

DEFENDER

THE NADC NEWSLETTER

When the Union Organizer Calls

Ronald Smith



Ronald Smith

Sidebar

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Typically, notice of a union organizing drive in a dealership is met with a combination of disbelief, incredulity, anger, resentment, self-pity and all of the other emotions that accompany the possibility that a third-party is going to come into your business and tell a fiercely independent businessman how to operate. Too many times, dealers not only act on emotion but think they are hamstrung in what they can say and do and "buy" a union with illegal actions or poorly run their counter-campaign. For purposes of this article, we will ignore the current House passed Bill (H.R. 800), which is one of the worst pieces of legislation I have seen in my 39-year career. Suffice it to say, business forces must be mobilized to stop this legislation if it appears that it has a serious chance of being enacted into law. The Bill, a payback to labor bosses, totally guts the 60 year legal right of free speech of employers and deprives employees of the right to reflect and vote secretly on the issue of life under a union "cloud." The Bill also applies Draconian "remedies" for what are typically minor violations of current labor law and mandates arbitration of anti-business contract issues.

I counsel clients to try not to react emotionally when they get the first notice of union organizing. They should say and do nothing until they have received some sound, competent advice about what they can say and how they can say it. Management can, during an organizing campaign, discuss issues, express opin-

ions, make statements of fact and conduct an aggressive campaign. In the lexicon of the National Labor Relations Board (NLRB), most of the time it is not what you say but how you say it.

As a general rule, a dealership's first formal contact from the union will be the receipt of a letter demanding recognition as the exclusive bargaining representative for a segment of employees, coupled with a demand to meet and negotiate a labor agreement. The law requires that the dealer have a good faith doubt as to the union's majority representative status. It is essential that a letter be immediately returned to the union stating that the dealer has a good faith doubt as to the uncoerced majority status of the union and suggesting the matter be referred to the NLRB to conduct a secret ballot election to determine the true wishes of the employees. Occasionally, a union organizer will appear on the premises or by telephone and make a request that the employer examine authorization cards or that a neutral party be selected to review the cards that the union has had the employees sign. Most of the time these cards are signed by employees to get fellow employees "off their back." Other times, other coercive statements or wild promises are made by union organizers or in some instances, people just want to see what the union has to offer and a union refuses to discuss anything with the employee until the employee signs a card. Over the years, I have had several elections where every-

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President's Message



Michael Charapp

As I write this, I have just finished reading a series of articles published by the *Detroit Free Press*. The articles cover a variety of subjects on one topic – the importance of dramatically reducing dealers for the comeback of the once and future Domestic 3. (As this is written the Teutonic marriage of one has not yet been dissolved).

I guess I shouldn't be surprised to see a Detroit newspaper put so much blame on dealers for the problems of the Domestic 3. After all, if it's not the fault of the dealers then it must be the fault of the Domestic 3 senior management, not a popular topic in Motor City where they all – or at least those who don't jet in weekly from Florida – live.

The Detroit Free Press view that dealers must shoulder the blame for the problems and the burdens of the

Domestic 3 recovery reminds me of an old joke. Two passengers are flying in a jet when the pilot takes to the microphone to announce that one of the two engines has just flamed out and this means an additional one hour flying time. One of the passengers turns to the other and says, "I hope the other engine doesn't go out. We'll be up in the air all afternoon." Cause and effect in the discussion of the problems of the Domestic 3 also get lost easily.

Dealers didn't cause the problems. Dealers sell what their franchisors produce. Sure, there are some dealers who can do better with a store than one would otherwise expect. However, even the best dealer must sell within the limitations of the brand. Too many dealers are an effect of cars that buyers don't buy, not vice versa.

The senior management of the Domestic 3 caused their problems. Solutions are in the hands of the new crop of senior managers. Strong arming dealers to create a dealer network that the senior managers of the Domestic 3 think they want this week (as opposed to last week, or next week when things are sure to be different) is hardly the answer to the problems.

All of this reminds

me of the reasons why NADC was started. Dealers are in a precarious position. They are large enough with sufficient image issues to be convenient targets for plaintiffs' lawyers, class action litigators, franchisors, government regulators, law enforcement and the like. However, they are not big enough (with a few notable exceptions) to have access to an army of legal specialists for the many issues regularly faced by the typical dealer.

For years, those of us who represented dealers struggled to pull together information from a variety of places such as Automotive News, NADA bulletins, and similar resources. We were spread far and wide. We seldom had easy access to folks like us who could share experiences, help with ideas, be a sounding board, etcetera.

