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Partly in reaction to their failure rate in union elections, unions have changed their organizational tactics in recent years and are now trying a new tactic — demands for bargaining on behalf of union members, even where the union admittedly does not represent a majority of the employer's employees. This unsettled area of law under the NLRA should make employers cautious when dealing with "minority-union" organizing.

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Labor Management

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Labor's New Organizing Tactic: Demands By "Minority Unions" For "Members Only" Contracts

By James Winkler

Over the past several decades unions have normally demanded to bargain on behalf of employees based on a claim that they represented a majority of the employees. Employers have been increasingly successful over this period in defeating unionization through victories in National Labor Relations Board elections. Partly in reaction to their failure rate, unions have changed their organizational tactics in recent years and are now trying a new tactic — demands for bargaining on behalf of union members, even where the union admittedly does not represent a majority of the employer's employees. Employers are even being faced with unfair labor practice charges when they refuse to engage in such "minority union" bargaining.

The new tactic has been applauded by Charles J. Morris, professor emeritus at Southern Methodist University Dedman School of Law, in recent publications and speeches. Morris contends that "members only" bargaining was commonplace in 1935 when the original Wagner Act was passed, and that such bargaining was wide spread in the late 1930's and 1940's. He argues that the National Labor Relations Act envisions and protects such bargaining, and that members only bargaining is "now ready for revival."

The intent of the unions advancing this tactic is to obtain contracts for members as a first step to organize an employer's entire workforce and eventually become the majority representative of the employees. In New York, "ROC-NY", a newly formed organization, has embraced minority unionization. Its co-founder has stated that the intent of the organization is to organize a small number of employees in a restaurant,

create a demand, protest in front of the restaurant, get press, and eventually get a minority union contract for the employee members that not only affects those members, but impacts all of the employees in the restaurant. The organization has even picketed for such minority union contracts.

In Pittsburgh, charges with the Board have been filed when an employer refused to bargain with a minority union for a members only contract. There is a very real possibility that this case will be reviewed by the Board's General Counsel in Washington D.C., and may even be litigated as a test case.

Bargaining with Minority Unions May be Unlawful

The law is clear that an employer and a union both violate the law if the employer grants recognition to a union as the exclusive representative of the employees in a bargaining unit if the union does not represent a majority of the employees. In 1961 the Supreme Court enforced a Board order against both an employer and a union when such recognition was granted, even where the employer and the union in good faith mistakenly believed that the union represented a majority of the employees. However, in doing so, the Court noted that "the violation which the Board found was the grant by the employer of exclusive representation status to a minority union, as distinguished from an employer's bargaining with a minority union for its members only."

There may be nothing unlawful about an employer meeting with a union official to discuss, and to even bargain over, work issues relating solely to an employee who has openly requested or acquiesced to such

representation, but there is no current case law that would suggest that an employer would have an obligation to bargain with the union on the employee's behalf. We will follow closely the Pittsburgh NLRB charge to see whether the Board's General Counsel dismisses the charge, or sets it for further hearing.

An employer also acts at its peril if it enters into a "members only" minority union contract that applies to, or even impacts, the working conditions of other employees who have not designated the union as their representative. Such bargaining and contract could very well violate Section 8(a)(2) of the Act which prohibits an employer from giving unlawful "support" to a union.

Furthermore, granting recognition to a union to bargain on behalf of employees who are union members could even violate the rights of the employee union members where such employee members have not specifically requested such recognition. Professor Morris may be right that minority union contracts were common place in the late 30s and 40s under the original Wagner Act, but the Act has undergone several changes. In 1947, amendments to the Act specifically added the right of employees "to refrain" from union activity, and the Board and the courts have consistently extolled the virtues of employee free choice and the right of employees to be free from unlawful restraints by both unions and employers in the selection of their bargaining representative. The Board has consistently noted that membership in a union does not by itself establish that the union member designates the union to represent him/her for purposes of bargaining with the employee member's employer. If an employer agrees to bargain with a minority union for a "members only" contract, without obtaining the approval of the employee members, a member employee could very well file charges against the employer if he/she did not want such representation. Furthermore, the employer would be acting at its peril if it asks the employee members if they want such representation. Such questioning, without proper safeguards, could constitute unlawful interrogation.

Discrimination Unlawful

It should be remembered that an employer cannot discriminate against employees based on their union membership. If a minority union demands to bargain for a "members

only" contract, or if union member employees request to have a minority union represent them in negotiations, the National Labor Relations Act may protect such conduct, and an employer acts at its peril if it disciplines or otherwise discriminates against the employee members because of such recognition requests. There is also no specific provision of the law that prohibits minority union picketing for recognition, although the law prohibits picketing for recognition if another union is certified, if an election has been held in the last year, or if the picketing continues for an unreasonable period, not to exceed thirty days, without filing for an election with the Board. If employees engage in a lawful strike, even if it is on behalf of a minority union, their conduct may be protected by the National Labor Relations Act.

Response to Demand by Minority Union

These new union tactics provide new challenges for employers. If faced with an organizational drive that includes a demand for minority union bargaining, the employer should be aware that:

- it acts at its peril if it discriminates against employees based on such organizational activity and that it would be prudent to follow traditional procedures for interfacing with employees during a union campaign;
- minority union picketing may be protected and should be aware that employees engaging in a strike in support of a minority union may have the same rights that are granted to employees striking on behalf of "majority status" unions;
- the current state of the law does not require bargaining with a minority union, but that such issue may soon be litigated before the National Labor Relations Board;
- granting recognition to a minority union to bargain on behalf of employees who are union members may violate the rights of members who have not specifically acquiesced to such bargaining, and that soliciting the members as to their intent to have such representation, without proper safeguards, may violate the law; and
- granting recognition to a minority union to bargain on behalf of employees who are union members may violate the law if it impacts the employees who are not members.

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