

WHAT IS OLD IS NEW AGAIN: ARE THERE PITFALLS IN RETURNING TO RACIAL APPEALS IN UNION ORGANIZING CAMPAIGNS?

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ABSTRACT

On August 4, 2017, workers at Nissan North America, Inc.'s Canton, Mississippi plant voted against representation by the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). The vote was overwhelming, with 2,244 workers (over 63% of those voting) rejecting the bid to unionize. The union had previously failed to organize another Nissan plant in Smyrna, Tennessee in 1989 and 2004, and more recently had a failed organizing attempt at Volkswagen's Chattanooga, Tennessee plant in 2014. It was one more demonstration of the inherent difficulty in labor union organizing workers in Southern automobile assembly plants.

The loss, in and of itself, was not uncommon, but the tactics used by the union were—an appeal to the racial identity of the majority of the workers at the targeted plant—African Americans. This tactic was first considered innovative, but, in reality, it marked a return to methods which had previously proved effective nearly half a century earlier. This manuscript investigates the rise of the use of racial and ethnic appeals in union organizing campaigns, and the effect that the 55-year-old *Sewell* doctrine, which governs such occurrences, is likely to have on the 21st-century organizing efforts.

To provide the reader with a better understanding of the issues addressed in this manuscript, the authors will offer an overview of the union representation process under current U.S. labor law. Also provided will be a brief history of the two parties in this process (UAW and Nissan), as well as a synopsis of recent organizing attempts in the Southern states.

THE REPRESENTATION PROCESS

As some readers may be unfamiliar with the highly structured union organizing process and the area-specific language that is used in the manuscript, the authors now provide a brief review. The representation process (also called the organizing process or campaign) is designed to ensure that workers can exercise their right to organize and bargain collectively without interference from management, as guaranteed in the National Labor Relations Act of 1935's section 7 (29 U.S.C § 157).

The union begins the process by establishing organizational targets, largely based on the propensity of workers to support the organizing campaign, as well as the anticipated reaction of the employer (Leap, 1995). The Union will establish an organizing committee and attempt to generate interest among the targeted employees to support its aims by signing authorization cards (Fulmer, 1981).

The authorization card campaign is important for two reasons. First, it formally initiates the process when the first card is signed. For the union this critical as it must achieve a showing of interest within 30 days in most cases (Feldacker & Hayes, 2014). Second, unless the union can get a minimum of 30% of the proposed bargaining unit to sign the authorization cards, the entire campaign will be stopped and cannot resume organizing for another 12 months (NLRA, § 158(b)(7)). Unions typically attempt to achieve a critical mass during the authorization card phase of a 60-70% showing of interest, knowing that many who sign the authorization card may change their minds when casting their actual ballot, or do not vote at all (Leap, 1995). The actual representation election (also called a certification election) involves a secret ballot, signing authorization cards is done in public.

Once the union receives at least a 30% showing of interest, the union can petition the National Labor Relations Board (NLRB) for a representation election. The campaigning between the employer and the union will intensify at this point. During this period, the employer is authorized to mount an aggressive campaign and engage in a number of antiunion activities (see Figure 1). The campaign culminates with the ballots being cast in the representation election. It should be noted that under certain circumstances, the initial election date can be postponed. In the event that a party (usually the union) files a blocking charge, an unfair labor practice allegation (ULP), the NLRB has the authority to delay the election pending the resolution of the ULP (Atleson, *et al.*, 1984, pp. 127-8).

In either instance, the election is overseen by a field representative of the NLRB and observers from the two parties. The outcome is determined by a simple majority of the ballots cast. If the union prevails, the NLRB issues a bargaining order requiring the employer to bargain with the union in good faith (Robinson, *et al.*, 2002).

In the event of major irregularities occurring during the campaign, either party (again, this is usually the union) can petition the NLRB with a complaint within seven days of the election (NLRB, 2017, §§101.19-101.21). The claim is that the other party's conduct and actions tainted the outcome. The NLRB must investigate the allegation and at the conclusion of the investigation can impose one of three remedies: (1) the charge has no merit and the election results stand; (2) the charge has merit and a new election will be scheduled; or (3) the employer's conduct was so egregious that the employees are too intimidated to vote their will and the union is declared the bargaining representative regardless of the vote (*NLRB v. Gissel Packing Co.*, 1969).

