

U.S. Supreme Court hears challenge to union neutrality agreements

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Union-employer agreements that make it easier for workers to unionize are under attack from an anti-union group — in a case heard by the U.S. Supreme Court Nov. 13. In the case, *UNITE HERE Local 355 vs. Mulhall*, the anti-union National Right to Work Legal Defense Foundation is arguing that the so-called union “neutrality” agreements violate federal labor law.

Neutrality agreements have become standard practice for unions like UNITE HERE and Service Employees International Union (SEIU). They’re an alternative to certifying a union through an election — a process that can be very stacked in the employer’s favor. Employers use legal maneuvers to delay union elections and then pressure workers to vote no in mandatory-attendance anti-union presentations and in one-on-one meetings with managers. In the standard neutrality agreement, an employer lets union representatives communicate with workers, pledges not to oppose worker efforts to unionize, and agrees to recognize a union if a majority of workers sign cards requesting that (a process known as “card check”). Employers typically do that either to avoid a campaign of negative public-

ity from the union, or in exchange for union support for some business goal, like more public funding of nursing homes.

The Mulhall case started with a neutrality agreement between Florida-based UNITE HERE Local 355 and Mardi Gras Gaming, which operates a greyhound race track near Miami. In 2004, Florida UNITE HERE promised \$100,000 in support of a statewide referendum to allow slot machines at dog racing tracks in Broward and Miami-Dade counties. In exchange, casino operators signed neutrality agreements. The measure passed by 50.8 percent, and UNITE HERE moved to unionize the casinos.

Under the neutrality agreement, Mardi Gras was supposed to give the union limited access to company work premises, provide a list of workers, with their addresses, and voluntarily recognize Local 355 if a majority of its workers signed authorization cards. But Mardi Gras reneged on the deal. UNITE HERE sued to enforce the agreement.

Then Martin Mulhall, a groundskeeper at the race track sued, represented by William Messenger of the National Right to Work Legal Defense Foundation, arguing that the neutrality agreement itself was illegal. Under

Section 302 of the National Labor Relations Act, it’s illegal for an employer to pay, lend, or deliver “things of value” to a union. The intent of that section is to prevent employers from bribing unions. But Messenger argued that access to employer premises and a list of employees were things of value, and for an employer to agree to give them to a union should be considered a federal crime.

Incredibly, the Eleventh U.S. Court of Appeals agreed. UNITE HERE then appealed, joined by the U.S. Department of Justice, and the Supreme Court agreed to hear the case.

It’s always hard to predict how a court will rule, but in the Nov. 13 oral argument, Messenger’s logic drew fierce questioning from justices Elena Kagan, Ruth Bader Ginsberg, Anthony Kennedy and Stephen Breyer.

“Let’s just say that there was an employer,” Kagan said. “This employer said, you know, I think that my employees should have a right to listen to you and to decide for themselves whether they want to be represented by — by the union, so I’m inviting the union onto my premises. Just simple as that. You’re saying that the employer cannot do that.”

“That’s correct,” Messenger replied.

“So this is to say that the National Labor Relations Act prohibits employers from providing access to their premises, from granting a union a list of employees, or from declaring itself neutral as to a union election.”

“Yes,” Messenger replied.

“Do you acknowledge that your answer to Justice Kagan is contrary to years of settled practices and understandings?” Justice Anthony Kennedy interjected.

Even conservative Justice Antonin Scalia was drawn in. “What if the employer does not oppose the union, he neither speaks against it nor for it? Is that giving something of value to the union?”

“If he agrees to do so,” then yes, Messenger replied.

Kagan pointed out the law says seven days after an election is scheduled, an employer has to make available to the union an employee list. Kagan “So you’re suggesting that if the employer gives it six days after, that’s not only not required, that’s forbidden?”

Deputy Solicitor General Michael Dreeben argued for the Department of Justice that the purpose of the National Labor Relations Act is to encourage collective bargaining. Section 302 was intended to prevent

employers bribing unions; it’s not intended to prevent employers from making agreements that further the purpose of the Act, namely collective bargaining.

Conservative Justice John Roberts took the opportunity to ask Dreeben if he would agree that card check is more coercive than secret ballot: “The union organizer comes up to you and says, well, here’s a card. You can check I want to join the union, or two, I don’t want a union. Which will it be? And there’s a bunch of your fellow workers gathered around as you fill out the card.... and he’s a big guy.”

“Some would argue that employers also have big guys,” Dreeben replied. “And it’s very coercive to have your employer in there on the factory floor reminding employees daily that they’re very anti-union and that there are a lot of costs to joining a union.”

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