

UAW's Principles for Fair Union Elections

Gary Klotz
Butzel Long
klotz@butzel.com
313-225-7034

With its membership below 400,000, the UAW recently issued its “Principles for Fair Union Elections.” It plans on using these Principles in an attempt to unionize new members, initially at foreign-owned automotive companies. UAW President Bob King has predicted that by using the Principles, the UAW will organize at least one foreign-owned automotive plant by the end of 2011. Presumably, if using the Principles with foreign-owned automotive companies results in the successful organizing of new UAW members, the UAW will extend its use of the Principles to other companies, particularly including foreign-owned automotive suppliers.

The UAW, which, in June, approved spending \$60 million on organizing, also will use part of its \$800 million strike fund for its organizing efforts. UAW President Bob King stated: “We have, in many ways, pretty deep pockets in terms of what we’re willing to spend ... we have really unlimited resources to devote to this.”

For the reasons outlined in this article, the Principles are one-sided in favor of the UAW and should be unacceptable to any non-unionized employer that wants to remain union-free.

The Principles consist of a Preamble, eleven principles, and a brief explanation of each principle.

The Preamble identifies the Principles as establishing a framework that will permit employees to freely exercise their right to join or not to join a union. According to the Preamble, a new framework is needed because the “current federal framework under the National Labor Relations Act does not protect the rights of workers to freely decide whether or not to join the UAW.” The UAW pledges that if employers “abide by” the Principles, the UAW “will respect the choice of the workers whether or not they choose to join the UAW.”

Principle #1

- **A Fundamental human right**

1. The right to organize a free trade union is a fundamental, human right recognized and respected in a democracy.

Analysis: Section 7 of the National Labor Relations Act provides that employees have the legal right to unionize or to refrain from unionizing. Principle #1 merely restates that Section 7 right to unionize, but omits the employees’ right not to unionize. That omission reflects the Principles’ one-sided nature.

Principle #2

- **No coercion, intimidation or threats**

2. Employees must be free to exercise the right to join a union or refrain from joining a union in an atmosphere free of fear, coercion, intimidation or threats. There is no free choice if a worker is afraid of losing a job or losing benefits as a result of his or her choice, or is intimidated into making a choice not of one’s own making.

Analysis: Section 8 of the NLRA prohibits both employer *and* union interference with employees’ exercise of their Section 7 rights. Yet Principle #2 *only* focuses on “coercion, intimidation, or threats” committed by an employer, and that focus again indicates the Principles’ one-sided nature.

Principle #3

- **No repercussions from management or the union**

3. Management must clearly articulate that if workers choose to unionize, there will be no negative repercussions from the company. The

UAW must clearly articulate that if workers choose not to unionize, there will be no negative repercussions from the union. Both the company and the union will negotiate in good faith, and any failure to reach agreement will not be caused by bad faith negotiations.

Analysis: Section 8(c) of the NLRA already provides that employers have a free speech right to express their opposition to unions, so long as they do not threaten employees with reprisals for engaging in union activities or promise benefits for not engaging in union activities. Principle #3 would erode an employer's free speech right by prohibiting an employer from stating that "negative repercussions" may result from unionization. For example, an employer arguably would violate Principle #3 by notifying its employees that if a contract with the UAW increases the employer's expenses too much, then the employer may become uncompetitive, which could affect job security.

In addition, Principle #3's statement that employees will not be subject to "negative repercussions" from either the employer *or* the UAW presents a false symmetry. If an employer is unionized, the employer can react to unionization, including by closing its business. In contrast, if the UAW fails to unionize a work force, the UAW has no ability to impose "negative repercussions" on the employees. The UAW's pledge of no "negative repercussions" thus has no practical meaning or value; it signifies only empty UAW rhetoric.

Principle #4

- **No wage or benefit promises from management or the union**
 4. Management will clearly articulate that it does not promise increases to pay or benefits if workers choose not to unionize. The UAW will clearly articulate that it does not promise increases in pay or benefits if workers choose to unionize.

Analysis: The NLRA, as construed by the National Labor Relations Board, already prohibits employers from promising pay or benefit increases to encourage employees to remain union-free or from threatening pay or benefit decreases to discourage employees from unionizing. In contrast, promising or, at a minimum, implying that unionization will result in higher wages

and better benefits has traditionally constituted one of a union organizer's core sales pitches to non-unionized employees. It is part of a union's broader organizing message: the union can solve or try to solve whatever problems an employee has with the employer or its supervisors.

