

Beyond Labor Law: Private Initiatives to Promote Employee Freedom of Association in the Obama Era^{†*}

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INTRODUCTION

This Article first discusses the impact of the National Labor Relations Act (NLRA) and its procedures as they relate to trade union organizing. It then describes and analyzes an alternative dispute resolution program—the first of its kind anywhere in the United States and perhaps the world—established by the British multinational corporation FirstGroup PLC (“FirstGroup” or “the company”) to respond to criticisms that the company was failing to protect employees’ freedom of association rights in the United States. The Article examines the strength and limitations of the process, describes standards adopted by a program to resolve disputes against the backdrop of the NLRA, and considers a few issues which may arise from the implementation of the program, such as whether deference to the program can and should be provided by the National Labor Relations Board (NLRB or “the Board”) (as is the case with grievance-arbitration machinery) and whether the process once implemented can become a contract that can be enforced by employees or unions. Finally, the Article focuses upon the initiatives of the Obama Administration, some of the key decisions and policies of the new Obama Board, and the relationship between these efforts and private initiatives such as the FirstGroup program.

I. THE IMPACT OF THE NLRA ON UNION ORGANIZING

Two developments have fueled the demand for new approaches to the issue of trade union organization and recognition and, more specifically, the rights of employees to band together for the purpose of obtaining collective representation in the workplace. The first is that the labor movement is in considerable trouble, on a downward membership slope since 1955 when, at the time of the merger between the American Federation of Labor (AFL) and the Congress of Industrial Organizations (CIO), union membership reached nearly 35% of those in the

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workforce.¹ The figures in 2010 were approximately 12%, with just under 7% in the private sector.² Today, a majority of union members are public employees;³ and, had it not been for state legislation modeled in some respects after the NLRA itself, the decline for the entire movement would translate into single-digit figures that are ascribed to the private sector alone. The decline accelerated considerably in the union-hostile decades of the 1980s and 2000s.

The NLRA has been a factor in this phenomenon, albeit a subordinate one.⁴ The statute, aimed at providing both representation machinery which allows employees to select representatives of their own choosing and a code of conduct in the form of prohibited unfair labor practices, contains loopholes which foster delay in the administrative and judicial process.⁵ These loopholes have been apparent since the 1970s.⁶ This is true for both the unfair labor practice and representation machinery.⁷

The unfair labor practice machinery lends itself to protracted litigation by a multilayered process. Subsequent to an investigation by an NLRB regional office as a representative of the independent General Counsel for the Board and the issuance of a complaint by such, the process commences with a hearing before a career civil servant administrative law judge.⁸ The process can continue as an

1. WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 18 (1993) [hereinafter GOULD, *AGENDA FOR REFORM*].

2. News Release, Bureau of Lab. Stats, U.S. Dep't of Lab., Union Members—2010 (Jan. 21, 2011).

3. *Id.* According to the Bureau of Labor Statistics, 36.2% of public sector workers are union members, compared with 6.9% in the private sector. *Id.*

4. Factors more important than the law are: (1) globalization, which has translated into foreign competition in the union strongholds in manufacturing as well as corporate threats and the realization of threats to move facilities outside the United States; (2) deregulation in the heavily unionized transportation industries which has produced smaller non-union competition; (3) a change in the nature of the employment relationship triggered by both undocumented workers who are unprotected under the NLRA and the emergence of new contingent employees who are relatively vulnerable by virtue of either their temporary or independent contractor status; (4) the shift from manufacturing to service, which has produced more employer resistance to union organizational activity by virtue of the inability of such firms to either absorb or pass on to the public labor costs attributable to benefits in collective bargaining agreements; and (5) technological innovation, which has reduced the number of blue-collar jobs more susceptible to union organization. *See* GOULD, *AGENDA FOR REFORM*, *supra* note 1, at 11–29 (1993) (discussing these and other reasons for the decline of union density).

5. *See* GOULD, *AGENDA FOR REFORM*, *supra* note 1, at 158–62; WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB* 287–92 (2000) [hereinafter GOULD, *LABORED RELATIONS*].

6. *Id.*

7. *Id.*

8. This entire procedure is described in more detail in WILLIAM B. GOULD IV, *A PRIMER ON AMERICAN LABOR LAW* 60–64 (4th ed. 2004) [hereinafter GOULD, *PRIMER*]. In recent years, the administrative law judges have been provided flexibility to fashion so-called bench decisions either at the hearing itself or within seventy-two hours of its completion. *Cf.* *NLRB v. Beverly Enter.-Mass., Inc.*, 174 F.3d 13 (1st Cir. 1999) (allowing administrative law judge to issue bench decisions without accepting briefs from the parties).

appeal to the Board in Washington, D.C., and, at least a year subsequent to the beginning of the process, can result in appeals to the circuit courts of appeals and petitions for certiorari to the U.S. Supreme Court (the overwhelming percentage of which are denied).

Representation cases in which, generally speaking, employees or unions are filing a petition with the Board in order to trigger a vote on the question of whether a union should represent the employees in an appropriate unit as the exclusive bargaining representative, can also produce the same kind of delay— notwithstanding the fact that the representation machinery is supposed to be more expeditious and streamlined.⁹ Most representation controversies that wind up in the hands of the Board and the courts relate to which employees are eligible to vote, what the size of the appropriate bargaining unit is, and whether conduct engaged in prior to the election has interfered with employee free choice. These delays have placed the spotlight on the limited scope and weakness of remedies available under the Act.¹⁰

The problem grew worse during the 1980s and 2000s because of the infidelity of the NLRB during those periods to the basic principles of freedom of association and the promotion of collective bargaining contained in the Act. During the past two to three decades, as the administrative adjudication pendulum has swung more violently toward an anti-union view, labor and management, as well as Democrats and Republicans, have become more polarized on a wide variety of issues including labor policy.¹¹

9. *Angelica Healthcare Servs. Grp., Inc.*, 315 N.L.R.B. 1320 (1995); *cf.* *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401 (1940).

10. *See* GOULD, *AGENDA FOR REFORM*, *supra* note 1; William B. Gould, *Taft-Hartley Revisited: The Contrariety of the Collective Bargaining Agreement and the Plight of the Unorganized*, 13 *LAB. L.J.* 348 (1962); Theodore J. St. Antoine, *A Touchstone for Labor Board Remedies*, 14 *WAYNE L. REV.* 1039 (1968); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 *HARV. L. REV.* 1769 (1983). In recent years, labor law reform debate has taken the form of discussion of the Employee Free Choice Act. William B. Gould IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 *LA. L. REV.* 1 (2009) [hereinafter Gould, *New Labor Law Reform*]; William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 *U.S.F. L. REV.* 291, 316–22 (2008) [hereinafter Gould, *The Employee Free Choice Act of 2009*]. For a good discussion of the weakness of the NLRA as opposed to other employment statutes, see generally Morris M. Kleiner & David Weil, *Evaluating the Effectiveness of National Labor Relations Act Remedies: Analysis and Comparison with Other Workplace Penalty Policies* (Nat'l Bureau Econ. Research, Working Paper No. 16626, 2010).

11. Of course, the swing to different points of view depending upon whether a Democrat or Republican occupies the White House is not a new phenomenon. Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 *SYRACUSE L. REV.* 93 (1954); W. Willard Wirtz, *New National Labor Relations Board; Herein of "Employer Persuasion,"* 49 *Nw. U. L. REV.* 594, 594–95 (1954); *cf.* Bernard D. Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 *U. CHI. L. REV.* 78 (1962). But the Bush era of the 2000s seems to have taken on a dimension more considerable than any of the periods described in the cited literature, including the Reagan era itself. *See* William B. Gould IV, *Independent*

As this has happened, the method of NLRB appointment itself has changed.¹² Said Colby College Professor G. Calvin Mackenzie:

What is most distressing ultimately is the transcendent loss of purpose in the appointment process. The American model did not always work perfectly, but it was informed by a grand notion. The business of the people would be managed by leaders drawn from the people. Cincinnatus, in-and-outers, non-career managers—with every election would come a new sweep of the country for high energy and new ideas and fresh visions. The president’s team would assume its place and impose the people’s wishes on the great agencies of government. Not infrequently, it actually worked that way.

But these days, the model fails on nearly all counts. Most appointees do not come from the countryside, brimming with new energy and ideas. Much more often they come from congressional staffs or think tanks or interest groups—not from across the country but from across the street: interchangeable public elites, engaged in an insider’s game.¹³

As Professor Mackenzie has noted, the appointments made to the Board in the past few decades have been disproportionately “inside the Beltway” appointments where connections on Capitol Hill and with lobbying organizations are valued more than previously obtained expertise in the field of labor-management relations and the law.¹⁴ Proceeding alongside this phenomenon has been the recently devised so-called “batching” method of appointment through which a package of nominees is confirmed together, which both labor and management and Democrats and Republicans can support.¹⁵

Until 1994, when I was confirmed as Chairman and two other Board Members and the General Counsel were simultaneously appointed and confirmed due to Senator Nancy Kassebaum’s opposition to me, there had been no batching of confirmations in fifty-one years after the Taft-Hartley amendments increased the number of Board members from three to five, therefore necessitating the

Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board, 82 IND. L.J. 461 (2007); William B. Gould IV, *The NLRB at Age 70: Some Reflections on the Clinton Board and the Bush II Aftermath*, 26 BERKELEY J. EMP. & LAB. L. 309 (2005).

12. The following discussion, up to and including the text accompanying note 17, is substantially similar to one I have already published in Gould, *New Labor Law Reform*, *supra* note 10, at 30–32.

13. G. CALVIN MACKENZIE, *STARTING OVER: THE PRESIDENTIAL APPOINTMENT PROCESS IN 1997* 39–40 (1998), *reprinted in* GOULD, *LABORED RELATIONS*, *supra* note 5, at 18.

14. These paragraphs have been taken substantially from Gould, *New Labor Law*, *supra* note 10, at 31–32.

15. *See* *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Here, the Court, in a 5-4 opinion authored by Justice Stevens, held that a two-member NLRB lacked authority to issue decisions. *Id.* at 2645. All of this arose out of the ongoing standoff between Republicans and Democrats on NLRB appointees. Note Justice Kennedy’s accurate comment in dissent: “During the past two years, events have turned what Congress had undoubtedly thought would be an extraordinary circumstance into an ordinary one . . .” *Id.* at 2650 (Kennedy, J., dissenting). For more on “batching” appointments, see generally GOULD, *LABORED RELATIONS*, *supra* note 5.

simultaneous appointment of a Democrat and Republican in 1947. For the past fifteen years, that is, during the Clinton and Bush II administrations, both Democratic and Republican Congresses have followed the Kassebaum approach. Regrettably, the Obama Administration—which campaigned on a platform of “change”—appears to adhere to the new status quo of “batching,” notwithstanding the fact that fewer Washington insiders have been appointed.¹⁶

This policy should be abandoned. For, again, Professor Mackenzie has described this process well:

The tendency to select appointees to an agency as teams and to divide up control over the choices has become the norm in Washington. The Senate, in fact, often delays confirmation until several nominations to the same agency accumulate, thus allowing it to require that the President include some nominees who are effectively designated by powerful Senators.

This kind of batching of nominations rarely happened before the present date. Even on the regulatory commissions, whose original statutes require that only a bare majority of appointees can be from any one party, a vacancy in an opposition party chair was usually filled by the President with an enrollee in the opposition party who supported the President. These appointments, common for most of this century, came to be known as “friendly Indians” and were routinely confirmed by the Senate even when it was controlled by the opposition party. But they allowed the incumbent President to control the appointment process and to shape the majorities on most regulatory commissions.

That is nearly impossible these days. The membership of the regulatory commissions has become little more than the sum of the set of disjointed political calculations. Concerns about fealty to leadership, effective teamwork, and intellectual or ideological coherence play almost no part in the selection of regulatory commissioners. The juggling of political interests dominates. That we as a nation often get inconsistent and incoherent regulatory policies should be no surprise to those that follow the shuffling and dealing that produces regulatory commissioners.

An additional complicating factor in “batching” is that the Republicans do not have the same incentive to make a deal regarding a group of nominees for a particular agency. This is especially so of an agency like the National Labor Relations Board which operates under statutory principles in which a large number of Republicans do not believe. Accordingly . . . all of the incentives are weighted toward crippling the agency.¹⁷

Thus, the appointments process, particularly during the past decade and a half, has produced, in most instances, the lowest common denominator. In 1997, Senator Trent Lott, bargaining with President Clinton in the wake of three years of

16. *Acorn's Ally at the NLRB*, WALL ST. J., Oct. 15, 2009, at A16 (“The NLRB has both GOP and Democratic members, and nominees are typically packaged together to avoid hearings.”). This view represents a new myth about the NLRB appointment process.

