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THE CRIMINAL ELEMENT OF NEUTRALITY AGREEMENTS

Mark A. Carter & Shawn P. Burton

I. THE RISE OF THE NEUTRALITY AGREEMENT

Over twenty years ago, Harvard Law Professor Paul Weiler boldly proclaimed that “[c]ontemporary American labor law more and more resembles an elegant tombstone for a dying institution.”\(^1\) Weiler’s words were somewhat prophetic, as today the Board-supervised election is all but dying.\(^2\) General Counsel Meisburg’s 2006 Operations Report is proof enough of this fact.\(^3\) According to the Report, only 3643 representation petitions were received during the 2006 fiscal year, compared to 4894 in the previous fiscal year.\(^4\) This amounted to an unspeakable 25.6% decline in just one fiscal year.\(^5\) The downward trend continued in 2007.\(^6\) Although dramatic, the
numbers in the last ten years are even more staggering. Since 1997, the number of representation petitions filed with the Board has decreased by 41%, from 6179 in 1997 to 3643 in 2006. The reason behind this dramatic decrease is no mystery. Unions view the traditional statutory recognition model as incapable of providing the "laboratory conditions" it once promised. From the unions' perspective, the delay, lack of meaningful access to the electorate, and ineffectual remedies for unfair labor practices make the Board-supervised election a truly unequal playing field. As one recent scholar put it, "optimism has given way to cynicism and despair about the law's ability to protect workers and enhance collective bargaining." Some estimate, for example, that the Board takes an average of 557 days to certify a union after an election accompanied by illegal conduct. Former General Counsel Feinstein similarly estimated that it takes roughly two years to prosecute an unfair labor practice case. Also, consider the fact that employers are permitted to freely distribute anti-union literature during work time, hold compulsory captive audience speeches during working hours, and conduct one-on-one meetings with employees. Unions, on the other hand, do not generally enjoy the same access. Employers may lawfully restrict the distribution of union literature by employees, as well as employee discussions about union organizing.

8. Id.
9. Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948) ("In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.").
10. Steven Greenhouse, Unions, Bruised in Direct Battles with Companies, Try a Roundabout Tactic, N.Y. TIMES, Mar. 10, 1997, at B7 (quoting Andrew Stern, President of the Service Employees International Union, as saying, "the system of representation elections is heavily weighted in favor of employers.").
11. James J. Brudney, Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms, 90 IOWA L. REV. 819, 832-34. Unions are seeking to "sidestep the intimidating consequences of employers’ anti-union speech or conduct and to minimize the eviscerating impact of lengthy delays under the Board’s legal regime." Id. at 832.
Employers may also lawfully prohibit non-employee union officials from accessing its facilities altogether.\(^\text{17}\)

Whether you accept these arguments or not, the stark reality is that the labor movement’s strategy for halting the decline in union membership has changed vastly in recent years.\(^\text{18}\) Unions are turning more and more to non-traditional recognition models to gain new members.\(^\text{19}\) Service Employees International Union ("SEIU") Local 32BJ leader Mike Fishman bluntly stated recently that, "[w]e don’t do elections."\(^\text{20}\) Consider, for instance, the movement’s highly-publicized attempt to legislate-away its membership and election ills. Since November of 2006, when the Democratic Party took control of both houses of Congress, unions throughout the country have focused their efforts and resources on passing the Employee Free Choice Act.\(^\text{21}\) AFL-CIO President John J. Sweeney "called this the labor movement’s top priority ...."\(^\text{22}\) The Union’s efforts seem to be paying off, because on March 1, 2007, the House of Representatives passed the Employee Free Choice Act (EFCA) by a vote of 241 to 185.\(^\text{23}\) The bill narrowly escaped passage after the Democrats failed to get the sixty votes necessary to defeat the

\(^\text{17}\). Lechmere, Inc. v. NLRB, 502 U.S. 527, 540-541. However, unionization success rates may be unaffected by employer behavior. Perhaps the most well-known scholarly piece is the often cited Stephen B. Goldberg, Julius G. Getman & Jeanne M. Brett, *Union Representation Elections: Law and Reality: The Authors Respond to the Critics*, 79 Mich. L. Rev. 564 (1981). In that piece, the authors argue that employer anti-union campaigns have little, if any, impact on election results. Id. at 569. Based on interviews with 1000 employees, the authors quite convincingly demonstrate that "[f]or the great majority of employees . . . the effect of the campaign, if any, must be to cause them to vote consistent with their original intent." Id. In fact, they found that statistically "eighty-seven percent voted in accordance with that intent, despite vigorous, frequently unlawful campaigning in nearly every election." Id.

\(^\text{18}\). Editorial, Labor’s New Organizing Tactic, N.Y. Times, Mar. 26, 1997, at A20 ("American labor leaders are developing a new tactic to boost union membership.").

\(^\text{19}\). See Brudney, supra note 11, at 824-25 ("Starting in the late 1970s, individual employers and unions began negotiating agreements that modified this traditional [NLRB-regulated] approach . . . ").


Republican-led filibuster.\textsuperscript{24}

Another fundamental, non-traditional recognition model used by unions, and one that has recently taken center stage with the Board and the labor community, is the neutrality agreement. The neutrality agreement has indeed grown in popularity over time. As one scholar recently noted, "[b]y the late 1990s, as unions bargained for neutrality protection with greater frequency, these agreements had become a central component of the labor movement’s organizing strategy."\textsuperscript{25} Moving into the twenty-first century, nothing has changed. According to former Board member John Raudabaugh, "more than 80 percent of [the AFL-CIO’s] newly organized employees in 2002 were organized through corporate campaigns and bargained-for neutrality and card check agreements . . . ."\textsuperscript{26} In fact, from 1998 through 2003, the AFL-CIO reported that it organized roughly three million workers, less than one-fifth of which "were added through the formerly pre-eminent Board elections process."\textsuperscript{27} Without a doubt, neutrality agreements have emerged as "the organizing instrument of choice."\textsuperscript{28}

Neutrality agreements are simply pre-election bargained for agreements between organizing unions and the employers of employees they seek to organize.\textsuperscript{29} These agreements set forth the "rules of the game," so to speak, for the organizing campaign.\textsuperscript{30} The type and number of rules agreed to vary widely. The first neutrality agreement, for instance, believed to have been between the United Auto Workers ("UAW") and General Motors Corporation ("GM") in 1976, was simple\textsuperscript{31}: it merely prohibited the employer from disparaging or advocating against the union or unionism during the


\textsuperscript{25} Brudney, supra note 11, at 825 (footnote omitted).