Significantly, Principle #4 does not limit, in any way, the UAW's freedom to make promises about employment terms and conditions that do not concern wages and benefits, such as, for example, the following standard promises: a "voice" in the workplace; a legally binding contract; an end to "at-will" employment; a guarantee of "just cause" protection against discipline and discharge; a grievance procedure with an outside, impartial arbitrator, not the employer, as the final decision-maker; union stewards to enforce the contract and to protect employees; an end to "favoritism"; and the union's support and strength.

Principle #4 also does not limit pro-UAW employees, who will advocate for the union during an organizing campaign, from promising that the UAW would obtain higher wages and benefits for the employees. Under Principle #4, the UAW would not be accountable for promises made by pro-UAW employees who are not acting as the UAW's agents. Principle #4 accordingly would not eliminate promises that the UAW would obtain higher pay and better benefits; it might only change who is making those promises from an official UAW representative to the pro-UAW employees who function as unofficial UAW representatives.

The real question about Principle #4 is whether the UAW would comply with it by forsaking the use of promises as an organizing tactic. If the UAW were to violate Principle #4, however, the Principles provide no remedy for the employer, except using Principle #8's "immediate resolution" system, which would not reverse the effects of any UAW promises. The UAW's use of promises would not be illegal under the NLRA, so an employer could not allege that the UAW acted unlawfully by violating Principle #4. Also, Principle #4 would have no effect on promises made by unofficial UAW organizers – pro-UAW employees.

Principle #5

- **Equal access to the electorate**
 5. During the course of a union representational

campaign, employees will have the opportunity to hear equally from both the union and management regarding this issue. There will be no mandatory meetings of employees on the issue of unionization unless the UAW is invited to participate in the meetings. Written and oral communications must be equal. The union must be granted the same ability as the employer to post campaign material.

Analysis: Principle #5 represents one of the UAW's most radical proposals. No non-unionized employer should voluntarily agree to Principle #5, and, by itself, Principle #5 ensures that employers should or will reject the UAW's Principles.

Currently, during organizing campaigns, employers have the rights to conduct "mandatory meetings" – "captive audience" meetings - , to talk to employees, and to publish "campaign material" about unionization *without any union involvement or oversight*. Conversely, unions currently have no right to campaign among employees, including distributing "campaign material," on an employer's property. Unions, however, can meet with employees during non-working time and away from the employer's property, even visiting employees' homes (which employers cannot do during a pre-election campaign), and can contact them by telephone, mail, or e-mail.

Principle #5 would revolutionize union organizing campaigns both by granting the UAW completely "equal access" to the employees at work and by depriving employers of their ability to campaign as they see fit on their property. The effects of Principle #5 would be to end "captive audience" meetings with employees at work except if the UAW is present and to end employer oral communications and written "campaign materials" unless the UAW can equally communicate with the employees. Agreeing to Principle #5 would amount to virtual unilateral disarmament by an employer in terms of its tools for communicating with and educating employees during an organizing campaign.

In addition, Principle #5 does not prohibit the UAW from meeting and communicating with employees during non-working time and away from the employer's property, including visits to employees' homes. By retaining that off-site access *and* by obtaining "equal access" on the employer's property, the UAW would achieve a marked

and substantial advantage over an employer regarding communications with employees during a union organizing campaign. Nor does Principle #5 grant an employer "equal access" to employees at off-site union meetings.

Principle #5 amounts to another one-sided principle that grants new rights to the UAW, eliminates existing employer rights, and would cripple an employer's ability to campaign effectively.

Principle #6

- **Disavow any threats from community allies**

6. Management will explicitly disavow, reject and discourage messages from corporate and community groups that send the message that a union would jeopardize jobs. Likewise, the UAW will explicitly disavow, reject and discourage messages from community groups that send the message that the company is not operating in a socially responsible way.

Analysis: Currently, employers can encourage "corporate and community groups" to support their efforts to remain union-free, but cannot direct those groups to make promises or threats that would be unlawful if the employer directly made them. In practice, however, employers rarely involve those kinds of groups in their campaigns to remain union-free. In contrast, unions use the support of other unions and community groups to help organize employees.

Principle #6 does not state that the UAW will forsake the use of its community-based allies to persuade employers to unionize. To the contrary, it only provides that the UAW will not use its community-based allies to accuse an employer of failing to act in "a socially responsible way." No definition of acting in "a socially responsible way," however, is set forth in Principle #6's explanation, so what it means is unknown and thus could be the source of disputes between the UAW and an employer that agrees to the Principles.