A HISTORY BACKGROUND

History of United Autoworkers

The UAW was founded in Detroit, Michigan in May 1935. Its first strike was on November 16, 1936, at General Motors' Lakewood Assembly Plant in Atlanta Georgia to get GM to recognize the UAW (Herring and Thrasher, 1974). Its membership had reached its zenith in 1979 with 1.5 million dues-paying members. Like many labor unions, the UAW saw its member numbers drastically decline during the 1980s and 1990s. By 2009 member roles had dropped to only 355,191 as result of the recession of the previous year. By 2016 its membership had made a comeback to 415,963 (U.S. Office of Labor-Management Standards, 2017). Much of this growth can be attributed to the recovery of the American automobile industry and with it manufacturing jobs in companies which were previously organized. However, with over 600,000 retire members drawing pensions (citation), this union is motivated to increase the ranks of dues-paying members.

The UAW initiated an innovative organizing strategy in the 2000s by organizing graduate student employees in California, Connecticut, Massachusetts, New York, and Washington. As a technical note, graduate students in public universities are excluded from protection under federal labor laws as the Labor Management Relations Act (29 U.S.C. § 152(2) excludes state and local government employers, which public colleges are. Consequently, these bargaining units have been organized under individual state labor laws. Private universities, on the other, are covered under the National Labor Code. Private sector graduate students were given a boost in 2016 when the NLRB declared them to be employees as defined in the National Labor Relations Act hence entitled to organize without interference by management (*Columbia University*, 2016).

Problems in Organizing the South

The South has always presented difficulties for union organizers, not just the UAW. All of the states designated as *Southern* by the U.S. Chamber of commerce are right-to-work states. None have a strong union tradition. Additionally, right-to-work states are authorized under the Labor Management Relations Act to enact legislation, or amend state constitutions, to limit union membership to strictly voluntary status (20 U.S.C. § 164). An employee in a bargaining unit cannot be required to join the union representing that unit as a condition of employment (Fossum, 2014).

For the UAW, this has resulted in a series of failed organizing attempts beginning with Nissan's Smyrna, TN assembly plant in 1989 in which the union lost the representation election by more than two to one. They are not the only union to experiences such problems. The International Association of Machinists and Aerospace Workers (IAM) lost a certification election by a 74-26% vote at a Boeing Plant in Charleston, South Carolina in February 2017 (Schreiber, 2017)

More recently, the UAW's organizing efforts seemed to be garnering some traction as it narrowly lost a representation election in Volkswagen's Chattanooga TN plant with 46.6% of the vote. However, this defeat occurred as a result of a snap election in which the employer had signed a neutrality agreement the previous January 27, 2014 (Agreement for a Representation Election, Volkswagen, 2014). The union failed to get the simple majority necessary to become the

bargaining agent despite the fact that Volkswagen had not even initiated an anti-organizing campaign. As a face-saving gesture, the union arranged for a Community Organizing Engagement policy in which union representative can meet with Volkswagen's management and executive committee, but do not have a collective bargaining agreement (CBA) with the company, which would be unlawful under the Labor Management Relations Act (29 U.S.C. §§158(a)(1) and (2)). Under this arrangement, the UAW can only engage "constructive dialogue" with the company, however it cannot negotiate for wages, hours and conditions of employment,

The History of Nissan in America

Nissan North America began operation in 1958 as Nissan Motor Corporation, USA, an importer of the Datsun motor vehicles line. The name was changed to the current Nissan North America, Inc. in 1990. Three years later the company began operation of its first manufacturing facility in Smyrna, TN. That facility was followed by its powertrain plant in Decherd, TN in 1997, and its vehicle assembly plant in Canton, MS in 2003 (Nissan, 2017). As of this writing, the company has no major facilities in the United States which have union representation.