NADC is here to help level the playing field for dealers. Our most critical function is the sharing of information, ideas, strategies, and experiences. We do it through this publication, conferences and workshops, the NADC website and emails. NADC is out to help everyone raise his or her game. We have achieved a lot so far, and we will achieve much more with your help and support.

Michael Charapp, President of the NADC, is a partner with Charapp & Weiss, LLP in McLean, VA.

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one in a small bargaining unit has signed a card and everyone winds up voting against the union. Normally unions will not file petitions unless they have two-thirds to three-fourths of the cards signed in what they consider to be an appropriate bargaining unit. The Clinton NLRB has issued decisions fragmenting dealership bargaining units pretty much along "craft lines." I am hoping that the Bush NLRB goes back to the more traditional "front-end, back-end" bargaining units that were the norm for 40 or 50 years, but that is another article. Once the bargaining unit is established, conduct a "straw ballot" at least twice a week with appropriate supervisors trying to determine how each employee would vote at that particular time and if they are pro-union or leaning union, who and what might make a difference in their vote.

Next, I tell dealers to draw-up an organization chart for the firm. List every employee and every supervisor in every department with their date of hire and job title and objectively attempt to determine the strengths and weaknesses of first and second-line, and even top management in the organization. There are some campaigns where supervisors have been actively involved on the union side. It's also important to note that an unfair labor practice committed by a supervisor, regardless of how well-intentioned, will bind a company. There are many different do's and don'ts for top management, the dealer and supervisors. We would conduct a "classroom" teaching session that instructs supervisors in what they should be doing and saying or not saying. Also, at that time, decisions are made with regard to whether some individuals that might be considered supervisors are really bargaining unit members and, as such, might be eligible to vote in an upcoming election.

Instruct all management that there is no additional hiring or firing without specific approval, which must be checked out in

advance with legal counsel. Many times a union will try to get a "ringer" employed in the organization to assist with union organizing from the inside. Be sure to check every prospective employee's references thoroughly and to time hiring decisions so that they affect the number and hopefully, quality of people in the bargaining unit.

No discipline should be instituted without specific approval and a thorough review of all the facts. Too often dealers think they cannot discipline employees during a union organizing drive. That is not correct. The mere fact that a union organizing drive is taking place will not insulate an employee from appropriate discipline, including dismissal, if conditions warrant discipline. However, most of the time any disciplinary action will result in the filing of an unfair labor practice charge by the union. It costs the union nothing to have the government investigate mostly worthless charges filed for the purpose of harassing the company and attempting to flex political muscle with the employees.

Employer's free speech might go away if the insidious House Bill (H.R. 800) is allowed to become law. Currently, Section 8(c) of the National Labor Relations Act enunciates management's right to free speech and any limitations thereon. It states

8(c) [Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

In any written or verbal statement or discussions regarding unionism, dealers must be guided by the following general guidelines:

1. Make no threats (actual or implied) in the event of employee union activity.
2. Make no promises (actual or implied) conditioned upon the accomplishment or rejection of any union activity.
3. Do not poll or interrogate employees about their or other employees' union membership. Do not ask them how they plan to vote – or what happened at union meetings.
4. Do not say or imply that if a union organized your employees you would withdraw all existing benefits or say you will never sign an agreement with a union.
5. Your counter-union campaign must be carefully planned over the course of several weeks or months. You should not permit any hand-outs, flyers, cartoons, or the like to be distributed until they have been thoroughly reviewed. These should be reviewed by you with your supervisors. Remember, however, that your campaign needs to be planned, and your campaign will last over a period of several weeks. It is essential that your campaign peak at the time your employees cast their ballots.

In any discussions with employees, if union issues are raised, or if inquiries are made by employees concerning union activities, you can:

1. Point out to employees that the National Labor Relations Act not only gives employees the right to form, join or assist labor organizations, but also gives them the equal right "...to refrain from any and all such activities."
2. Advise employees that no one and no union has a right to threaten or coerce employees to join a labor organization.
3. Advise employees that no one has to sign any union membership or authorization card – and to read carefully anything they are asked to sign.
4. Advise employees that no union has a

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Executive Director's Message

First California Chapter workshop



Jack Tracey, CAE

On June 14th the California Chapter of NADC jointly sponsored a legal workshop with the California Motor Car Dealers Association. The event was held in Burbank and attracted over 80 attorneys drawing attendance from both organizations.

Many of the California chapter members attended the workshop and several contributed as presenters. The program was divided into three sessions. The workshop began with a litigation

panel where NADC members Aaron Jacoby and Bob Daniels participated. This session covered litigation hot spots in California and suggestions for effective strategies to combat adverse litigation.

