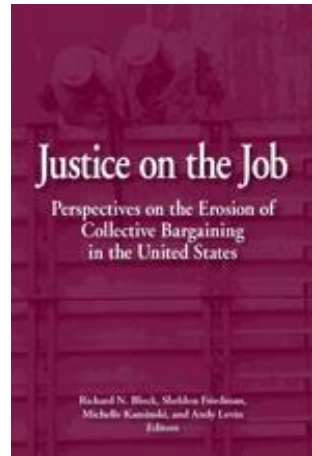

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Dancing with the Smoke Monster: Employer Motivations for Negotiating Neutrality and Card Check Agreements

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Dancing with the Smoke Monster

Employer Motivations for Negotiating Neutrality and Card Check Agreements

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Heads would spin on some of the old local managers who had spent years opposing the union. But there have been many conversions to the new philosophy. The horror of unionization wanes with the reality of it. It turns out to be a smoke monster, not a real monster.

—Manager describing internal reaction to the negotiation of a neutrality and card check agreement.

For decades the labor movement in the United States, along with many industrial relations and legal scholars, has argued that the union recognition procedures provided under national labor law do not sufficiently protect workers' rights to join, form, or assist unions. In particular, the requirement of an election, the procedures leading up to an election, and the timing of those procedures allow employers to undertake extensive antiunion campaigns that at best undermine worker free choice and at worst violate the law. This was not always so. Under section 9(c) of the original National Labor Relations Act (NLRA), the National Labor Relation Board (NLRB) was permitted to certify unions using "secret ballot elections or utiliz[ing] any other suitable method." Until a board policy change in 1939, the method most often used was the simple process of evaluating cards signed by workers indicating they wanted the union to represent them. If a majority of the workforce signed such cards, the board certified the union. The Taft-Hartley Act

took away the board's discretion as to the method used to verify majority status. However, employers may still recognize a union voluntarily based on cards.

Referencing this earlier experience in the United States, the use of similar procedures in several Canadian provinces (Thomason 1994; Thomason and Pozzebon 1998), and the chilling effect of legal and illegal management resistance in this country, some proposals for comprehensive labor law reform call for a return to card check recognition procedures (for the most recent discussion see Godard [2003]). In the absence of this or any other reform, unions have increasingly negotiated agreements directly with employers to use card check recognition procedures as well as to remain neutral on the subject of union organizing. In a recent study (Eaton and Kriesky 2001), we conclude that these types of agreements, particular those calling for card checks, substantially reduce management campaigning—including illegal tactics such as firing union supporters—and produce much greater rates of union success. For example, across organizing campaigns under all types of organizing agreements, we estimate a union win rate of 67.7 percent compared to an NLRB election win rate of 45.6 percent over roughly the same time period.¹ Thus, these agreements have the potential to enhance the exercise of workers' rights to collective bargaining and freedom of association.

This chapter serves as a follow-up to Eaton and Kriesky (2001). While the sources for that study were primarily interviews with union representatives and the review of contract language, this study focuses on management's experience with these agreements. In interviews with representatives of 34 employing organizations, we explore the reasons management has agreed to negotiate neutrality and card check agreements (N/CC), their impact on management campaigning, and reactions to N/CC from the employer's own management team and the broader management community. We use these interviews to shed light on two overarching questions. Do these agreements actually encourage greater management respect for workers' rights to freely decide whether or not they want union representation, or are employers who agree to N/CC softer in their opposition to unions to start with? To what extent is the source of managerial antiunionism economic and rational, as some of the literature suggested (Freeman and Kleiner 1990; Kleiner 2001), and

to what extent is it rooted in management values, ideology, and culture (Jacoby 1991) that deny workers' rights?

The chapter is organized as follows. We first provide a description of the sample of employers interviewed. Next we present a comprehensive discussion of the reasons respondents gave for negotiating these agreements. This discussion follows the logic of earlier studies of employer opposition to union organizing, in assuming employers make cost/benefit analyses in deciding whether or not to accept N/CC language. We follow with a section on the impact of these agreements on managerial campaigning. Next we look at reactions to the negotiation of these agreements from both the internal and external management communities. Finally, we conclude with an analysis of the broader meaning of these results for the nature of managerial antiunionism in the United States.

