"We Just Want A Democratic Workplace": Can the NLRB Protect Starbucks' Pro-Union Workers?

Posted on April 13, 2022 by John Logan

John Logan updates us on the spunky Starbucks workers campaign against the Goliath of union avoidance, asks what the National Labor Relations Board (NLRB) is doing or could do to help, including his perspective on how this fits into the long history of the National Labor Relations Act and union-busting tactics. -editor

The anti-union campaign is not going well for the world's largest coffee house chain, Starbucks. The union campaign by Starbucks Workers United (which is affiliated with the Service Employees International Union) has spread to over 200 stores, largely as a result of the self-organization of the predominantly young workers, and the union has won 18 out of 19 elections. On Monday, Starbucks lost the first two Boston store NLRB elections gaining a single vote. Last week, Ithaca became the first town in the country with entirely unionized Starbucks stores. The union won three elections there, with the company winning only one vote in each election. Two

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weeks ago, Starbucks Workers United won a NLRB election in Seattle, the corporation's home town with which it is closely associated, by a vote of 9-0. In response to a question about what they wanted, one pro-union Seattle barista replied, "we want to help organize everyone, everywhere, forever."

In a real sense, this is a struggle over two competing versions of the future of work. The version of Starbucks CEO Howard Schultz is based on algorithmic management, disposable workers, low wages and a workforce lacking an independent voice. Starbucks' pro-union employees reject that vision. As worker-organizers Maggie Carter, a barista in Knoxville, Tennessee, explained just before the union's first victory in the South: "We just want a democratic workplace."

But Starbucks shows little sign of giving up its war of attrition against pro-union workers, and the allegations of unlawful union busting tactics have increased. Pro-union workers had alleged that the company committed multiple other unfair practices in its campaign to crush the organizing campaign: it has threatened to close unionized stores at Buffalo, sacked seven pro-union workers at a store in Memphis, tried to drive out pro-union workers by reducing their hours and strictly enforcing the company's scheduling policies, surveilled workers and potentially committed other unfair labor practices (ULPs) designed to undermine worker support for unionization and frustrate collective bargaining.

A Knoxville Starbucks Workers Rally, 2022. Credit: Maggie Carter

Fear Makes the Wolf Seems Bigger

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The two central themes of Starbucks' anti-union campaign are fear and futility. Exploiting workers' fears of job losses and retaliation, and creating a sense of futility surrounding unionization, have long been at the center of corporate anti-union campaigns. Rather than a choice between the union or no union, Starbucks is trying to turn the campaign into a choice the union or your job, in which workers fear retaliation, fear job losses, fear store closures, fear hours reductions, and fear draconian enforcement of previously flexible personnel policies.

Terminating activists, discriminating against pro-union workers and threatening job losses in the event of a union victory often succeed in creates a chilling atmosphere in the workplace. Starbucks has allegedly threatened to shutter the first stores to unionize, and made absolutely clear to workers – via text messages, captive meetings and a slick website – that, individually and collectively, they will likely suffer adverse consequences if they opt for unionization. Allegations of unlawful tactics such as these are nothing new when it comes to union organizing campaigns. In recent years, over 40% of all organizing campaigns have been tainted by allegations of unfair management practices, and unlawful discrimination against union activists and supporters is one of the most potent weapons of anti-union corporations.

Not Just A Few Bad Lattes

Starbucks' ability to undermine the right to choose a union extends well beyond practices that are currently unlawful under the NLRA. U.S. labor law gives corporations enormous leeway to subvert workers' free choice without having to commit unlawful practices. Starbucks has engaged the services of Littler Mendelson, the country's largest and most sophisticated "union avoidance" law firm. Littler Mendelson attorneys excel at finding *legal ways* to subvert and undermine union campaigns, and it has financial and reputation incentives to keep fighting unionization to the bitter end. During the Starbucks campaign, Littler attorneys have sought to delay elections, manipulate bargaining units, pack units with newly-hired employees and purge them of pro-union employees through draconian enforcement of company personnel policies. Arthur Mendelson, one of the firm's founders, once explained that anti-union corporations "can do so much within the confines of the law to combat unionism that they need not and should not violate the law." And as a popular union avoidance manual advised corporate clients in the 1980s, the "possibilities for communicating [anti-union message] are almost endless."

