

SUCCESS DESPITE RTW

Techniques To Increase Union Membership

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I. INTRODUCTION

Succeeding in a “right-to-work” (RTW) state means hard work and effective organizing. There are legal techniques that help but are only useful if the union is effective in organizing workers, both those it currently represents and in new units. The union must be growth-oriented. Simply trying to hold onto what it has means decline. Hard work is always the essential ingredient but flexibility and creativity, even to the point of iconoclasm, is also necessary.

Successful unions in RTW states use a wide variety of techniques. Some are positive reinforcements and others are negative towards those who do not think they should be members. There are carrots and sticks.

II. CARROTS AND STICKS

Carrots

Constant contact between the union and represented employees is essential. Union staff cannot wait in the office for people to call with problems. Staff must be out in the field much of the time. The relationship between the union and employees in existing units is treated just like new organizing. The union’s goal is to achieve 100% membership in existing units. This means finding and proselytizing those who have not yet joined, both at the workplace and in home visits.

The union must get good contracts and give good service. The better the union delivers, the better its reputation and the easier it is to sell people on joining. New organizing comes into play here. If the union increases its density in a market, it is better able to achieve good contracts. Success breeds success. Stagnation leads to decay. Heavy investment in organizing new units is indispensable.

Union benefit plans have been historically big selling points. This is still true although it is more challenging in today’s environment of underfunded and expensive pension plans and health plans endangered by the Affordable Care Act. Nevertheless, most employees value their participation in these plans highly. The union needs to associate itself with these plans and explain that they exist only because the union exists, and the union exists only because it has members. While membership is not technically a requirement for participation, workers should be led to see that is an indispensable connection.

Peer pressure is the most effective organizing tool in existing units. Union staff can only make occasional contact with individuals but co-workers can continuously advocate with non-members that they should join.

Union in RTW states should consider whether to reduce or drop their usual initiation fees. These fees constitute a barrier to joining the union, the opposite of what is desired. The amount of money realized from these fees is nothing compared to the income from long-term membership.

Non-members in existing units must be given all the same terms and conditions of employment as members. *Hughes Tool Co.*, 104 NLRB 318, 324-325 (1953). This does not extend to dues-financed programs. *Id.* at 324. These can be limited to members. Many such programs can be devised. Entertainment attractions and transportation companies like airlines offer group discounts that unions can obtain for their members. Unions can obtain group insurance products like disability and life insurance that are offered only to members. Some unions offer assistance with unemployment insurance and workers' compensation claims and since this assistance is provided by staff paid through dues, and these government benefit programs are outside the collective bargaining relationship, only members receive the help. The more of these dues-financed benefits the union can put together, the more attractive union membership becomes in addition to the advantages derived from collective bargaining.

Certifications are needed for some jobs. These are usually provided through training courses at private or public educational institutions not affiliated with unions, or through union-sponsored training programs. The union training programs are usually jointly-trusted Taft-Hartley plans financed by employer contributions. This means that non-members must be allowed to participate. If the union is able to offer certification without employer involvement, however, then it can become a provider for this employment opportunity and limit its availability to members. It is worth considering trying to convert employer contributions to wages, then the wages to dues, in order to achieve more union control over training and certification, despite the shrinkage from different tax treatment of employer contributions than union dues and the opportunity for non-members to pocket the increased wage.

Sticks

Peer pressure can be negative as well as positive. There are outside limits to how far co-workers can go in making work life unwelcoming to non-members. *Farmer v. Carpenters Local 24*, 430 U.S. 290 (1977). But no law requires union members to be friendly to scabs or helpful beyond the requirements of the work processes in which employees are engaged.

There is no right of privacy in being a freeloader. A union and its members can expose this fact. The names of those enjoying the benefits of collective representation but not paying for it may be posted in the workplace, in the union office, on the union's website, through social media, etc. These postings do not need to be gentle. These people are scabs and may be called so. *Letter Carriers v. Austin*, 418 U.S. 264 (1974). Unions should resort to this type of exposure only after organizing efforts have been tried diligently and have failed.

A non-member has no right to participate in union affairs. This includes the collective bargaining process. *NLRB v. Financial Inst. Employees of America, Local 1182, Chartered by United Food and Commercial Workers Intern. Union, AFL-CIO*, 475 U.S. 192 (1986). Non-members do not have any right to come to meetings where proposals are discussed. Communications about the progress of negotiations can be confined to union members. Non-members do not have any right to vote on ratification of an agreement. If the union gathers workers to discuss workplace problems and their solutions, non-members have no right to participate. Non-members cannot vote in the election of union officers. If there is any process for selecting shop stewards that involves their co-workers, non-members can be excluded. Of course, non-members can also be excluded from union events such as picnics and barbeques,

concerts, political meetings, etc. These exclusions should be very plain for all to see so that the effect of not being a member is felt.