SAMPLE AND METHODS

The sample was drawn from the same companies that were in our original survey (Eaton and Kriesky 2001).² There was substantial attrition from our original list of about 130 agreements from various sources, including the merger or failure of companies and bad contact information.³ Elimination of these categories brought us down to 69 organizations. Of these, 10 refused outright, 20 refused passively by failing to reply to our repeated attempts to contact them, and 5 told us they either never had or no longer had an organizing agreement, leaving us with 34 interviews, some only partially done. This constitutes a response rate of about 50 percent.

Based on our previous research, the industries represented in this employer-based study correspond fairly closely to the industries in which these agreements have been concentrated (see Table 9.1). The bulk of the interviews (19) were conducted with representatives from steel, hotel and gaming, telecommunications, and auto assembly and supply. Most respondents were high-level human resource or labor relations executives, often at the vice president level. In some cases, we talked instead to lower-level, facility-based labor relations managers. Most often, the level of the manager interviewed was the individual

Table 9.1 Number of Companies, by Industry, that Participated in the Study

	Number of companies
Steel/steel fab.	5
Hotel	4
Gaming	3
Telecommunications services	3
Auto assembly	2
Auto parts	2
Health care	2
Nonprofit social services	2
Telecomm. equipment	1
Food service	1
Construction/agricultural equipment	1
Nursing home	1
Aluminum	1
Mining	1
Apparel	1
Forest products	1
Electrical	1
Agriculture	1
Retail (groceries)	1
Total	34

whose scope of responsibility included oversight or implementation of the organizing agreements within the organization. Interviews were conducted over the phone and lasted from 30 to 90 minutes.

Table 9.2 presents data regarding unionization in the sample organizations. Research in the 1980s provided evidence that labor relations strategy, specifically union avoidance, was explained in part by union density: high density employers were less likely to pursue active avoidance strategies (Cooke and Meyer 1990; Kochan, Katz, and McKersie 1986, p. 60). Thus, we would expect companies that have agreed to neutrality and card check to also have high union density. Indeed, our sample tilts toward heavily unionized companies dominated by a single union perceived to have a great deal of bargaining power. Still, almost a quarter of the companies have low union density (0–25 percent), indicating that unions are pursuing neutrality and card check as both a

Table 9.2 Unionization Levels in the Sample Organizations

	Number	Percent of total
Percentage unionized ^a		
0–25	7.0	21.9
26–50	7.0	21.9
51–75	6.0	18.8
76–100	12.0	37.5
Total	32.0	
Average	57.0	
Percent unionized by largest union		
0–25	2.0	6.9
26–50	5.0	17.2
51–75	4.0	13.8
76–100	18.0	62.1
Total	29.0	
Average	73.7	
Trend in unionization at time agreement signed		
Growing	3.0	10.7
Stable	19.0	67.9
Declining	6.0	21.4
Total	28.0	
Dominant union has a great deal of bargaining power		
Strongly agree or agree	22.0	68.8
Neutral	7.0	21.9
Strongly disagree or disagree	3.0	9.4

^aThis is the current percentage. But in most cases, the agreements have not led to major increases in density.

growth strategy (expanding into new employers and markets) and a defensive strategy (maintaining representation among traditionally organized employers and businesses).

Some observers have argued that it is important to look beyond general density to concentration of union power, most often indicated by centralization of representation by a single union.⁴ Table 9.2 also includes data on the percentage of unionized workers represented by the single largest union. It is interesting to note that in the 14 cases where overall density is 50 percent or below, there is still a single dominant

union in all but two, suggesting that concentration of union representation may be a more important factor in winning organizing agreements than overall density. At the same time, the very low-density cases are also those with the weakest and most ineffective language.

Given union motivations for negotiating these agreements, we found it surprising (and not quite credible) that the majority of our respondents claimed that unionization rates had been stable in their organizations at the time they first agreed to N/CC. Less surprising is the final result in Table 9.2: that employers consider the unions, to whom they have had to concede organizing agreements, to have a great deal of bargaining power. Interestingly, the most frequently mentioned sources of that bargaining power were the density of the union *within the firm or organization* and the union's political connections.