17. MACKENZIE, *supra* note 13, at 30–31.

continuous vacancies and recess appointments, was able to strike a bargain much to his liking.¹⁸ Lott possessed the necessary leverage since, from his party's perspective, there was no incentive to have the agency move forward.¹⁹ The opposite was true for President Clinton. In a sense, this has played itself out again in 2009 and 2010 as President Obama has faced relentless opposition to his nominees as well.²⁰

All of this has made more pronounced a kind of "black hole" for administrative delay involving an infinite number of appeals beginning with the regions and the administrative law judges to Washington. Ironically, the speed by which the Board produces decisions—always a problem for the agency in the Reagan-Bush I 1980s as well as the mid-1990s in the early days of the Clinton presidency—has continued to decline²¹ notwithstanding the fact that the caseload itself has diminished considerably over the past decade.²² Deep ideological polarization exacerbated by congressional political pressure and consequent scrutiny of the Board's decisions might have been diminished by rulemaking—but generally, thus far, there has been unwillingness to take this step.²³ In my judgment, the

18. See GOULD, LABORED RELATIONS, *supra* note 5, at 249–50.

19. See *id.* at 40.

20. Press Release, NLRB, Brian Hayes, Mark Pearce Confirmed by Senate as Board Members (June 22, 2010), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580379241>; Press Release, White House, President Obama Announces Recess Appointments to Key Administration Positions (Mar. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions>; see also Hans Nichols & Holly Rosenkrantz, *Obama Bypasses Senate, Makes Appointments to NLRB, Treasury*, BLOOMBERG.COM (Mar. 28, 2010), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aKr_AXeeC82k; Sheryl Gay Stolberg, *Obama Bypasses Senate Process, Filling 15 Posts*, N.Y. TIMES, Mar. 28, 2010, at A1.

21. Compare SIXTY SECOND ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 1997 164 (1997) (median of seventy-nine days from assignment of an unfair labor practices case to the Board to issuance of a decision), with SEVENTY-SECOND ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 2007 184 (2007) (median of 517 days). While this comparison is admittedly a dramatic one, it highlights a real decline in the Board's average speed in producing decisions over the past two decades.

22. See *Graphs & Data: Board Decisions Issued*, NLRB, <https://www.nlr.gov/chartsdata/decisions>.

23. On June 2, 1994, the Board issued an Advance Notice of Proposed Rulemaking on the issue of the appropriateness of requested single location bargaining units in representation cases arising in various industries. See *Appropriateness of Requested Single Location Bargaining Units in Representation Cases*, 59 Fed. Reg. 28,501 (June 2, 1994) (advance notice). Thereafter, on September 28, 1995, the Board issued a Notice of Proposed Rulemaking setting forth a proposed rule applicable to almost all Board cases in which a unit of unrepresented employees at a single location was sought. GOULD, LABORED RELATIONS, *supra* note 5, at 262. The proposed rule set forth the factors the Board proposed to use in determining the appropriateness of such units. *Id.* at 71–72. Congress, however, attached a rider to the agency's fiscal year (FY) 1996 appropriations bill, prohibiting the expenditure of funds used in any way to promulgate a final rule. *Id.* at 131. That rider also was attached to the agency's final appropriations bills for FY 1997 and FY 1998. *Id.* at 168–73. On February

combination of statutory limitations, infidelity to the Act's basic premises by NLRB appointees in the 1980s and the early 2000s, and reticence to decide any cases by the "insiders" on the ground that it might offend someone and thereby impair reappointment prospects for such incumbents, have all been important factors in the Board's tardiness and ineffectiveness.

Nonetheless, President Obama has bought into the "batching" process which led to phenomena so roundly condemned by Professor Mackenzie. He initially nominated a Republican Party political stalwart to one of the three vacancies in 2009–2010 and only backed away when the Republican leadership refused to abide by the deal and filibustered the Democratic appointees who were eventually given recess appointments without their Republican counterpart!²⁴ Obama was right to do this and, on balance, should have stayed away from the batching process for the reasons outlined by Professor Mackenzie. But this was only a temporary phenomenon in which an agreed-upon batching process was inadvertently abandoned. Ultimately President Obama acceded to party stalwarts when Republicans allowed one (but not two) of his nominees to be confirmed.²⁵ Like his unwillingness to press forward with labor law reform, this posture may trigger later difficulties when future nominations are made.²⁶

President Obama's acquiescence has tended to contribute to agency paralysis. Additionally, when coupled with the above-mentioned developments, it has tended to create considerably more interest in private machinery outside the NLRB, the NLRA's procedures, and the development of alternative strategies for union organizing. One such strategy has been the use of corporate campaigns by unions to induce changes in employer behavior through public pressure.²⁷ In connection with

23, 1998, the Board (over my dissent) withdrew the proposed rule. *See* Rules Regarding Standardized Remedial Provisions in Board Unfair Labor Practice Decisions and the Appropriateness of Single Location Bargaining Units in Representation Cases, 63 Fed. Reg. 8890–91 (Feb. 23, 1998). Regrettably and predictably, this vote led directly to attempts by some members of the House Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies to interfere in case adjudication. *See* GOULD, LABORED RELATIONS, *supra* note 5, at 178–82. This attempt was resisted in my letter of March 19, 1998 to the Subcommittee in response. *Cf.* Am. Hospital Hosp. Ass'n v. NLRB, 499 U.S. 606, 620 (1991); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008).

24. *See* Meredith Shiner, *Senate Stops Craig Becker Nomination*, POLITICO.COM (Feb. 9, 2010, 5:00 PM), <http://www.politico.com/news/stories/0210/32758.html>.

25. *See* Steven Greenhouse, *Deadlock Is Ending on Labor Board*, N.Y. TIMES, Mar. 31, 2010, at B1.

26. For a comparison of the remarkable similarities between labor reform initiatives in the Clinton and Obama Administrations, see William R. Corbett, *"The More Things Change . . .": Reflection on the Stasis of Labor Law in the United States*, 56 VILL. L. REV. 227 (2011).

27. These corporate campaigns seem to have been more successful where the union undertaking is an international one given the employer's principal headquarters in Europe, where there is more receptiveness to freedom of association and collective bargaining. *See* Louis Uchitelle, *Globalization, Union-Style*, AM. PROSPECT, Dec. 2010, at A6. Another pressure point opportunity arises where the employer is a government contractor which might be subtly influenced by government itself. My Board took jurisdiction over government contractors, despite the argument that they were infused with public employer

these campaigns, unions frequently have sought and negotiated recognition procedures providing for a card check procedure, which is based upon majority employee support manifested through the execution of authorization cards, or a privately conducted election. Both of these procedures frequently involve private arbitrators who are appointed to resolve controversies. Other negotiated terms may include expanded union access to private property beyond that which is provided by federal labor law, limitations on employer speech against the union, limitations on union speech against the employer, prohibitions against captive audience meetings and interrogation of employees, and proposed procedural and substantive terms of a collective bargaining agreement to be negotiated if union recognition is realized.²⁸ However, in an extremely trenchant and persuasive article, Professor Laura Cooper highlighted the limitations of such initiatives.²⁹ In essence, the arbitrator may be called upon to interpret policies which give rise to disputes under the NLRA itself or are alien to contractual disputes to which the arbitrator may be accustomed to addressing under the collective bargaining agreement.³⁰ However,

characteristics and thus beyond the jurisdiction of the Act and the Board. *See* Pikesville United Methodist Hosp., Inc. v. United Steelworkers, 109 F.3d 1146 (6th Cir. 1997) (enforcing 318 N.L.R.B. 1107 (1995)); Teledyne Econ. Dev. v. NLRB, 108 F.3d 56 (4th Cir. 1997) (enforcing 321 N.L.R.B. 58 (1996)); Mgmt. Training Corp., 317 N.L.R.B. 1355 (1995). Some of the Board's rulings addressing the demarcation line between government and private sectors are more torturous and less clear. *See* Enrichment Servs. Program, Inc., 325 N.L.R.B. 818, 821 (1998) (Gould, Chairman, concurring); Okla. Zoological Trust, 325 N.L.R.B. 171, 172 (1997) (Gould, Chairman, dissenting).

A third avenue for union pressure lies in the existence of highly visible employees with which the public might be induced to sympathize because of their poor conditions. Illustrative of the last mentioned group are the janitors who were the object of a "Justice for Janitors" campaign, see Christopher L. Erickson, Catherine Fisk, Ruth Milkman, Daniel J.B. Mitchell & Kent Wong, *Justice for Janitors in Los Angeles and Beyond: A New Form of Unionism in the Twenty-first Century?*, in *THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION* 22 (Phanindra V. Wunnava ed., 2004), agricultural workers, see Herman M. Levy, *The Agricultural Labor Relations Act of 1975: La Esperanza de California para el Futuro*, 15 SANTA CLARA LAW. 783 (1975), and household employees or domestic servants, see Domestic Workers Bill of Rights, Assemb. A01470, 2009–2010 Leg., Reg. Sess. (N.Y. 2010) (codified in part at N.Y. LAB. LAW §§ 160, 161, 170 (McKinney Supp. 2010)) (providing domestic workers in New York with the same protections most other workers have enjoyed for decades). Governor Paterson signed the New York legislation on August 31, 2010, and the law went into effect on November 29, 2010. *Id.* The last two groups (agricultural and household employees) are beyond the coverage of federal law through the NLRA. 29 U.S.C. § 152(3) (2006).

28. The Board has correctly held that a framework for future collective bargaining is neither inconsistent with *Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964), *enforcement denied*, 355 F.2d 854 (2d Cir. 1966), nor with *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961), upon which the Board's holding in *Majestic Weaving* rests. *See* Dana Corp., 356 N.L.R.B. 1 (2010). *See generally* Gould, *The Employee Free Choice Act of 2009*, *supra* note 10, at 322–24 (discussing so-called conditional recognition agreements and advocating their compatibility with the NLRA).

29. Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 IND. L.J. 1589 (2008).

30. William B. Gould IV, *A Half Century of the Steelworkers Trilogy: Fifty Years of Ironies Squared*, in *ARBITRATION 2010: THE STEELWORKERS TRILOGY AT 50: PROCEEDINGS OF*

Cooper pointed out that more fundamental problems relate to limits that are imposed upon the arbitrator on issues of fact.³¹

First, the arbitrator presides over an adversarial process whereby unions and employers seek out employees to support their position without those employees having counsel or separate representation. This is in relative contrast to the role of the NLRB in representation matters where the Board has independent investigatory powers and takes all evidence so as to obtain as full a factual picture as possible.

Second, “[a]lthough the NLRB has clear and broad subpoena authority as well as the ability . . . to obtain information by making a party aware of the agency’s power to decide issues adversely in the absence of requested information, the existence of arbitral authority to subpoena witnesses and documents and to issue discovery orders is far from clear.”³²

Third, in a negotiated, grievance-arbitration machinery context, the discovery process takes place at the lower steps of the grievance process, and the union is able to play a monitoring role to protect employees against potential retaliation. In representation disputes, the union is unable to play that role, and the third party arbitral process provides no promise of confidentiality as does the NLRB.

Despite these and other limitations outlined by Professor Cooper with respect to certain privately negotiated procedures, unions and employers continue to enter into these sorts of arrangements, again, often times stemming from a corporate campaign conducted by one or more unions against an employer. In the case of FirstGroup, however, the company adopted a different approach in connection with its corporate social responsibility policy and in the face of a corporate campaign by several unions. That approach was the implementation of a Freedom of Association Policy (“FoA Policy”) and Independent Monitor Program to monitor compliance with the policy.

II. GLOBALIZATION & CORPORATE SOCIAL RESPONSIBILITY

During the same period of union decline discussed above, economic globalization rapidly increased.³³ While U.S. corporations look for strategic opportunities abroad, foreign corporations likewise look to the United States as a rich source for investment and expansion opportunities, no doubt triggered, in part,

THE SIXTY-THIRD ANNUAL MEETING: NATIONAL ACADEMY OF ARBITRATORS 35 (Paul D. Staudohar & Mark I. Lurie eds., 2010); William B. Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969).

31. Professor Cooper has emphasized the fact that arbitrators acting under neutrality/card check agreements . . . are left with a decidedly inferior ability accurately to determine the facts underlying disputed issues. . . . [T]he adversarial arbitral process may put vulnerable workers at risk since it requires potential employee witnesses to be interviewed in private by interested parties and obligates them to give their testimony in open hearings before unions and employers alike.

Cooper, *supra* note 29, at 1613.

32. *Id.* at 1612. *Cf.* Laura J. Cooper, *Discovery in Labor Arbitration*, 72 MINN. L. REV. 1281 (1988) (setting forth the limitations of, and ambiguity surrounding, discovery in the arbitration process).