III. CONTRACT LANGUAGE

Although non-members must receive the same terms and conditions of employment as members, certain provisions in collective bargaining agreements help achieve higher membership levels. Sample clauses for all the types of contract provisions discussed below are in the Appendix.

Dormant union security

Union security provisions should be negotiated into collective bargaining agreements in RTW states, or kept where they exist, with a trigger clause making them effective when state law allows. Employers will propose deletion of existing union-security provisions on the grounds that they are obsolete or inapplicable but we all know that it is harder to negotiate something into an agreement than it is to keep it.

Access

Agreements in RTW states need to have union access provisions. These should be as broad as possible. At a minimum, they are needed to give union staff the opportunity for contact with workers that is needed to refer them to join the union, as well as dealing with them about grievances and workplace problems. Some access provisions also give union staff and benefit fund representatives the right to be on premises to explain benefit programs and enroll employees in them – including benefit programs that are sponsored only by the union and are available only to union members.

Employee contact information

For many of the same reasons, the union needs to have a provision in the agreement requiring the employer on a regular basis to supply employee information to the union, including contact information such as home addresses, telephone numbers and e-mail address. Much effective organizing takes place away from work. Getting contact information from the employer is the most efficient way to have the knowledge necessary to facilitate this organizing.

Participation in hiring process

The earlier the union can get to new employees to inform them about what the union offers and advocate that they join, the higher the rate of success. Union staff may be present at new employee orientations, if they can get the employer to agree. An alternate technique is the “reverse referral”, where the employer agrees to send employees to the union for orientation about the collective bargaining agreement and benefit plan as part of the hiring process. Obviously, if the union can negotiate to become the source of new employees, this is very useful.

Dues checkoff

By far the most important provision is dues checkoff. Dues checkoff is governed by §302(c)(4) of the Labor Management Relations Act, 1947, 29 U.S.C. § 186(c)(4), not by § 8(a)(3) of that Act, 29 U.S.C. § 158 (a)(3). Section 14(b) of the Act, 29 U.S.C. § 164 (b), only allows states to prohibit contracts requiring union membership as a condition of employment. It does not give states the ability to regulate dues checkoff, which is exclusively governed by federal law. Dues checkoff is voluntary. *See Service Employees Local 74 (Parkside Lodge of Connecticut)*, 323 NLRB 289, 293 (1997); *Communications Workers of America, Local 1011, AFL-CIO*, 281 NLRB 413 (1986); *Int'l Union of District 50, United Mineworkers of America (Ruberoid Co.)*, 173 NLRB 87, 95 (1968). Employees may choose to pay dues by this convenient method but they may not be required to do so. Instead, they have given voluntary assignments of their dues amounts. These assignments specify, as the LMRA mandates, when and how the assignments may be revoked. Honoring the assignments according to their terms is therefore not making employees pay dues against their will; it is holding them to their voluntary, contractual commitments. Because dues checkoff is separate from union security and is governed exclusively by the LMRA, state laws such as “right to work” laws are preempted. *Seapak v. Industrial, Technical and Professional Emp., Division of National Maritime Union, AFL-CIO*, 300 F. Supp. 1197 (N.D. Ga. 1969), *affirmed* 423 F.2d 1229 (5th Cir. 1970), *affirmed* 400 U.S. 985 (1971). *See also International Brotherhood of Operative Potters, AFL and CIO et al. v. Tell City Chair Company*, 295 F. Supp. 961 (S.D. Ind. 1968) (Indiana statute requiring union dues assignments to be ‘revocable at any time by the employee,’ preempted). The States may not prohibit what federal law allows, with the narrow exception of union security.

If a dues checkoff authorization makes the deduction of dues-equivalents independent of membership in the union, resignation of membership does not revoke the authorization. *Steelworkers Local 4671 (National Oil Well)*, 302 NLRB 367, 368 (1991); *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991); *Teamsters Local 667 (American Freight)*, 302 NLRB 694 (1991); *Affiliated Food Stores*, 303 NLRB 40 (1991) *Woodworkers (Weyerhaeuser Co.)*, 304 NLRB 100 (1991). *See Allied Production Workers*, 337 NLRB 16, 19 n. 9 (2001). This is obviously of extreme importance in RTW states where members may resign at any time.