NEGOTIATIONS

It is difficult to quantify the motivations for bargaining organizing agreements. Relying on existing industrial relations literature, we use a cost/benefit framework to organize the issues employers reported considering in deciding whether to agree to some form of organizing language.⁵ We extend the cost side of the discussion by using a conventional framework for analyzing bargaining power, which weighs the projected cost of not agreeing to an opponent's proposal against the projected cost of agreeing to that proposal. Although in each case, the parties weigh their particular cost and benefit estimates in deciding whether to enter into a neutrality agreement, below we summarize the sample as a whole on the benefits and two types of costs. The specific costs and benefits reported are listed in Table 9.3.

Benefits of Agreeing

The majority of respondents emphasized that in negotiating organizing agreements, they were attempting to avoid costs. However, a significant minority emphasized instead the benefits of agreeing. Most of the benefits anticipated focus on the value that unions can add to the

Table 9.3 Employer Objectives in Negotiating Organizing Agreements

Benefits of agreeing

Union willing to add value to the business

Labor–management partnership

Assistance in increased funding for nonprofits

Assistance in obtaining qualified, skilled labor

Assistance in attracting business/customers

Maintenance of good relations with workforce

Ability to shape organizing campaigns

Costs of not agreeing

Work stoppage (18)

Loss of specific, needed concessions

Organizational picketing

Loss of a client or project

Costs of agreeing

None (6)

Low (7)

Some (20)

Increased wages and benefits (13)

Decreased attractiveness as takeover/merger target

Loss of flexibility

Loss of employee rights

Loss of cooperative, nontraditional work culture

business or to a particular business strategy. There were several different specific examples of unions adding value.

In two cases, respondents emphasized union–management partnership as their dominant strategic goal in negotiating organizing agreements. In both, these employers had decided to pursue business strategies that were tied to embracing a strong role for unions and employees in management decision making. To establish such significant partnering required recognizing the union’s legitimate interest in representing workers’ rights in the workplace and in their own institutional survival and growth. Other employers engaged in partnerships, particularly those involving the United Steelworkers of America, also talked about partnership, formal or informal, and union willingness to negotiate more flexible agreements. This includes the recognition in new bargaining

agreements that new business lines might not be able to support the same wage levels or work rules as in the traditional businesses. Specific examples of this union response are detailed in the section on costs of agreeing.

One company, an auto parts supplier, observed that the UAW had become a force in sourcing decisions for the Big Three and was advocating for increasing business with unionized suppliers. Thus, welcoming unionization could secure or expand customers. A group of Massachusetts residential care facilities were motivated to reach organizing agreements by the potential for the union involved, SEIU, to extract increased funding from the legislature: “Anybody who could help bring more money, better working conditions, more respect, we were willing to accommodate their needs.”⁶ These employers also hoped to be able to establish a constructive, nontraditional relationship with the union once organized. In yet another set of cases, the value added by the union was in supplying qualified, skilled labor. Representatives of casinos in one of the large, unionized markets reported (as did the union representatives in the earlier study) that when the casinos originally opened, they were desperate for skilled labor. The unions (Hotel Employees and Restaurant Employees International Union and the building trades) could supply that labor. Further, the unions continue to add value to the industry in this way today, which is one reason the language endures.

In some interviews, managers reported that the give and take of bargaining over organizing language provided an opportunity to reach a specific, high priority management bargaining goal in negotiations with currently organized workplaces. The specific issues mentioned in these cases included restrictions on subcontracting, the length of the contract, wage reductions, and other concessions to cope with bankruptcy.

Beyond adding value to the business, employers realized additional benefits through the bargaining over the details of the organizing agreement itself. This bargaining offers management the opportunity to shape how organizing is conducted. This was especially important to employers who believed organizing was going to take place whether or not there was language addressing it. As one employer put it:

Other companies may be dealing with unions that aren't factual and therefore feel the need to be able to respond factually. But this kind of problem can be handled in the language. For instance, if you think home visits are coercive, use the neutrality agreement to

ban them. Employers need to realize they can shape the campaign through the give and take in negotiating these agreements.