33. Uchitelle, *supra* note 27.

by lower American wages and conditions of employment as compared to Europe. Although foreign businesses have operated in North America since the days of colonization, the recent expansion of economic globalization has led to more and more foreign companies operating and investing in businesses in the United States.³⁴ FirstGroup is just one such example.³⁵

Foreign companies likely will continue to play a prominent role in the U.S. economy. Despite identifiable benefits that foreign investment brings to the United States, challenges exist for foreign multinational companies doing business in the United States. One such challenge, and one that FirstGroup has faced, is in the area of labor relations.

Although the principles of the NLRA are fundamentally sound, the protections for employees' rights to freedom of association in the United States are not as robust as international standards to which many foreign companies, particularly European-based ones, have committed themselves and to which their shareholders hold them. For example, many European companies voluntarily commit themselves to codes of corporate governance and international standards, including the United Nations Universal Declaration of Human Rights, the International Labour Organization Declaration on Fundamental Principles and Rights at Work, and the Guidelines for Multinational Enterprises established by the Organisation for Economic Co-operation and Development, among others. This focus on corporate citizenship has increased steadily since the 1970s, when investors began directing their money based on corporations' social, environmental, and ethical performances. Since that time, dozens of organizations have formed to evaluate companies' performance and adherence to socially responsible policies, and investment funds with billions of dollars of capital to invest have directed their investments based on companies' records in this area. Because of the voluntary nature of these codes of conduct, effective, independent, and transparent monitoring is a critical component of evaluating meaningful and measurable standards.³⁶

34. "More than five million Americans, or roughly 10 percent of the [U.S.] industrial workforce, [are] employed by companies based overseas." MICHELINE MAYNARD, *THE SELLING OF THE AMERICAN ECONOMY: HOW FOREIGN COMPANIES ARE REMAKING THE AMERICAN DREAM 2* (2009). Furthermore, "more than 560,000 Californians earn a paycheck from a firm based outside the United States." *Id.* at 25.

35. Other examples of major foreign employers include Toyota, Honda, Nissan, Hyundai, Unilever, Tesco, Sony, the Tata Group of India, the European Aeronautic Defense and Space Company (EADS), Haier of China, Nestlé of Switzerland, Severstal of Russia, ArcelorMittal of Luxembourg, and InBev of Belgium (owner of Anheuser-Busch). Foreign companies have invested more than \$2 trillion in the American economy and opened or expanded nearly 760 American factories. MAYNARD, *supra* note 34, at 22. See generally Matthew J. Slaughter, *How U.S. Multinational Companies Strengthen the U.S. Economy*, BUS. ROUNDTABLE & U.S. COUNCIL FOUND. (Spring 2009), available at http://businessroundtable.org/uploads/studies-reports/downloads/Slaughter_Paper-Color.pdf.

36. See Michael Posner & Justine Nolan, *Can Codes of Conduct Play a Role in Promoting Workers' Rights?*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY 207 (Robert J. Flanagan & William B. Gould IV eds., 2003).

In 2001, FirstGroup implemented a corporate social responsibility (CSR) policy, which encompasses the international codes and standards listed above, among others.³⁷

One of the many commitments undertaken by the company in its CSR policy is adherence to the following principle:

Employees have the rights of freedom of association and collective bargaining. We respect the right of our employees to choose whether or not to join a trade union without influence or interference from management. Furthermore we support the right of our employees to exercise that right through a secret ballot.³⁸

This commitment stems from principles promulgated by the International Labour Organization (ILO), which include employees' right to freedom of association. As discussed in greater detail below, several unions used FirstGroup's public commitment to its CSR policy and the principles and codes of conduct set forth therein to exert pressure on the company to alter alleged anti-union conduct of company managers in the United States. This pressure led the company to formally adopt a specific Freedom of Association Policy and Independent Monitor Program in the United States.

III. FIRSTGROUP PLC

FirstGroup is a United Kingdom-based company and is the world's leading transport operator with revenues of over £5 billion.³⁹ The company employs more than 130,000 staff throughout the United Kingdom and North America and transports around 2.5 billion passengers each year.⁴⁰ The company that exists today grew out of the deregulation of bus services in the United Kingdom. In 1989, employees of a municipal bus operator for Aberdeen, Scotland (Grampian Regional Transport), bought GRT and substantially owned it under an Employee Share Ownership Plan.⁴¹ The company acquired several other former nationalized bus companies in England and Scotland and merged with the Badgerline Group in June 1995 to form FirstBus.⁴² FirstBus continued to grow by acquiring other English, Welsh, and Scottish nationalized operators and was renamed FirstGroup in 1998 when the company acquired railway businesses as a result of privatization of the railways in the United Kingdom.⁴³

37. For the current version of the company's CSR policy, see CORPORATE SOCIAL RESPONSIBILITY POLICY, FIRSTGROUP PLC (May 2011), available at http://www.firstgroup.com/assets/pdfs/csr/csr_policy_2011.pdf.

38. *Id.* at 13.

39. *Our Company*, FIRSTGROUP PLC, http://www.firstgroup.com/corporate/our_company.

40. *Id.*

41. William B. Gould IV, *Using an Independent Monitor to Resolve Union-Organizing Disputes Outside the NLRB: The FirstGroup Experience*, DISP. RESOL. J., May/July 2011, at 49 [hereinafter Gould, *Using an Independent Monitor*].

42. *Id.*

43. *Id.*

In 1999, FirstGroup sought to strengthen and diversify its business by acquiring Ryder Public Transportation in the United States, thereby forming FirstGroup America.⁴⁴ The purchase made FirstGroup the second largest operator of school buses (First Student) and a leading provider of transit management (First Transit) and vehicle maintenance services (First Services) in the United States. FirstGroup viewed the purchase as a strategic step which would allow the company to apply its public transportation experience and expertise in the U.S. market. FirstGroup had recognized that the school bus market was highly fragmented and that there had been a steady increase in outsourcing of school bus transportation to the private sector.

About eight years later, on February 7, 2007, FirstGroup agreed to purchase Laidlaw International, Inc. for \$3.6 billion.⁴⁵ Laidlaw was the largest operator of yellow school buses, provided transit services, and owned and operated Greyhound.⁴⁶ The deal closed on September 30, 2007, making First Student the leading student transportation provider in North America, serving more than 1500 school districts with more than 60,000 buses.⁴⁷ The deal also increased operations at First Transit, which now employs 15,500 people and operates 7000 buses out of 235 locations in forty-one states, Canada, and Puerto Rico.⁴⁸ FirstGroup also retained the Greyhound name and continued to identify strategic opportunities to develop the Greyhound business.⁴⁹

When FirstGroup acquired Ryder, some of the facilities that it inherited were already organized by several different unions who continued to organize other locations. Shortly after FirstGroup's entrée into the United States, the International Brotherhood of Teamsters contacted colleagues in the Transport and General Workers Union (TGWU) in the United Kingdom—the largest union representing bus workers at FirstGroup—to gather information about the company. Over the next few years, representatives from the TGWU, the Teamsters, the International Transport Workers' Federation, and others met to discuss FirstGroup's North American business.⁵⁰

Beginning in 2004, after being frustrated by alleged anti-union tactics by FirstGroup America and poor working conditions, the Teamsters, the TGWU, and the Service Employees International Union (SEIU) escalated pressure on

44. On September 13, 1999, FirstGroup completed the acquisition of Ryder Public Transportation Services, Inc. ("Ryder") for \$934 million. FIRSTGROUP, ANNUAL REPORT 12 (2000), available at <http://www.firstgroup.com/corporate/investors/annualreports.php>. FirstGroup also acquired Bruce Transportation Group, Inc., a school bus operator in New England, for \$12.6 million on September 14, 1999. *Id.* At this time, other U.K. operators were also moving into the U.S. market—Stagecoach acquired Coach USA, the bus and taxi operation, and National Express acquired Durham Transportation, North America's fourth largest school bus operator.

45. Gould, *Using an Independent Monitor*, *supra* note 41, at 50.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

FirstGroup.⁵¹ The unions campaigned against FirstGroup in the United Kingdom,⁵² held rallies at FirstGroup offices in the United Kingdom and United States,⁵³ worked with a U.K. lobbyist firm to communicate its positions to members of Parliament,⁵⁴ hosted a week-long fact-finding mission to the United States for two MPs and a member of the London Assembly,⁵⁵ communicated directly to the

51. Alistair Osborne, *US and British Unions Combine to Use Their Muscle*, DAILY TEL. (London), Nov. 10, 2004, at 31. One example of the company's alleged anti-union position was a letter to staff from a manager at FirstGroup's Jacksonville, Florida, location. *Id.* The manager wrote, "It is our company's position that a union is unnecessary and would not benefit our customers, employees or businesses." *Id.* In response, Moir Lockhead, FirstGroup's chief executive, stated, "If there is a question mark over the language used in our America managers' communications with employees then we will look at it," and alleged that some staff were being harassed to join the SEIU which was "totally unacceptable." *Id.*

52. In the fall of 2004, the unions described FirstGroup's operations as a "creeping Americanization" of UK bus services" and "a 'race to the bottom' in workers' pay and service standards." Kristy Dorsey, *Union Protests at FirstGroup's 'Creeping Americanisation' of UK Bus Services*, HERALD (Glasgow, Scotland), Oct. 15, 2004, at 31. Of course, the labor relations, laws, and culture of the United States and United Kingdom are quite different in a number of respects. *See generally* William B. Gould, *Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971*, 81 YALE L.J. 1421 (1972).

53. In 2004, the unions held rallies or marches at FirstGroup offices in Paddington, London, Connecticut, Florida, Illinois, and Minnesota. *See* Osborne, *supra* note 51, at 31. In April 2007, the Teamsters held a rally in the United States to highlight claims of anti-union activity, alleging that FirstGroup had failed to implement a neutrality policy toward union membership and created an atmosphere of hostility and harassment. Ian Forsyth, *First Denies US Union's Claims of Harassment*, PRESS & J. (Aberdeen, Scot.), Apr. 10, 2007, at 17.

54. In November 2004, Mr. Lockhead received a letter from MPs sponsored by the TGWU expressing their disappointment at the company's anti-union stance in the United States. In the fall of 2005, the unions lobbied at a Labor Party conference, handing out a dossier that lambasted FirstGroup for its service standards, reliability, and treatment of workers. Simon Bain, *FirstGroup Claims US Trade Union Lobbyists Are 'Mischief-Makers'*, HERALD (Glasgow, Scotland), Sept. 29, 2005, at 22.

55. A spokesperson for the SEIU stated, "[w]e think these things need to be brought to light in the UK, where MPs are uncomfortable having a leading British company accused of this kind of conduct in the US." David Perry, *FirstGroup Face Protest from Angry U.S. Union*, PRESS & J. LTD. (Aberdeen, Scot.), July 4, 2005, at 6. The mission's report on its June 2005 visit concluded:

It appears from our discussions with management that the aggressive pursuit by First Student of market share, based upon underpricing other tenders, is based to a great extent on reducing the terms and conditions of employees against those in both the publicly owned school bus services and those of other employers.

Karl West, *Bus Giant Faces Anti-Union Accusation: Angry Delegation from U.S. Subsidiary First Student Brings Its Fight to Annual Meeting in Aberdeen*, HERALD (Glasgow, Scot.), July 13, 2005, at 21 (quotation marks omitted). In July 2007, pressure continued to mount from the U.K. government when Gwyneth Dunwoody, MP, chair of the House of Commons Transport Select Committee, (i) sponsored an adjournment debate in Parliament on July 24

shareholders accusations of FirstGroup America's anti-union policies and poor wages and benefits,⁵⁶ and made other public statements.⁵⁷ The Teamsters also commissioned several studies of alleged violations of workers' rights of freedom of association under international human rights law.⁵⁸

Throughout the campaign, FirstGroup repeatedly denied that the campaign was propaganda;⁵⁹ accused the unions of bullying its employees in the school bus

arguing that FirstGroup should honor International Labour Organization standards, and (ii) joined trade union representatives in warning FirstGroup that it needed to act on a growing "anti-union" reputation in the United States or risk tarnishing its image with U.K. and European investors. Nathalie Thomas, *MP Warns 'Anti-Union' FirstGroup that U.S. School Bus Row Could Hit Investment*, SCOTLAND ON SUNDAY, July 29, 2007, at 2.

56. At the July 2005 FirstGroup annual general meeting for shareholders (AGM), a delegation from the SEIU drove a yellow school bus to the meeting to communicate directly to the shareholders. Frank Urquhart, *Union Stages FirstGroup Protest*, SCOTSMAN (Scot.), July 15, 2005, at 53. A First Student driver from New Jersey stated:

We are getting anti-union comments and notices put in our pay cheques every week, as well as anti-union posters put up in our employee trailers. They [the company] have put a sense of fear and intimidation to drivers and school monitors that they might lose their bonuses or even their jobs if they join the union.

