* court stated, "no calculating machine has yet been invented to make these determinations [between proper and improper] with certainty."[34] Accordingly, it recommended that a "common sense" case-by-case analysis was the best approach to discern whether an improper benefit has been conferred.[35]

The Eleventh Circuit agreed. Examining the statutory text, it explained that "[v]iolations of Section 302 only involve payments, loan or deliveries."[36] Intangible organizing assistance, it continued, could not be "loaned" or "delivered," because both verbs "contemplate the transfer of tangible items."[37] However, such assistance could operate as "payment." In this regard, "whether something qualifies as a payment depends . . . 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 [Section] 302—curbing bribery and extortion—are implicated."[38]

The court announced that "[i]t is too broad to hold that all neutrality and cooperation agreements are exempt from the prohibitions of [Section] 302."[39] To be sure, it permitted that employers and unions may set ground rules during an organizing campaign, even if the parties derive a benefit from such an arrangement. However, "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."[40] Here, it found that the agreement could have monetary value (but left open the question of whether a "thing of value" *must* have monetary value). Ultimately, it concluded that Mulhall stated a claim for relief, and remanded his claim to the district court to inquire why UNITE and Mardi Gras agreed to cooperate.

Looking Ahead

With a division among the Third, Fourth, and Eleventh Circuits, it is currently unsettled whether a neutrality agreement—which is not uncommon—might be prohibited under Section 302 of the LMRA as an unlawful "thing of value." UNITE HERE,

however, has petitioned the U.S. Supreme Court for *certiorari*, requesting review of the Eleventh Circuit's decision in *Mulhall*. Significantly, the U.S. Supreme Court has requested that the solicitor general file a brief reflecting the government's view on whether intangible items can be "delivered" under Section 302(a)(2) of the LMRA.[41]

Underlying the question of whether a neutrality agreement can constitute the type of corruption the LMRA is intended to prohibit is the issue of whether a "thing of value" must have monetary value. On the one hand, the *Adcock* Court found that Congress intended for a "thing of value" to have an ascertainable value and that the concessions granted by the employer to the union have no such value within the meaning of the LMRA. By contrast the Eleventh Circuit, in *Mulhall,* stated that it was not necessary to address whether a "thing of value" needed to have monetary value to determine if a particular neutrality agreement violated Section 302(a)(2) of the LMRA. Rather, it held that concessions similar to those found lawful by the Third and Fourth Circuits *could* be unlawful under certain circumstances.

Pending a decision by the U.S. Supreme Court, which may be issued in the next term, employers facing union organizing drives should consider carefully the nature of the concessions agreed to in exchange for entering into a neutrality agreement. Under the *Sage Hospitality* and *Adcock* decisions, employers in the Third and Fourth Circuits may arrange with a union to exchange future bargaining concessions for employee access and card check recognition. However, in the Eleventh Circuit, there is more ambiguity about when a concession will be deemed to be a thing of value prohibited by the LMRA. Although setting ground rules for an organizing campaign remains permissible, employers should avoid even the appearance that the neutrality agreement was entered into to exert improper influence over a union.

Howard S. Lavin is a partner and Elizabeth E. DiMichele is a special counsel in the Employment Law Practice Group of Stroock & Stroock & Lavan LLP, concentrating in employment law counseling and litigation.

For More Information

Howard S. Lavin
212.806.6046
hlavin@stroock.com

Elizabeth E. DiMichele
212.806.5477
edimichele@stroock.com

1. 29 U.S.C. § 186.
2. 359 U.S. 419, 425 (1959).
3. *Id.* at 425-26.
4. 390 F.3d 206 (3d Cir. 2004).
5. 550 F.3d 369 (4th Cir. 2008).
6. 667 F.3d 1211 (11th Cir. 2012).
7. *Sage Hospitality*, 390 F.3d at 209.
8. *Id.* at 210.
9. *Id.* at 218.
10. *Id.*
11. *Id.* at 219.
12. *Id.* 550 F.3d 369.
13. *Id.* at 372.
14. *Id.*
15. *Id.* at 373.
16. *Id.*
17. *Id.* at 374.
18. 359 U.S. 419.
19. *Adcock*, 550 F.3d at 375.
20. *Id.*
21. *Id.* at 375 n.3.
22. 667 F.3d 1211.
23. *Id.* at 1213.
24. 967 F.2d 539, 542 (11th Cir. 1992).

25. *Mulhall*, 667 F.3d at 1214.
26. *Id.* (internal quotations omitted).
27. *Id.*
28. *Id.* at 1214.
29. 634 F.3d 852 (6th Cir. 2011).
30. *Mulhall*, 667 F.3d. at 1215.
31. 333 F.2d 450 (2d Cir. 1964).
32. *Mulhall*, 667 F.3d at 1215 (citing *United States v. Roth*, 333 F.2d at 453).
33. *Id.* (citing *United States v. Roth*, 333 F.2d at 454).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *UNITE HERE Local 355 v. Mulhall*, U.S., No. 12-99, brief invited 1/14/13.

New York
180 Maiden Lane
New York, NY 10038-4982
Tel: 212.806.5400
Fax: 212.806.6006

Los Angeles
2029 Century Park East
Los Angeles, CA 90067-3086
Tel: 310.556.5800
Fax: 310.556.5959

Miami
Southeast Financial Center
200 South Biscayne Boulevard, Suite 3100
Miami, FL 33131-5323
Tel: 305.358.9900
Fax: 305.789.9302

Washington, DC
1875 K Street, NW, Suite 800
Washington, DC 20006-1253
Tel: 202.739.2800
Fax: 202.739.2895

www.stroock.com

This publication may be attorney advertising.
Prior results do not guarantee a similar outcome.