\textsuperscript{27} Brudney, supra note 11, at 828.


\textsuperscript{29} See Charles I. Cohen, Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?, 16 LAB. L. 201, 201-03 (2000).

\textsuperscript{30} See id. at 203 ("Simply put, neutrality agreements go far beyond a company remaining neutral in the face of a union organizing drive at one of its unorganized facilities.").

In return, the UAW agreed not to disparage General Motors during the campaign.33 These agreements evolved over time, however, becoming increasingly sophisticated. Today, neutrality agreements commonly contain employer gag rules (like the one in the original UAW/GM agreement), mutual non-disparagement provisions, union access clauses, card check clauses, alternative dispute resolution mechanisms, and after-acquired stores/facility clauses.34 Some neutrality agreements contain clauses giving unions access to a list of names, addresses, telephone numbers, and job titles for all employees eligible for representation long before the analogous *Excelsior Underwear, Inc.* mandate is imposed.35 Others go as far as requiring employers to hold compulsory captive audience speeches where union officials speak on the benefits of their unions and unionization in general.36 And still others set the substantive contract terms for future collective bargaining agreements, despite the Board’s seemingly clear prohibition against such conduct.37

32. Id. at 40 n.6, 41.

33. Id. at 40 n.6.


35. 156 N.L.R.B. 1236 (1966); see discussion infra Part IV.A.

36. An agreement between Heartland Industrial Partners, LLP and the United Steelworkers International Union contained the following provision: “The Company shall provide the Union with a complete list of all of its employees in the proposed bargaining unit who are eligible for union representation. Such a list shall include each employee's full name, home address, job title, and work location.” Appellants/Cross Appellees' Final First Brief at 9, Patterson v. Heartland Indus. Partners, Nos. 06-3791 & 06-3792 (6th Cir. Apr. 5, 2007) [hereinafter Patterson Brief] (on file with authors).

37. See Tentative Agreement By and Between Freightliner LLC and UAW for the Purpose of Establishing a Card Check Procedure at 1, Freightliner LLC-UAW, Dec. 16, 2002 [hereinafter Tentative Agreement] (“Freightliner and the UAW will jointly present an initial information program that explains the card check procedure to employees. In advance of the meeting, a letter from Freightliner will be sent to all employees explaining the card check Agreement and process that will be used—including the date and time of the meetings to be held in the Plant. Attendance at these meetings will be compulsory, with pay, during working hours.”) (on file with authors).

38. See, e.g., *In re Julian Resnick, Inc.*, 86 N.L.R.B. 38, 39 (1949) (allowing employers and non-certified unions to bargain over the substantive terms of a future collective bargaining agreement as long as the parties did not formally execute their agreement until the union attained representative status), *overruled by* Majestic Weaving Co., 147 N.L.R.B. 859, 860 & n.3 (1964) (prohibiting unions and employers from even negotiating substantive contract terms prior to the union attaining representative status). Recently, the Administrative Law Judge in *Dana Corp.*, 2005 NLRB LEXIS 174 (A.L.J. Apr. 11, 2005), questioned whether the *Majestic Weaving
II. ATTACKING THE NEUTRALITY AGREEMENT

A. Congressional And Agency Attacks

Neutrality agreements have come under increased attack in recent years. A Canadian scholar examining U.S. labor law quite accurately stated: "A battle is raging in American labour law" over neutrality agreements. In May 2002, several Republican members of Congress introduced a House bill seeking to eliminate the unions' and employers' right to enter into neutrality agreements containing card check clauses. A similar bill, entitled the Secret Ballot Protection Act of 2004, was introduced two years later, also designed to make certain neutrality agreements unlawful.

The Board, similarly, has chipped away at neutrality clauses. In June 2004, the NLRB, by a 3-2 vote, agreed to consider whether and to what extent a recognition bar prevents employees from petitioning for decertification after the union has gained recognition pursuant to a voluntary recognition or a neutrality agreement. Not unexpectedly, the Board in the fall of 2007 limited the reach of the recognition bar in these situations. Now, unlike with recognition achieved through a secret-ballot election, no election bar will be imposed on decertification after a card-based recognition unless two conditions are met. First, employees in the bargaining unit must receive notice of the recognition and of their right, within forty-five days of the notice, to file a decertification petition or to support the filing of a petition by a rival union. Second, forty-five days must pass from the date of notice without the filing of a valid petition. According to the Board, its decision was driven "to provide greater protection for employees' statutory right of free choice and to give proper effect to the court- and doctrine applies to neutrality agreements. Id. at *17.

