COLLECTIVE INTELLIGENCE

# Unions Seek Influence in Corporate Battles

By Jonathan Doorley
May 2024

**The collision of financial, political and social issues in deal-making and proxy contests has never been more apparent in the United States than it was in 2023 and thus far in 2024. While shareholder value creation remains the *sine qua non* of transactions and proxy contests, investors of all kinds have long been imposing their own specific agendas on issuers. In addition to the widening scope of activism, there are new players for senior management teams and boards to contend with – most notably organized labor.**

**Recent activism cases in the US reveal how labor unions have inserted themselves more aggressively into transactions and shareholder disagreements. Unions are not a monolith – they each have their own distinct agendas and cultures, reflected in the ways they interact with the capital markets. Below, we review three recent examples of this trend – two that have recently reached a resolution and one that is ongoing – and we offer some lessons to help executives prepare for this kind of engagement with their workers.**

## The Strategic Organizing Center Nominates Directors at Starbucks

In November, the Strategic Organizing Center (SOC) – a coalition of unions representing about 2.5 million workers that owned 162 shares of Starbucks – submitted nominations for three candidates to the company's board of directors. SOC works with pension funds sponsored by labor unions, and in recent years the group regularly submitted non-binding shareholder proposals that support the "long-term interests of workers and their families" at many of the country's largest and best-known companies.

The engagement with Starbucks was the first time a labor organization or special interest group nominated labor-affiliated representatives as directors to a corporate board in the United States. This approach is typically associated with traditional shareholder activists lobbying for broad changes to strategy, capital structure, governance, and leadership. But unlike shareholder activists who are motivated by generating an economic return on their investment, labor affiliated candidates have different priorities that may conflict with a US board's fiduciary duties to maximize shareholder value.

The Universal Proxy Card rule implemented in August 2022 by the Securities and Exchange Commission aided SOC's nominations. The new rule requires management and the dissident shareholder to list all nominees for election in a proxy contest on their proxy card and in their proxy statement. The change effectively leveled the playing field for running a proxy contest by making it less complicated to solicit

shareholder support and allowing shareholders to more easily pick and choose between each side's nominees at a company's annual meeting.

After months of back-and-forth letters, investor presentations and public posturing, the SOC failed to garner crucial support from major institutional investors or proxy advisors Institutional Shareholder Services ("ISS") and Glass Lewis. After Starbucks and Workers United struck a crucial deal on a collective bargaining framework in late February, the SOC decided to withdraw its nominations.

## Key lesson

This was an important test of SOC's resolve to fight an expensive and time-consuming campaign and of the willingness of proxy advisors and major institutional shareholders to support nominations of labor actors. This fight garnered a significant amount of attention in newsrooms and boardrooms around the country, not just because of the potential implications at Starbucks but because of the impact that single-issue directors would have on corporations across the country if this campaign were successful and became a trend. All companies with labor unions must include this scenario in their activism defense preparedness.

# Ancora Enlists Support of Unions in Fight Against Norfolk Southern

The US railroad sector has been rife with shareholder activism campaigns in recent years. The typical playbook centers around an activist pushing a company to reduce its operating ratio to generate more shareholder value, while management argues that cost cuts should not denigrate customer service or put safety at risk.

This spring, the activist investment firm Ancora nominated a seven-person change-of-control slate to Norfolk Southern's 13-person Board in an effort to install a new CEO. In addition to the usual battling over business plans and board member bona fides, the two sides aggressively courted support of other stakeholders, even though they would not have the ability to vote on May 9th.

The Brotherhood of Locomotive Engineers and Trainmen and the Brotherhood of Maintenance of Way Employees, which collectively make up almost 50% of Norfolk's unionized workforce, publicly supported Ancora, as did Cleveland-Cliffs, a customer of the railroad. Norfolk Southern contended that Ancora had violated Railway Labor Act rules when soliciting support from the unions. Smart Transportation Division, a union with almost 30% of the union workforce, came out in support of Norfolk Southern's existing leadership, as did the Surface Transportation Board, the industry's primary regulator.