Costs of Not Agreeing

As described earlier, our analysis of costs incorporates two elements relevant to the bargaining environment in which neutrality and card check is established. These are the costs of not agreeing to the language and the cost of agreeing. They are evaluated in turn below. Despite the fact that most aspects of neutrality and card check have been typically understood to be permissive subjects of bargaining and the strike has been widely viewed as waning in power, the principal projected cost of not agreeing for more than half (18) of our respondents was an anticipated work stoppage. Though in most cases, the threat sufficed. One large and well-known telecommunications employer took and lost a strike widely reported to have hinged in substantial part on this issue.⁷

Respondents cited other projected costs of not agreeing aside from work stoppages.⁸ In one case, a partially organized chain of stores agreed to neutrality language to avoid picketing that would potentially damage their business. In other cases, the union used action(s) of a third party to impose (or threaten to impose) costs on the employer. These third parties included a primary employer's clients, municipalities providing financial support to a business, union pension funds (a potential source of investment), or religious and other community groups. These third parties imposed costs by either withholding investment dollars or withholding business as customers.

Campaigns involving multiple pressure points to move employers to agree to neutrality and card check are not always successful. Indeed, one company reported that it always carefully weighs the business case for opening an operation in a particular market against union or investor pressure when responding to a demand for N/CC. Another respondent successfully resisted union pressures involving "politicians, negative PR, and sit-ins at referral agencies."⁹ The evidence presented here makes clear that, contrary allegations notwithstanding, employers do have choices to make about organizing agreements, and that the decision to agree to organizing language is often, at root, a business decision, with employer concerns about workers' rights playing at best, a secondary role.¹⁰

Costs of Agreeing

Twenty-eight respondents supplied information about their perceived costs of agreeing to some type of organizing language. Of these, a significant majority (20) projected some additional costs, although about a third of these (7) thought the costs would be low.

The respondents reporting either no costs (6) or low costs (7) can be lumped together for analytical purposes. A significant portion of this group had low-cost expectations because they expected either no, or a very low level of, organizing. For some, most covered workers were already organized and the company was either not planning to expand or was actually downsizing. As one put it, "If we get to the point of opening new facilities, that will mean we have succeeded and that will be great." Others simply expected little successful organizing, in some cases because they had negotiated weak language. Others expected costs to be low because of their good relationship with the union and the union's flexibility. One manufacturer in this category is involved in an extensive union-management partnership, including a joint effort to redesign work and provide a more rapid response time to customers, therefore presumably increasing market share. Thus, any increases in wages and benefits would be offset by reduced production costs and increased sales. Several respondents in this category indicated that the union was willing to reach "an innovative, lower-cost agreement" in new facilities. One final employer in this group expected the union to organize successfully and labor costs to increase. However, they also expected that many, if not most or even all, of their competitors would also be organized so that there would be little competitive consequence.¹¹

The largest single group (13) stated that they did expect successful organizing and therefore increased labor costs. A few companies within this group indicated that, as stated earlier, because the union had shown a willingness to negotiate "nontraditional," flexible labor contracts, at least some of the wage and benefit increases were offset by looser work rules. Two respondents identified costs related to mergers or takeovers. A couple of respondents reported that the neutrality and card check agreement made the company a less attractive merger or takeover target.

It is important to note that many respondents weighed differently the costs of including “core” or “strategic” occupations within the N/CC agreement from those with newer, more competitive business lines. In these cases, the potential costs of agreeing were seen as outweighing the costs of not agreeing.¹² Respondents reported that they either would resist or had actually resisted coverage of these employees. These include, in particular, salaried workforces, especially in manufacturing companies, and gaming occupations (dealers, slot attendants, etc.) in gaming establishments. As one employer put it, “Neutrality and card check covers traditional union occupations, not [occupations labeled as management]. [We] are definitely not neutral about whether these should be union. This seems to be an irritant to the union, but they are not pushing hard to change it.”

For other employers, the issue is the competitiveness of particular lines of business. For instance, large, diversifying manufacturing companies need to protect new lines of business from what they perceive to be noncompetitive labor costs and work rules: “[Union] wages would kill [our noncore/nontraditional] businesses.” But, as discussed earlier, other companies have successfully sought the union’s recognition that some lines of business need sheltering and have thus been able to agree to more comprehensive coverage: “The union has been willing to reach nontraditional types of contracts . . . If you’re honest, you assume unionization is going to make for higher costs. But this doesn’t necessarily have to be true. [Nontraditional business unit] managers are happy with their contracts.”

