

# Using an Independent Monitor to Resolve Union-Organizing Disputes Outside the NLRB: THE FIRSTGROUP EXPERIENCE

BY WILLIAM B. GOULD IV

Facing an aggressive union-organizing campaign at its U.S. subsidiary, a multi-national company implemented an unprecedented ADR program to address complaints that management violated the company's corporate social responsibility policy and its commitment to the right of employees to associate with a union. The program, known as the Independent Monitor could be a model for other companies.

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For decades, the National Labor Relations Act (NLRA) and the National Labor Relations Board (NLRB), the federal agency that enforces the NLRA, have been ineffective in protecting the rights of employees to associate freely with labor unions. This has led some unions to devise alternative strategies, such as “corporate campaigns,”<sup>1</sup> to obtain recognition as a collective bargaining representative for employees. One

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British company, FirstGroup plc, faced such a campaign and took an unprecedented approach in response to union complaints that its U.S. subsidiary was interfering with the right of employees to unionize. The company adopted a Freedom of Association Policy (FoA Policy) and appointed a neutral third-party expert in labor disputes to create an Independent Monitor Program (IM Program) to investigate alleged violations of that policy.

This article briefly discusses the limitations of the NLRA and NLRB, which have contributed to a decline in union organizing. It then discusses the development of FirstGroup's FoA Policy and IM Program and examines how they worked. Finally, the article considers whether the NLRB should defer to private dispute resolution programs like the IM Program, which could provide a model for private multinational companies wrestling with labor-organizing disputes.

### **The Decline of Union Organizing**

During the past several decades, the rate of union organizing among employees has been on the decline. In 1955, union membership reached 35% of the workforce, but over the next two decades, the numbers began to go down. The decline accelerated considerably in the union-hostile decades of the 1980s and 2000s. In 2011, the percentage had plummeted to 11.9% (only 6.9% in the private sector).

The NLRA has been a factor in this phenomenon.<sup>2</sup> To protect the right of employees to associate with labor unions,<sup>3</sup> the statute proscribes unfair labor practices (ULPs) and establishes a representation process that allows employees to select representatives of their own choosing. The statute, however, contains limitations, apparent since the 1970s, that foster delay in the NLRA's administrative and judicial processes for ULP and representation claims.<sup>4</sup> For example, an employer is able to delay representation elections through extensive litigation, which is exacerbated by the absence of any time limitations on the NLRB or its general counsel to act.

With respect to ULP claims, employees and unions must navigate through a multi-layered process to enforce rights conferred by the NLRA. First, an employee or union files a ULP charge with the regional NLRB office. Second, that office conducts an investigation on behalf of the general counsel for the NLRB. Third, if

there is cause to believe that a ULP has been committed, the regional office will issue a complaint. Fourth, a hearing is held before a career civil servant with the title of administrative law judge who then issues a ruling. Then there are several levels of appeals. The ALJ's ruling can be appealed to the NLRB in Washington. The NLRB's decision can be appealed to the appropriate federal circuit court of appeals. Finally, an unsuccessful party can file a petition for review to the U.S. Supreme Court.<sup>5</sup>

The multi-step representation process set forth in the NLRA is prone to similar delays, even though it is supposed to be more expeditious and streamlined.<sup>6</sup> The first step is filing a petition with the NLRB to trigger a vote on whether a union should represent a group of employees as their exclusive bargaining representative. The petition may be filed by an employee or union where 30% of employees within an appropriate bargaining unit support a union or an election.<sup>7</sup> Following the filing of the petition, the

parties may enter into a consent agreement and stipulate to certain election issues that might otherwise be in dispute, such as the time and place of voting, employee eligibility, and the appropriate bargaining unit. If the parties do not reach an agreement, the alternative is to hold an evidentiary hearing on the disputed issues, which creates the potential for delay.<sup>8</sup> That hearing is held before a hearing officer in a regional

office of the NLRB. Following the hearing officer's decision, the losing party may appeal. That appeal is made to the NLRB in Washington, where some appeals have been known to languish for years, delaying the opportunity to select a collective bargaining representative. Even in the case where the parties enter into a consent agreement, an unsuccessful party can request a review of election conduct and, in some cases, appeal to the NLRB in Washington. This appeal also has the potential to hold up the certification of the collective bargaining representative.

Representation cases also can be delayed when they become ensnared in ULP proceedings. This can occur, for example, when an employer simply refuses to bargain with a union that obtains majority support at the ballot box.<sup>9</sup> In this situation, the union's only recourse is to file a refusal-to-bargain ULP charge, which then proceeds through the multi-step labyrinth described above.<sup>10</sup>

### ***The representation process in the NLRA can result in protracted litigation that lasts for several years.***

Thus, both ULP and representation disputes can result in protracted litigation that lasts for several years.<sup>11</sup> Since employee interest in unionizing may wane over time, an employer can thwart a union's organizing effort by taking advantage of the weaknesses inherent in the NLRA procedures. These delays seriously limit the NLRA's ability to protect employee freedom of association rights. This problem has encouraged unions to develop alternative strategies for organizing employees.