In the end, ISS and Glass Lewis both recommended that shareholders vote for some portion of Ancora's slate. Ancora won three board seats, although the candidate they wanted to replace Norfolk Southern's CEO was not elected.

## Key lesson

Both sides aggressively courted labor, political, customer and regulatory third parties. None of those parties vote in a proxy contest but they hold sway with the stewardship teams at passive investment funds. In future proxy fights and contested M&A transactions in critical infrastructure industries, management teams and Boards should expect equally intense solicitation of the wider stakeholder universe. In the end, however, that support must always be converted into votes to be effective.

## United Steelworkers Attempts to Block Nippon's Acquisition of US Steel

There are not many things that Republicans and Democrats can agree on these days, but both parties do share a desire to block Tokyo-based Nippon Steel's pending acquisition of Pittsburgh-based US Steel.

In an election year where Pennsylvania and Ohio are key battleground states, politicians from both sides of the aisle are eager to win the support of voters in two states that have big labor populations and are critically important to the steel industry. Republicans including JD Vance (R-OH), Josh Hawley (R-MO) and Marco Rubio (R-FL), and Democrats including Sherrod Brown (D-OH), John Fetterman (D-PA) and Bob Casey (D-PA) have all rebuked the transaction. President Biden even weighed in, stating "US Steel… should remain a totally American company – American-owned, American-operated by American union steelworkers," while former President Trump said "I would block [the deal] instantaneously. Absolutely."

When the transaction was announced in December, the United Steelworkers (USW) quickly rebuked both companies, stating that neither US Steel nor Nippon reached out to the union regarding the deal. USW contended that the deal was struck in violation of its partnership agreement, which it believes requires US Steel to notify the union of a change in control or business conditions. US Steel disputes that reading of the agreement. Since then, USW President David McCall has called on government regulators to scrutinize the transaction, which he believes not only has critical implications for labor but also for national defense, critical infrastructure and supply chains.

Whether politics can influence the closing of the acquisition will be a point of much speculation over the next six to twelve months. The Department of Justice has already made a second request for information, and the original timeline for the transaction to close has been postponed. The Committee on Foreign Investment in the United States (CFIUS) is also conducting a review and will need to weigh many considerations associated with a critical infrastructure asset being sold to a company based in an ally country. Both divisions of the government are intended to be politically independent.

### Key lesson

To get a deal over the finish line and positioned for post-close success in today's landscape, companies can no longer just focus their messaging on shareholders. They must craft a compelling narrative that engages a much more diverse set of stakeholders on a wider spectrum of political and social topics. To navigate the increasingly unpredictable and politicized M&A approval process – whether in Washington D.C., London, Brussels or Beijing – companies must clearly explain the benefits of the deal to the market, consumers, employees and communities. Companies must aggressively amplify the merits of the transaction directly and through surrogates, while countering detractors and correcting misinformation, to create a media and political environment that is conducive to clearance.

## Conclusions

In this environment of economic uncertainty, political division and geopolitical turmoil, organized labor and regulators will continue to play an important role in many transactions and proxy fights. Companies need to be prepared for aggressive attempts to block the deal or extract concessions. Our view is that the best defense against these inevitable challenges is a strong offense. Our clients that are most successful in these situations are the ones prepared to run proactive campaigns to win the hearts and minds of their stakeholders and neutralize detractors.

# To continue the conversation

**Jonathan Doorley**
Partner and Co-Head of Office, New York
jdoorley@brunswickgroup.com


Jonathan Doorley is a Partner and Co-Head of New York, overseeing the growth and operations of Brunswick's largest office in the Americas with 250 team members. Jonathan is also Global Co-Head of the firm's Financial Situations & Capital Markets practice, advising clients across industries on developing and implementing stakeholder engagement programs related to mergers and acquisitions, shareholder activism and other material market matters.

*In 2023, Brunswick advised on 293 transactions worth $286 billion and counseled corporate issuers on 18 publicly disclosed activist defense engagements with an average market cap of $21.9 billion.*