

“Card Check 2.0” – NLRB General Counsel Seeks to Resurrect Long-Dead Joy Silk Doctrine to Help Unions Organize Employees

Labor & Employment Law Update

By Michael Hughes on April 18, 2022

On April 11, 2022, the National Labor Relations Board’s General Counsel, Jennifer Abruzzo, filed a brief in a case pending before the NLRB, *Cemex Construction Materials Pacific*, seeking a return to the NLRB’s long-abandoned *Joy Silk* doctrine. Under that doctrine, unions may obtain representational status, simply by claiming to have the support of a majority of a private employer’s employees (typically through union card signing)—and putting the burden on the employer to affirmatively demonstrate a good-faith doubt as to that majority status in order to lawfully refuse to recognize the union as the employees’ exclusive representative without an election.

During his campaign, President Biden vowed to be “the most pro-union president you’ve ever seen.” His appointment of Abruzzo as NLRB GC, and her swift and radical pro-union agenda, has given life to that vow. GC Abruzzo has wasted no time in setting out to fundamentally shift NLRB policy in an effort to tilt the playing field in favor of labor unions.

For years, advocates for organized labor have sought to establish “card check”—as opposed to secret ballot elections—as the manner in which a union may gain representational status. Under a card check system, a union would secure employees’ signatures on authorization cards; if a majority of employees in the unit sign such cards, the union would then demand the employer recognize the union as the employees’ exclusive bargaining representative. Currently, an employer has no obligation to recognize a union on the basis of authorization cards—instead, an employer may insist that the question be determined through a secret ballot election conducted by the NLRB.

Secret ballot elections allow employees to cast their vote privately and anonymously. By contrast, card signing is often completed by pro-union employees approaching other employees to have them sign an authorization card in their presence. Often, card signing is carried out in group meetings, where employees may feel pressured into signing in front of their peers. Also, the

process is nearly completely unregulated and employees may not fully understand the purpose of the card—many times they are told the card is simply to gain more information, or to seek an election. For these reasons, the NLRB has, for the last 50 years, established the secret ballot election as the preferred method of determining employee support for a union.

Union adherents have tried to establish the card check system through federal legislation, but such attempts have failed in Congress. Because of these failures, the NLRB's pro-union GC now seeks to have the current NLRB (which, is comprised of majority pro-union democratic appointees), reverse 50 years of Board precedent in order to make card check a reality, without the need for legislation.

Specifically, in *Cemex Construction*, GC Abruzzo argues for the NLRB reinstate the 1960s-era *Joy Silk* doctrine. Under that doctrine employers would be required to recognize and bargain with a union claiming to have majority support of the employer's employees, unless the employer could affirmatively establish a good-faith doubt as to the claimed majority status of the union. In the years when the *Joy Silk* doctrine was used, it was modified by the Board to put the burden on a union to demonstrate an employer's bad faith in failing to recognize a union that claimed to have majority support, and the doctrine eventually required a showing that the employer had committed a serious unfair labor practice before the Board would require the employer to recognize and bargain with the union absent an election. By the late 1960s, the NLRB abandoned *Joy Silk* completely and established that an employer did not have to accept card check (or any other method of claimed majority status), but could insist that the question be determined by a secret ballot election. Here, GC Abruzzo argues for a return to the original *Joy Silk* method, placing the burden on any employer to affirmatively establish that it has a good-faith doubt of the union's claimed majority status if it refuses to voluntarily recognize a union upon demand. Factors sought to be considered when determining an employer's alleged good-faith doubt of claimed majority status would include all relevant circumstances, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and any alleged unlawful conduct.

It remains to be seen how the Board will decide this issue: will it maintain precedent from the last 50 years allowing employers to rely on a secret ballot election; or will it mandate that the burden is on employers to prove a good-faith doubt, if they refuse to voluntarily recognize a union claiming majority support of the employees? The current make-up of the Board, being majority pro-union, democratic appointees, puts the secret ballot election at severe risk of extinction.

Another argument raised by GC Abruzzo in the *Cemex Construction* case also bears mentioning. GC Abruzzo also calls for the end of so-called "captive audience" meetings. Typically, once a union files a petition for an election, an employer will hold meetings with its employees in order to educate them on the election process, the specific union involved, and the collective bargaining

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process. Our previous post on April 11th covered the GC's prior memorandum outlining her intent to cast such mandatory meetings as unlawful. Now, the GC has formally taken this position in the *Cemex Construction* case, urging the Board to adopt the same position.

Coupled with card check recognition under a return to *Joy Silk*, the muzzling of employers' ability to conduct any educational or counter-campaign is the NLRB GC's cynical attempt to completely upend all current procedures for determining whether employees truly wish to be represented by a union. The motivation is clear: since more and more employees are choosing to remain non-union, pro-union advocates in the current administration are seeking to establish procedures that allow union adherents to gain signatures on binding authorization cards through promises, propaganda and peer pressure, while eliminating employers' ability to educate employees and eradicating the secret ballot.

Non-union employers should act now to protect against a union demand for recognition based on a clandestine card-signing campaign. First, the best way to stave off any union organizing attempt is through good and fair employment practices. But more important than ever, employers should learn to recognize union organizing efforts and, if it is likely such an effort is afoot, to begin to educate employees on what it would mean to belong to a union and how they can see through common union false promises and propaganda. These efforts should focus on educating employees on what signing a union card may mean—so that they can make a full, informed decision before signing a card. Under a return to *Joy Silk*, it would be too late to educate employees on the facts and perils of unionization after a majority have already signed cards.

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