The second session covered franchise law and Bert Rasmussen served as one of the panelists. California franchise law was covered and an informative discussion about tactics used by factories to manipulate franchise agreements was provided.

The final topic covered compliance with Rob Cohen co-presenting this session. Covered material included vehi-

cle registration printouts (KSR) liability, DMV task forces, foreign language transactions and disclosure statements.

Five hours of CLE credit were awarded to the workshop by the California Bar Association.

Cooperative efforts like this provide the Association with the opportunity to spread the word about NADC and to draw upon a talent base beyond our membership so that our educational programs can be the best they can be. We are planning other events for our California chapter members.

Contact Jack Tracey at 410-712-4037 or: jtracey@dealercounsel.com

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right to pressure them to join a labor organization; and to advise you if they are pressured by any union.

5. Tell employees that the signing of a membership or authorization card in any union does not mean they have to vote for that union. In the event of an election, they can vote as they please by secret ballot, regardless of what they have signed.

6. Tell employees to consider union promises carefully before accepting them as fact.

7. Tell employees in the event of a National Labor Relations Board election, the same would be by secret ballot and no one would know how an employee votes.

8. Advise employees that in the event the union is endeavoring to organize them, they should inquire into and know the background of the organization and its agents. You can also post articles and federal reporting forms for employee review.

9. Tell employees you were and are always willing to discuss with them any problems they may have, provided the matters discussed do not violate your obligations under the National Labor Relations Act.

10. Explain to employees the company benefits and conditions.

11. Tell employees about any untrue or misleading statements made by a union organizer or by handbill or through any medium of union propaganda.

12. Tell employees that if a majority of them select the union (an outside organization), the company will have to deal with it on all their daily problems involving wages, hours, and other conditions of employment. Advise them that the company would prefer to continue dealing with the employees directly on such matters.

13. Tell employees how their wages, benefits and working conditions compare with other companies in the area whether unionized or not.

14. Tell employees the disadvantages of

belonging to a union such as the expense of initiation fees and monthly dues, membership rules restricting freedom, and their loss of the right to make their own decisions on matters involving wages, hours and other working conditions.

15. Tell employees that in negotiating with the union, the company does not have to agree to all of the union's terms and certainly not to any terms which are not in the economic interest of the business.

16. Advise employees that in your opinion no union is needed to represent them in this company, and that you would prefer not to have a union.

17. Tell your employees that you strongly object to a union shop. Under a union shop, your employees would have to belong to the union in order to work in your place of business.

18. Show legal professionally prepared anti-union videos during a campaign.

Remember... Make certain of your statements and actions so that you do

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not violate provisions of the National Labor Relations Act because, if you do, under present National Labor Relations Board decisions, any election the company wins could be set aside – and if the union had evidence (by a card check or otherwise) that it represented a majority of employees in the appropriate unit, the Board could order the company to recognize and bargain with the union, despite the election results.

What you, as management **cannot** do:

1. **Make any promises** to employees contingent upon some action for or against a particular union.
2. **Make any threats** to employees contingent upon some action for or against a particular union.
3. **Interfere** with the right of employees under the law to join, form or assist labor organizations.
4. Ask employees whether or not they have joined a union or how they are going to vote or what their union incli-

nations are.

5. Have anything to do with the circulating of any employee petitions for or against any particular labor organization.
6. **Indicate approval or disapproval** of the activities of employees who are trying to form a union or change union representatives.
7. **Criticize or discriminate** against any employee for expressing a preference or a desire for any particular labor organization.
8. **Discharge or discriminate** against employees **because of union activities**.
9. **Spy** on union meetings. (Parking across the street from a union hall to watch employees entering the hall would be suspect).
10. Conduct yourself in a way which would indicate to employees that you are watching them to determine whether they are participating in union activities.
11. Discipline or penalize employees actively supporting a union for an infraction which non-union employees are

permitted to commit without being likewise disciplined.

12. Take any action that is intended to impair the status of, or adversely affect an employee's job or pay because of his activity on behalf of the union.

13. Select employees to be laid off **with the intention** of curbing the union's strength, or to discourage affiliation with it.

14. Ask employees for an expression of their thoughts about a union or its officers.

15. Ask employees about the identity of the investigator or leader of employees favoring the union.

When I first got involved on behalf of management in union organizing drives, my mentor told me a maxim which I have found very helpful to management over the years - treat every friend like an enemy and every enemy like a friend.