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According to the NLRB, Starbucks' aggressive anti-union campaign has violated the law, but Mendelson's point was correct: if the problem were only that a few bad Starbucks managers were breaking the law, the solution would be simple: tougher penalties for those that commit unlawful practices. But Starbucks is attempting to bully pro-union workers through both lawful and unlawful tactics. Thus, the Biden NLRB needs to take on practices such as mandatory "captive audience" meetings – which Starbucks has used repeatedly to intimidate workers – to remove the fear factor and ensure that workers' have a fair choice, as the law requires. As early as 1947, a Board attorney recognized the potentially devastating impact of captive speeches, warning that the Board must consider them "with the eyes and minds of the worker who is on the receiving end, rather than with those of a lawyer sitting in Washington." The Board should separate Starbucks' right to speak out on unionization from its ability to force workers to listen to its anti-union propaganda. Outlawing mandatory captive meetings, which can terrorize workers, need not require a change in the law. The Biden NLRB should end the obscene spectacle of billion-dollar corporations such as Starbucks forcing $15 per hour workers to attend anti-union meetings conducted by highly paid external consultants.

And it may now be starting the process to do just that.

Can the Biden NLRB Neutralize Starbucks' Union Busting?

Thus far, the Biden NLRB, and its General Counsel Jen Abruzzo, who has been a force of nature since taking over as the Board's top lawyer, have demonstrated an unusual determination to take actions that would protect workers' right to choose a union. Most noticeably, last week, Abruzzo announced her intention to take on employers' principal anti-union tactic: captive audience meetings. Abruzzo said that captive meetings were "inherently coercive" and that she would "urge the Board to reconsider such precedent and find mandatory meetings of this sort unlawful." This would be a valuable first step to making employer speech no more compelling – and thus, no more coercive – than union speech. But is the Biden NLRB any match for anti-union corporations with the steadfast determination and deep pocket of Starbucks? The vicious anti-union campaign has laid bare the limitations of the NLRB's election and ULP processes, with two long-standing problems standing out: delay and inadequate remedies.

Delay: "Time is on Your Side"

First, the NLRB election and ULP processes are still far too slow and this delay can

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be fatal for union organizing campaigns. Scholars have recognized for decades that employers use deliberate delaying tactics to undermine union campaigns. As early as 1940, one senior Board attorney worried that the cumbersome NLRB elections would provide hostile employers "with a means of sabotaging the bargaining process through dilatory tactics." In 1959, Senator John F Kennedy lamented delays and compared the Board's proceedings to the English Chancery Court proceedings in Jarndyce vs. Jarndyce, as portrayed in Dickens's *Bleak House*. Union avoidance law firms such as Littler Mendelson have become leading experts in exploiting loopholes in NLRB processes to ensure long delay. One prominent union avoidance law firm, Jackson Lewis, infamously advised its clients that, when it comes to NLRB elections, "time is on your side." Starbucks' principal delaying tactic has been to contest the composition of the single-store bargaining units, which usually delays elections for several weeks. In recent years, underfunding and understaffing have exacerbated this issue: the Board has lost 30% of its staff since 2010 and Republicans in Congress have sought to starve it to prevent it doing its job.

Starbucks workers are still waiting far too long for elections, vote counts and first contracts. The NLRB is taking too long to dismiss Starbucks' continuous legal appeals of single-store bargaining units. The Board knows that Starbucks is exploiting the appeals process to prolong its anti-union efforts and disrupt the momentum of the organizing campaign; it has presented no new facts concerning the organizational structure of stores that would cause the NLRB to reconsider the appropriate bargaining unit. Starbucks workers are still waiting far too long for justice after facing anti-union discrimination. For example, the hearing for the two Phoenix-based pro-union workers is scheduled for June 14th, thus giving Starbucks management months to continue its anti-union aggression at the store.

Last week, the NLRB ruled that the sacking of the "Memphis Seven" wad unlawful, but the workers are still awaiting reinstatement. Earlier this month, the NLRB issued its first charge against Starbucks, alleging that the company unlawfully discriminated against two pro-union employees at a store in Phoenix, Arizona. Previous ULPs filed by the union are still pending before the NLRB. These discriminatory discharges – usually targeting union leaders – have a "chilling impact" on the entire organizing campaign, so the Board knows it must move more quickly on these allegations, and with any allegations that Starbucks is obstructing the negotiation of first agreements at its first two unionized stores in Buffalo. The Biden NLRB, like the Obama Board before it, is trying to tackle the issue of unnecessary and unjustified delaying tactics in both union elections and ULP

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charges, but it still needs to do much more.

Remedies: Toothless Tiger or Mouse that Roared?