What was Old is New Again: Identity Organizing

As a historical aside, using identity politics is hardly a new innovation. In the 1960s, employers had used it as a means for making non-coercive inflammatory appeals to the racial prejudices of white employees in an attempt to keep unions out (Williams, 1973). In one case (*Sewell Manufacturing*, 1962), the employer had released a picture of an organizer for the International Brotherhood of Electrical Workers (IBEW) dancing with a Black woman. It would not raise an eyebrow in 21st century America, but in 1960s Mississippi this was viewed by many white employees as a vote for the union was a vote for an integrated society (*NLRB v. Bancroft Manufacturing*, 1975). Consequently, the NLRB declared that appeals to racial prejudice have no place in representation elections (*Sewell*, 1962), p.14). The election in question was declared to be tainted, then set aside, and a new election was scheduled. Though direct appeals to prejudice are generally prohibited, NLRB does allow unions to make appeals to racial and ethnic pride (Feldacker and Hayes, 2014, p.97).

In most cases, the ban on racially based rhetoric is to protect the employees from the employer's inflammatory messages (Rogers, 2012). Part of this enforcing a more onerous standard for employers is linked to the NLRB's position that the employer's position of economic power over employees creates an inherently coercive environment for campaign speech (Larsen-Bright, 2002).

THE SEWELL DOCTRINE

Making of appeals to the racial prejudices of workers was addressed by the National Labor Relations Board (NLRB) in its 1962 decision, *Sewell Manufacturing*. In the aforementioned case, the employer had circulated a picture of a union organizer with a Black woman. Out of this case, the NLRB would create what has become known as the *Sewell Doctrine*. The NLRB held "... that the employer's propaganda directed to race exceeded the permissive basis for choosing or rejecting

a bargaining representative was an impossibility“ (138 NLRB 72). In essence, the comments made by a primary party (the union and the employer) must be truthful and germane to the election, if they are irrelevant and inflammatory, the NLRB will set the election results aside, which it did in *Sewell*. A phrase often used in labor circles is that the actions of a party destroyed the “laboratory conditions” expected in the representation election. “Laboratory conditions” merely means that there must be an atmosphere in which neither the union nor the employer can interfere or coerce employees in their free choice of representation--or not (*NLRB v. River City Elevator*, 2002)

Inflammatory Comments by Third Parties

The prohibition had initially been on employer’s use of inflammatory racially based statement to manipulate election outcomes, though union appeals to race have been subjected to the same scrutiny (citation). However, the NLRB and federal courts have given less weight to the comments of third parties (i.e., religious leaders, civil rights advocacy groups, political figures and even the employees themselves) during representation campaigns (221 NLRB 1131). Some courts, like the U.S. Court of Appeals for the Fourth Circuit, have granted a general exemption to third parties by ruling that the NLRB does not have the authority to force third parties to prove their statements were truthful or germane, nor can it require the primary parties (employers and unions) to defend statement which they did not make (*Ashland Facility Operations v. NLRB*, 2012).

The NLRB has very little control over the utterances and actions of third parties, and, therefore, limits *Sewell* to the content of primary party speech. Part of this rationale is tied to the fact that though the third party may have interests aligned with the primary party, the primary party cannot control a rogue third party using the election campaign to further his/her own agenda (Shinn-Krantz, 2016). At the time of this writing, five federal circuit courts have chosen not to impose *Sewell’s* restrictions on third-parties (*Ashland Facility Operations v. NLRB*, 2012; *NLRB v. Foundry Division of Alcon Industries*, 2001; *Clearwater Transportation v. NLRB*, 1998; *Did Building Services v. NLRB*, 1990; *M & M Supermarkets v. NLRB*, 1987). There is, consequently, no judicial pressure on the NLRB to change its stance. So long as inflammatory racial and religious appeals are made by third parties, the primary parties do not violate the *Sewell* doctrine

THE ORGANIZING CAMPAIGN IN CANTON

History of the Nissan Organizing Efforts

Unlike Volkswagen in Chattanooga, Nissan initiated a very strong anti-union campaign in Canton, MS. The company’s campaign focused on reminding the employees of the economic situation in the Canton area before the plant was opened. Job opportunities, good benefits, safe working conditions and good pay were touted as the benefits of the plant (Bajaj, 2017). The company also ran anti-union advertisements on local stations. It was a very much by-the-book campaign (see Figure 1).