Principle #7

- **No disparaging the other party**

7. Both the UAW and management should

acknowledge that the other party is acting in good faith with good intentions. Negative and disparaging remarks about the union or the company are not appropriate and not conducive to a spirit of mutual respect and harmony, and will not be made by either party.

Analysis: Principle #7, like Principle #5, is a radical UAW proposal that no non-unionized employer could agree to without voluntarily surrendering its ability to educate employees about the UAW and to express its opposition to unionization. By itself, Principle #7, like Principle #5, ensures that employers should or will reject the UAW's Principles.

Employers now have the free speech right under Section 8(c) of the NLRA to express their opposition to unionization. Expressions of that opposition typically entail the presentation of *facts* about unions in general and, in particular, the union seeking to organize an employer's employees. The facts address, among other issues, the following: strike history; failures to win representation elections or, if elected, to obtain contracts; dues structure; history of "unfair labor practices"; constitution; and expenditures of members' union dues. The facts are intended to educate employees about unionization and, admittedly, to portray the union in a "negative and disparaging" manner.

Principle #7 would substantially erode an employer's free speech right. It would effectively silence employers by, for example, prohibiting employers from presenting inconvenient facts about the UAW – the decline of its membership from 1.5 million in 1979 to under 400,000 now or its concessions to the Detroit Three – that, from the UAW's perspective, would be characterized as "negative" or "disparaging." Agreeing to Principle #7 would effectively amount to both an employer's "neutrality" on the issue of unionization and a voluntary relinquishment of both an employer's free speech right to oppose unionization and its ability to educate employees about unions. In brief, the combination of Principle #5 and Principle #7 would censor and silence employers.

In contrast, the UAW's ability to explain to employees the asserted advantages of unionization would be unaffected and, as a consequence of the limitations imposed on employers by Principle #5 and Principle #7, unchallenged. A UAW organizing campaign conducted under the Principles accordingly would devolve into a

one-sided contest in which the UAW would campaign with effectively no restrictions, except, if honored, Principle #4's ban on UAW promises of increased pay or benefits and Principle #7's pledge not to make "negative and disparaging" remarks about the employer. Meanwhile, an employer, due to the restrictions imposed by the Principles, would lack the ability to mount a robust campaign against the UAW.

Further, as with Principle #4, Principle #7's prohibition against the UAW's use of "negative and disparaging" remarks about an employer would not prevent pro-UAW employees from making such remarks. "Negative and disparaging" remarks about an employer thus would not end as a result of Principle #7; pro-UAW employees, instead of official UAW representatives, would make those remarks.

If the UAW were to violate Principle #7 by making "negative and disparaging remarks" about the employer, then the employer's only remedy for the UAW's violation of Principle #7 would be to use Principle #8's "immediate resolution" system. Yet the "immediate resolution" system would not reverse the effects of the UAW's violation of Principle #7. Also, as with Principle #4, Principle #7 would not limit "negative and disparaging" remarks about the employer by the pro-UAW employees who serve as unofficial UAW advocates and, by definition, tend to be opposed to and "negative and disparaging" about their employer.

Principle #8

• Immediate Resolution

8. Any disagreements between the UAW and management about the conduct of the organizing campaign, including allegations of discriminatory treatment or discipline relating to the union campaign, will be resolved immediately through an impartial, third party.

Analysis: Regarding Principle #8, a key question is who or what will be that "impartial third party?" What will be the procedures for obtaining an "immediate" resolution by that "impartial third party?" What authority will the "impartial third party" possess to resolve a disagreement, and what remedies will the "impartial third party" be empowered to impose? Principle #8, however, answers none of those critical questions.

Principle #8's explicit identification of one kind of "disagreement" – "allegations of discriminatory treatment or discipline relating to the union campaign" – indicates one of the UAW's purposes for Principle #8: establishing, in effect, a grievance procedure in which pro-UAW employees can allege and pursue claims that the employer has disciplined or otherwise discriminated against them because of their support for the UAW during an organizing campaign. The existence of a means for the "immediate" resolution of those claims by an "impartial third party" and its aggressive use by the UAW could inhibit an employer from disciplining or engaging in any other adverse employment action against pro-union employees – for *any* reason, including legitimate, non-discriminatory reasons – in order to avoid the time, expense, and distraction of any proceedings before the "impartial third party." For that reason, Principle #8, in conjunction with Principle #5 and Principle #7, represents another UAW proposal that would neutralize or neuter an employer during a union organizing campaign.