### **Unions Turn to Corporate Campaigns**

One strategy unions have developed in response to union decline and delays in the NLRB process is the "corporate campaign." Unions create these campaigns to exert public pressure on employers to stop alleged interference with union organizing efforts.<sup>12</sup>

In these campaigns, unions frequently seek to negotiate recognition procedures that would be an alternative to the representation process under the NLRA. One procedure is a privately conducted election; another is a card-check procedure by which a union gains recognition as the collective bargaining representative for employees based on the number of employees who sign union authorization cards. The union and employer might also negotiate other terms including: union access to the employer's 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, and prohibitions against captive audience meetings and interrogation of employees.

As part of the negotiated recognition procedures, the union and employer often appoint a private arbitrator to resolve controversies that arise. However, in an extremely trenchant and persuasive article, Prof. Laura Cooper has highlighted the limitations of using arbitrators for disputes about union recognition.<sup>13</sup> She points out that where arbitrators are involved in a relatively mechanical process (for example, counting authorization cards and checking the signatures against the employer payroll to determine whether a majority of the employees have expressed allegiance to the union as their bargaining representative), there is no problem. However, where the scope of the bargaining unit itself is in controversy, vexatious problems can arise for the arbitrator. For example, arbitrators may be called upon to decide hotly contested issues involving policies embodied in the NLRA itself, which they are not accustomed to addressing under collective bargaining agreements.

However, Prof. Cooper pointed out more fundamental problems. First, an arbitrator relies upon employee witnesses called by unions and employers to support their respective positions, whereas the NLRB has independent, investigatory powers to seek out the full set of facts. Second, the NLRB has broad subpoena authority and the ability to decide issues in the absence of information requested by the parties, whereas the authority of arbitrators "to subpoena witnesses and documents and to issue discovery orders is far from clear."<sup>14</sup> Third, in grievance-arbitrations, the discovery process takes place at the lower steps of the grievance process, and the union can play a monitoring role to protect employees against potential retaliation. In representation disputes, the union cannot play that role because the employees are not yet protected by a collective agreement. In addition, the arbitral process provides no promise of confidentiality as do the NLRB's procedures.<sup>15</sup> Despite the limitations outlined by Prof. Cooper, some unions and employers have continued to enter into these sorts of arrangements.

In the case of FirstGroup plc, which faced a corporate campaign by several unions alleging violations of employee association rights, the company adopted a unique approach that did not present these problems. I turn to that subject now.

### **FirstGroup plc**

FirstGroup plc is a British company that claims to be the leading transport operator in the United Kingdom and North America with revenues of over £6.4 billion.<sup>16</sup> The company employs more than 125,000 staff throughout the U.K. and North America and transports around 2.5 billion passengers each year. The company grew out of the deregulation of bus services in the U.K. In 1989, employees of a municipal bus operator (Grampian Regional Transport) for Aberdeen, Scotland, bought the company under an Employee Share Ownership Plan. The company acquired several other former nationalized bus companies in England and Scotland and merged with the Badgerline Group in June 1995 to form First Bus. First Bus continued to grow by acquiring other English, Welsh, and Scottish nationalized operators and changed its name to FirstGroup plc in 1998, when it acquired railway businesses after the U.K. privatized the railway industry.

In 1999, FirstGroup plc sought to strengthen and diversify its business by acquiring Ryder Public Transportation in the United States. The purchase made FirstGroup America, a wholly

owned subsidiary of FirstGroup plc, the second largest operator of school buses and a leading provider of transit management and vehicle maintenance services in the United States. FirstGroup plc viewed the Ryder purchase as a strategic step that would allow it to take advantage of, and apply its public transportation experience and expertise in, the U.S. market. Then, on Feb. 7, 2007, the company agreed to purchase Laidlaw International, Inc. for \$3.6 billion. Laidlaw was the largest operator of yellow school buses. It also provided transit services and owned and operated Greyhound. The deal closed on Sept. 30, 2007, making FirstGroup America's school bus unit (First Student) the leading student transportation provider in North America, serving more than 1,500 school districts with more than

tional declarations and codes. One of the many principles in the CSR Policy states: "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."

Beginning in 2004, several unions used FirstGroup plc's public commitment to the CSR Policy to exert pressure on the company to alter what the unions considered to be anti-union conduct by managers at FirstGroup America. The Teamsters, the TGWU, and the Service Employees International Union held rallies at FirstGroup offices in the U.K. and the U.S. They

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60,000 buses. The deal also increased operations at the transit management unit (First Transit), which employs 15,500 people and operates 7,000 buses out of 235 locations in 41 states, Canada and Puerto Rico. FirstGroup retained the Greyhound name and planned to identify strategic opportunities to develop the Greyhound business.

### **FirstGroup Attracts Labor Union Attention**

When FirstGroup plc acquired Ryder in 1999, some of the facilities that it inherited were already organized by several different unions. Those unions were also involved in organizing other former Ryder locations. Shortly after the Ryder purchase, the International Brotherhood of Teamsters contacted colleagues in one of Great Britain's largest trade unions, the Transport and General Workers Union (TGWU)—which represented bus workers at FirstGroup's U.K. facilities—to gather information about FirstGroup. Over the next few years, representatives from the TGWU, the Teamsters, the International Transport Workers' Federation (ITWF), and others met to discuss FirstGroup's business. That business included a Corporate Social Responsibility Policy (CSR Policy), implemented in 2001, which incorporated international standards of corporate governance and individual rights embodied in several different interna-

worked with a U.K. lobbyist to communicate their positions to members of Parliament, and they hosted a week-long fact-finding mission to the U.S. for three British government officials. They also communicated their complaints about FirstGroup America's anti-union behavior (and about low wages and benefits) directly to FirstGroup plc's shareholders. The Teamsters also commissioned several studies of alleged violations of rights of freedom of association under international human rights law.