Id. (alteration in original). At the July 2006 AGM, the Teamsters handed out copies of a May 2006 report by Lance Compa, *see infra* note 58, and drivers from the United States described aggressive anti-union campaigning by FirstGroup involving posters, banners, leaflets, and letters in the period of time leading up to union elections. At the July 2007 AGM, the Teamsters again called for the Company to adopt a workers' rights policy and to enforce it. First Student employees who were present at the meeting refuted claims that no evidence of anti-union behavior could be found in the United States, though the union welcomed an apparent agreement by Chairman Martin Gilbert to look into the credibility of the reports.

57. One such example is from February 2007, when FirstGroup announced its plans to purchase Laidlaw. IBT President James Hoffa pledged to resist any deal because the union was concerned "that FirstGroup's troubling labor and service record could negatively impact Laidlaw's existing relationships with school districts and the long-term profitability of the new company." Karl West, *FirstGroup Fights Unions Over Stake in U.S. Buses*, DAILY MAIL (U.K.), Feb. 8, 2007, at 68.

58. In May 2006, Lance Compa, an attorney and professor specializing in international labor and human rights law, issued a thirty-three-page report titled, *Freedom of Association and Workers' Rights Violations at First Student, Inc.: Report and Analysis Under International Human Rights and Labor Rights Standards*, reporting evidence of alleged anti-union behavior by the Company. In October 2006, Mr. Compa issued a report titled, *Follow-Up Report: Freedom of Association and Workers' Rights Violations at First Student, Inc.*, in which Mr. Compa found that U.S. First Student management failed to implement the promised neutrality stance. In March 2007, the Teamsters published a twenty-eight-page report titled, *FirstGroup's Neutrality Policy: Failed Implementation—A Trio of Expert Policy Assessments*, which was a collection of reports from three different professionals whom the Teamsters asked to analyze the company's adherence to its stated neutrality policy. All three authors concluded that FirstGroup's behavior in the United States was not neutral. *See* LANCE COMPA, JOHN LOGAN & FRED FEINSTEIN, *FIRSTGROUP'S NEUTRALITY POLICY: FAILED IMPLEMENTATION* 10, 21, 28 (2007).

59. In November 2004, FirstGroup stated, "[i]n the U.S. all of our employees are free to join a trade union" and noted that 18% of its school bus staff were unionized. Alistair Osborne, *U.S. and British Unions Use Their Combined Muscle*, DAILY TEL. (U.K.), Nov. 10,

industry into becoming union members;⁶⁰ communicated the company's neutral stance to its shareholders;⁶¹ commissioned a former MP to give an independent view on the company's operations;⁶² and committed to eradicating anti-union behavior at its U.S. operations.⁶³ FirstGroup also issued an internal policy on employee relations labeled, "The Group's neutral view on union membership,"⁶⁴ and appointed observers to provide oversight of the company's policy.⁶⁵ However,

2004, at 31. In July 2005, a company spokesman said, "[t]he allegation that the company is anti-union is complete nonsense." *Yellow Bus in Protest Over Transport Giant*, EVENING EXPRESS (U.K.), July 4, 2005, at 4. In response to a union rally in April 2007, the Company stated, "[w]e are absolutely committed to the policy of neutrality and continue to monitor its application." Ian Forsyth, *First Denies U.S. Union's Claims of Harassment*, PRESS & J. (Aberdeen, Scot.), Apr. 10, 2007, at 17.

60. See Robert Ballantyne, *FirstGroup Feuds with U.S. Union*, SUNDAY TIMES (London), July 3, 2005, at 4.

61. At the July 2005 AGM, Mr. Lockhead told shareholders, "FirstGroup's policy towards trade unions is clear: staff are free to choose whether or not to join a union and to take that decision in secret ballot. We will not sign away that right." Frank Urquhart, *Union Stages FirstGroup Protest*, SCOTSMAN (Scot.), July 15, 2005, at 53. In response to a resolution proposed by employee and institutional shareholders at the July 2006 AGM—calling on the Company to adopt a human rights policy based on international labor conventions and to report to shareholders on material risks that could arise as a result of Company labor practices—the Company took the position that the resolution was not necessary because the Company's already existing policies adequately addressed the matters called for in the resolution. Ian Forsyth, *Employee Investors Hoping to Drive Changes at Bus Giant*, PRESS & J. (Aberdeen, Scot.), May 17, 2006, at 21.

62. Following the July 2005 AGM, FirstGroup invited former Glasgow MP and prominent trade unionist John Lyons to visit its U.S. operations in September 2005. On October 20, 2005, Mr. Lyons issued a report titled, "Investigation into Vehicle Safety and Anti-Trade Union Behaviour at First Student," which concluded that "in the past, managers at First Student were clearly anti-trade union" but that "today the situation is quite different." COMPA, *supra* note 58, at 30 (May 2006 Report). However, at the July 2006 AGM, Mr. Lyons stated, "[t]he trade unions are right when they say there is all sorts of material which is anti-union. That was the case in Baltimore and Iowa. These are very heated debates, but there is still no excuse—and I have made this point to the board. If the company makes a commitment to be neutral, each individual manager should ensure that is the situation, and clearly that did not happen." Graeme Smith, *FirstGroup to Root Out Anti-Union Practices: Complaints About Some U.S. Management to Be Followed Up*, HERALD (Glasgow, Scot.), July 14, 2006, at 21.

63. At the July 2006 AGM, Chairman Martin Gilbert promised to "stamp out anti-union behaviour" by senior managers at First Student and that the Company "would 'do everything in its power' to ensure the company was neutral on the issue of employee representation." Barrie Clement, *FirstGroup to Stamp Out U.S. Union Bashing*, INDEPENDENT (U.K.), July 14, 2006, at 54. Mr. Gilbert also reported that the Company had hired Mr. Lyons to travel to the United States at least four times a year and report to the board of directors to make sure its policy of strict neutrality towards union recognition was not being abused in the United States. *Id.*; see also Letter from Moir Lockhead, to Graham Stringer, MP (July 7, 2006) (on file with author) (pledging to "support the principles" of ILO Conventions on workers' freedom of association).

64. Gould, *Using an Independent Monitor*, *supra* note 41, at 50. This document served as the basis for the more widely distributed Freedom of Association Policy in 2008. *Id.*

65. The observers were asked to (i) observe activities during secret ballot elections; (ii)

criticisms of the observers arose and allegations of anti-union behavior continued. This led to the company contacting me about serving as Independent Monitor of FirstGroup's Freedom of Association Policy in the United States. After a series of meetings between myself and Mr. Lockhead and other company officials, as well as correspondence from Mr. Lockhead to shareholders and the Teamsters,⁶⁶ the FirstGroup Independent Monitor Program (the "Program") commenced as of January 1, 2008.⁶⁷

Initially, it was unclear whether the unilaterally implemented Program would be accepted by the unions and whether the employees and front-line managers would know about it.⁶⁸ However, on January 25, 2008, Mr. Lockhead referred two complaints to the Program, which provided the Program with its first opportunity to investigate and report on alleged violations of the company's FoA Policy.⁶⁹ Also,

confidentially interview employees and managers; and (iii) prepare reports to FirstGroup which summarized their findings. *Id.*

66. In August 2007, external counsel for FirstGroup contacted me. In mid-November, I met Mr. Lockhead and agreed to become FirstGroup America's Independent Monitor of the Company's FoA Policy. Following the meeting, Mr. Lockhead distributed a letter to shareholders notifying them of the Company's appointment of me as the Independent Monitor of the FirstGroup FoA Policy. Mr. Lockhead similarly sent a letter dated December 5, 2007, to Mr. Hoffa of the Teamsters announcing the adoption of the FirstGroup Independent Monitor Program.

67. During December 2007 and early January 2008, I had several meetings and telephone conversations with FirstGroup corporate representatives to set the groundwork for the Program. And, at that time, I also put together a team of experienced labor law and labor relations professionals, who were based both in the Midwest and on the West Coast of the United States, to assist me in investigating complaints that were filed through the Program.

68. On January 14, 2008, Mr. Hoffa sent Mr. Lockhead a letter expressing serious concerns regarding FirstGroup's adoption of the Independent Monitor Program. Letter from James Hoffa, President, International Brotherhood of Teamsters, to Moir Lockhead, Chief Executive Officer, FirstGroup PLC (Jan. 14, 2008) (on file with author). Mr. Hoffa explained that the Teamsters welcomed an Independent Monitor and were pleased with my appointment, but stated the Teamsters' belief that the Program would fail without "robust" processes in place to ensure implementation and enforcement that would distinguish the Program from the existing observers whose credibility, in his view, was lost at the 2007 AGM. *Id.* Mr. Hoffa also questioned FirstGroup's decision to unilaterally adopt the Program without seeking a dialogue with the Teamsters. *Id.* On January 24, I met with representatives of the Teamsters union regarding the Program. At that meeting the procedures were explained to the Teamsters' Organizing Department, which expressed considerable interest and support for the process and raised questions about it. In April 2008, I met again with representatives of the Teamsters to discuss the Program and to obtain input. The Teamsters representatives had several requests and proposals for how the Program should function.

69. Mr. Lockhead sent me a letter requesting that I investigate certain allegations made by the Teamsters of anti-union behavior at a First Student facility in Hodgkins, Illinois, and First Transit facilities in Atlanta, Georgia. The allegations surrounding the Hodgkins, Illinois facility had been the subject of letters between Mr. Lockhead and Mr. Hoffa at the end of 2007, as well as the subject of a six-page report issued by former NLRB General Counsel, Fred Feinstein, whom the Teamsters had asked to examine and assess the union organizing campaign in Hodgkins. In response to the Company's announcement on October 1, 2007, that it had closed its acquisition of Laidlaw, Mr. Hoffa had written Mr. Lockhead to reiterate the Teamsters' concern about FirstGroup's ability to enforce its corporate policy of

beginning in February 2008, the Teamsters filed several complaints alleging FoA Policy violations at a number of First Student facilities.⁷⁰ By the time of the company's July 2008 AGM, representatives of the Teamsters spoke favorably about the Program.⁷¹ In addition, as described below, several steps were taken to publicize the Program; and, at a managers' meeting in February 2008, Mr. Lockhead spoke alongside me and advised FirstGroup senior managers that if any of them objected to the FoA Policy or the Program then they could simply resign.

IV. FIRSTGROUP'S INDEPENDENT MONITOR PROGRAM: AN ALTERNATIVE RESPONSE TO UNION ORGANIZING DISPUTE RESOLUTION

FirstGroup's FoA Policy and Independent Monitor Program were designed to promote employees' rights within the backdrop of the principles of the NLRA, as defined by the NLRB during these past seventy-five years of its existence, and the principles of international labor law as reflected in Conventions 87 and 98 of the International Labour Organization.⁷² In contrast to many neutrality agreements

neutrality toward unions. Letter from James Hoffa, President, International Brotherhood of Teamsters to Moir Lockhead, Chief Executive Officer, FirstGroup PLC (2007) (on file with author). Mr. Hoffa reported that since the acquisition, workers had witnessed flagrant violations of the neutrality policy at former Laidlaw locations, including Hodgkins. *Id.* Mr. Lockhead responded by letter dated November 2, 2007, in which Mr. Lockhead explained that, following the acquisition, all of the company's management teams had been made fully aware of the company's FoA Policy and that his understanding was that there had been general compliance with the FoA Policy. Letter from Moir Lockhead, Chief Executive Officer, FirstGroup PLC to James Hoffa, President, International Brotherhood of Teamsters (Nov. 2, 2007) (on file with author). Mr. Hoffa responded by letter dated January 10, 2008, raising concerns about FirstGroup's investigations of the alleged violations and summarizing findings from Mr. Feinstein's report that supported his concerns about the company's ability to implement and enforce its FoA Policy. Letter from James Hoffa, President, International Brotherhood of Teamsters, to Moir Lockhead, Chief Executive Officer, FirstGroup PLC (Jan. 10, 2008) (on file with author). The Independent Monitor ultimately concluded that Mr. Feinstein's report was baseless.

70. Gould, *Using an Independent Monitor*, *supra* note 41, at 51.

71. In June 2008, the Teamsters questioned whether the Company would abide by the recommendations of the Independent Monitor. However, at the Company's July 2008 AGM, Frederick Potter, International Vice President of the IBT and Local President for Teamsters Local 469 in New Jersey, commented, "Stakeholders agree to this bilateral approach [referring to the Program as a novel approach to the FoA Policy] instead of an anti-union approach, and this makes sense." Note of Shareholder Questions/Comments, First Group PLC Annual General Meeting 1 (July 10, 2008) (on file with author). Kim Keller, Deputy Director of Organizing for the Teamsters also stated:

I am so pleased to report that the observation of the unions (in the US) is that the Compliance Monitoring Program works well in the US and is an innovative, progressive program to improve labor relations. I commend William Gould and the detailed investigations and his reports. The Independent Compliance Monitor has rolled back anti-union behaviour in the US and reports in US locations of misconduct have lessened.