Although most respondents defined costs in financial and economic terms, two suggested difficult-to-quantify costs. One hospitality employer suggested a cost was in “giving up employee rights [under federal labor law].” A nonprofit human service agency feared the loss of a cooperative, nontraditional work culture.

In sum, then, although some employers did see the potential for higher labor costs resulting from these agreements, that view was certainly not universal. Some saw these costs offset by some benefit. Others simply found that these costs of agreeing were less than the costs of not agreeing. Finally, with rare exceptions, management did not perceive these agreements as jeopardizing workers’ rights. In the cases in which respondents implied that these rights were an issue, it was re-

flected in concern for the crafting and enforcement of language, rather than whether or not language would exist.

Indeed, although our respondents emphasized the cost/benefit reasoning for their decision, several respondents also mentioned what might be called a consistency argument for neutrality. Many employers, particularly those working in partnership with a union, found it difficult to argue with this logic: “[The union] said, ‘How can you talk out of both sides of your mouth at once?’ The [nonunion property] is literally attached by a tunnel—joined at the hip with a union property and it just didn’t make sense.” In short, some managers agreed to neutrality or card check to be consistent in their approach to their relationship with the union.

IMPACT ON MANAGEMENT’S BEHAVIOR IN CAMPAIGNS

We looked at the impact of N/CC agreements on employers in two ways. We asked about 1) management campaign behavior before and after the agreement, and 2) management behavior in organizing campaigns covered by the agreement versus campaigns among work groups not covered by the agreement. Overall, employers found these questions odd and were surprised that anyone would think that the agreements don’t make a difference.¹³

Twenty-six respondents answered the question about whether there had been organizing before the agreement. Only 4 said there had not been. Of the 22 indicating there had been organizing, 17 (81 percent) said that they responded differently after the agreement than before. Some employers just indicated that they used to respond “traditionally” and now do not. Others were more specific. One employer said, “Prior to the organizing agreement, we had a design called ‘Fully Informed Employee Choice.’ We presented pros and cons of unionization. Managers were free to express opinions either way. Now—full neutrality.” Another responded, “Now we’re limited. Before we showed videotapes, had meetings, hired consultants. Now we do none of these.”

Several employers indicated that they did use a softer approach to organizing prior to the agreement, but that that approach had been further toned down by the organizing agreement. One employer respond-

ed, “We never ran a Southern-style campaign, with real mud-slinging, ‘[The] Union’s going to come into town in Cadillacs, steal your money and your women’ kind of campaign . . . After [the agreement] we are much more careful.” Three respondents indicated that their response to organizing had not changed.¹⁴

Twenty-nine respondents answered our question about coverage of the agreement, all but one indicating that there are union-eligible employees who are not covered. Of these, only 17 answered the question about whether or not the response to organizing is different for covered employees than noncovered. (Many could not answer this question because there had been no organizing among noncovered employees.) Here again, the majority (88 percent) of those answering indicated that they respond to organizing by covered employees differently than noncovered:

[For noncovered employees, we run t]raditional campaigns—limited access to associates, we communicate much more: the company is the point of information. In [neutrality/card check] campaigns, we give the union access, allow the union to be the visible point of information. The company remains in the shadows.

[For noncovered employees, we run] very typical [campaigns]—6 weeks of communications so that employees can make informed decisions. We hire consultants, run full tilt campaigns, the works.

However, some indicated that there is a kind of spill-over from the organizing agreement even to those not covered and that the campaigns they ran were not as intense as they would otherwise have been:

The [union] made a play for salaried workers in one plant. We were a little more aggressive, but still high road. There was a difference in what we could say . . . with this group, we could say we preferred to remain nonunion.

While we cannot conclude from these results that these companies were not “soft” campaigners to start with, we can say that the agreement has changed, specifically softened or even eliminated their campaign behavior. Some respondents clearly viewed themselves as soft campaigners, but it is not clear that unions perceive these same employers as “soft” in their tactics.

An additional indicator of the impact on management behavior is management’s desire to change the language. The respondents split al-

most evenly on this question. Twelve individuals thought their language either worked well or had been in place so long that it would cause more trouble to change than to retain.