39. See Doorey, supra note 13, at 2.
42. Id. at § 3(b).
44. See Dana Corp., 351 NLRB No. 28, 2007 WL 2891099, at *2 (Sept. 29, 2007).
45. Id.
46. Id.
47. Id.
Board-recognized statutory preference for resolving questions concerning representation through a Board secret-ballot election.\footnote{Id. at *5.}

The after-acquired stores clause, a common neutrality agreement feature that facilitates recognition without a secret-ballot election, has also been challenged.\footnote{Susan J. McGolrick, \textit{NLRA: NLRB 2-1 Grants Shaw's Request for Review in Case Involving After-Acquired Store Clause}, 55 Daily Lab. Rep. (BNA), at A-1 (Mar. 22, 2006).} In March 2006, the Board, by a 2-1 vote, agreed to consider the propriety of such clauses.\footnote{Id.} Again, not unexpectedly, the Board in \textit{Supervalu, Inc.}\footnote{351 NLRB No. 41, 2007 WL 2948440 (Sept. 30, 2007).} indirectly limited a union’s ability to achieve recognition through a non-traditional method by making the after-acquired stores clause a non-mandatory subject of bargaining in most circumstances.\footnote{Id. at *7.} The implication is clear. Employers can resist inclusion of such clauses in a collective bargaining agreement and, importantly, can pursue an unfair labor practice charge against a union that insists on its inclusion, effectively eliminating another tool used by unions to avoid the purported perils of the traditional recognition model.\footnote{See id.}

\textbf{B. Judicial Attacks}

Neutrality agreements have also been attacked in the courts. In 2003, for instance, a group of employees from Heartland Industrial Partners, LLP filed suit under section 302 of the Labor Management Relations Act challenging a neutrality agreement entered into between their employer, Heartland, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (USW).\footnote{Patterson v. Heartland Indus. Partners, LLP, 428 F. Supp. 2d 714, 716, 718 & n.3 (N.D. Ohio 2006).} This suit was a comprehensive attack on neutrality agreements; therefore, it is worth briefly exploring here.\footnote{The issue of neutrality agreements violating section 302 has been raised before. In \textit{Hotel Employees & Rest. Employees Union v. Sage Hospitality Res., LLC}, 390 F.3d 206 (3d Cir. 2004), the defendant argued that the neutrality agreement that it had entered into was void because it violated section 302. \textit{Id.} at 209-10. The Third Circuit found that the agreement did not amount to a “thing of value” and, therefore, did not violate section 302. \textit{Id.} at 219.}

In 2000, Heartland and the USW agreed to, what they called, the “Framework for a Constructive Collective Bargaining Relationship”
Pursuant to the Framework Agreement, Heartland agreed to provide the USW with organizing assistance. Specifically, it agreed to provide, among other things, a list of names and addresses of all employees eligible for representation, access to the workplace for purposes of campaigning, and a guarantee that company officials would "refrain from speaking unfavorably about the union." The USW, in return, agreed to a host of bargaining concessions.

Based on this quid pro quo arrangement, plaintiffs claimed that the USW unlawfully demanded and accepted a "thing of value" and that Heartland unlawfully delivered a "thing of value" to the USW. Both acts, the plaintiffs claimed, violated section 302. The defendants filed motions for summary judgment, arguing that the organizing assistance delivered to and accepted by the union did not constitute a "thing of value." The court agreed. Since no "money changed hands," the court framed the question at issue in the following terms: "[D]o neutrality or cooperative agreements given between the parties constitute the kind of 'other thing of value' that the statute prohibits?" Answering in the negative, the court adopted wholesale the Third Circuit's reasoning in Hotel Employees & Restaurant Employees Union v. Sage Hospitality Resources, LLC:

There are many reasons why this argument makes no sense, including the language of [s]ection 302 itself, which proscribes agreements to "pay, lend, or deliver . . . any money or other thing of value." The agreement here involves no payment, loan, or delivery of anything. The fact that a Neutrality Agreement - like any other labor arbitration agreement - benefits both parties with efficiency and cost saving does not transform it into a payment or delivery of some benefit. "Furthermore, any benefit to the union inherent in a more efficient resolution of recognition disputes does not constitute a thing of value within the meaning of the statute."

57. Id. at 716-17.
58. Id. at 717.
59. Id.
61. Id. at 15, 18, 19.
63. Id. at 723-24.
64. Id. at 724 (quoting Hotel Employees & Rest. Employees Union v. Sage Hospitality Res.,
There was, indeed, no further analysis by the court. The court adhered to the Third Circuit’s logic in *Sage Hospitality*, without further analysis of the institutional realities or needs of unions.65 The plaintiffs in *Heartland* have appealed to the Sixth Circuit Court of Appeals.66

The most recent judicial attack on neutrality agreements came from an unlikely source using an unlikely statutory scheme. In January 2006, a group of employees from Freightliner LLC filed suit advancing a novel legal theory under the Racketeer Influenced and Corrupt Organization Act ("RICO") and section 302.67 In *Adcock v. Freightliner LLC*, the plaintiffs claimed that the neutrality agreements between their employer and the union seeking recognition ran afoul of RICO.68 The claim was premised on an allegedly unlawful scheme wherein an employer delivers valuable organizing assistance to a union in exchange for the union’s agreement to make future bargaining concessions.69 The employees, represented by the National Right to Work Legal Defense Foundation, did not enjoy success. As in *Heartland*, the court in *Freightliner* dismissed their claims because the organizing assistance that was the foundation of their case did not constitute, from the court’s perspective, a "thing of value."70

The remainder of this paper explores the contours of this most recent attack on neutrality agreements. In Part III.A, the paper outlines the nuts and bolts of RICO claims premised on section 302. In Part III.B, the *Freightliner* case is examined in detail. Then in Part IV, the paper presents the authors’ thoughts on whether the decision in *Freightliner* sounded the death knell for section 302 premised RICO claims and concludes that certain neutrality agreements likely violate RICO and are, therefore, criminal. In the last Part, the authors explore the potential implications of making neutrality agreements unlawful under RICO.