Id.

72. *See* Int'l Lab. Org., Freedom of Association and Protection of the Right to Organise

noted above, a basic premise of the Program was that the actual recognition process would continue to proceed through the NLRB process while matters involving alleged management interference with union organizing and related anti-union conduct would be handled by the Independent Monitor's office. Under the FoA Policy, recognition issues were to be resolved by the Board itself through the secret ballot box election process, rather than any form of card check alternative. A key assumption and consideration was that a resolution of freedom of association issues involved in union organizational campaigns would reduce or eliminate impediments to free and fair elections—and would do so in a more timely manner and under standards more rigorous than those provided by the NLRA itself.⁷³

The principal components of FirstGroup's Independent Monitor Program were the following⁷⁴:

First, any FirstGroup employee, third-party representative of an employee, or representative of a labor union that represents or is seeking to represent employees of FirstGroup could file with the Office of the Independent Monitor (OIM) a complaint alleging one or more violations of the company's FoA Policy. Examples of complaints that the OIM received included allegations that a manager or supervisor discriminated against an employee based on union activity, made anti-union comments, enforced overly broad no-talking, solicitation, and distribution rules, or prohibited the wearing of union insignia, among other things. Complaints needed to be submitted within sixty days of the alleged violation, and submitting a complaint form did not affect the right to file an unfair labor practice charge or to complain to any public agency.

Second, the OIM would investigate the allegations and report its findings to FirstGroup and the complaining party, generally within thirty to sixty days of the filing of the complaint. The investigative process would include telephonic and/or in-person interviews of the complaining party, relevant witnesses, and company management. Both sides also would have the opportunity, but were not required, to submit written materials in support of or opposition to the complaint. If the OIM found a violation of the FoA Policy, then the report would include non-binding recommendations to the company to cure the violation.

Third, the company would respond to the OIM's report within thirty days of receiving the report, either adopting, not adopting, or modifying the recommendations. To provide transparency to the process, the company's response was sent to both the OIM and the complaining party.

Convention (Sept. 9, 1948), *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087>; Int'l Lab. Org., Right to Organise and Collective Bargaining Convention (Jan. 7, 1949), *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098>.

73. Because my view is that the right not to associate is subsumed in the right of association contained in the FoA Policy and the NLRA, FirstGroup was obliged to favor neither the pro- nor the anti-union groups in organizational campaigns. As the unions were not signatories to the Program, the Independent Monitor had jurisdiction only over employer conduct, and not union conduct that occurred away from the workplace or in a manner in which management did not know or should not have known about the conduct. Nonetheless, the Independent Monitor urged non-employee union organizers who, in his opinion, interfered with the right to refrain to cease and desist from such conduct.

74. The following list of components is based on the author's first-hand knowledge of the IM program.

Finally, the OIM periodically would report to the Board of Directors of FirstGroup regarding its activities and findings with regard to the Program itself.

During the Program's three-year tenure,⁷⁵ the OIM received 372 alleged violations of the FoA Policy and issued 143 reports (seventy-two of the allegations were found to be outside the jurisdiction of the Program, and thirty-two of the allegations were withdrawn). Slightly over one-half of the complaints were filed by employees while the other complaints were filed, in most part, by the union. (The company referred five complaints to the Program.) The vast majority of the complaints arose from First Student facilities—the company experiencing the greatest amount of union organizing—though complaints were also filed with respect to First Transit, First Services, Greyhound, and First Canada facilities. The OIM “found 67 FoA Policy violations and made 152 recommendations. The company adopted 51% of those recommendations, modified 16% of them, and rejected 33% of them.”⁷⁶

The following characteristics of the Program attributed to the general success of the Program and use by employees and unions alike, increased awareness of employees' freedom of association rights, and led to management training and a modified culture within FirstGroup America.

First, the Program provided for an expeditious process. During the Program's tenure, complaints were investigated and reported on within forty-five days on average, and 85% of the cases were completed in less than ninety days.⁷⁷ One of the reasons for the expeditious nature of the process is that it did not require hearings.

When a complaint was filed with the OIM, the OIM immediately notified senior executives at FirstGroup of the filing of the complaint and assigned it to an investigator. The investigator then contacted the complaining party, generally within a few days, to introduce himself, describe the process, and gather additional information about the complaint. The investigator then contacted the contract manager at the location to do the same. Depending on the scope of the complaint and the factual disputes at issue (if any), the investigator then either scheduled an on-site investigation or continued to conduct the investigation telephonically. None of the interviews were taken under oath or transcribed.⁷⁸

75. Following Sir Moir Lockhead's retirement in 2010, the Company terminated the Program on December 31, 2010, citing the increased percentage of its workforce that was organized and a decrease in the number of complaints filed with the Independent Monitor, among other reasons.

76. Gould, *Using an Independent Monitor*, *supra* note 41, at 53.

77. With additional resources dedicated to a program such as this, these timetables could be reduced even further.

78. In the investigation conducted by the court-appointed examiner in the Lehman Brothers bankruptcy case, the examiner adopted a similar approach as a means to expedite the process and obtain cooperation of several hundred witnesses who were interviewed. *See* Letter from Anton R. Valukas, Examiner, *In re Lehman Bros. Holdings, Inc.*, No. 08-13555 (Bankr. S.D.N.Y. 2010), to Diana Adams, United States Trustee (Apr. 1, 2010) (regarding Best Practices for Examiners) (on file with Andrew Olejnik, Associate, Jenner & Block LLP).

The Program relied on the cooperation of the parties and a thorough investigation by the OIM to uncover any inconsistencies and to find the facts—the OIM did not have a subpoena power. After the investigation and generally within thirty days, the investigator prepared a report for the Independent Monitor laying out the facts. The Independent Monitor then analyzed the facts, requested additional factual investigation by the investigator (if necessary), and prepared a final report for the complaining party and the company addressing whether there had been a violation of the FoA Policy. If the Independent Monitor found a violation, he then made recommendations for actions to be taken by the company to cure the violation. The company then had thirty days to adopt, not adopt, or modify the recommendations and communicated its response to both the OIM and the complaining party.

Second, the Program was voluntary. Nothing in the Program prohibited a party from filing a complaint with the NLRB or any other public agency at any time—before, during, or after a complaint was filed. However, faith in the impartiality of the Independent Monitor, based on his reputation and expertise, as well as comfort with communicating with the OIM’s investigators generated confidence in the Program and a willingness to utilize it.⁷⁹

Third, the Program emphasized transparency. As noted above, the Independent Monitor’s reports were distributed to both the complaining party and the company, and the company’s responses to any recommendations were communicated to both the OIM and the complaining party. Nothing in the Program prohibited either of the parties from further distributing or communicating the findings, conclusions, and recommendations to others.

Fourth, the Program was not overly formalistic, thereby making it accessible to employees. The Program’s complaint form comprised two pages which requested basic identifying information about the complaining party, company location, witnesses, date and location of the incident, and a description of the alleged violation. Complaining parties were free and welcome to submit additional paperwork in support of their allegations, but such detail was not necessary to initiate an investigation. The OIM received allegations ranging from one sentence to several pages. The informal interview process allowed the OIM to obtain additional information about the allegations and minimize the barrier to entry that an overly burdensome complaint process might impose.

Fifth, the FoA Policy and Independent Monitor Program were more expansive than the NLRA. The most prominent example of the FoA Policy’s expansiveness was the limitations that it placed on the employer’s ability to engage in speech that was intended to influence employees’ decision with respect to labor union representation. Other examples of the expansiveness of the FoA Policy also emerged during the course of the Program and are described below.

Sixth, the Program provided for publicity of employees’ rights that was more expansive than the NLRA. The NLRA, in contrast to modern employment law

79. It was not uncommon for employees or union organizers to express skepticism about the Program because it was funded by FirstGroup. However, in every investigation in which this concern was raised, the investigator was able to alleviate the concerns by explaining the credentials of the Independent Monitor and the fact that neither the Independent Monitor nor the investigators were employed by or dependent on the company.

statutes, does not provide for any publicity of employees' rights. In contrast to all other legislation, no notice advising employees or applicants about the nature of the law is required.⁸⁰ Accordingly, the provision for publicity in the Program provided a benefit that is not available under U.S. labor law. As part of the rollout of the Program, the company, at the OIM's direction, took several steps to notify employees of the FoA Policy and Program and to educate them on their meaning.

On April 25, 2008, the company mailed a letter authored by the Independent Monitor to more than 81,000 FirstGroup employees throughout the United States. It described the Independent Monitor Program, the complaint procedure, and the machinery attached to it. The Independent Monitor's letter was accompanied by a supportive letter from Dean Finch, then Chief Operating Officer for FirstGroup America. Because this communication was so abbreviated—it consisted of just two pages—it seemed to have caught the attention of many employees. Following that letter, the company and the OIM took several other steps to improve (1) employees' awareness and understanding of the FoA Policy and Program, and (2) management's adherence to the FoA Policy.

Every FirstGroup America facility was outfitted with a glass-enclosed bulletin board on which a copy of the FoA Policy and an overview of the program were posted. The documents provided the contact information for the OIM in the event an employee wanted to obtain copies of the Program documents or additional information about the Program—which they also could obtain from their local manager.

The company also conducted a web-based training program for the FirstGroup America managers throughout the United States. The training program explained the FoA Policy and Program, described what managers could and could not do, recommended actions that managers should take, and advised managers that failure to comply with any aspect of the FoA Policy or Program would subject the managers to discipline, up to and including discharge.

Beginning in June 2008, FirstGroup attached a short letter about the Program to employees' paychecks so that the employees would be aware of the Program even if they did not observe the glass-enclosed bulletin board and were not advised of it by local management. Additionally, the company included in its employee handbooks the FoA Policy and Program description, overview, and complaint form.

The FirstGroup also filmed and distributed a DVD video describing the FoA Policy and Program and their contours and parameters. In the video, Mike Murray, then Chief Executive Officer of Operations for FirstGroup America, explained to the employees the FoA Policy and why it was important to the company. The Independent Monitor then explained the Program and the OIM's complaint, investigation, and reporting procedures. The DVD video was shown to employees at monthly safety meetings.

80. The Obama Board has proposed rulemaking to reverse this anomaly. *See* Proposed Rules Governing Notification of Employee Rights under the National Labor Relations Act, 29 C.F.R. pt. 104 (2010). This, along with the Board's decision to transmit notices of statutory violations electronically as well as post them in conspicuous places in the employer's establishment, may assist in making employees aware of the statute and its remedies. *See* J & R Flooring, Inc., 356 N.L.R.B. No. 9 (Oct. 22, 2010).

Finally, the OIM established a website through which employees and others could obtain more information about the Program and could contact the OIM. Using the website, employees could download Program documents (including a complaint form), submit a complaint electronically, find answers to frequently asked questions about the Program, and learn more about the team of investigators.

In sum, these aspects of the Program—expediency, voluntariness, transparency, lack of formalism, expansiveness, and publicity—led to the success and attractiveness of the Program.

V. STANDARDS ADOPTED BY THE INDEPENDENT MONITOR IN RESOLVING DISPUTES

As noted above, the FoA Policy and Independent Monitor Program were designed to promote rights within the backdrop of the principles of the NLRA as defined by the NLRB. Although the Independent Monitor primarily relied upon those principles in analyzing alleged violations of the FoA Policy, there were a number of instances in which the FoA Policy enhanced employees' rights under the NLRA. Differences between the FoA Policy/Program and the NLRA stemmed from the fact that the Program explicitly states that the scope of protection afforded to employees was more expansive than that in the NLRA itself.

A. *Employer Speech*

The first and foremost illustration of this proposition is the prohibition against anti-union speech which disparages the union and its organizational efforts. This contrasts with the NLRA, particularly through its Taft-Hartley amendments, which contain a so-called free speech proviso set forth in section 8(c) providing for anti-union employer free speech so long as threats or promises of benefit are not employed.⁸¹ The FoA Policy, on the other hand, reflects the company's publicly expressed posture of neutrality toward union organizational efforts, in contrast to Taft-Hartley, which allows the employer to be anti-union in its speech and commentary so long as it does so within defined limits.⁸² The FoA Policy comports more generally with the proposition that robust free speech is properly engaged in by all sides—at least in the sense that both sides should have an opportunity to get its message across. The policy provides that an employer does have a legitimate interest in setting forth its point of view on unionization issues and yet one which circumscribes employer speech more severely than the NLRA provides.⁸³ Thus, for instance, selective use of data about union success in representing employees is prohibited—the employer being required to present a balanced and full picture and one that does not, through its selectivity, disparage the union with a non-objective propaganda-type message.

81. Labor Management Relations (Taft-Hartley) Act § 8(c), 29 U.S.C. § 158(c) (2006).

82. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969). *See also* Eldorado Tool, 325 N.L.R.B. 222, 225 (1997) (Gould, Chairman, concurring and dissenting).