Among the 13 managers who indicated that they wanted to change the language, a second notable division occurred. About half of this group suggested specific revisions, including more employer latitude to talk to employees and more controls on the union's behavior, especially home visits. The other (approximately) half of this group stated clearly that, although it was not currently possible, they would like to be rid of the neutrality or card check language.

This result is further supported by data recorded on a more hypothetical question. Near the end of the survey, we asked participants, "Recognizing that you might prefer to pursue both options . . . if your company was forced to choose, would it prefer to keep as much of the company nonunion as possible, or build a cooperative relationship with existing unions?" Fifty-five percent answering the question indicated that preserving nonunion status where possible was preferable. This level of resistance is remarkable.

REACTIONS IN THE MANAGEMENT COMMUNITY

Initial Internal Management Reaction

It was not surprising that a strong majority (75 percent) of the respondents answering these questions described strong opposition within the managerial hierarchy. Some respondents talked about general dissatisfaction within management ranks, citing no specific pockets of opposition:

But most managers think [neutrality and card check] is foolish. They are still thinking in the old model—that the union is an obstacle rather than in the new model where the unions can help them manage and meet their goals.

The majority were opposed but as long as the CEO was for it, no one was going to say anything.

In a handful of cases, virtually everyone appeared to oppose the language:

We were pariahs—we'd failed. Nobody thought it was worthwhile. There were no supporters within management.

But in many cases, particular management types stood out in their opposition. The largest single group mentioned was managers of newly developed and/or nonunion businesses within larger diversified organizations. In some cases, these managers were used to operating in largely or entirely nonunion companies that had been purchased or merged into more unionized companies:

There are deep cultural and philosophical differences. [The merged company] was largely nonunion and managers from that world don't understand.

Some junior department heads—say, 25 percent—couldn't accept it. They came from down the street [in nonunion businesses] and just didn't understand the give and take in the union environment and why this was the right thing to do. They were philosophically opposed.

Less commonly mentioned were particular functional groups within management. Some respondents specifically mentioned that their lawyers, either internal or external counsel, were opposed to language that the company was willing to accept, a phenomenon that raises questions about the role of lawyers in labor relations strategy:

The lawyers were outraged—said it was stupid.

Management Compliance

In our earlier study (Eaton and Kriesky 2001), union representatives reported that many of the problems relating to employer compliance with neutrality and card check agreements occurred in large, centralized bargaining relationships. In these relationships, unions often complained that lower-level managers, for a variety of reasons, did not adhere to the organizing agreement. Thus, we asked our management respondents about whether they “encountered obstacles in getting local managers to comply,” and if so, what they did about it.

The sample was evenly divided on this question, with 11 reporting problems and 12 reporting no problems or only minor ones.¹⁵ Some of

those reporting problems have found some lower-level managers to be a major headache:

I've had some knock-down, drag-out fights. 'What do you mean I can't do x!?!' . . . They also fight over control [of the campaign].

As with the initial reactions described above, compliance was most difficult for managers habituated to a nonunion environment:

It's been very, very tedious in one area that has been entirely non-union.

Regardless of the compliance problems encountered, the means of ensuring ultimate compliance were similar. Some managers focus on education to secure compliance:

[We have] a certain amount of complaints with noncompliance with the design. [We respond] with education—so the problems are more from misunderstanding than real resistance. Education is the best remedy.

Local managers want advice on how to do it. They don't want to screw up. They look to HR and legal to explain it, define the meaning. They're not happy, but they want to do it right.

At times, pointed messages about the organizational consequences have been necessary. Some companies have resorted to either the threat of or actual individual consequences in the form of discipline.¹⁶

The owners were very serious and managers were under threat of losing their jobs . . . [T]he company hired private investigators to investigate [union] charges and actually transferred or put managers on leave.

Some thought they could say publicly, 'Yes sir!' but continue opposition . . . People got in trouble. The message was clear.

Maybe 25 percent of lower-level managers couldn't ever accept [it], couldn't catch on and had to leave.

There would not be [obstacles from local managers], because we take this very, very seriously. No ifs, ands, or buts . . . For local managers, the stakes are very high if they don't comply.