65. *Id.*
III. RICO ACTIONS PREMISED ON SECTION 302 OF THE LABOR MANAGEMENT RELATIONS ACT ("LMRA")

A. Nuts and Bolts of Section 302 Premised RICO Claims

RICO makes it unlawful for "any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise . . . ."71 RICO also makes it unlawful "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ."72 In either instance, there are four basic elements to any RICO claim. To hold an employer liable under RICO, the plaintiff must establish that: (1) a person (2) through a pattern of racketeering activity (3) acquired or maintained, directly or indirectly, any interest in or control of (4) any enterprise which is engaged in interstate commerce.73 To hold a union liable under RICO, the plaintiff is required to plead and prove: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.74 As a threshold matter, RICO requires that litigants first establish the pattern of predicate activity (i.e. racketeering activity).75 The RICO statute lists a number of predicate acts.76 A section 302 violation is an enumerated predicate act.77

Section 302 provides that it

shall be unlawful for any 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

73. Freightliner, 2006 U.S. Dist. LEXIS 82279, at *3 (citing 18 U.S.C. § 1962(b)).
74. Freightliner, 2006 U.S. Dist. LEXIS 82279, at *3 (citation omitted).
the employees of such employer.... 78

Section 302 imposes a similar restriction on unions, making it unlawful to demand, accept, or receive "any money or other thing of value." 79 Accordingly, an employer violates RICO if it acquires or maintains control of a union, or conducts the affairs of a union, through a "pattern" of section 302 violations. 80 Similarly, a union violates RICO if it conducts or participates in the affairs of an employer through a "pattern" of section 302 violations. 81

B. Adcock v. Freightliner LLC

There is not much history to section 302 premised RICO claims, at least not where the predicate act is the delivery and acceptance of organizing assistance. To date, only one lawsuit has been filed. This lawsuit was filed as a class action by five employees of Freightliner LLC in January 2006. 82 The lawsuit challenged the lawfulness of a neutrality agreement entered into by Freightliner and the UAW. 83 The case was ultimately dismissed by the United States District Court for the Western District of North Carolina and is currently on appeal in the Fourth Circuit. 84 The relevant facts alleged are set forth below.

Freightliner is a manufacturer with multiple facilities in the United States. 85 The case mainly involved four facilities, all of which were located in North Carolina: Mt. Holly Truck Manufacturing Plant; Gastonia Parts Manufacturing Plant; Cleveland Truck Manufacturing Plant; and Thomas Built Buses Manufacturing Plant. 86 Only the Mt. Holly facility was unionized. 87 The Mt. Holly employees were represented by the UAW. 88

The plaintiffs alleged that during the early spring of 2002, the UAW initiated an effort to organize the other Freightliner

81. Id.
82. Adcock Complaint, supra note 69, at 1.
83. Id. at 1-2.
85. Adcock Complaint, supra note 69, ¶ 5.
86. Id. ¶¶ 22, 30, 36, 45, 58.
87. Id. ¶ 15.
88. Id.
facilities. In doing so, a UAW official contacted Freightliner and demanded assistance in its organizational efforts. Among its demands were compulsory captive audience meetings with Freightliner and UAW officials, access to the various Freightliner facilities for the purpose of soliciting support, and prohibitions against negative comments about the UAW and unionization.

In response to these demands, Freightliner insisted that the UAW agree to certain preconditions in exchange for any organizing assistance. Chief among these preconditions was an agreement that the UAW make bargaining concessions at the expense of employees that the UAW represented at the Mt. Holly facility and at the expense of employees that the UAW was seeking to represent at the other three North Carolina facilities. Freightliner made this precondition clear to the UAW in an August 2002 letter, insisting that:

A final agreement is dependent upon receiving some contractual relief at Mt. Holly. Specifically, Freightliner expects cancellation of 12/02-wage increase, cancellation of 1/03 profit sharing bonus, benefits cost sharing by employees, and an extension of the current contract with no wage increases.

After both parties fired off their first demands, negotiations began and continued into the winter of 2002. Finally, in December 2002, Freightliner and the UAW entered into two interrelated agreements. One was entitled the "Tentative Agreement By and Between Freightliner LLC and UAW for the Purpose of Establishing a Card Check Procedure" ("Card Check Agreement"). In the Card Check Agreement, Freightliner agreed to compulsory captive audience meetings, access to its facilities, and a gag rule. The other agreement was entitled the "Agreement on Preconditions to a Card Check Procedure Between Freightliner LLC and the UAW"

89. Id.
90. Id. ¶ 16.
91. Id.
92. Id. ¶ 17.
93. Id.
94. Id. ¶ 19.
95. See id. ¶¶ 18-20.
96. Id. ¶ 20.
97. Tentative Agreement, supra note 37, at 1.
98. Id. at 1-2.
It identified a long list of bargaining concessions agreed to by the UAW with respect to wages, benefits, and other terms and conditions such as transfer rights, subcontracting rights, and overtime. 

Several aggrieved employees filed a thirty-nine page, 113 paragraph, four count complaint in January 2006. Freightliner and the UAW were the two named defendants. Both defendants filed a motion to dismiss. The defendants argument was essentially twofold. First, they claimed that plaintiffs failed to establish a violation of section 302 (i.e. the threshold predicate act requirement). Second, they claimed that, even if plaintiffs had made the requisite threshold showing, they failed to establish a "pattern" of section 302 violations.

On November 9, 2006, the United States District Court for the Western District of North Carolina issued a brief opinion, with sparse analysis, dismissing the lawsuit. According to Judge Mullen, there was "no evidence that 'things of value' were improperly exchanged between the UAW and Freightliner." Relying on the Ninth Circuit's decision in Hotel Employees v. Marriott Corp. and the Third Circuit's decision in Hotel Employees & Restaurant Employees Union v. Sage Hospitality Resources, LLC, Judge Mullen reasoned that "[p]articipation of unions and employers in card check programs is proper and has never [been] held to be illegal." From a public