83. Shepherd Tissue, Inc. 326 N.L.R.B. 369 (1998) (Gould, Chairman, concurring); *Eldorado Tool*, 325 N.L.R.B. at 225 (Gould, Chairman, concurring and dissenting); Caterpillar, Inc., 321 N.L.R.B. 1178, 1184 (1996) (Gould, Chairman, concurring); Novotel New York, 321 N.L.R.B. 624 (1996).

B. Solicitation, Distribution, Talking, and Union Insignia Rules

Another common subject of dispute addressed by the Independent Monitor involved various kinds of union tactics on company property. Such examples include the attempt to solicit, and thus recruit, members to the union, the distribution of literature about union activity, and the wearing of union insignia. Considerable confusion existed in distinguishing between the concepts of solicitation and distribution, a difficulty no doubt exacerbated by some of the convoluted rules laid down by the Board itself.

Though, under the Program, nonemployee union organizers were explicitly precluded from obtaining access to company property in the same fashion as the Supreme Court decreed in *Lechmere v. NLRB*,⁸⁴ the Independent Monitor held that employees have the same right to solicit during nonworking time in line with Supreme Court precedent.⁸⁵ From the beginning, the U.S. Supreme Court established relatively clear rules that protected both rights during nonworking time, that is, “working time is for work.”⁸⁶ And, in contrast to the rules relating to insignia and discussion, both of which are generally protected during working time as well, solicitation involves the actual distribution of authorization cards which employees are asked to sign. But, in the Board’s 1962 *Stoddard-Quirk Manufacturing Co.* decision, the case’s holding considerably muddied the waters, ruling that distribution of literature, in contrast to solicitation, could be precluded during nonworking time in working areas.⁸⁷ The court relied on the potential for littering as its justification, as it may undercut the employer’s production objectives.⁸⁸ At the time of this decision, I thought that a limitation of the decision was the fact that in many, if not most workplaces, a clear demarcation line could not be established between working and nonworking areas⁸⁹ and that, at a minimum, this issue would unnecessarily promote litigation. In the 1990s, the Board concluded that where the demarcation line between nonworking and working areas was ambiguous, section 7 organizational rights were chilled—this case, ironically, arose in one of the FirstGroup predecessor facilities.⁹⁰

As for employees talking about the union, consistent with Board precedent, the Independent Monitor held that talking may take place during both working and nonworking time since the company did not have a policy (which employers rarely

84. 502 U.S. 527 (1992).

85. *Republic Aviation Corp.*, 324 U.S. 793, 801–05 (1945) (citing *Peyton Packing Co.*, 49 N.L.R.B. 828 (1943)) (approving the *Peyton Packing* rule and holding that union insignia constitutes protected activity under the NLRA during both working and nonworking time); see also *Eastern Omni Constructors, Inc.*, 324 N.L.R.B. 652, 655 (1997) (“Employees have the protected right to wear union insignia while at work.” (citing *Republic Aviation Corp.*, 324 U.S. at 801–03), *enforcement denied*, *Eastern Omni Constructors, Inc. v. NLRB*, 170 F.3d 418, 428 (4th Cir. 1999)).

86. This concept was first adumbrated in *Peyton Packing Co.*, 49 N.L.R.B. 828 (1943).

87. 138 N.L.R.B. 615, 621 (1962).

88. *Id.* at 630.

89. William B. Gould IV, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73, 80 (1964).

90. See *Laidlaw Transit, Inc.*, 315 N.L.R.B. 79, 83 (1994).

do) prohibiting all conversations about all non-work-related matters during working time itself.⁹¹ And, with respect to the wearing of union insignia, again consistent with Board precedent, the Independent Monitor held that the employer can prohibit such union activity during nonworking time if it has “special circumstances” to do so.⁹²

Throughout the tenure of the Program, the OIM observed the difficulties involved with the practical application of definitions. However, in working in conjunction with the Independent Monitor, FirstGroup improved the guidelines provided to employees and managers with respect to solicitation, distribution, and talking, though concerns still remained stemming from the difficulty in requiring employees to guess what constitute proper boundaries between working and nonworking areas.

The Independent Monitor also addressed an issue of more recent vintage for the Board—employee use of e-mails to communicate about union organizational activity. The Independent Monitor held that sending an e-mail communication involving union organizational activity constituted activity protected by the FoA Policy.⁹³ This is in sharp contrast to the position that the Board has taken more recently in upholding an employer’s policy that barred employees from using the company’s e-mail system for all non-job-related solicitations,⁹⁴ though the Board now has the issue under reconsideration.⁹⁵ In essence, the Independent Monitor was of the view that e-mail communications as a form of union organizational activity, while different in form than solicitation and distribution of literature on company property, constitutes the very same thing in substance.

91. *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1253 (10th Cir. 2005); *see also W.W. Grainger, Inc.*, 229 N.L.R.B. 161, 166 (1977) (asserting that no discussion rules should be distinguished from no solicitation rules).

92. *Meijer, Inc.*, 318 N.L.R.B. 50, 50 (1995) (quoting *United Parcel Service*, 312 N.L.R.B. 596, 597 (1993), *enforcement denied*, 41 F.3d 1068, 1073 (6th Cir. 1994)); *see BellSouth Telecomm. Inc.*, 335 N.L.R.B. 1066 (2001), *enforcement denied by Lee v. NLRB*, 393 F.3d 491, 497 (4th Cir. 2005); *Burger King v. NLRB*, 725 F.2d 1053 (6th Cir. 1984), *denying enforcement in relevant part of* 265 N.L.R.B. 1507 (1982); *Cf. Washington State Nurses Assoc. v. NLRB*, 526 F.3d 577 (9th Cir. May 20, 2008); *Pioneer Hotel & Gambling Hall, Inc.*, 324 N.L.R.B. 918, 922–23 (1997) *enforcement in part*, 182 F.3d 939 (D.C. Cir. 1999).

93. *See Timekeeping Systems, Inc.*, 323 N.L.R.B. 244 (1997) (a unanimous Board held that the sending of an e-mail message about working conditions was concerted activity within the meaning of the NLRA and that an employee does not lose the protection of the NLRA through his or her attempt to communicate with other employees on such subjects merely because e-mail was used).

94. *See Guard Publ’g Co.*, 351 N.L.R.B. 1110 (2007).

95. *See Guard Publ’g Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009) (finding that substantial evidence did not support the Board’s determination that the employer acted lawfully in discriminating against an employee for two union-related e-mails and remanding the case to the Board for further proceedings), *enforcing in part and remanding in part Guard Publ’g Co.*, 351 N.L.R.B. 1110 (2007). In the D.C. Circuit’s opinion, the court noted that, although the union believed that the company violated section 8(a)(1) by maintaining a policy that prohibited e-mail use for all “non-job-related solicitations,” it did not seek review of the Board’s ruling to the contrary. *Guard Publ’g*, 571 F.3d at 58.

C. *Expeditious Elections*

Another area in which the FoA Policy and Program offered more protections to employees' right to freedom of association was the company's commitment to expeditious elections. The company concluded that representation elections should be "held as early as possible" inasmuch as one principal concern with elections is that the delay inherent in the process is often associated with the erosion of employee free choice. For instance, the Independent Monitor held that appealing the Regional Director's decision to Washington, D.C., would undercut an expeditious election process and thus the right to choose freely absent "extraordinary circumstances." The Independent Monitor stated that FirstGroup should agree under the Board's rules and regulations to enter into consent election agreements, which would make a Regional Director's decision final.

D. *Interrogation of Employees*

Because the FoA Policy provides for representation elections rather than voluntary card checks, the Independent Monitor held that no form of interrogation would be permissible under the FoA Policy. In contrast to the standards created by the Board under the NLRA, FirstGroup had no legitimate interest in determining employee sentiment. An inquiry by management of an employee's view of union representation would only be legitimate if the employer was attempting to determine whether employee sentiment made it appropriate for the employer to recognize the union on some basis other than a secret ballot box election. Under the NLRA, the interrogation of an employee's support for the union or involvement in union activities depends upon a number of factors.⁹⁶ The case law is supposed to protect employees against a threat of reprisal or force or a promise of a benefit. But, as noted above, under the FoA Policy, no careful delineation need be drawn between interrogation that is precluded and that which is permitted, because recognition on the basis of union cards is out of the question since only card recognition would involve employee sentiment expressed outside the ballot box. In these circumstances, management has no business interrogating the employee.⁹⁷

96. See *Blue Flash Express, Inc.*, 109 N.L.R.B. 591, 593 (1954) (explaining that the test for determining whether an interrogation is coercive is "whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act"); *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967) (expanding and explaining the *Blue Flash Express* test); see also *Rossmore House*, 269 N.L.R.B. 1176 (1984), *aff'd*, *Hotel Employees and Restaurant Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *NLRB v. Lorben Corp.*, 345 F.2d 346 (2d Cir. 1965). For the Supreme Court's most recent pronouncements on interrogation, see *Allentown Mack Sales & Services, Inc. v. NLRB*, 522 U.S. 359 (1998).

97. This approach is somewhat akin to the approach taken by the Board before the advent of the Eisenhower Administration. See *Standard-Coosa-Thatcher Co.*, 85 N.L.R.B. 1358 (1949).

E. Surveillance

Finally, a number of complaints occurred where allegations of surveillance were involved. The Independent Monitor followed decisions of the Clinton Board⁹⁸ and attempted to establish a demarcation line between observation of open and public union activity, which is protected, and that which is “out of the ordinary,” for example, taking note of which employees received union hand bills.⁹⁹ The test implemented by the Independent Monitor, as has been implemented by the Board, was whether “observation goes beyond casual and becomes unduly intrusive.”¹⁰⁰

VI. LEGAL QUESTIONS ARISING FROM THE IMPLEMENTATION OF THE PROGRAM

As is often the case when unprecedented private programs are implemented, questions arise as to how the private machinery fits within the body of existing public law. This Part addresses several of those questions, including: whether deference to the Program can and should be provided by the NLRB, as is the case with grievance-arbitration machinery; and whether the Program, once implemented, becomes a contract that can be enforced by employees or unions, amongst others.

A. Discrimination

Discrimination cases are another example of the extensive reach of the FoA that went beyond the NLRA.¹⁰¹ The Supreme Court has held, at the Board’s urging, that a violation may be made out in some “mixed motive” cases: that is, those in which one reason amongst at least four employer actions taken is non-discriminatory but the other reasons are in fact anti-union.¹⁰² On the other hand, in accordance with the position I took while serving on the Board, under the FoA Policy, when one of a number of reasons is discriminatory, a violation must be found.¹⁰³

B. Deferral

For the past half-century, ever since the NLRB’s decision in *Spielberg Manufacturing Co.*,¹⁰⁴ there have been many twists and turns and much debate and scholarship regarding the Board’s deferral policy toward arbitral decisions.¹⁰⁵

98. See *Nat’l Steel & Shipbuilding Co.*, 324 N.L.R.B. 499 (1997), *enforced*, *Nat’l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268 (D.C. Cir. 1998).

99. *Opryland Hotel*, 323 N.L.R.B. 723, 730 (1997).

100. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942, 945 (9th Cir. 2008) (quoting *Kenworth Truck Co.*, 327 N.L.R.B. 497, 501 (1999)).

101. In this arena, both the Obama and Clinton Boards have held so-called “pre-emptive” discharges to be a violation. See *Paraxel Int’l, LLC* 356 NLRB No. 82 (Jan. 28, 2011); *Koronis Part Inc.* 324 NLRB 675 689 (1997).

102. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983).

103. See *Frick Paper Co.*, 319 N.L.R.B. 9, 12 (1995) (Gould, Chairman, concurring).

104. 112 N.L.R.B. 1080 (1955).

105. See, e.g., Raymond G. Bush, *The Nature of the Deferral Problem Involving Section 8(a)(1) and 8(a)(3) Charges*, 4 LAB. LAW. 103 (1988); Leonard Page & Daniel W. Sherrick,

However, following the Board's 1984 decisions, the NLRB's standards have been generally consistent.¹⁰⁶ In its *Spielberg* decision, the Board held that it would defer to an arbitration award where (1) the proceedings appear to have been "fair and regular," (2) "all parties [have] agreed to be bound," and (3) the arbitral decision "is not clearly repugnant to the purposes and policies of the Act."¹⁰⁷ In its *Olin* decision, the Board added that it would find that an arbitrator considered an unfair labor practice if "(1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practices."¹⁰⁸

In all of these cases, the deferral question arose where a collective bargaining agreement was in place. In my view, however, there is nothing in the Board's analysis that would limit deferral to such circumstances.¹⁰⁹ Where a collective bargaining agreement does not exist, the Board may be more stringent in requiring clear evidence that all parties have agreed to be bound by the arbitral award, but such circumstance is not precluded. Again, however, the Board has said that "it is patently contrary to the letter and spirit of the Act for the Board to defer its undoubted jurisdiction to decide unfair labor practices to a disputes settlement system established unilaterally by an employer."¹¹⁰ Thus, unilateral programs have been looked upon as contrary to public policy.¹¹¹

The NLRB's Deferral Policy and Union Reform: A Union Perspective, 24 U. MICH. J.L. REFORM 647 (1991).