Second, the NLRB's remedies against unlawful anti-union practices are far too weak. If the Board finds Starbucks guilty of firing pro-union workers, it orders the reinstatement of the workers (if they want their jobs back), requires that Starbucks pays back wages (minus any wages the workers have earned in the meantime), and order Starbucks to post a notice stating that it will respect workers' right to choose a union. Most corporations simply regard such penalties as simply a cost of doing business. If discriminatory dismissals were to continue, the Board may seek federal court orders ordering the reinstatement of workers, as it has done at Amazon in Staten Island. The Biden NLRB has already increased the use of "10(j) injunctions" to tackle unlawful anti-union behavior. Starbucks Workers United has also requested that the Board seek a nationwide injunction to prevent the company from continuing to reduce hours, which it says Starbucks is doing to financially punish pro-union workers.

General Counsel Abruzzo has announced the Board's desire to increase the cost of violating workers' right to choose a union by imposing harsher penalties and punitive remedies. In both the Starbucks campaign, and at the union campaigns at Amazon, it has shown a strong desire to stop unlawful activity from derailing union campaigns. It has additional remedies other than 10(j) injunctions at its disposal. If the Board ruled that Starbucks' egregious unlawful conduct had made a fair election impossible, it could impose a "Gissel bargaining order" on the basis of a majority of signed authorization cards. The Board rarely takes this route – Republican NLRB and Courts have repeatedly raised the burden of proof the Board requires in order to impose such orders — and even if were to do so, Starbucks could appeal the decision in the federal courts. The appeals process often takes years to conclude and anti-union corporations typically get a more favorably hearing before the courts. General Counsel Abruzzo has raised the possibility of reviving the "Joy Silk" doctrine, which, between 1949-1969 enabled the Board to impose bargaining orders significantly tougher than Gissel bargaining orders, which replaced them. It's not entirely clear whether such a move could withstand a court challenge, but the Biden NLRB likely will not avoid taking measures for fear of being reversed in the courts, and believes it has a duty to educate non-specialist judges in the proper enforcement of labor law.

Workers Need Corporate-Wide NLRB Remedies Against Starbucks

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The NLRB has rightly insisted that Starbucks union elections take place on a store-by-store basis – single store bargaining units have almost always been the presumptive bargaining unit in food retail. But when it comes to remedies for unlawful anti-union practices, Starbucks workers need corporate-wide remedies from the NLRB. If Starbucks succeeds in driving out pro-union workers in Buffalo, Phoenix or Memphis, this will have a chilling impact not only in those stores but at every other Starbucks store at which pro-union workers are trying to organize.

Corporate-wide remedies, which would start with action by the General Counsel, would make it easier for the Board to prove future ULPs because it can re-use evidence from previous cases. It would also make clear that the problem lies not just with a few lawless Starbucks managers, but with a centralized, systematic campaign to undermine workers' right to form a union.

The Board has traditionally acted as if each store was a separate entity calling its own shots: thus, even if the Board decided that Starbucks had unlawfully forced out pro-union workers at one store, it would not use that as evidence in future alleged unlawful terminations at other stores. Starbucks' anti-union strategy is clearly corporate-wide, designed and implemented by Starbucks HQ and its union avoidance law firm; and store managers have been taken away to receive additional "training" on union issues, under the auspices of Starbucks HQ, and has planted corporate employees in stores to "provide an alternative viewpoint" on unionization.

Corporate-wide NLRB remedies are effectively a nationwide-wide cease-and-desist order. They make future violations easier to prove: instead of starting from scratch every time on remedies, future ULPs would be a violation of the cease-and-desist order even if that specific Starbucks store had no previous ULPs. Thus, the Board could use anti-union animus from one Starbucks store to prove ULPs at other stores; it would no longer need to prove anti-union animus at every individual Starbucks store. This would enable the NLRB to impose serious remedies more easily and more quickly because it could rely upon violations from several Starbucks stores instead of being limited to just what happened at each specific store. Thus, ULP violations at one store might not support a 10(j) injunction, but it would be more likely to do so if the Board were to combine violations from several Starbucks stores.

It's unclear whether or not the Board can act quickly enough to protect Starbucks workers – given that any rule changes at the Board will almost inevitably face legal

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challenges from anti-union organizations – and whether even enhanced penalties for ULPs will be a match for an extremely wealthy and steadfastly determined anti-union corporation such as Starbucks. However, in order to offer maximum protection for pro-union workers, the NLRB's should use 10(j) injunctions to go after similar employer retaliation at several stores around the county, thus showing a pattern of unlawful anti-union actions. This kind of decisive action could embolden workers who, understandably, may fear being the victims of retaliation.