100. Id. at 1-2.
101. Adcock Complaint, supra note 69, at 1.
102. Id.
103. Brief in Support of Defendant UAW's Motion to Dismiss at 1, Adcock v. Freightliner LLC, No. 3:06CV32-MU, 2006 U.S. Dist. LEXIS 82279 (W.D.N.C. Nov. 9, 2006) [hereinafter UAW Motion to Dismiss] (on file with authors); Memorandum of Law of Defendant Freightliner LLC in Support of Motion to Dismiss at 1, Adcock v. Freightliner LLC, No. 3:06CV32-MU (W.D.N.C. Nov. 9, 2006) [hereinafter Freightliner Motion to Dismiss] (on file with authors).
104. UAW Motion to Dismiss, supra note 103, at 2; Freightliner Motion to Dismiss, supra note 103, at 2.
105. UAW Motion to Dismiss, supra note 103, at 2-3; Freightliner Motion to Dismiss, supra note 103, at 6.
108. 961 F.2d 1464 (9th Cir. 1992).
109. 390 F.3d 206 (3d Cir. 2004).
110. Freightliner, 2006 U.S. Dist. LEXIS 82279, at *4-5 (citing Hotel Employees v. Marriott Corp., 961 F.2d 1464, 1468 (9th Cir. 1992); Hotel Employees & Rest. Employees Union v. Sage Hospitality Resources, LLC, 390 F.3d 206 (3d Cir. 2004)).
policy perspective, Judge Mullen further reasoned that "[i]f the [c]ourt were to find that participation in cardcheck agreements was illegal, it would have the effect of criminalizing all collective bargaining agreements." The court did not reach the issue of whether the plaintiffs sufficiently alleged a "pattern" of section 302 violations. Similar to Heartland, the plaintiffs appealed the dismissal, and the case is currently pending before the Fourth Circuit.

IV. THE FUTURE OF SECTION 302 PREMISED RICO CLAIMS

The foregoing discussion begs the question of what the future holds for RICO claims premised on section 302 of the LMRA? As the courts in Sage Hospitality, Heartland, and Freightliner made clear, this largely depends on whether litigants can demonstrate that there was a demand for and delivery of a "thing of value." With neutrality agreements, the union does not demand nor does the employer deliver "money." The crucial question is, therefore, whether organizing assistance falls within the statutory phrase "other things of value." The courts in Heartland, Sage Hospitality, and, most recently, Freightliner all said no to this question. But these courts by no means settled the issue because Freightliner is currently on appeal.

As the remainder of this paper demonstrates, there is a possibility that the Freightliner court will be reversed on appeal. The authors argue that there is a basis upon which the courts could conclude that "organizing assistance" constitutes a "thing of value." The reason the district courts in Heartland and Freightliner did not reach this same conclusion was because they failed to realistically examine the "value" of the organizing assistance in question. If the Fourth Circuit does that which other courts have thus far failed to do

111. Id. at *5.
112. See generally id. (granting defendants' motion to dismiss without addressing "pattern").
113. Id., appeal docketed, No. 06-2287 (4th Cir. Dec. 8, 2006).
and critically scrutinizes the organizing assistance bargained for as real, tangible, and economically valuable, it should conclude that organizing assistance, particularly active (versus passive) organizing assistance, is a "thing of value."

The future of these claims also largely depends on the litigants establishing a "pattern" of section 302 violations. No court has addressed this issue in the organizing assistance context. The plaintiffs in *Freightliner* raised the argument, but the court never reached the issue because it dismissed the case for failure to satisfy the threshold predicate act requirement.117 The authors explore below the contours of the "pattern" requirement and argue that plaintiffs may similarly be able to successfully meet this requirement.

**A. Organizing Assistance Can Constitute a "Thing of Value"**

As explained in Part III.A above, to prevail on a section 302 claim, the plaintiff must show that the union demanded, or the employer delivered, a "thing of value." The employer in *Freightliner* argued that organizing assistance does not amount to a thing of value because section 302 only covers "tangible" things that are "financial in nature."118 According to the employer, "[o]nly rarely has [s]ection 302 been applied to the payment or delivery of non-cash items, and in those few cases, the 'value' conferred was of some financial benefit, not some ephemeral, subjective value."119 The employer argued in the alternative that since neutrality agreements generally have been found lawful, the neutrality agreements at issue had to be lawful under section 302.120 The union advanced a similar argument, asserting that "[n]eutrality agreements like the Freightliner-UAW Agreement at issue here have consistently been held to be lawful and enforceable under the National Labor Relations Act."121 Both arguments are vulnerable for the reasons that follow.

The first argument is based on a premise that evades the nature and financial needs of unions. It can be said that unions are not purely altruistic institutions, making decisions without a care for what

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118. *Freightliner* Motion to Dismiss, supra note 103, at 6-8.
119. *Id.* at 8 (citing United States v. Boffa, 688 F.2d 919, 935-36 (3d. Cir. 1982); United States v. Schiffman, 552 F.2d 1124, 1126 (5th Cir. 1977)).
120. *Id.* at 11-12; UAW Motion to Dismiss, supra note 103, at 12-13 (citations omitted).
121. UAW Motion to Dismiss, supra note 103, at 6 (citations omitted).
they receive in return for their organizing efforts. Arguably, unions are no different than any other American business that operates under the weight of a balance sheet. Therefore, in order to survive, a union must balance debit and credit. They face the same economic reality facing any business, even a non-profit business. As any other business, they care, and in fact, must care, about money. There is, of course, nothing wrong with valuing money. How else would unions achieve their legitimate goals?

The point is not to challenge or question the motives of the union movement, but rather merely to argue that organizing assistance provides no “tangible” benefit or is “financial in nature.” It is reasonable to assume that the heart of the union movement is its members, because members contribute financially via membership dues. In this respect, members are, without a doubt, the gold standard. More members equals more union dues, and union dues fuel the ability to organize more members. Unions, therefore, logically want union dues to sustain the movement. And anything that makes it easier for unions to meet this need is something of value.

There can be little doubt that organizing assistance helps meet this need, because such assistance may significantly increase unions’ chances of achieving representative status. There is an uncontroverted body of scholarly literature, for instance, confirming a “correlation between employer campaigning and the probability that the employees will vote against collective bargaining.”

One scholar even suggested that the growing resistance exerted by management during organizing drives “may be a major factor in the more rapid decline of U.S. unions.”