Throughout the campaign, FirstGroup plc repeatedly dismissed the unions' allegations as propaganda and accused the unions of bullying its school bus drivers into becoming union members. Meanwhile, in communications to shareholders, the company claimed to be neutral on the issue of unionization, and it went so far as to commission a former Member of Parliament to give an independent view on the company's operations. At the same time, it committed in principle to eradicating any alleged anti-union behavior at its U.S. operations.

In 2007, the company issued to its management an internal policy on employee relations that expressed a neutral view on union membership. That policy served as the model for the FoA Policy, which was released to employees in 2008. The FoA Policy stated that the company was committed to supporting the following employee

rights: (1) freedom of association, (2) a secret ballot election, (3) an informed choice, and (4) a representative voter turnout. In addition, the FoA Policy expressed management's commitment not to engage in anti-union conduct. It stated: "Management shall not act in any way which is or could reasonably be perceived to be anti-union. This includes refraining from making derisive comments about unions, publishing or posting pamphlets, fliers, letters, posters, or any other communication which should be interpreted as criticism of the union or advises employees to vote 'no' against the union." The FoA Policy also reserved the company's right to provide employees with factual data relevant to election issues. It stated, "[W]e believe that employees should be able to make an informed choice and therefore management may provide balanced factual information to assist its employees in making that choice."

The objective of the FoA Policy was "[t]o manage [the company's] business in support of [its] employees and the above rights and to refrain from management conduct, whether written or verbal, which is intended to influence an employee's view or choice with regard to labor union representation. In particular, during union organizing campaigns, management shall support the employee's individual right to choose whether to vote for or against union representation without influence or interference from management."

### **FirstGroup Establishes the IM Program**

In November 2007, shortly before the FoA Policy was sent to employees of FirstGroup plc and its subsidiaries, Sir Moir Lockhead, CEO of FirstGroup plc, contacted me about serving as an Independent Monitor of FirstGroup's FoA Policy in the U.S. I accepted and, over the next several weeks, participated in several meetings and telephone conversations with FirstGroup corporate representatives, which set the groundwork for what would become the IM Program. I also established a team of experienced labor law and labor-relations professionals to assist me in investigating alleged FoA Policy violations.

The IM Program commenced on Jan. 1, 2008. At that time it was unclear whether the unions would accept and use this unilaterally implemented ADR program and whether employees and front-line managers would know about it.

Prior to January 2008, Sir Moir sent a letter to FirstGroup shareholders notifying them of my appointment as the Independent Monitor. He also sent a letter to James P. Hoffa of the Teamsters announcing the adoption of the program. Mr. Hoffa's reply expressed serious concerns regarding FirstGroup's adoption of the IM Program. Although he said that the Teamsters welcomed an Independent Monitor and were pleased with my appointment, he worried that the program would fail (as had previous company monitoring efforts) without "robust" processes in place to ensure implementation and enforcement. Mr. Hoffa also questioned the company's decision to adopt the program unilaterally, without seeking a dialogue with the Teamsters. Later that month, I met with representatives of the Teamsters' Organizing Department to explain the IM Program's procedures. At that meeting, the Teamster representatives raised questions about the program but expressed considerable support for the process.

Although the Teamsters had not yet accepted the IM Program, on Jan. 25, 2008, Sir Moir referred two previously received Teamster complaints to the IM Program. Soon thereafter, the Teamsters filed several complaints with the Independent Monitor alleging FoA Policy violations at a number of First Student facilities.

To emphasize to FirstGroup America's senior managers the importance of the IM Program, at a management meeting in February 2008, Sir Moir advised these managers that if any of them objected to the FoA Policy or the IM Program, then they could simply resign.

To make front-line managers, union organizers, and employees aware of the IM Program, the company and I took the following steps.



*FirstGroup America owns and/or operates over 70,000 school and transit buses, and maintains many more vehicles in over 1100 locations in the United States and Canada.*

VisionofAmerica/Joe Sohm/Getty Images

On April 25, 2008, the company mailed a letter I wrote to more than 81,000 FirstGroup America employees throughout the U.S. describing the IM Program, the complaint procedure, and the machinery attached to it. This letter was accompanied by a supportive letter from Dean Finch, then Chief Operating Officer for FirstGroup America. Because this communication was so abbreviated—just two pages—it seemed to have caught the attention of many employees.

Next, every FirstGroup America facility was outfitted with a glass-enclosed bulletin board on which the FoA Policy and an overview of the IM Program were posted. These documents provided contact information for the IM Program in the event an employee wanted literature about the program or additional information. They also informed employees that this material could be obtained from their local manager.

The company also conducted an internet-based training program for FirstGroup America managers. The training program explained the FoA Policy and IM 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 IM Program would subject the managers to discipline, up to and including discharge.

Then, in June 2008, the company attached a short letter about the IM Program to employee paychecks. It also added to the employee handbook a copy of the FoA Policy, a description and overview of the IM Program, and a complaint form. The company also created a DVD describing the FoA Policy and the IM Program, which it showed to employees at monthly safety meetings. In the video, Mike Murray, then CEO of Operations for FirstGroup America, explained the FoA Policy and why it was important to the company. I also appeared on the DVD and explained the IM Program's complaint, investigation, and reporting procedures.