The rules about revocation of dues checkoff authorizations apply equally in RTW states as in union-security states. An employee may make revoke only in the window specified in the authorization. The employee may revoke only by the means specified. *Rock-Tenn Company*, 238 NLRB 403, 408 (1978), *enf'd* 594 F.2d 862 (5th Cir. 1979). The employee cannot even get a reduction of dues for union expenditures not “germane” to representation. This right under *Beck* exists only where membership is compelled by a union security provision. In RTW states, there is no compulsion and therefore no right to reduction.

Although a window opens up at the expiration of the collective bargaining agreement, dues checkoff (unlike union security) does not terminate automatically upon expiration. *Lowell Corrugated Container*, 177 NLRB 169 (1969); *Associated Press*, 199 NLRB 1110 (1972); *IBEW, Local 2088*, 302 NLRB 322 (1991); *Quality House of Graphics*, 336 NLRB 497, 512-513

(2001). So, for example, an employer does not violate the National Labor Relations Act by continuing to honor unrevoked check-off authorizations after the expiration of the CBA. *Lowell Corrugated Container*, 177 NLRB at 173. Similarly, a union does not violate the Act when it demands that dues be checked-off after expiration of a CBA pursuant to unrevoked authorizations. *Chemical Workers Local 143*, 188 NLRB 705 (1971).

In *Frito Lay*, 243 NLRB 137 (1979), employees attempted to revoke their dues check-off authorizations during the hiatus between the expiration of one collective bargaining agreement and the execution of a new agreement. The Board held that the check-off authorizations survived the expiration of the CBA and that the employees could only revoke their authorization during the window period prior to the old CBA's expiration date. The card in that case stated that an employee could give notice of revocation "not more than twenty (20) days and not less than ten (10) days prior to the expiration of each period of one year or of the applicable collective bargaining agreement between my Employer and the Union, whichever occurs first." *Id.* The window period was stated once and then was followed by the two alternate dates when it opened, followed by a final clause indicating that these two dates were in fact alternative dates when the ten-day window opens. The Board read them this way. "The authorizations provided that they would be irrevocable except for two escape periods: one 10-day period ending 10 days prior to the expiration of 1 year from date that the authorization was executed; and one 10-day period ending 10 days prior to the expiration of any collective bargaining agreement in effect or which became effective after the execution of the authorization." *Id.* at 139. The employees tried to revoke their authorizations after the ten-day window period at the expiration of their collective bargaining agreement had closed. The Board held that they were not entitled to do so and that the employer and union did not commit unfair labor practices by continuing to check off their dues. *Id.* This analysis was reaffirmed recently in *Smith Food-Drug Centers, Inc.*, 358 NLRB 66 (2012). The card in that case stated that it would be "irrevocable for a period of one (1) year from the date of execution or until the termination date of the agreement between the Employer and Local 99, whichever occurs sooner, and from year to year thereafter, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period I give the Employer and Union written notice of revocation..." "Subsequent yearly period" most naturally refers to the annual periods following execution of the authorization, not the expiration on the collective bargaining agreement. The only explicit window was one tied to the expiration of the "yearly period". Nevertheless, the Board interpreted the authorization as providing two window periods, one at the anniversary date of the authorization and the other at the expiration of the collective bargaining agreement. Attempts by employees to revoke after the closing of the contract-expiration window period were ineffective. *Id.*, slip op. at 4-5.

In RTW states (at least) dues checkoff may not be terminated unilaterally by the employer after the expiration of the agreement. *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865 (9th Cir. 2011). See *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015).

IV. THE ROLE OF THE EMPLOYER

Employers influence employees' views on whether to join the union. Unions have some ways to influence the employers' views.

In some industries, union labels are in use. In particular ones, the union label has considerable commercial value, as in the printing trades and some branches of construction. The union label is not a term or condition of employment. It is intellectual property owned by the union and the union can set its terms for licensing. Those terms can include a requirement that everyone in the union's unit must be a member, not just those happen to work on particular product. That is really what the union label should mean. For this to be effective, of course, there must be enforcement.

Construction unions use job targeting or "equality" funds to keep and increase market share. Most of these funds are derived from dues. Where this is true, the union has the power to set the criteria for grants to a contractor. One-hundred percent membership in the union's bargaining unit at that contractor should be one criterion.