Principle #9

- **Secret ballot election**

9. The democratic right of workers to freely and collectively choose if they want to form their UAW local union is the workers' First Amendment right. A secret ballot election incorporating these principles is an acceptable method of determining union representation if principles two through six have been adhered to, and if there is no history of anti-union activities. The parties may select an alternative method on a case-by-case basis that reflects the best process for demonstrating employee wishes. If the parties cannot agree on specifics of the procedure, an arbitrator may decide.

Analysis: Principle #9, which is entitled "Secret ballot election," however, only states a qualified endorsement of the secret ballot election, which is the standard method under the NLRA. But it also indicates a preference for card-check recognition to which an employer currently is not legally obliged to agree. The failed Employee Free Choice Act would have required employers to recognize unions based on signed union authorization cards from a majority of the employees.

Principle #9, despite its title, constitutes a thinly disguised effort to achieve what EFCA failed to achieve: forcing employers into card-check recognition agreements. The last two sentences of Principle #9 disclose that Principle #9's ultimate goal consists of using card-check recognition, not secret ballot elections. On a "case-by-case" basis, the UAW can be expected to demand card-check recognition as the "alternative method."

Under Principle #9, a secret ballot election is "acceptable ... if principles two through six have been adhered to, and if there is no history of anti-union activities." But if not, then a secret ballot election would not be "acceptable," and the UAW's preferred alternative to a secret ballot election presumably would be card-check recognition. Any employer conduct that, according to the UAW, allegedly violates Principle #s 2-6, including, for example, any employer campaigning or any adverse employment actions against pro-UAW employees that offend the UAW, in other words, would render a secret ballot election unacceptable to the UAW, would trigger a demand for card-check recognition, and could result in the employees' loss of the opportunity to vote in a secret ballot election.

Principle #10

- **Bargaining**

10. If employees choose to unionize, the employer and union will engage in collective bargaining to achieve an agreement as soon as possible. The goal will be an agreement that takes into account the employer's need to remain competitive; the dignity, respect, and value of every employee; the importance and value of full employee engagement and creative problem solving; and that provides a fair compensation system. The employer and the UAW commit to full information sharing and joint creative problem solving. The employees will vote on whether to accept the agreement. Disagreements between the union and company will be discussed in a respectful manner. If no agreement is reached within six months of recognition, the parties may mutually agree to mediation and/or interest arbitration to resolve any outstanding issues.

Analysis: The NLRA requires an employer and a union to bargain in good faith, but not to agree to a collective bargaining agreement. An element of good faith

bargaining consists of providing information, although an employer does not have to furnish financial information except to substantiate a poverty plea.

Principle #10 would revolutionize the bargaining process for an initial collective bargaining agreement in several ways.

First, Principle #10's proposed duty to share information would constitute a major expansion of an employer's duty to provide information. The UAW's proposed "full information sharing" represents another of the Principles's false symmetries. "Fully" sharing information, in fact, would be one-sided: an employer would furnish information to the UAW; the UAW would not share information with an employer. That is because a union rarely has information that is relevant to an employer's collective bargaining relationship with a union or to collective bargaining issues. "Full information sharing" also would encompass UAW access to employer financial information, including, for example, profit/loss and balance sheets, regardless of whether the employer is pleading an inability to pay the UAW's wage and benefit demands due to poverty.

Second, and even more revolutionary, would be the risks of both "mediation" or "interest arbitration," if mutually agreed to, after six months of negotiations and, consequently, an arbitrator's imposition of collective bargaining agreement terms on issues such as, for example, wages, benefits, and paid time off. The failed Employee Free Choice Act contained a similar "interest arbitration" provision, but the NLRA does not require an employer to agree to either a collective bargaining agreement or "interest arbitration." Principle #10, in essence, amounts to an effort to obtain voluntary employer agreement to EFCA's "interest arbitration" concept. For that reason alone, employers should or will reject the Principles.

While Principle #10 states that "mediation" or "interest arbitration" would result from a mutual agreement, an employer, in practice, may agree to "mediation" or "interest arbitration" as a matter of coercion, not volition. The reason is that in response to an employer's refusal to agree to "mediation" or "interest arbitration," the UAW could strike against the employer. Principle #10 does not preclude the UAW from striking during the negotiations for an initial collective bargaining agreement.