Finally, I established a Web site through which employees and others could: (1) find answers to frequently asked questions about the IM Program, (2) download program documents (including a complaint form), (3) submit a complaint, and (4) learn more about the team of investigators.

The program continued for three years until the company terminated it effective Dec. 31, 2010, due to a decrease in the number of complaints filed with the program, a decrease in non-unionized company facilities, national negotiations between the company and the Teamsters, and the retirement of Sir Moir. Ultimately, in June 2011, FirstGroup and the Teamsters negotiated a national agreement for school bus drivers.<sup>17</sup>

### **Overview of the IM Program**

FirstGroup's FoA Policy and IM Program were designed to promote employee rights against the backdrop of public law, including the

principles of: (1) the NLRA as defined by the NLRB and the U.S. Supreme Court during the past 75 years,<sup>18</sup> and (2) international labor law as reflected in Conventions 87 and 98 of the International Labor Organization.<sup>19</sup> A basic premise of the IM Program was that the union recognition process would continue to proceed through the NLRB's secret ballot box election process rather than any form of card check alternative. Matters involving alleged management interference with union organizing and related anti-union conduct would be handled by the IM

Program. A key assumption of the IM Program was that resolving freedom of association complaints would reduce or even eliminate impediments to free and fair union elections—and would do so faster and under standards more rigorous than those provided by the NLRA.

Another premise of the IM Program was that the right not to associate was subsumed in the right of association contained in the FoA Policy and the NLRA. Therefore, FirstGroup plc and its subsidiaries were obliged to remain neutral and favor neither side in the union organizing campaign. In addition, because no union was a signatory to the IM Program, the Independent Monitor had jurisdiction over only employer conduct, not union conduct that occurred away from the workplace. (Nonetheless, in some reports and letters, I urged non-employee union organizers, who in my opinion interfered with the right, to refrain from such conduct.)

### **IM Program Process**

The principal components of FirstGroup's IM Program were the following.

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Any FirstGroup employee, representative of an employee, or labor union that represented or was seeking to represent the employees could file a complaint (with or without supporting written materials) with the Independent Monitor, alleging one or more violations of the FoA Policy. The complaint form was only two pages long, and it requested basic factual information about the complaining party, the date and location of the incident, a description of the alleged violation, and the names of witnesses. Complaints needed to be submitted within 60 days of the alleged violation, and submitting a complaint did not affect the right to file a ULP charge or to complain to any public agency. A copy of each complaint was furnished to the company, which could respond to the complaint and submit written materials. Complaining parties could file a complaint anonymously or request that their identity be treated as confidential. The Independent Monitor honored such requests after redacting the employee's identity from information submitted to the company.

The Independent Monitor investigated any complaints and reported his findings to the company and the complaining party, generally within 30-60 days of the filing of the complaint. When a complaint was filed, the Independent Monitor immediately notified senior executives and assigned it to an investigator. The investigator then contacted the complaining party to introduce himself or herself. The investigator then described the process and gathered additional information about the complaint. The investigator contacted the complaining party's manager and relevant witnesses to gather information. None of the interviews were taken under oath. 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. Both sides had the opportunity, but were not required, to submit written materials in support of or in opposition to the complaint.

After the investigation and generally within 30 days, the investigator prepared a preliminary report for the Independent Monitor that laid out the facts of the case. The Independent Monitor sometimes requested additional investigation. He then analyzed the facts 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 of the FoA Policy, he made recommendations for actions to be taken by the company to cure the violation.

The company had to decide how to respond to

the Independent Monitor's recommendations. It did not have to accept any recommendations. Within 30 days it could adopt, reject, or modify them. It could decide to accept some recommendations and reject the rest from the same report. To provide transparency, the company would send its response to the report to both the Independent Monitor and the complaining party.

Finally, the Independent Monitor periodically reported to the Board of Directors of FirstGroup plc regarding his activities and findings with respect to the FoA Policy and IM Program.

### **Use of the IM Program**

During the IM Program's three-year tenure, the Independent Monitor received complaints alleging 372 violations of the FoA Policy and issued 143 written reports. Complaints alleged, among other things, 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.

Of the 372 alleged violations, 32 were withdrawn prior to the issuance of a report, and 72 were found to be outside the jurisdiction of the Independent Monitor because they asserted general workplace grievances that did not involve union activity, or were not filed within 60 days of the incident, as required by the program. In those instances, the Independent Monitor informed the complaining party of the company's confidential employee hotline.

Slightly over one-half of the complaints were filed by employees while the rest were filed mainly by unions. Five complaints were referred to the program directly by the company. The vast majority arose from First Student facilities—where the greatest amount of union organizing occurred. However, complaints were also filed with respect to First Transit, First Services, Greyhound, and First Canada facilities.

The Independent Monitor 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.

### **Strengths of the Program**

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

First, the IM Program provided for an expedi-

tious process. Complaints were promptly investigated and reported on within 45 days, on average, and 85% of the cases were completed in less than 90 days. One of the reasons for the expeditious nature of the process is that it did not require hearings, and, with additional resources, the timetables could be reduced even further. Since the Independent Monitor did not have any subpoena power, the IM Program relied on the cooperation of the parties and a thorough investigation to uncover any inconsistencies and find the facts.