Unions are sometimes called upon to consider midterm contract concessions, either for a particular job, for a finite period of time, or permanently. Midterm bargaining is a non-mandatory subject. *The Boeing Company*, 337 NLRB 758, 762 (2002). A union might condition its willingness to engage in midterm bargaining on the level of membership in the unit.

APPENDIX

SAMPLE PROVISIONS

Union security trigger

Notwithstanding anything to the contrary therein, this Section shall not be applicable if all or any part thereof shall be in conflict with applicable law; provided, however, that if all or any part of this Section becomes permissible by virtue of a change in applicable law, whether by legislative or judicial action, the provisions of this Section held valid shall immediately apply.

Access

Authorized representatives of the Union shall be permitted to visit the Employer's establishment for the purpose of communicating with employees and supervisors regarding Union business and collecting Union dues, assessments and initiation fees. Such visits shall not interfere with the conduct of the Employer's business or with the performance of work by employees during their working hours. Union representatives will be required to report to the designated office or Security and sign in and wear identification while on the premises of the Employer.

Employee information

To permit the Union to properly and efficiently carry out its responsibilities, the Employer shall provide the following information to the Union:

- (a) By the tenth (10th) day of each month, a list of all employees hired into the bargaining unit or transferred into the bargaining unit during the preceding month, including each employee's name, social security number, department, job title, home address, phone number, gender, status (full time, part time, etc.), date of hire, date of birth and ethnicity.
- (b) By the tenth (10th) day of each month, a list of all bargaining unit employees terminated placed on leave of absence or transferred out of the bargaining unit, during the preceding month including each employee's name, social security number, the reason for such termination, leave of absence or transfer and the date(s) of such personnel transactions, and the expected date of return for leaves of absence.
- (c) The reports described in subsections (a) and (b) shall be sent to the Union by fax or mail or downloaded from the Company's FTP site by the Union or uploaded by the Company to the Union's FTP site or via email.
- (d) The Employer shall furnish the Union with a quarterly list of all employees in the bargaining unit, including each employee's name, social security number, department, job title, date of birth, date of hire and sex. Data regarding employee ethnicity will not be shared with any person, media or entity outside the Union and employee benefit funds. This report shall be in an Excel spreadsheet or in a formatted text format like .csv format, containing header information in any one of the following media:

1. Downloaded by the Union from the Company's FTP site;
2. Uploaded by the Company to the Union's FTP site;
3. Via e-mail transmission (See 4.03(c) above);
4. CD ROM.

"Reverse referral"

When the Employer considers applicants for employment who have not been referred to the Employer by the Union's dispatch office, the Employer shall, in order to maintain a consistent and orderly process, advise such applicants that in order to obtain employment they must be dispatched for available positions. The Union will give the applicants proof of registration. The Employer agrees no employee will be hired or put to work without a referral slip from the Union's Dispatch Office except in the case of an emergency. The Union's referral service shall send applicants named by the Employer directly back to the Employer. Such applicants named by the Employer shall be processed by the service without any discrimination. Any applicant named by the Employer shall be permitted by the Union's referral service to register in the same manner as others. If there are any problems with processing of applicants, the parties will review such problems and make such changes as may be necessary.

Union participation in orientation process; employer neutrality

The Employer shall give the Union the right to participate in the Employer's employee orientation process for new employees. Union representatives shall be allowed to either participate jointly or immediately subsequent to Employer representatives in giving new employees information about the Union, the collective bargaining agreement and the benefit programs under the agreement. In advance of each orientation meeting, the Employer shall provide the Union with a list of all new employees who will be involved in the orientation, including each employee's name, social security, job title, department and full-time or part-time status. The Employer will not make any negative references to the Union during the Employer's interviewing, hiring and orientation processes. The Employer shall not advise applicants or employees as to the need for or desirability of Union membership.

Checkoff authorization “irrespective” of union membership

PAYROLL DEDUCTION AUTHORIZATION

Date _____

I, the undersigned, hereby request and voluntarily authorize the Employer to deduct from any wages or compensation due me, an amount equal to the regular monthly dues uniformly applicable to members of _____ (“Union”) in accordance with the Constitution and Bylaws of the Union.

This authorization shall remain in effect and shall be irrevocable unless I revoke it by sending written notice to both the Employer and the Union by registered mail during a period of fifteen (15) days immediately succeeding any yearly period subsequent to the date of this authorization or subsequent to the date of termination of the applicable contract between the Employer and the Union, whichever occurs sooner, and shall be automatically renewed as an irrevocable check-off from year to year unless revoked as hereinabove provided, irrespective of whether I am a Union member.

Signed _____

Social Security No. _____