The area of labor relations is generally quite confusing to a dealer because it deals **continued on page 8**

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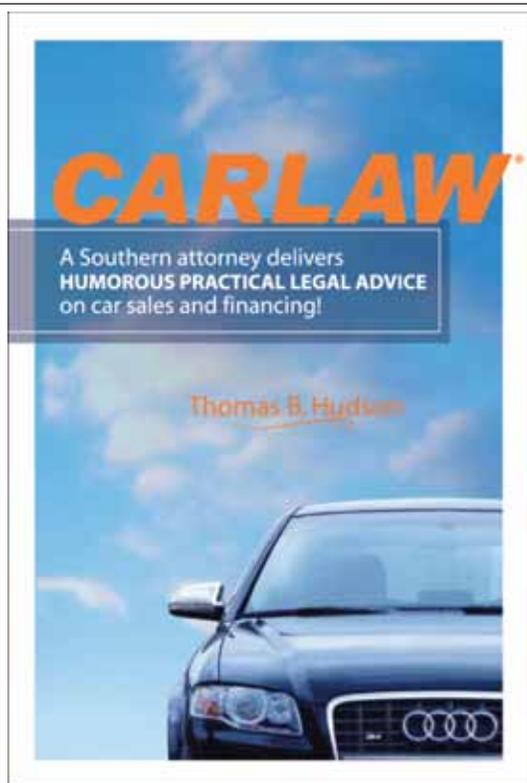
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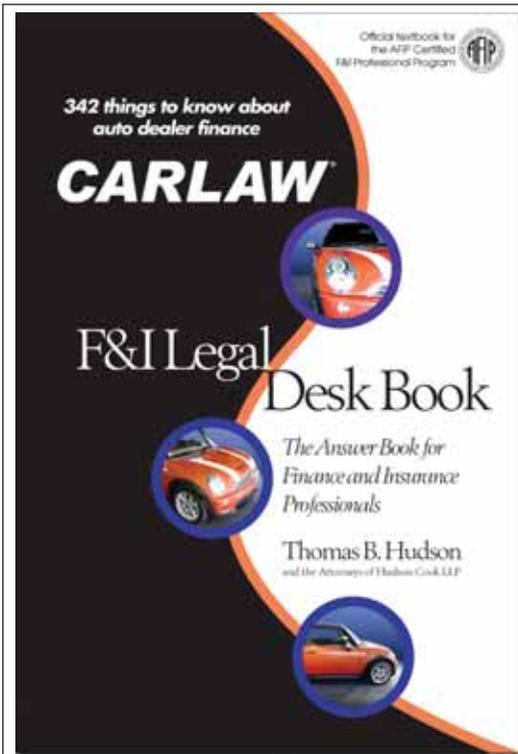
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Union ... from page 5

with the application of certain rules to unpredictable situations. Any time you are dealing with people, unpredictable situations can arise almost immediately and employee opinion can shift numerous times during the union campaign. This article is not intended, nor is it possible for any article to act as a substitute for good advice in individual situations. A dealer’s best bet is to contact competent counsel in the area to plan a counter-campaign to keep the organization safe from the intervention of a third party that, in reality, cares nothing about the dealer’s business. Generally unions care only about their lifeblood members. Organizing is down; union members are down; many regional directors of the NLRB are prosecuting cases that are absolutely silly because they do not have enough legitimate case work for their staffs, and they do not want to lose staffing because they may never get that staff reauthorized. No bureaucrat wants to lose turf. Bargaining orders are being sought by some regional directors upon factual situations which would have been dismissed a few years ago. Even in the best

of counter-union campaigns, the dealer will be looking at defending unfair labor practice charges.

Sometimes local associations or groups of dealers can ban together and help with the expense. Union organizing does have a domino effect. If one dealership in a community gets organized and the union is successful in negotiating a contract which is perceived as being more favorable, then the union will be knocking on the door of the next dealer down the street. There is a real legitimate community of interest among dealers in banning together economically to fight unionization.

Over the years, I have been asked many times why dealerships do not like unions. My response generally is that at one time in our history of labor management relations, unions probably performed a legitimate function in larger companies. However, unions generally do not work well in smaller organizations where the keystone is service to the public, rapid response and a need for intrapersonal relationships. When properly explained, most sales people come to the conclusion that a union is counter-intuitive to good dealership sales

functions. Also on the back-end, there are different characteristics to the work and craft of various employees that make unions burdensome. The biggest problem for dealers, however, is that unions interfere with the right of the dealer to manage his or her business. That is the key!

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