THE WALL STREET JOURNAL.

Labor's Supreme Test

The Justices can protect workers from union-business collusion.

November 13, 2013

With their membership declining, unions have become more politically creative and one of their tactics has been to cut deals with management to replace bottom-up organizing on the shoproom floor. On Wednesday, the Supreme Court heard oral arguments on whether so-called neutrality agreements between Big Labor and business are collusion that infringes on the rights of employees.

Martin Mulhall (Unite Here v. Mulhall) is a groundskeeper at the Mardi Gras greyhound racetrack in Florida, where he has worked for 40 years. In 2004, Unite Here's Local 355 struck a deal with the company to grease the skids for unionization.

Mardi Gras gave the union an employee list and contact information, provided access to those employees on company property, and gave the union a veto over what the company could say about unionization. The company also let the union proceed with "card check" in lieu of a secret-ballot organizing election. In return, the union agreed not to strike and spent $100,000 to support a local gaming initiative favored by the company.

Mr. Mulhall didn't want to join a union and objected to the company entrapping him in a unionized workplace. He sued, arguing that Mardi Gras's collusion with Unite Here is forbidden by the 1947 Labor Management Relations Act, aka Taft-Hartley. Under Section 302 of that law, employers are forbidden from giving any "thing of value" to a union that wants to organize its employees.

The law was intended to block companies from buying off union officials, or vice versa. In the case of Unite Here, Mardi Gras's capitulation to make organizing easier was unquestionably a thing of value, feeding a potentially new stream of union dues to ensure its officials' salaries. As Justice Antonin Scalia put it Wednesday, "I guess it would mean that the—the union can cut a deal with the employer that if the employer gives them a freehand" and assists them "in organizing, the union will promise not to—not to seek a raise in wages or not to seek insurance coverage or whatever."

This isn't a typical voluntary contract between two private parties. The collusion comes in the context of heavy regulation that gives unions unusual privileges and monopoly organizing power at private companies. Taft-Hartley was written to protect workers from precisely this kind of deal. As the Cato Institute's Ilya Shapiro puts it, the Mardi Gras-Unite Here arrangement wasn't so much a free contract as "two wolves agreeing to eat a sheep."

Since the 1990s, unions have turned more frequently to neutrality agreements that don't require unions to persuade a majority of workers who are increasingly skeptical of union benefits. To get the company

to acquiesce, unions often intimidate management with threats to demonize the company or organize boycotts.

It's been worth the effort: While unions typically win only 45% of secret ballot elections, they succeed in 78% of organizing efforts using card check, when the union needs merely to collect signed cards from 50% of the work force to automatically become the monopoly bargaining agent.

If the Justices agree that Mardi Gras's concessions represent a "thing of value," organizers will have a harder time getting companies to sign off on deceptive procedures like card check. Unions will have to spend more time convincing individual workers that they can provide a service worth having. That would be a real thing of value.