Neutrality agreements, which

122. Doorey, supra note 13, at 10. See generally Weiler, supra note 1, at 1776-86 (discussing varying employer intimidation tactics and the probability that these tactics caused the decrease in union victory rates from 1950 to 1980); William T. Dickens, The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again, 36 INDUS. & LAB. REL. REV. 560, 574 (1983) (conducting a statistical examination of 3100 elections and asserting, among other things, that “written communications distributed late in the campaign and meetings held early in the campaign most probably have an effect [on how workers vote in union elections].”). The union victory rate has dropped precipitously since the 1950s where it hovered around seventy percent. Weiler, supra note 1, at 1776 tbl.1. Since the 1960s, the union victory rate has been around fifty percent. Doorey, supra note 13, at 3 n.7.

123. Morris M. Kleiner, Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector, 22 J. LAB. RES. 519, 519-20 (2001) (“Management resistance to unionization has long been considered a deterrent to the growth of private sector unions.”) (citation omitted); see also Dickens, supra note 122, at 574 (“[B]oth legal and illegal tactics can affect how workers vote.”); Hartley, supra note 28, at 372 (including employer intimidation as one of four disadvantages “widely understood as contributing significantly to the decline in union membership during the last quarter of the twentieth century”).
largely silence employers during an organizing campaign, eliminate this "major factor." There is also a proven correlation between election success and other forms of organizing assistance besides simple neutrality, such as card check arrangements. One recent well-known study conducted by Eaton and Kriesky found that when unions were able to obtain neutrality agreements with card check agreements, the election success rate was 78.2%, compared to the overall NLRB election win rate of approximately 46%. Also, consider the organizational benefits of having employee contact information and equal union access to the workplace. Forty years ago, the Board in Excelsior Underwear Inc. went great lengths to explain these benefits. Thus, because increased union membership equals increased financial profitability (a vital element of sustaining the union movement) and union membership is ultimately increased by employer organizing assistance, a claim that such assistance does not constitute a tangible financial benefit to unions must be suspect. Why else would unions make neutrality agreements the centerpiece of their organizational strategy? If such agreements were not a "thing of value" to unions, surely American labor leaders would not be making, as they are, "a fundamental shift in strategy away from a 60-year tradition of concentrating on workplace elections."

The second argument, which the Freightliner court accepted, misses the mark as well by framing the legal question in a way that leads invariably to the desired answer. In other words, the employer and the union both claim that the plaintiffs are attacking neutrality agreements as a concept. By doing so, the defendants are focusing the debate on "neutrality" and "card check" or passive employer

124. See Hartley, supra note 28, at 372 ("[N]eutrality agreements can redress four disadvantages unions confront when organizing: employer intimidation, harmful delay, inadequate access to employees, and inability to secure a first contract.").

125. Eaton & Kriesky, supra note 34, at 51-52.
127. Id. at 1240-43. The Board explained the organizing benefits in the following terms:

[T]hrough his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, [he] is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation . . . .

Id. at 1240-41 (footnote omitted).

assistance (i.e. remaining silent during the campaign and accepting authorization cards as a means of determining representative status), rather than the individual provisions contained within the agreements that provide purely active assistance. Indeed, both defendants, as well as the courts in *Freightliner* and *Sage Hospitality*, uncritically find that neutrality agreements are ideal and lawful under section 302. As the court in *Freightliner* explained, "[p]articipation of unions and employers in card check programs is proper and has never [been] held to be illegal."  

This analysis focuses entirely on clearly passive employer conduct and ignores other forms of employer conduct in union organizing drives. From a practical standpoint, it would seem that there are three distinct forms of employer conduct that may be exhibited during an organizing drive. One form is outright employer *resistance*. This form of conduct is the most common, and the form unions try to avoid with the use of neutrality agreements. The second form of employer conduct is *passive campaign assistance*. This form of conduct, which has become increasingly more popular, is merely acquiescence. For example, employers agree to remain silent during a campaign or not insist on a Board-supervised election. Employers are simply inactive during and non-resistant to union organizing efforts. The third form of employer organizing conduct is *active campaign assistance*. This form is much more rare, but not entirely uncommon as evidenced by *Freightliner* and *Heartland*.

For obvious reasons, the first form of employer campaign conduct, *employer resistance*, does not implicate section 302 (nor RICO) because there is nothing of value involved. The second form of employer campaign conduct, *passiveness* or *acquiescence*, also does not implicate section 302, albeit for a less obvious reason. *Passive employer conduct*, while certainly a "thing of value" to unions, may not, arguably, be "lent" or "delivered" as required by section 302. Pure employer neutrality and card check arrangements are, therefore, more likely than not lawful under section 302. On the other hand, *active employer organizing assistance*, such as granting organizers access to the workforce during working hours and compelling employees to attend union proselytizing meetings during working hours, besides being a "thing of value," can be, and is, lent or

delivered to the union, as was alleged in *Freightliner*. The line between lawful and unlawful is not hard to see. *Passive employer conduct* does not appear to be unlawful, because the employer is essentially doing nothing. *Active employer assistance*, on the other hand, appears unlawful, because the employer is actively doing something for a union. The distinction is akin to the difference between misfeasance and nonfeasance, with misfeasance being to torts what active employer assistance is to section 302. There is indeed (or at least should be) a relevant difference in the section 302 analysis between assistance and acquiescence, or action and inaction.

Therefore, contrary to the UAW’s argument in *Freightliner*, section 302 would not render all neutrality agreements illegal. A neutrality agreement, like the original 1976 GM/UAW agreement, which only contained a gag order, is most likely lawful under section 302 because it merely obligates the employer to “passive” assistance. But neutrality agreements that provide unions with active organizing assistance, a significant asset in increasing organizational success, may be unlawful because such assistance is both delivered and a thing of value to unions. Clearly then, when the focus is placed on the individual provisions contained within neutrality agreements (rather than neutrality agreements as a concept) and an honest examination of the union movement’s institutional needs is conducted, it is rational to conclude that active organizing assistance can violate section 302.