Whatever its limitations, the Biden NLRB might still be the last, best hope for Starbucks pro-union workers. Greater financial penalties for unfair management practices were included in both the Protecting the Right to Organize (PRO) Act and President Biden's Build Back Better bill, but both of those pieces of legislation appear to be dead on arrival in the U.S. Senate.

Starbucks' Fearless Young Workers

Thus far, Starbucks fearing mongering anti-union campaign hasn't worked out as planned, and may even have backfired. The Starbucks union campaign has been led by courageous young, diverse, mostly female, politicized workers. After two years of extreme stress during the pandemic, burnout from a huge increase in mobile orders, a tight labor market with a plentiful supply of low-wage service work, and rising inflation that hurts low wage workers most, they are determined to win just treatment on the job and view unionization as the way of achieving those goals. Their fear of anti-union retaliation may have diminished during the pandemic.

Moreover, the worker-led process of "self-organization" at Starbucks is totally consistent with what the authors of the Wagner Act had originally envisaged, and which Board's first officers believed could be fatally undermined if corporations were allowed to engage in anti-union intimidation. According to the Board's first chair, J. Warren Madden, "Upon this fundamental principle – that an employer shall keep his hands off the self-organization of employees – the entire structure of the act rests. Any compromise or weakening of that principle strikes at the room of the law." Over the past half century, hostile employers and their consultants and law firms – assisted by Republican NLRBs and right-wing judges — have undermined that process of worker self-organization. However, the inspirational union campaign at Starbucks is providing at least glimpse of what it could look like in the future.

But Starbucks and its anti-union law firm appear to be in this for the long haul. In mid-March, Starbucks brought back legendary CEO Howard Schultz, who, among

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other things, got rid of the United Food and Commercial Workers Union when it represented Seattle-area Starbucks stores in the 1980s. According to one UFCW organizer from that period, the self-proclaimed "progressive" Schultz would tell workers, "Maybe you need unions in the coal mines, but not at Starbucks stores." Schultz had already been drafted in to tell workers at Buffalo that they didn't need a union, when he used a Polish concentration camp analogy to tout Starbucks employee benefits and to discourage unionization.

In common with other "anti-union progressives," Schulz, who was also a prominent critic of the Employee Free Choice Act – an effort to strengthen the right to choose a union during the Obama era – is likely to personalize the anti-union campaign. In his 1999 memoir, Schultz wrote that if Starbucks workers trust "me and my motives, they wouldn't need a union." Schultz claims that he's "not an anti-union person." but is "pro-Starbucks, pro-partner, pro-Starbucks culture." But it's unlikely that Schulz's personal assurances – and Starbucks' aggressive anti-union campaign – will be enough to stop the spread of one of the most innovative organizing campaigns this century. One his first day back on the job, Schultz complained that "companies throughout the country being are assaulted in many ways by the threat of unionization," and later stated to Starbucks pro-union workers, "If you hate Starbucks so much, why don't you go somewhere else?" But Schultz doesn't understand that pro-union workers don't hate Starbucks but want to make it better. According to pro-union workers at a store in Oviedo, Florida, "We love our store. We love our manager. We love this company. Together we can make Starbucks so much more than it currently is."

Tipping Point or False Dawn?

Ultimately, labor law reform is essential if the almost 50% of non-union workers in the United States who say they want union representation are to have any chance of getting it. The Starbucks campaign could be critical in this respect. Meaningful labor law reform is unlikely to happen unless people are engaged with the issues, understand them and feel like they have a stake in the outcome; pro-union Senators cannot simply hope to force it through while no one is looking. The anti-union lobby will always have enough power to defeat such a strategy. But one of the principal obstacles to labor law reform has always been that few people without a professional interest understand how labor law works: they don't know about it, don't care about it and the labor movement has lacked a language with which to explain it.

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But the American public may finally be paying attention. The inspirational union campaigns at Starbucks, Amazon and elsewhere have generated incredible media coverage and created an "usually promising moment" for U.S. unions. This labor movement "moment" could just evaporate into thin air; but it may just spark an organizing wave across the low-wage service sector, and help stimulate a national debate over the pitiful state of workers' rights. If we are to see union revival – and if the NLRB can stop the coffee behemoth from breaking the law to break the union – more democratic workplaces might just start at Starbucks.

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