Freeman and Kleiner (1990) present evidence that union opposition is rational at the level of the individual manager—managerial careers often suffer following a successful union organizing drive. As the above

comments suggest, the environment in some organizations had changed with neutrality/card check such that managerial careers will suffer from failure to abide by the organizing agreement. This appears to be a crucial aspect of the implementation of these agreements from the perspective of union activists who argue that workers are afraid to support unionization because of management reprisals for doing so.

Reactions in External Management Community

To determine how employers willing to engage in neutrality or card check were viewed by their business colleagues, we asked: “To the best of your knowledge, has the company been criticized within the management community for signing this agreement?” If necessary, we prompted respondents to think in terms of their particular industry or geographical region. Although a handful couldn’t answer the question, most did answer. Among those who answered, a majority (about 60 percent) said they had not been criticized. Most of these respondents came either from industries like steel or telecommunications, where some form of organizing agreement has become common practice, or where operations are located in metropolitan areas that are heavily unionized. As one put it, “This is standard practice in the industry.”

Still, in these industries, the employers who had agreed to the language most favorable to the union came under fire:

Yes, within [our] industry. I hear that [the union] throws [our agreement] in other company’s faces regularly. So, I do hear [criticism] in the [industry] labor relations community.

When there was criticism, it is typically from within the industry:

Yes, the [industry] community feels very threatened. They don’t necessarily agree [with our strategy]. Traditionalists are saying, ‘Oh, my God. What would happen to me, to [the industry] if we lose control?’

To some extent, within [the] industry, but we get criticized for a lot of stuff . . . In certain cities, if the facility becomes union, similar facilities locally would criticize the local management.

Indicative of the strong antiunion sentiments permeating employer circles across the country, some respondents experienced criticism in either industry-based or locally based social relationships:

I'd walk into a room and get the cold shoulder.

I've been called a Communist.

The local management will hear it from other managers at local business group meetings.

At the local level, within local business communities, we have definitely been criticized, called a cancer. We have 'abandoned' everyone else. This doesn't come from within the . . . industry. It is local.

Some respondents suggested the pressure is especially intense in the South:

Yes, particularly within some communities. For instance, with one acquisition in South Carolina, [we heard, 'You] are welcome but please don't bring the union along with you.'

This is the South and there have been a lot of threats of customers to pull out [business] if the union wins, which is a real concern.

ANALYSIS AND CONCLUSIONS

There is clear evidence from these interviews that most organizing agreements make a difference in employer campaign behavior. Employers themselves report that their campaign behavior changes in the face of these agreements, even in some cases in the face of weak agreements. Although it remains possible that these employers were not the most aggressive antiunion campaigners to start with, these agreements are still having an effect on their conduct. As such, these interviews provide further evidence that these agreements serve to enhance workers rights to free choice and to engage in collective bargaining.

The interviews also make clear, however, that employers remain extremely reluctant to engage in these agreements. This finding is clearly consistent with the emerging legislative efforts by the HR Policy Association (formerly the Labor Policy Association) and others to prohibit card check recognition (see Eaton and Kriesky 2003). Further, these agreements represent a privatization of rights and rights enforcement. The enhancement of rights through these agreements comes about

through union bargaining power. The use of power to enforce the right to unionization and collective bargaining is precisely what the Wagner Act sought to avoid. Thus, while N/CC agreements expand worker rights, they cannot ultimately substitute for comprehensive labor law reform.

Beyond these observations, the interviews also tell us something about employer antiunionism, perhaps the single most important factor undermining workers rights to collective action in the United States. We see considerable evidence for the Freeman and Kleiner (1990) view that the employer decision to oppose unionization (or in this case, *not* to oppose it) is rooted in economic rationality. In their terms, union campaigns to win organizing language have focused both on increasing the cost of opposition and, at least in several cases, decreasing the cost of unionization, the costs involved with organizing itself, or other costs. Further, employers clearly had their eyes on their competitors when deciding what to do about N/CC; employers in industries where the negotiation of organizing agreements has become commonplace were less concerned about the consequences and reported less of a negative reaction.

There is evidence for motivations beyond economic rationality, however. In particular, the strong opposition to the extension of N/CC to and unionization of salaried and other strategically located occupational groups appears to result from a desire to maintain managerial control. Of course, most respondents recognized that a significant source of union bargaining power is the union's density within the firm. Many further worried that agreeing to N/CC would increase the union's density. This increase in union power and control could ultimately translate into higher costs as well.