**B. A “Pattern” of Section 302 Violations Can Be Shown**

If the threshold predicate act requirement is met, the litigant still must be able to allege a “pattern” of section 302 violations,

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133. The Union will argue, of course, that this active versus passive distinction is irreconcilable with the rule from *Excelsior*, 156 N.L.R.B. 1236 (1966), clinging to the obvious, but intellectually lazy, contention that the *Excelsior* list is “delivered” to the union. This argument misses the mark. The *Excelsior* list is an obligatory prerequisite to a free and fair election. Employers are indeed forced to divulge this list. *Id.* at 1239-40. Even more basic than that, the list is delivered to the Board, not the Union. *Id.* This simple procedural requirement necessarily prevents the *Excelsior* rule from running afoul of section 302.
134. UAW Motion to Dismiss, *supra* note 103, at 11.
135. Hartley, *supra* note 28, at 377-78. Many of the early neutrality agreements were likely lawful under section 302 because they focused almost exclusively on gagging the employer. *See* *id.* at 378.
otherwise, a RICO action cannot be maintained. The Supreme Court’s decision in H. J. Inc. v. Northwestern Bell Telephone Co. is the seminal case on the “pattern” requirement. According to the high Court, to meet the pattern requirement, there must be “continuity” between the alleged predicate acts. There are two forms of continuity, open and closed. To show the latter, there must be a “series of related predicates extending over a substantial period of time.” But “[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement.” With open continuity, the predicate act must pose “a specific threat of repetition extending indefinitely into the future” with no natural ending point.

In Freightliner, the union and the employer argued that open continuity was not implicated because the scheme had a natural ending point—recognition at the various Freightliner facilities. The union and the employer further argued that closed continuity could not be met either because the acts did not extend over a “substantial period of time.” The employer claimed that the scheme only lasted fifteen months. Similarly, the union asserted that the scheme lasted only fourteen months. The plaintiffs disputed this, claiming that the scheme lasted thirty-one months. The court failed to address either open or closed continuity, raising the question: what constitutes a “pattern” of section 302 violations premised on organizing assistance?

136. Mesasco, Inc. v. Wassermann, 886 F.2d 681, 683 (4th Cir. 1989) (finding that a pattern is a necessary “element of any RICO action”).
138. Id. at 239.
139. Id. at 241.
140. Id. at 242.
141. Id.
142. Id.
143. UAW Motion to Dismiss, supra note 103, at 2-3, 25 (citing GE Inv. Private Placement Partners II v. Parker, 247 F.3d 543, 549 (4th Cir. 2001)); Freightliner Motion to Dismiss, supra note 103, at 18.
145. Freightliner Motion to Dismiss, supra note 103, at 19.
146. UAW Motion to Dismiss, supra note 103, at 24.
147. See Adcock Complaint, supra note 69, at 7, 21.
1. Showing Open Continuity

The defendants in *Freightliner* were likely accurate in their analysis of open-ended continuity. There appeared to be a natural ending period, that being when the employees at the three unorganized North Carolina facilities either accepted or rejected the UAW. Logically after that, the employer would not be obligated to provide the union with any organizing assistance. This would be true of most neutrality agreements because of the natural ending point—the date the election results are certified by the Board or the date the authorization cards are counted. However, there is one exception. Where the neutrality agreement contains an after-acquired stores/recognition clause, the employer's obligations to continue to provide active assistance continues. With these clauses, employers agree to extend the parties' future collective bargaining agreement to any "new unit if the union can establish majority support in that unit." The inclusion of such a clause would, therefore, (in addition to being potentially unlawful under *Majestic Weaving Co.*) make the scheme theoretically endless, allowing a plaintiff to show open-ended continuity. This is supported by existing caselaw. Courts have held that "[p]redicate acts over a short period may nonetheless meet the pattern requirement under an open-ended theory of continuity" when there is a threat of continuity. In *Teamsters Local 372 v. Detroit Newspapers*, the court explained that "[a]n analysis of the threat of continuity cannot be made solely from hindsight" because, "[a]ll racketeering activity must necessarily come to an end sometime." The D.C. Circuit reached a similar

149. *Cf. GE Inv.*, 247 F.3d at 549 ("Where the fraudulent conduct is part of the sale of a single enterprise, the fraud has a built-in ending point, and the case does not present the necessary threat of long-term, continued criminal activity.").

150. *See Doorey*, supra note 13, at 17 (explaining that an after acquired clause can extend a collective agreement to a newly established unit not originally included in the agreement).

151. *Id.*

152. *Majestic Weaving Co.*, 147 N.L.R.B. 859, 860-61 (1964) (holding a contract invalid and a violation of employees rights because the employer negotiated the contract terms with a non-majority union).

153. This assumes that the employer provides active organizing assistance to the union in its efforts to organize any facility acquired by the employer in the future. Otherwise, the predicate act requirement could not be met.


156. *Id.* at 766 (citing United States v. Busacca, 936 F.2d 232, 238 (6th Cir. 1991)).
conclusion in *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*.\(^{157}\) In that case, the union had committed four predicate acts during a four day strike.\(^{158}\) Regardless of the "relatively short duration of the strike," the court held that the acts themselves "could, if proved, establish a distinct threat of long term racketeering activity, either explicit or implicit."\(^{159}\) Likewise, it could be argued that just as with the strikes in these two cases, an after-acquired stores clause could create a threat of continuity, even though the organizing drives at the initial facility or facilities have ended. However, absent such a clause, open continuity may be difficult to show because of the natural ending point.

2. Showing Closed Continuity

Most litigants advancing this theory will likely choose to show closed continuity in order to meet the "pattern" requirement. Closed continuity is "centrally a temporal concept."\(^{160}\) Thus, there must be sufficient duration between the first and last predicate act alleged.\(^{161}\) Predicate acts extending over a few weeks or months will generally not be of sufficient duration to meet the pattern requirement.\(^{162}\) With this in mind, courts have generally been unwilling to find closed continuity when acts occurred over a limited period, often requiring something greater than one year.\(^{163}\) The Eleventh Circuit has held that six months is not enough.\(^{164}\) The Seventh Circuit has similarly held that seven months is not enough.\(^{165}\) Acts extended over longer periods have, however, been found sufficient. The Third Circuit has held that nineteen months could be sufficient.\(^{166}\) The Fourth Circuit

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\(^{157}\) 883 F.2d 132 (D.C. Cir. 1989)

\(^{158}\) Id. at 134, 138.