Second, the IM Program was voluntary. Nothing prohibited a party from filing a complaint with the NLRB or any other public agency at any time—even after a complaint was filed.

Third, the IM Program also emphasized transparency by sharing the Independent Monitor's reports and the company's responses with the complaining party. Nothing prohibited either of

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the parties from further distributing or communicating the findings, conclusions and recommendations to others.

Fourth, the IM Program was designed to be accessible to employees. The procedures were not overly formalistic. The complaint form was simple and required basic factual information. Complaining parties could submit additional paperwork in support of their allegations, but it was not necessary to initiate an investigation.

Fifth, the FoA Policy and IM Program provided more expansive association rights than were available under the NLRA. One example is the limitation that the FoA Policy placed on the employer's ability to engage in speech that was intended to influence employees' decisions with respect to labor union representation.

Another example is that the IM Program provided for publicity of employee rights, while the NLRA does not. The statute does not require any notice advising employees or applicants about the nature of the law. However, the current NLRB has proposed rulemaking to reverse this anomaly.<sup>20</sup>

The IM Program was also broader in terms of employee rights than the NLRA in regard to the right to expeditious elections and to be free of discrimination, both of which are discussed below.

### **Limitations of the Program**

Several factors threatened the IM Program's effectiveness.

First, the program was designed and adopted unilaterally by the company. As a result, unions, employees and managers were not made aware of it until after the Independent Manager was appointed. Once they were informed of the program, it was uncertain whether they would use the program.

Second, when some union representatives at already unionized FirstGroup facilities learned of the IM Program, they perceived it as a means of undermining their representation of employees. They complained that the FoA Policy had no application where employees were already organized and that the only purpose of informing employees of their freedom of association rights could be to suggest that they could become non-unionized.<sup>21</sup>

Third, acceptance of the FoA Policy and IM Program by senior management and executives of the company was not uniform and unconditional. Acceptance required time. Even so, changes in company leadership generated impediments to the IM Program when the agenda of new leaders conflicted with the FoA Policy.

To a great extent, the company dealt with these problems by publicizing the IM Program, and explaining the FoA Policy and the purpose of the Independent Monitor's role to unions, employees, and managers.

But there was one other problem due to the unprecedented nature of the IM Program. It created uncertainty and skepticism among some employees and unions. There were several reasons for this. The employees, unions and company managers had different understandings of what that policy meant and how it should be interpreted. There was no precedent for interpreting the policy. Over the course of the IM Program, the Independent Monitor developed case precedent that provided greater certainty in the application of the FoA Policy. However, the company's ability to reject or modify the Independent Monitor's recommendations undermined that certainty. Furthermore, the company was unwilling to accord any measure of deference to the Independent Monitor's reports.

Overall, the strengths of the IM Program exceeded its limitations, most of which were remediable through publicity and education. This enabled the program to operate for three years. During this time, the standards the Independent Monitor used to interpret the FoA Policy and evaluate alleged violations established the boundaries of appropriate conduct during union organizing campaigns.

### **Standards of Conduct Under the FoA Policy**

I primarily relied upon the principles embodied in the NLRA in analyzing alleged violations of the FoA Policy. But, because the IM Program explicitly stated that the scope of protection afforded to employees was broader than the NLRA, I went beyond these principles in certain cases. Here are some examples.

#### *Employer Speech*

Although the FoA Policy permitted the company to engage in union-related speech, the FoA Policy circumscribed employer speech more severely than the NLRA does.<sup>22</sup> The NLRA, particularly through Section 8(c) of the Taft-Hartley amendments, allows an employer to use anti-union speech so long as no threats of coercion or promises of benefit are employed.<sup>23</sup> By contrast, the FoA Policy's neutrality policy prohibited the company from using anti-union speech or speech that disparaged the union and its organizational efforts. However, the FoA Policy did not curtail all speech by the company. The company could present balanced facts but not selective data to disparage the union or deliver subjective anti-union propaganda.

#### *Solicitation, Distribution, Talking, and Union Insignia Rules*

Freedom of association and free speech rights have been influenced and shaped by First Amendment constitutional principles for more than six decades.<sup>24</sup> However, the NLRA does not prevent an employer "from making and enforcing reasonable rules covering the conduct of employees on company time."<sup>25</sup> Accordingly, under the FoA Policy, a balance had to be struck between employee rights and an employer's right to operate its business and maintain discipline. Disputes commonly arose regarding attempts to solicit and recruit members to the union, attempts to distribute literature about union activity, and the wearing of union insignia. Considerable confusion existed about what conduct was protected and what was prohibited. In other words, where should the line be drawn between employee free speech rights and the employer's right to enforce

workplace rules?

NLRB precedent allows employees to talk about the union during both work and non-work time if the employer does not have a policy (which employers rarely do) prohibiting all conversations about all non-work related matters during working time.<sup>26</sup> NLRB precedent also permits employees to wear union insignia, including t-shirts and buttons, during work and non-work time, unless there are "special circumstances," such as an appearance rule for employees.