The UAW response to this was to refocus their campaign on race. Instead of advocating the traditional seat-at-the-table argument, the union instead concentrated on civil rights. This was a message that the union hoped would resonate since 70% of the Canton plant’s workers were

African-Americans. To a further this end, civil rights leaders were invited to encourage workers to stand against alleged intimidation by the Nissan Company. Tee-shirts were provided with the message “Vote NO if you’re a slave” (Wolfe, 2017)

Bernie Sanders & Danny Glover March 4, 2017

In March 2017, the UAW also organized what was called the March on Mississippi: *Worker’s Rights = Civil Rights*. In this gathering of local and regional civil rights leaders were Senator Bernie Sanders, Representative Bennie Thompson of Mississippi’s first congressional district, NAACP President Cornell Brooks, and actor/activist Danny Glover. The message was formulated to connect the employees’ right to vote for the union with protecting individual employee’s from intimidation as African-Americans in the workplace (UAW, March 2017). The campaign was being transformed from union representation to a civil rights protest, accompanied by the appropriate rhetoric. The event even had a name not connected to the organizing, *the March on Mississippi*.

Two quotes from Mr. Glover illustrate this tactic: “. . . it’s important to remember, the first response to union organizing in the South wasn’t ‘Right to Work’—it was violence. . .” The other, “The economic oppression of black workers began with slavery, continued in the Jim Crow era and now takes the form of suppression of union activity.” (Glover, 2017) Equating worker rights to civil rights was so inspired that one publication prognosticated that it ushers in a new era of union organizing in the South (Nichols, 2017). Under *Sewell*, had the union made such statements as a primary party, it would have the burden of proving their accuracy. Third parties are under no such burden.

The intent behind such emotional appeals was to galvanize workers along racial lines. Because the majority of the workers were African- Americans it was hoped that the result would be a victory for the union. When the final votes were counted, 64% of those who voted, voted against the union. It was a bitter defeat for the union. It appeared, in hindsight, that the economic message of the employer resonated more with the employees than the emotional appeal of the union.

CONCLUSION

In an era characterized by an increased emphasis on identity politics and multiculturalism, it is hardly surprising that these concepts would not be applied to union organizing. What the Nissan campaign may indicate is that racial themes that may not resonate over economic ones. The union focused some of its campaign on abstract concepts like appeals to historical oppression or perceived hostility of management or coworkers. Because of the provocative nature of the rhetoric, such as equating working for the company as slavery, this messaging was shifted to third parties. This precluded *Sewell’s* prohibition of inflammatory racial speech from being invoked.

The company focused on tangibles, good wages and improved standard of living. The results of the election would indicate that the economic appeals won out over the emotional ones. The question is now, will unions continue racial appeals in plants with large ethnic workforces, or will the defeat in Canton have a chilling effect on such tactics?

APPENDIX

Figure 1. Lawful Employer Activities during a Representation Election Campaign

<ul style="list-style-type: none"> ○ Provide <i>factual</i> information <ul style="list-style-type: none"> • Factual information about unions in general • Factual information about the union in question • Factual information about local wages and cost of living ○ Announce that it will use all <i>legal</i> means to resist unionization ○ Send letters to employees ○ Remind employees of union dues ○ Remind employees of the possibility of strikes (do not say that there will be strikes as this is a ULP) ○ Remind employees that work rule will continue to be enforced during the campaign ○ Remind employees that even if they signed authorization cards, they are not obligated to vote “yes” for the union ○ Train supervisory personnel in labor relations ○ Ban union organizers from company property ○ Hire consultants ○ Permit anti-union employees to form “No Vote” committees, but give them no direct support (this would be a ULP) <p>Sources: National Federation of Independent Business, 2017; Leap, 1985)</p>

Figure 2. Automobile assembly plants in the South

Manufacturer	Location
BMW Group	Greer, South Carolina
Daimler AG	Vance, Alabama
Daimler AG	Ladson, South Carolina
Honda Motor Company	Lincoln, Alabama
Hyundai Motor Company	Montgomery, Alabama
Kia Motors	West Point, Georgia
Nissan Motor Company	Smyrna, Tennessee
Nissan Motor Company	Canton, Mississippi
Toyota Motor Corporation	Georgetown, Kentucky
Toyota Motor Corporation	San Antonio, Texas
Toyota Motor Corporation	Blue Springs, Mississippi
Toyota Motor Corporation	Buffalo, West Virginia.
Volkswagen Group	Chattanooga, Tennessee

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