\(^{159}\) Id. at 145.


\(^{161}\) Id. at 242.

\(^{162}\) Id.


\(^{164}\) Aldridge v. Lily-Tulip, Inc., 953 F.2d 587, 593 (11th Cir. 1992).


recognizes that a two year pattern is sufficient. A similar threshold seems to exist in the Sixth Circuit. There is, however, no litmus test or bright-line rule for the requisite duration. Many circuits examine the duration issue on a case by case basis, with an eye toward other factors that may lengthen or shorten the requisite duration, such as the number of predicate acts, the number of participants, and the number of victims. Consequently, litigants bringing these claims will be at the mercy of the case law in their particular circuit, and in those circuits that have a longer durational requirement, the likely success of these litigants will be greatly reduced merely by the inherent (and relatively) short-term nature of an organizing campaign. In Freightliner, for example, there were three separate and distinct organizing efforts at three different facilities involving hundreds of employees that arguably lasted less than two-years. Nonetheless, courts enjoy wide discretion to recognize a closed pattern. The statute requires only two predicate acts, and the Yellow Bus Lines court found a pattern despite only four days of alleged racketeering activity.

V. IMPLICATIONS

As explained above, modern neutrality agreements that provide unions with active organizing assistance likely violate section 302 of the LMRA. Depending on the language in these agreements and the length of the scheme, they likely also violate RICO. For unions, if the plaintiffs are successful in Freightliner this means that they will
obviously lose a powerful non-traditional recognition tool that has, by many accounts, halted the decline in union membership. For employers, like Heartland, seeking an amicable relationship or a labor partner, they will have to deal with unions at arms length until, and if, the union is ultimately certified by the Board following an election or card check. Beyond the direct impact on employers and unions, the truly interesting aspect of these revelations is the global implications for American labor law. Is it really a bad thing to impose liability for entering into certain types of neutrality agreements? Should courts be meddling with pre-certification bargaining between unions and employers? What implications does civil liability for neutrality agreements have on post-certification collective bargaining?

Although unions will likely disagree, imposing liability for entering into certain types of neutrality agreements is not a bad thing. It can, indeed, be a good thing. The Freightliner story is proof of this. In that case, if the allegations are accurate, the union made significant bargaining concessions as a quid pro quo for a set of admittedly organizational-friendly neutrality provisions. There were twelve concessions total, all of which were made before the union became the exclusive representative of the Freightliner employees. Even more problematic, it is alleged that these concessions were not revealed to Freightliner employees. A few of the more notable concessions allegedly included: (a) no guaranteed employment or transfer rights between Business Units or Plants; (b) no sub-contracting prohibitions; (c) no additional restrictions imposed against overtime scheduling; (d) future benefits cost increases will be shared between the company and employees; and (e) there will be no wage adjustments provided at any newly organized facility prior to mid-2003. There was nothing regulating the union’s concessionary behavior. Indeed, the duty of fair representation does not attach until the union is certified, nor were any employees allegedly aware of the concessions until after-the-fact. Unions in

174. Adcock Complaint, supra note 69, at 6, 9-10.
175. Adcock Complaint, supra note 69, at 2.
176. Preconditions Agreement, supra note 99, ¶ 2, 6, 8, 10, 12.
177. See generally Adcock Complaint, supra note 69, at 1-2 (alleging that the agreements between Freightliner and the UAW were secret and that the bargaining concessions were deliberately concealed from the employees).
pre-certification bargaining are, therefore, free to pursue their own institutional self-interest. As one author put it, the employees are "the group that loses the most when neutrality agreements are entered into" because the employees "are the least powerful of the relevant groups and have no say in the decision to enter such agreements." 179

The obvious response to this line of reasoning is the fear that imposing liability on parties entering into neutrality agreements would criminalize collective bargaining agreements. 180 This is true, the argument goes, because "collective bargaining virtually always results in agreements that contain non-monetary provisions [that] the union wants." 181 This argument suffers the fatal flaw of mischaracterizing (or perhaps misunderstanding) the nature of the benefit received by the union. In the organizing assistance context, the employer is, arguably, under-valuing the nature of the benefit associated with such assistance. Whereas here, the argument, offered above, over-values the nature of the benefit received by the union in the collective bargaining setting.

With collective bargaining, the "thing of value" should run directly to the employees, not the union. However, the union may certainly benefit indirectly when a favorable term of employment is negotiated. Arguably, once the union is certified as the employees' exclusive representative, it has received its tangible and financial "thing of value." The real question is if contracted organizational assistance resulting in dues revenue—a distinctly tangible financial commodity—is a "thing of value."

At the negotiating stage, on the other hand, all the benefits flowing to the union have, as the employer argued in Freightliner, ephemeral and subjective value, benefits admittedly not covered by section 302. 182 Consequently, the American labor community need not fear. Section 302 premised RICO claims would not spell the end to collective bargaining as we know it. In fact, just the opposite may be true. The sanctity of the collective bargaining process, which has always been (or at least should always be) employee-centered, will be preserved. If the Fourth Circuit accepts the plaintiffs’ theory, then

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180. UAW Motion to Dismiss, supra note 103, at 11.
181. Id. at 13-14 (footnote omitted).
182. UAW Motion to Dismiss, supra note 103, at 9-11; Freightliner Motion to Dismiss, supra note 95, at 8-11.
employers will have less incentive to secretly engage in pre-certification concessionary bargaining, which is neither regulated by the NLRA or the LMRA (at this time) nor the employees the union seeks to represent.

The authors lend these thoughts not as a means of convincing their audience, but rather to facilitate discussion and debate on the very real possibility that the Fourth Circuit will find active organizing assistance unlawful under section 302 and criminal under RICO.