However, NLRB precedent regarding solicitation of union membership and distribution of literature is less clear. The U.S. Supreme Court had established relatively clear rules protecting both employee rights during non-working time, i.e., "working time is for work."<sup>27</sup> But, in *Stoddard Quirk Manufacturing. Co.*,<sup>28</sup> the NLRB muddied the waters considerably when it held that an employer could prohibit the distribution of literature (but not solicitation) even during non-work time in work areas. By distinguishing between solicitation and distribution activities in work and non-work areas, the NLRB complicated the rules and created confusion.<sup>29</sup>

There were practical difficulties in applying NLRB precedent to different forms of union activity and time, manner, and place restrictions. I helped the company prepare clearer rules for employees and managers on solicitation, distribution and talking rules. In so doing, I provided guidance not available under the NLRA. However, an area of confusion that remained at the end of the IM Program was setting proper boundaries between work and non-work areas so that employees did not have to guess which speech was protected and which was unprotected.

#### *Expedited Elections*

The FoA Policy offered more protection to employees than the NLRA does when it came to expedited elections. The company concluded that representation elections should be "held as early as possible," inasmuch as a key concern is delay associated with the erosion of employee free choice. The Independent Monitor concluded that, absent "extraordinary circumstances," appealing the decision of an NLRB Regional Director to Washington would undercut an expedited election process and, thus, the right of employees to freely choose whether to unionize. I urged the company to agree to enter into consent election agreements under NLRB rules, which would make the decision of the NLRB Regional Director final.

### *Interrogation of Employees*

Under the NLRA, management's questioning of an employee about his or her views on union representation is legitimate only if the employer is 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 (for example, a card check procedure) or the likelihood of a union petition to the NLRB for recognition. Because the FoA Policy permitted union recognition only through secret ballot box elections, the Independent Monitor concluded that no form of interrogation would be permissible under the FoA Policy. As a result, no careful delineation needed to be drawn between interrogation which is precluded and that which is permitted.<sup>30</sup>

### *Surveillance*

Surveillance of union activity by the employer also raises freedom of association issues. In addressing such complaints, the Independent Monitor followed NLRB decisions rendered during the Clinton Administration.<sup>31</sup> These decisions distinguished between observation of open, public union activity, which is allowed, and that which is "out of the ordinary," for example, taking notes of employees who received union hand bills, which is not allowed.<sup>32</sup> The Independent Monitor applied NLRB precedent to determine whether the company's observation went beyond the casual and became unduly intrusive.<sup>33</sup>

### *Discrimination*

The FoA Policy also went beyond the NLRA and NLRB precedent in terms of protection from discrimination. The Independent Monitor found unlawful discrimination (and an FoA Policy violation) in any case in which an employee proved by a preponderance of evidence that the company took an adverse action against him or her based in whole or in part on anti-union animus. The company could then show that the adverse action would have occurred in any event, which evidence the Independent Monitor used in determining what recommendations to make to the company. The Independent Monitor based this approach on the Supreme Court's statement in *NLRB v. Transportation Management* that it is "plainly rational and acceptable" to find an unfair

labor practice where the adverse action is in any way motivated by a desire to frustrate union activity.<sup>34</sup>

### **The Issue of Agency Deference to Private ADR Decisions**

As is often the case when a private dispute resolution program is implemented for the first time, questions arise as to how that program coexists with existing public law. Should the program be given deference by the NLRB, as is the case with grievance-arbitration under collective bargaining agreements? That is the question posed here with regard to the IM Program.

In *Spielberg Manufacturing Co.*, the NLRB 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."<sup>35</sup>

Favoring deferral is the fact that the IM Program was de-

signed against the backdrop of the NLRA to constitute a "fair and regular" process (assuming the absence of a hearing does not change this conclusion) in which all relevant facts are considered,<sup>36</sup> and the Independent Monitor's findings and conclusions were grounded in the NLRA so as not to be "clearly repugnant to the purposes and policies of the Act."<sup>37</sup> However, fatal to deferral is the fact that neither the company nor the union or employees agreed to be bound by the Independent Monitor's findings and recommendations. The NLRB 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...."<sup>38</sup> Thus, the NLRB has looked upon unilateral programs as contrary to public policy. In most cases involving deferral, parties have agreed in a collective bargaining agreement to be bound by the arbitral decision. The IM Program, however, did not contain such an agreement.

If the IM Program were modified so that the program was agreed to by the union and the employees and the employer committed to be bound by decisions of the Independent Monitor, then the program could be said to satisfy the NLRB's requirements for deferral. Extending the NLRB's deferral policy to private programs that

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adjudicate disputes in a union organizing campaign would be appropriate in light of the strong support and wide acceptance that voluntary arbitration of labor disputes has received in the grievance-arbitration context.

## Conclusion

The IM Program fulfilled an exigent need of FirstGroup to resolve union organizing disputes that could disrupt its North American business. Though unilaterally created and implemented, it cleverly was modeled on principles in the NLRA. This enabled unions and employees to view the program as an enhanced surrogate for the statute.

The FoA Policy and IM Program appear to have been well received by both labor and management, notwithstanding the program's non-binding quality and the fact that numerous violations and criticisms aimed at management were contained in the reports. Unions and employees likely were receptive because in many instances their charges were effectively addressed. Even when they were not, the process likely was cathartic for the parties, since the parties had an

opportunity to air their complaints before a neutral third person experienced in labor disputes. This fact made my role as Independent Monitor somewhat different from that of an arbitrator appointed to hear disputes under collective bargaining agreements.<sup>39</sup> I functioned more like a "standing neutral" who is limited to making recommendations to resolve disputes.