106. See, e.g., *United Techs. Corp.*, 268 N.L.R.B. 557 (1984); *Olin Corp.*, 268 N.L.R.B. 573 (1984). But see *Taylor v. NLRB*, 786 F.2d 1516 (11th Cir. 1986) (holding that deferral was not warranted and explaining that the Board's standards under *Olin Corp.* "cannot be reconciled with the need to protect statutory rights, as expressed by the Supreme Court").

107. *Spielberg Mfg. Co.*, 112 N.L.R.B. at 1082. In *Olin Corp.*, 268 N.L.R.B. at 574, the Board stated that it would defer to an arbitrator's award unless the award is "palpably wrong," that is, "unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act." The Board also placed the burden on the party challenging deferral. *Id.* But see *Mobile Oil Exploration & Producing, U.S., Inc.*, 325 N.L.R.B. 176, 180 (1997) (Chairman Gould, concurring), *enforced*, *Mobile Oil Exploration & Producing v. NLRB*, 200 F.3d 230 (5th Cir. 1999).

108. *Olin Corp.*, 268 N.L.R.B. at 574.

109. In *Pontiac Osteopathic Hospital*, 284 N.L.R.B. 442 (1987), an Administrative Law Judge (ALJ) ruled that deferral by the NLRB to the decision of the employer's appeal board was inappropriate. Although the ALJ noted that there was no collective bargaining agreement in place, the ALJ emphasized that the appeals board system was not an agreed-on method between the employer and its employees. *Id.* The assumption was that an agreed-upon procedure with or without a collective bargaining agreement is a prerequisite. *Id.*

110. *Am. League of Prof'l Baseball Clubs*, 180 N.L.R.B. 190, 191 (1969).

111. See, e.g., *Pontiac Osteopathic Hosp.*, 284 N.L.R.B. at 466 ("[M]anagement unilaterally implemented the appeals board system. Neither the concept of an appeals board nor the procedural rules that had been drafted and approved by management were submitted to the employees for a vote of approval or disapproval. Whatever else the appeals board system may be, it is not an agreed-on method between this Employer and its employees for dispute resolution. It is not a grievance procedure established by contract. It was created and implemented unilaterally by Respondent. The employees did not voluntarily elect to become parties to a collective-bargaining agreement containing this or any other form of dispute resolution machinery."). But see *West Maui Resort Partners*, 340 N.L.R.B. 846, 850-51 (2003) (holding that an independent party appointed by the employer to issue a report on

In the case of FirstGroup's Independent Monitor Program, the company did not agree to be bound by the Independent Monitor's findings and recommendations, which would likely prove fatal to any argument in support of Board deferral to the Program. Nonetheless, if an employer were to agree to be bound, an employee's or a union's voluntary use of the Program and execution of clear and unambiguous agreement to be bound by or resort to the Independent Monitor's decision could satisfy the Board's requirement that all parties have agreed to be bound.¹¹² As for the other deferral policy considerations, the processes and procedures of the Program were designed with the backdrop of the NLRA to constitute a "fair and regular" process whereby all the relevant facts pertaining to an alleged unfair labor practice would be considered. The absence of a hearing might arguably constitute a procedure that is not fair and regular—and yet this absence of a process that contributes so mightily to delay is one of the features that make the process both effective and expeditious.¹¹³ Moreover, a review of the Independent Monitor's findings and conclusions—again, grounded in the NLRA—as well as the abundant use of the Program by employees and union representatives, support a conclusion that the decisions reached by the Independent Monitor were not "clearly repugnant to the purposes and policies of the Act." Indeed, as one can see from a wide variety of issues discussed above—the most prominent of them being the company's neutrality policy—the IM program protects more effectively the basic policies of the NLRA than the statute does itself.¹¹⁴

Thus, a private program to adjudicate freedom of association disputes, which is binding on the employer and complaining party, could satisfy the Board's deferral policy standards. In light of the strong support and wide acceptance that voluntary arbitration of labor disputes has received in the grievance-arbitration context, the

NLRA matters is lawful: "None of the parties disputes Hunter's credentials as an experienced, neutral investigator; nor is there any evidence of collusion between Hunter and the Respondent with respect to his investigation or his findings. There is no allegation or evidence that Hunter was given any instruction that would have affected his ultimate findings, or that he made any references to union activities when interviewing the discriminatees that would have tended to have a coercive impact against their engaging in Section 7 activity." (footnote omitted).

112. *Cf.* Mahon v. NLRB, 808 F.2d 1342 (9th Cir. 1987) (holding that a union was empowered to bind union members to terms of a pre-arbitration settlement agreement despite its terms barring members from bringing claims for back pay under the NLRA); *Roadway Express v. NLRB*, 647 F.2d 415, 424 (4th Cir. 1981) (deferring to a settlement agreement and holding that an employee "fully and freely acted" upon a settlement agreement where he authorized his union advisor to accept its terms without back-pay, but without loss of seniority).

113. *See* George A. Bermann, *Administrative Delay and Its Control*, 30 AM. J. COMP. L. SUP. 473, 474 (1982) ("The path to systemic reform . . . probably lies not only in easing agency workloads and increasing their resources, but also in recognizing that trial-type procedures are not necessarily the best or only fair means of reaching administrative decisions.").

114. William B. Gould IV, *Labor Law Beyond U.S. Borders: Does What Happens Outside of America Stay Outside of America?*, 21 STAN. L. & POL'Y REV. 401, 422–26 (2010).

extension of the Board's deferral policy to private programs designed to adjudicate disputes arising during a union organizational campaign, would be appropriate.¹¹⁵

C. Enforceability of Program

The implementation of private dispute resolution machinery, such as the Independent Monitor Program, even if unilaterally adopted by an employer, could constitute an implied, enforceable contract in some jurisdictions.¹¹⁶ The implied contract theory is predicated on the notion that an employer should not be permitted to “reap the benefits of a personnel manual and at the same time avoid promises freely made in the manual that employees reasonably believed were part of their arrangement with the employer.”¹¹⁷ Factors to be considered in determining whether a policy will become binding include the level of specificity of the policy, employee acknowledgment of the policy, disclaimer language, the manner of distribution of the policy, and whether employee rights or obligations are defined in the handbook, among other things. Moreover, if a handbook policy were to be found to be a binding contract, at least a few jurisdictions may not permit modifications to the Program absent additional consideration,¹¹⁸ and, where affected employees are covered by collective bargaining agreements, unilateral modifications to the machinery could violate section 8(a)(5) of the NLRA, which makes it an unfair labor practice to refuse to bargain collectively with employees' representatives.¹¹⁹ Accordingly, employers intending to implement such machinery would be well advised to consider the state law in the relevant jurisdictions to understand whether the machinery might be found to be binding.

In the case of FirstGroup, the FoA Policy and Program documents were distributed to employees, posted at company facilities, and included in the

115. Indeed, such an approach can be deemed consistent with Board holdings such as *Lexington Health Care Grp.*, 328 N.L.R.B. 894 (1999) (promoting negotiation of agreements relating to union organizational activity) and *Dana Corp.*, 356 N.L.R.B. 49 (2010) (honoring voluntary recognition of majority status union).

116. See GOULD, PRIMER, *supra* note 8, at 226–28 (citing cases from various jurisdictions on this principle).

117. *O'Brien v. New England Tel. & Tel. Co.*, 664 N.E.2d 843, 848 (Mass. 1996) (“The principle that promises made in a personnel manual may be binding on an employer is accepted in a clear majority of American jurisdictions.”); see also Richard J. Pratt, Comment, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197, 208–09 (1990).

118. See GOULD, PRIMER, *supra* note 8, at 228 (citing jurisdictions and cases on this point).

119. National Labor Relations Act § 8(5), 29 U.S.C. § 158(a)(5) (2006). The fact that proceedings or conditions are not in the language of the collective bargaining agreement does not mean that the employer is not obliged to bargain with the union. See *Bonnell/Tredegear Indus., Inc. v. NLRB*, 46 F.3d 339 (4th Cir. 1995) (holding that since the method of calculating Christmas bonus was stated in employee handbook and had become custom within the company for many years, discontinuance of calculation method by the company—without bargaining to impasse—constituted violation of its duty to bargain under NLRA § 8(d), as amended, 29 U.S.C. § 158(d)); see also *Wald Mfg. Co. v. NLRB*, 426 F.2d 1328 (6th Cir. 1970).

company's National Employee Handbook. The FoA Policy included a legend at the bottom of the policy that stated, "THE COMPANY RESERVES THE RIGHT TO MAKE CHANGES AND/OR REVISIONS TO THIS POLICY AT ANY TIME." Similarly, the written description of the Program stated, "FirstGroup may modify or terminate its FoA Policy and this Program at any time." In addition, the Employee Handbook stated that neither it, nor any other supplemental handbooks or policies constituted an employment contract or agreement.¹²⁰

VII. PRIVATE INITIATIVES AND THEIR RELATIONSHIP TO LABOR LAW DEVELOPMENTS DURING THE OBAMA ADMINISTRATION

The Independent Monitor process came into existence against the backdrop of the above noted weaknesses in the NLRA as well as the Bush II Board's abdication of its statutory responsibilities in this new century. Under these circumstances, unions, even when excluded from negotiation of the mechanism as was the case in FirstGroup, saw the Independent Monitor Program as an enhanced surrogate for the NLRA. During the tenure of the Program, union membership increased from approximately 18% to more than 80%, which, in part, may have led to the termination of the Program as of December 31, 2010.¹²¹

Meanwhile, the Obama Administration has taken a number of initiatives which proceeded on essentially three fronts. First, Executive Order 13494, entitled "Economy in Government Contracting," instructs contracting agencies to "treat as unallowable the costs of any activities undertaken [by federal contractors] to persuade employees . . . to exercise or not to exercise . . . the right to organize [a union]."¹²² However, two immediate problems for this initiative are the doctrines of primary jurisdiction and preemption created under the authority of the leading Supreme Court decisions.¹²³ Justice Stevens, speaking for the majority, held that, inasmuch as the Taft-Hartley amendments to the NLRA "protect" noncoercive employer free speech from regulation, California, through exercise of the state's spending power, had regulated employer speech unconstitutionally. Other attempts through executive order involving the right of employers to permanently replace economic strikers who engage in protected activity have also been struck down.¹²⁴

120. *But see supra* note 87 and accompanying text.

121. *See Gould, Using an Independent Monitor, supra* note 41, at 52. From late 2007 at the commencement of the Independent Monitor's Program through early 2010 approximately 330 elections were held with unions winning 90% of them. FIRSTGROUP, CORPORATE SOCIAL RESPONSIBILITY REPORT 21 (2010), http://www.firstgroup.com/corporate/csr/csr_report_2010/. Prior to discussions about a national agreement, FirstGroup had stated that union membership was 66%, having increased 11% over the past year. *Id.* at 21.

122. Exec. Order No. 13494, 74 Fed. Reg. 6101 (Feb. 4, 2009). For a more detailed discussion of this Order, see David Edeli, *Is Executive Order 13494 Preempted Under Chamber of Commerce v. Brown?*, (July 5, 2010) (unpublished note) (on file with author).

123. *See Lodge 76, International Association of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132 (1976) (primary jurisdiction); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (preemption).

124. *See Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996); *see*

It is possible that the allowable costs approach undertaken by the Obama Administration may be distinguishable from the limitations upon expenditures condemned by the Court in *Brown*¹²⁵ inasmuch as they arguably do not plunge the contractor into the quagmire of accounting noted by Justice Stevens. This distinction seems at this point to be uncertain, leaving the executive order open to constitutional challenge.

So called Project Labor Agreements, which require adherence to the terms of a collective bargaining agreement and conditions of employment as a prerequisite for competitive bidding,¹²⁶ have been held to be constitutional by the United States Supreme Court as the government acting as a market participant,¹²⁷ notwithstanding new legal issues that may be presented by virtue of the veto of such agreements by various localities.¹²⁸ These contracts, while not discriminatory towards either non-union employees¹²⁹ or contractors, promote unionized labor and the badly needed objective of stimulus for the economy and infrastructure. If the Obama Project Labor Agreements continue to grow, construction industry unionization is promoted along with important projects.