An employer, after six months of negotiations, may have to decide between *either* "mediation" or "interest arbitration" or a strike. That is how accepting either option, as an alternative to a strike, may be a coerced, not a voluntary, choice.

An employer has no legal duty to reach an initial collective bargaining agreement with a union, but Principle #10 would virtually ensure that an employer would reach an initial contract with the UAW. That initial contract would result either from a voluntary agreement, which may result, in part, from the use of "mediation," or the arbitral imposition of contractual terms as a consequence of an "interest arbitration." Under Principle #10, an employer thus could refuse to reach an initial agreement only by both rejecting "mediation" or "interest arbitration" and successfully enduring a strike. For these additional reasons, Principle #10 should be completely unacceptable to any non-unionized employer.

Principle #11

- **Partnership in the mission of the employer**
 11. The UAW pledges that if the workers choose union representation, the union as an institution will be committed to the success of the employer and will encourage our members to engage in the employer's successful achievement of its mission. The UAW and the employer will work together in fulfilling the mission of the employer. The UAW embraces a performance-based and participatory culture where the union contributes to continual improvement of processes and shared responsibility for quality, innovation, flexibility and value.

Analysis: Principle #11 consists of aspirational language that imposes no specific duties on the UAW and grants no enforceable rights to an employer. It has public relations value for the UAW, but no practical value for an employer. Principle #11 should not or will not induce an employer into agreeing to the Principles.

What May Happen If An Employer Rejects The UAW's Principles?

The UAW's Principles amount to an ultimatum. An employer can agree to the Principles and will likely

become unionized as a consequence of its inability to campaign effectively against unionization. Or an employer can reject the Principles and subject itself to a corporate campaign by the UAW.

Bob King, UAW President, has explained how the UAW will react to employers that reject the Principles:

If a company makes the immoral decision to try to deny workers the democratic choice, then there will be strong and direct action from the UAW and our allies ... to hold that employer accountable.

“Direct action” against an employer may include corporate campaign tactics such as, for example, demonstrations at the corporate headquarters or other locations. Richard Bensinger of the UAW’s National Organizing Committee similarly stated that the UAW’s “enforcement wing for these fair election principles, a direct action component” would “deploy people ... in scores of locations ... anywhere we can create a rapid, sustained response of direct action.”

Any employer subjected to a UAW demand to accept the Principles would need to answer the following question: whether it should accept the Principles and, in all likelihood, become unionized, or whether it should reject the Principles and, in all likelihood, remain union-free, but risk subjecting itself to a corporate campaign waged by the UAW. The UAW’s threat of corporate campaigns may be a concern to large companies, such as foreign-owned auto manufacturers. That threat, however, may be of little or no concern to small or medium-sized automotive suppliers.

Conclusion

The UAW’s one-sided “Principles for Fair Union Elections” are designed to facilitate unionization, not to help an employer remain union-free. Under the

Principles, particularly Principles #3, 5, 7, and 8, an employer would waive key rights, including its Section 8(c) free speech rights. The cumulative effect of the Principles would be tantamount to an employer’s agreement to remain neutral on the issue of unionization and to refrain from campaigning against the UAW or educating its employees about unionization. Another consequence of the Principles, specifically Principle #9, even though it is entitled “Secret ballot election,” may be, in fact, the elimination of the use of a secret ballot election and instead the use of an “alternative method” – card-check recognition. Also, under Principle #10, an employer would be subject to “full information sharing,” potentially to “interest arbitration,” and almost certainly an initial collective bargaining agreement.

In exchange for its acceptance of Principles, a key question is what would an employer receive from the UAW? The answer is that an employer would receive only meager concessions from the UAW: essentially unenforceable commitments not to promise wage and benefit increases and to refrain from making “negative and disparaging remarks” about the employer. The UAW’s minimal commitments demonstrate both the one-sided nature of the Principles and the objective of facilitating unionization.

In sum, an employer that voluntarily accepts the Principles deserves to become unionized, which would be the likely, if not certain, consequence of accepting the Principles. Given the likelihood that employers will predictably reject the Principles and exercise their rights to resist unionization, the UAW’s one-sided Principles may signify merely the public relations foundation for the UAW’s institution of corporate campaigns, including various kinds of “direct action,” against foreign-owned automotive companies and, potentially, their suppliers. An objective of the corporate campaigns would be to coerce the foreign-owned automotive companies, as well, potentially as their suppliers, into corporate-wide “neutrality” and card-check recognition agreements.