Certainly the IM Program process was faster than an administrative proceeding with a formal hearing. And though the company could decide to reject or modify the Independent Monitor's decision on the merits of anti-union activity claims, it no doubt benefited from obtaining a neutral recommendation and probably influenced the company's behavior towards union organizing campaigns.

For this reason, the FirstGroup IM Program could be a model for companies with union organizing disputes to adopt. However, companies that adopt such an initiative must be committed to a faster, more transparent process with greater remedies for workers than under the NLRA. ■

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## ENDNOTES

<sup>1</sup> See discussion of "corporate campaigns" *infra* at 55.

<sup>2</sup> Other factors impacting the decline of union organizing include globalization, deregulation, an increase in contingent and undocumented workers, a shift from manufacturing to service industries, and technological innovation.

<sup>3</sup> One of the major statutory exclusions is public employees—though government contractors are included. *Management Training Co.*, 317 NLRB 1355 (1995).

<sup>4</sup> William B. Gould IV, *Agenda for Reform: The Employment Relationship of the Law* (MIT Press 1993). 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), and "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). For a good discussion of the weakness of the NLRA as opposed to other employment statutes, see generally, Morris Kleiner & David Weil, Evaluating the Effectiveness of National Labor Relations Act Remedies: Analysis and Comparison with Other Workplace Penalty Policies," (Nat'l Bureau Econ. Res. Working Paper

No. 16626 Oct. 10, 2010).

<sup>5</sup> The entire procedure is described in more detail in William B. Gould IV, *A Primer on American Labor Law* 60-62 (MIT Press 4th ed. 2004).

<sup>6</sup> On June 21, 2011, the NLRB proposed amendments to its rules and regulations governing the representation process to "remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation." See Representation—Case Procedures, 76 Fed. Reg. 36812 (June 22, 2011) (proposing to amend 29 CFR Parts 101, 102 and 103).

<sup>7</sup> An employer may also file a petition where the union demands recognition and has not filed its own representation petition.

<sup>8</sup> *Angelica Healthcare Serv. Group, Inc.*, 315 NLRB 1320 (1995). Cf. *American Fed. of Labor v. NLRB*, 308 U.S. 401 (1940). Specific examples of common disputes regarding the appropriate bargaining unit involve whether the unit should include: (1) employees at one facility or plant versus employees within the employer's broader administrative structure; (2) blue collar versus white collar employees at the same facility; or (3) craft versus semi-skilled or unskilled employees. In all of these situations, the question is which employees enjoy a "community of interest" with one another.

<sup>9</sup> Once the NLRB does render a

decision, however, that decision is final and non-appealable. *AFL v. NLRB*, *supra* n. 8. But, an employer refusal to bargain when it disagrees with the NLRB's representation determination and the union has prevailed at the ballot box transforms the representation issues into a ULP proceeding. In this instance, the same issues in dispute in the representation matter are then re-litigated in the ULP proceeding and can be appealed to the federal courts. See, e.g., *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965).

<sup>10</sup> *Ex-Cell-O Corp.*, 185 NLRB 107 (1970), rev'd and remanded sub. nom., *International Union, United Automobile Workers v. NLRB*, 449 F.2d 1046, 1050 (D.C. Cir. 1971) (presenting the issue of how such tactics can be remedied).

<sup>11</sup> These delays are further exacerbated by the appointment process for NLRB members, which has become politically polarized since the 1980s, contributing to agency paralysis. Appointees concerned about reappointment can be less than forthright and prompt in their analysis of pending cases, contributing to the delay problem. See generally, William B. Gould IV, *Labored Relations: Law, Politics, and the NLRB—A Memoir* (2000). See also *NLRB v. Anchor Concepts*, 166 F.3d 55, 59 (2d. Cir. 1999) ("the Board stands out as a federal administrative agency which had been rebuked before and for what

must strike anyone as a cavalier disdain for the hardships it is causing" through its vulnerability to the "dilatory virus and delay"); *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1141 (7th Cir. 1992) (Judge Richard Posner commenting that an eight-year delay by the Board was "inexplicable"). To compound matters, during the last administration, the NLRB was unable to operate because of the failure of President George W. Bush and the Senate to appoint and confirm a quorum. See *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010). In 2011, the Congress has threatened to refuse to allow President Barack Obama to make recess appointments. Joseph Williams, "Feisty NLRB Turns Up the Heat," *Politico.com* (July 18, 2011).

<sup>12</sup> These corporate campaigns seem to be 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," *The American 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.

<sup>13</sup> Laura J. Cooper, "Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator," 83 *Ind. L.J.* 1589 (2008).

<sup>14</sup> *Id.* at 1612. Cf. L.J. Cooper, "Discovery in Labor Arbitration," 72 *Minn. L. Rev.* 1281 (1988).

<sup>15</sup> See NLRB Casehandling Manual, Part One Unfair Labor Practice Proceedings, § 10054.3, available at [www.nlrb.gov/Publications/Manuals/ulp\\_casehandling\\_manual\\_\(I\).aspx](http://www.nlrb.gov/Publications/Manuals/ulp_casehandling_manual_(I).aspx); see also 29 U.S.C. § 158(a)(4) (2000) (it is an unfair labor practice for an employer to discriminate against an employee for filing charges or giving testimony under the NLRA).