Finally, the Obama Administration, with considerable Republican opposition of the kind that manifested itself when I was nominated as Chairman in the 1990s,¹³⁰ has moved ahead with a newly constituted National Labor Relations Board.¹³¹ Through an acting general counsel, the importance of section 10(j) injunctions has been stressed.¹³² The Board is poised to challenge state statutes that mandate secret

also N. Ill. Chapter of Associated Builders & Contractors v. Lavin, 431 F.3d 1004, 1006 (7th Cir. 2005) (prohibiting spending which becomes regulation when it affects conduct outside the finance project), *cert. denied*, 549 U.S. 813 (2006); Metro Milwaukee Commerce v. Milwaukee Cnty., 431 F.3d 277, 282 (7th Cir. 2005) (discussion by Judge Posner regarding the “spillover effect”).

125. *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008).

126. These Project Labor Agreements are well discussed in Dale Belman & Matthew M. Bodah, *Building Better: A Look at Best Practices for the Design of Project Labor Agreements*, 2010 ECON. POL’Y INST. 274.

127. *See Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I.*, 507 U.S. 218 (1993) (Boston Harbor).

128. *See Steven Greenhouse, Taking a Vote on Union Construction*, N.Y. TIMES, Oct. 14, 2010, at B1.

129. *See Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667 (1961).

130. *See GOULD, LABORED RELATIONS*, *supra* note 5, at 33–50.

131. *See* Press Release, White House, President Obama Announces Recess Appointments to Key Administration Positions (Mar. 27, 2010), *available at* <http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions>; Press Release, White House, Brian Hayes, Mark Pearce Confirmed by Senate as Board Members (June 22, 2010), *available at* <http://www.hilaborlaw.com/wp-content/uploads/2010/06/NLRB-Confirmation.pdf>; *see also* Hans Nichols & Holly Rosenkrantz, *Obama Bypasses Senate, Makes Appointments to NLRB, Treasury*, BLOOMBERG BUSINESSWEEK, Mar. 28, 2010, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aKr_AXeeC82k; Sheryl Gay Stolberg, *Obama Bypasses Senate Process*, N.Y. TIMES, Mar. 27, 2010 *available at* <http://www.nytimes.com/2010/03/28/us/politics/28recess.html>. *See generally* Marcia Coyle, *Labor Board Struggles for Relevance*, NAT’L L.J., Nov. 8, 2010.

132. *See* Memorandum from the Office of the Gen. Counsel to All Reg’l Dirs., Officers-

ballot elections involving exclusive bargaining representative status and are obviously unconstitutionally preempted by the Act.¹³³ It has also properly dismissed arguments that federal employer rights are denied by state statutes that limit anti-union campaigns on government projects.¹³⁴ True to the Clinton Board's condemnation of employer discrimination against so-called "salts,"¹³⁵ the Board has condemned discriminatory referral systems.¹³⁶ Under an important case protecting secondary display of stationary banners, the Board has held them not to be violative of the secondary boycott prohibitions.¹³⁷ Moreover, the Board has enhanced its limited remedial authority by providing for the first time for compound interest of back pay owed on a daily basis.¹³⁸

The problem here is not the Board's decisions—they are carefully well reasoned and worthy of judicial approval. The difficulty is that the decisions reflect continued and enhanced polarization of the kind that has plagued the Board for the past two or three decades, most particularly of the Clinton era of the 1990s.¹³⁹

in-Charge, and Resident Officers (Sept. 30, 2010).

133. See Letter from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to the Hon. Tom Horne, Att'y Gen., State of Arizona (Jan. 13, 2011) ("Preemption of State of Arizona Constitution Article 2, Section 36 by the National Labor Relations Act."); Letter from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to the Hon. Alan Wilson, Att'y Gen., State of South Carolina (Jan. 13, 2011) ("Preemption of State of South Carolina Constitution Article 2, Section 12 by the National Labor Relations Act."); Letter from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to the Hon. Marty J. Jackley, Att'y Gen., State of South Dakota (Jan. 13, 2011) ("Preemption of State of South Dakota Constitution Article 6, Section 28 by the National Labor Relations Act."); Letter from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to the Hon. Mark L. Shurtleff, Att'y Gen., State of Utah (Jan. 13, 2011) ("Preemption of Utah Constitution Article 4, Section 8 by the National Labor Relations Act."); State Constitutional Amendments Fact Sheet, NLRB (Jan. 14, 2011), <https://www.nlr.gov/news-media/backgrounders/state-amendments-and-preemption-0>. But see *NLRB Holds Off on Bringing Suit Against States with Secret Ballot Protection Constitutional Amendments*, LAB. MGMT. REL. PRACTICE GRP. (Feb. 4, 2011), <http://www.laborrelationscounsel.com/union-organizing-corporate-campaigns/nlr-holds-off-on-bringing-suit-against-states-with-secret-ballot-protection-constitutional-amendmen/>.

134. See *Independence Residences, Inc.*, 355 N.L.R.B. No. 153 (2010).

135. *NLRB v. Town & Country Elec., Inc.* 516 U.S. 85, 94 (1995).

136. See *KenMor Elec. Co.*, 355 N.L.R.B. No. 173 (2010).

137. See *Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. No. 159 (2010). Similarly, the Clinton Board addressed union organizational tactics with constitutional considerations as a backdrop. See *52nd Street Hotel Assoc.*, 321 NLRB No. 93 (July 8, 1996). A good discussion of these issues is contained in Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57 (2002); see also *Overstreet v. United Brotherhood of Carpenters & Joiners Local 1506*, 409 F.3d 1199 (9th Cir. 2005).

138. See *Jackson Hosp. Corp.*, 356 NLRB No. 8 (2010).

139. See William B. Gould IV, *What Would Employee Free Choice Mean in the Workplace?*, Presentation at the Fifty-Eighth Annual Conference of the Association of Labor Relations Agencies (July 20, 2009), available at http://www.law.stanford.edu/display/images/dynamic/publications_pdf/Gould%20July%2020%20Speech%20to%20ALRA1.pdf; see also William B. Gould IV, *Prospects for Labor Law Reform After the 2008 Election-Law Perspective*, (Jan. 4, 2009); William B. Gould IV, *Keynote Address to State Bar of California Labor and Employment Law Section Annual Meeting: The Decline and Irrelevance of the NLRB and What Can Be Done About It: Some Reflections on Privately*

President Obama, promising change in Washington, has settled back into the fifteen-year-old “batching” process, which exaggerates the ideological divide and puts little focus upon the appointment of experienced professionals and neutrals.¹⁴⁰ Already reduced to a four-member Board, all indications are that a Republican-influenced or -controlled Congress will attempt to undermine or circumscribe the best of President Obama’s appointment efforts.

Given the problematic nature of at least two of the three Obama labor initiatives, it is unlikely that the discussion of private agreements or policies will disappear. Unions may still have an interest,¹⁴¹ though the more balanced labor-management decision making of the Obama Board may make private agreements more attractive to employers, rather than unions. Management, for the same reasons that unions were attracted to private agreements in the Bush II Board era, might well become more interested in such initiatives in order to escape what they would view as the heavy hand of regulation. Whether management will be interested in genuine programs like the one launched by FirstGroup remains to be seen.

CONCLUSION

The FoA Policy and Program appeared to have been well received by both labor and management, notwithstanding their nonbinding quality and the fact that numerous violations and criticisms aimed at management were contained in the reports. The absence of a hearing contributed substantially to the ability of the process to be an expeditious one—one of the qualities which has been absent in labor law for at least four decades. The question of how a process such as this may be received by the NLRB and the courts—that is, will the reports be given some form of deference—remains to be answered.¹⁴²

Devised Alternatives, (Oct. 31, 2008) (speeches on file with author).

140. See MACKENZIE, *supra* note 13. In some measure, this divide was bridged in the Clinton Board era. See, e.g., Makro Inc., 316 N.L.R.B. 109, 114 (1995) (Gould, Chairman, concurring), *rev. denied sub. nom.* United Food and Commercial Workers Local No. 880 v. NLRB, 74 F.3d 292, (D.C. Cir. 1996), *cert. denied* 117 S. Ct. 52 (1996); Leslie Homes Inc., 316 N.L.R.B. 123, 131 (1995) (Gould, Chairman, concurring), *rev. denied sub. nom.* Metropolitan District Council United Brotherhood of Carpenters & Joiners v. NLRB, 68 F.3d 71, (3d Cir. 1995); International Longshoremens’ Association, 323 N.L.R.B. 1029, 1031 (1997) (Gould, Chairman, dissenting); Oil Workers International Union Local 1–591, 325 N.L.R.B. 324, 330 (1998) (Gould, Chairman, concurring); White Cap, Inc., 325 NLRB 1166, 1170 (1998) (Gould, Chairman, concurring); Lafayette Park Hotel, 326 N.L.R.B. 824, 829-834 (1998) (Gould, Chairman, concurring and dissenting in part). A good discussion of this matter is contained in Coyle, *supra* note 131.

141. UAW President Bob King has recently advanced this idea in connection with foreign-owned automakers. See Bob King, *Core Areas Where Agreement Needed*, UAW (Dec. 30, 2010), <http://www.uaw.org/story/core-areas-where-agreement-needed>; see also Nora Macaluso, *UAW’s King Says Talks with ‘Transplants’ Continuing, with Support From Other Unions*, Daily Lab. Rep. (BNA), Feb. 7, 2011.

142. There are other issues raised by the IM approach. For instance, the key to determining whether a subpoena can be issued to discover third party processes is whether the third party acts impartially. The system of labor mediation because of its essentiality to “continued industrial stability [constitutes] a public interest sufficiently great to outweigh the interest in obtaining every person’s evidence.” NLRB v. Joseph Macaluso, Inc. 618 F.2d 51,

FirstGroup did not negotiate the Program with the Teamsters or any of the other unions because: (1) a multi-union agreement would have been difficult to obtain; (2) the company was undoubtedly uneasy and somewhat distrustful of the union because of the allegations made against it; (3) the company probably feared that the unions would demand a card check and the company was committed to the secret ballot box election process. The unions may have been receptive because in many instances their charges and grievances were effectively addressed (and, even when they were not, the process was cathartic as is the case with arbitration involving collective bargaining agreements), and the process was infinitely preferable in many instances to the Bush II NLRB, which was not only one sided and anti-union, but also inattentive to the actual production of cases. Now, paradoxically, it may be that some companies will have an interest in their own machinery for precisely the opposite reasons, that is, the feared vigor of the newly constituted Obama Board. That approach clearly will not work.

Both sides that adopt the FirstGroup initiative must be committed to *more* protection in the form of remedies, speed, and publicity for workers than the NLRA. Only a balanced approach which takes labor and management beyond the law and effectively protects freedom of association through nonbinding reports and recommendations can succeed in such a venture. It may be that the globalization process and increased European investment in the United States will bring with it

56, (9th Cir. 1980). “The company argued that revocation of Hammond’s subpoena was improper because communications made to him during the course of the bargaining sessions were necessarily made in the presence of the opposing party and were not, therefore, confidential. Such a contention misapprehends the purpose of excluding mediator testimony which is to avoid a breach of impartiality, not a breach of confidentiality.” *Id.* at n. 3; *see also* Tomlinson of High Point, Inc. 74 N.L.R.B. 681, 688 (1947); *see generally* Dennis R. Nolan & Roger I. Abrams, *Arbitral Immunity*, 11 INDUS. REL. L.J. 228 (1989); Matthew M. Bodah, *What Labor Arbitrators Should Know About Arbitral Immunity: An Overview of the Law on Arbitrator Immunity and Its Application to Labor Arbitrators*, 63 DISP. RESOL. J. 28 (2008); Robert L. Clayton, *NRLB’s Authority and Procedures for the Issuance of Investigative Subpoenas*, ABA, Section of Labor & Employment, Mid-Winter Meeting (Feb. 24, 2004). It seems more than arguable that the Independent Monitor’s communications, and communications to him, are protected on state constitutional grounds. *See* Garstang v. Superior Ct., 39 Cal. App. 4th 526 (1995). In that case, the court established a qualified privilege of ombudsperson derived from the right to privacy in the California Constitution, Article 1, § 1. *Id.* The case involved an employee at a private university who sued her employer and three coworkers for damages for slander and intentional infliction of emotional distress. *Id.* at 530. Garstang sought to depose the three coworkers about statements made during informal mediation sessions with the university’s ombudsperson. *Id.* In balancing the competing interests with respect to Article 1, § 1, the court held the fundamental right to privacy outweighed the plaintiff’s interest in disclosure. *Id.* at 536. The court reasoned that the employees had an expectation that their communications with the ombudsperson would remain confidential, consistent with university pledge and assurance that they could rely on the ombudsperson’s confidentiality. *Id.* While some similarities between the Independent Monitor and corporate ombudsperson exist, points of difference only serve to reinforce a right to privacy. These include, the explicit promise of independence provided in the FoA policy and qualifications of all serving in the IM office. Such differences provided heightened impartiality and independence upon which communications would garner more substantial expectations of privacy.

some elements of international and European labor law more hospitable to the development of trade union recognition or procedures.