Finally, we close by noting that there are also indicators of the irrational or cultural/ideological component of the decision as well (Jacoby 1991), revealed through our interview process. For instance, there is evidence that some managers cling to their antiunionism past the point when it is rational for their career with a particular employer. Further, there is often a strong negative reaction in the external management community and among external counsel. While Freeman and Kleiner argue that it is economic rationality that sends employers to antiunion consultants and law firms, it appears to us that those consultants and law firms may themselves not always be acting in the employer's eco-

conomic interest—recommending opposition to unionization even when the employer has concluded that there are sound business reasons not to do so. This suggests that further research into the balance between rational economic choices and power relations and ideology is in order to fully understand the decision-making process about union opposition in general and neutrality and card check agreements in particular.

Notes

1. See Eaton and Kriesky (2001) for a full explanation of the comparability of these statistics.
2. That original sample was assembled from a variety of sources. We developed the initial list through a short survey sent to representatives of all U.S. unions with over 100,000 members; the survey asked respondents about the types of organizing agreements they had negotiated. We added to this group agreements identified by a review of legal and popular business publications. Finally, when we conducted more thorough interviews with union representatives about each agreement, we asked them to identify additional agreements that they were aware of, a process known as snowball sampling. For more information, see Eaton and Kriesky (2001).
3. We also did not attempt to contact employers for whom we had not been able to obtain contract language, who were very small, or who the union asked us not to contact. The sample size was further reduced by the merger of multiple agreements into a single entity. We were unable to find contact information for the handful of multiemployer associations in the original sample. We were able to do an interview with a representative from a multiemployer association that was not in the original database. That interview is not included in the results reported here.
4. Indeed, this argument is at the center of SEIU's current proposals for reorganizing and rationalizing the labor movement.
5. We emphasize that we recount here what managers told us about the bargaining process. While these reports are no doubt filtered through the lenses of the respondents, there are few, if any, major differences in the stories told by manager and union respondents about the same case. If anything, managers may have emphasized union bargaining power to a greater extent than the union representatives did.
6. For a published account of these negotiations, see Green (1997).
7. In another case, an employer was motivated by a union's prolonged and ultimately successful campaign to win neutrality and card check from a nonunion competitor: "We all saw [our competitor] go through a long, expensive battle to remain nonunion and then succumb."
8. Given that the dynamics of bargaining are complicated and multifaceted, some

of the strike threat cases referred to above also involved these other forms of pressure.

9. This case remains in the sample because the end result was extremely weak language about organizing—so weak that, until recently, the union chose not to attempt organizing at this employer. Unions who obtain very weak language do so for a variety of reasons, including saving face with members and observers and the possibility that the language will serve as a “foot in the door” and can later be improved upon.
10. For an example of the argument that management is so bullied that it abrogates its responsibility to protect workers’ rights, see Yager, Bartl, and LoBue (1998).
11. It is interesting to note that this mass organizing did not come to pass: “The owners had thought the whole industry would fall . . . Instead, there has been no other successful organizing.”
12. Sometimes explicit but often implicit in these discussions was the belief that the union was unwilling to push hard by imposing costs to cover nontraditional employee groups.
13. This reaction is consistent with anecdotal evidence that the same multinational employer will deal differently with unions in different countries, suggesting that at least part of the difference is conditioned by different regulatory regimes.
14. Two of these involved a neutrality-only agreement with a weak definition of neutrality and claim that the agreement has made no difference in how they respond to organizing. The other was a successor employer who indicated that their response thus far had been to deny coverage of the agreement but even if that failed they would still not change their negative approach.
15. This is the one substantial difference in the overlapping findings from the original union study and the employer study.
16. In one case, an organizing agreement that called for neutrality and non-NLRB elections provided for arbitration if the union alleged a pattern of noncompliance. If the union won the arbitration, the agreement called for card check as a blanket remedy. Our respondent told us that local managers were asked “if they really wanted to shoulder the responsibility for provoking a card check imposition on the whole corporation?” This was quite effective in modifying their behavior.

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Part 3

Legal Obstacles to Workers' Rights: Erected and Eliminated

Justice on the Job

**Perspectives on the Erosion
of Collective Bargaining
in the United States**

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