<sup>16</sup> See [www.firstgroup.com/corporate/our\\_company](http://www.firstgroup.com/corporate/our_company).

<sup>17</sup> Tim Sharp, "FirstGroup Buries the Hatchet with US Union Teamsters to Pen Bus Driver Deal," *Herald* (Glasgow, Scotland, June 3, 2011) at 29. However, wages continue to be negotiated on a local level.

<sup>18</sup> The NLRB is not required to acquiesce in U.S. Court of Appeals interpretations of the NLRA because the NLRB is the expert agency charged to interpret the NLRA. See *Theodore R. Schmidt*, 58 NLRB 1342 (1944).

<sup>19</sup> See Harry Arthurs, "Extraterritoriality by Other Means: How Labor Law Sneaks Across Borders, Conquers Minds, and Controls Workplaces Abroad," 21 *Stan. L. & Pol'y Rev.* 527 (2010). On differences between U.S. and British labor law, see William B. Gould IV, "Taft Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971," 81 *Yale L.J.* 1421 (1972).

<sup>20</sup> See Proposed Rules Governing Notification of Employee Rights under the National Labor Relations Act, 29 CFR Part 104 (Dec. 16, 2010). This, along with the Board's decision to transmit notices of statutory violations electronically as well as in physical, conspicuous places in the employer's establishment, may assist in making employees aware of the statute and its remedies. See *J. Picini Flooring*, 356 NLRB No. 9 (Oct. 22, 2010).

<sup>21</sup> Materials were sent to all facilities, union and non-union, because freedom of association rights apply to both. See *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974).

<sup>22</sup> *Eldorado Tool*, 325 NLRB 222, 225 (1997) (Chairman Gould concurring and dissenting); *Caterpillar, Inc.*, 321 NLRB 1178, 1184 (1996) (Chairman Gould concurring); *Novotel New York*, 321 NLRB 624 (1996); *Shepherd Tissue, Inc.*, 326 NLRB 369 (1998) (Chairman Gould concurring).

<sup>23</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); see also *Eldorado Tool*, *supra* n. 22.

<sup>24</sup> See *Thomas v. Collins*, 323 U.S. 516 (1945); cf. *Novotel* and *Caterpillar*, both *supra* n. 22.

<sup>25</sup> *Peyton Packing Co., Inc.*, 49 NLRB 828, 843 (1943), enf'd 142 F.2d 1009 (5th Cir.), cert denied, 323 U.S. 730 (1944).

<sup>26</sup> *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249 (10th Cir. 2005); see also *WW. Grainger, Inc.*, 229 NLRB 161, 166 (1977) (no discussion rules should be distinguished from no solicitation rules).

<sup>27</sup> This concept was first adumbrated in *Peyton Packing*, *supra* n. 25, and accepted by the Supreme Court in *Republic Aviation v. NLRB*, 324 U.S. 793 (1945).

<sup>28</sup> 138 NLRB 615 (1962).

<sup>29</sup> See William B. Gould IV, "The Question of Union Activity on Company Property," 18 *Vand. L. Rev.* 73 (1964). This confusion was particularly prevalent in the case of FirstGroup's bus

operations where the Company could not draw a bright line between work and non-work areas. See, e.g., *Laidlaw Transit, Inc.*, 315 NLRB 79 (1994).

<sup>30</sup> This approach is somewhat akin to the approach taken by the Board before the advent of the Eisenhower Administration. Cf. *Standard Coosa Thatcher*, 85 NLRB 1358 (1949).

<sup>31</sup> *National Steel & Shipbuilding*, 324 NLRB 499 (1997), enf'd, 156 F.3d 1268 (D.C. Cir. 1998).

<sup>32</sup> *Opryland Hotel*, 323 NLRB 723 (1997).

<sup>33</sup> *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942 (8th Cir. 2008), citing *Kenworth Truck Co., Inc.*, 327 NLRB 497, 501 (1999).

<sup>34</sup> 462 U.S. 393 (1983); *Frick Paper Co.*, 319 NLRB 9, 10 (1995) (Chairman Gould concurring).

<sup>35</sup> 112 NLRB 1080, 1082 (1955); see also *Olin Corp.*, 268 NLRB 573 (1984); *Mobile Oil Exploration*, 325 NLRB 176, 180 (1997) (Chairman Gould concurring), enf'd 200 F.3d 230 (5th Cir. 1999). Although there have been many twists and turns and much debate and scholarship regarding the NLRB's deferral policy towards arbitral decisions, these standards still apply.

<sup>36</sup> Although it could be argued that the absence of a hearing causes the procedure not to be "fair and regular," the absence of the hearing makes the process both effective and expeditious. See George A. Bermann, "Administrative Delay and Its Control," 30 *Am. J. Comp. L. Supp.* 473, 474 (1982) ("[T]he 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 an administrative decision.").

<sup>37</sup> 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 more effectively protected the basic policies of the NLRA than the statute does itself.

<sup>38</sup> *The American League of Professional Baseball Clubs*, 180 NLRB 190, 191 (1969); see also *Pontiac Osteopathic*, 284 NLRB 442, 466 (1987); *West Maui Resort Partners*, 340 NLRB 846, 850 (2003).

<sup>39</sup> Of course, arbitration itself is therapeutic and not the final step in the process under some circumstances. *Carey v. Westinghouse Elec. Co.*, 375 U.S. 261 (1964).

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