UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DANA CORPORATION Employer,	)	CASE NO. 8-RD-1976
and	)	
CLARICE K. ATHERHOLT Petitioner,	)	
and	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO Union,	)	
and	)	
METALDYNE CORPORATION (METALDYNE SINTERED PRODUCTS) Employer,	)	CASE NOS. 6-RD-1518 6-RD-1519
and	)	
ALAN P. KRUG AND JEFFREY A. SAMPLE Petitioners,	)	
and	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO Union.	)	

BRIEF ON THE MERITS OF EMPLOYER METALDYNE CORPORATION (METALDYNE SINTERED PRODUCTS)

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I. INTRODUCTION

In September 2002, Metaldyne Corporation[1] ("Metaldyne") and the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America ("UAW" or "Union") entered into a Neutrality Agreement[2]. This Neutrality Agreement states, in part, that if the UAW provides proof that it has achieved majority status in a bargaining unit at one of the company's facilities, then the Company will agree to voluntarily recognize the Union as the exclusive bargaining representative of employees in the bargaining unit. Based upon the longstanding "voluntary recognition bar," the National Labor Relations Board ("Board" or "NLRB") will normally dismiss any petition (*e.g.* RD- decertification petition) filed with the Board after voluntary recognition for a "reasonable period of time." *MGM Grand Hotel, Inc.*, 329 NLRB 464 (1999).

On June 7, 2004, the Board granted a Request for Review of the "voluntary recognition bar" and Motion to Consolidate Cases[3]. *See Dana Corporation,* 341 NLRB No. 150 (2004). In granting review, the Board noted:

> We believe that the increased usage of recognition agreements, the varying contexts in which a recognition agreement can be reached, the superiority of Board supervised secret ballot elections, and the importance of Section 7 rights of employees, are all factors which warrant a critical look at the issues raised.

On June 14, 2004, the Board issued an Order inviting the parties and interested amici to file briefs with the Board on or before July15, 2004.

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[1] Metaldyne Sintered Products, also named in one of the original decertification petitions, is a subsidiary of Metaldyne Corporation.

[2] Although the agreement reached between the UAW and Metaldyne titled as a "neutrality agreement," this type of agreement is also known as a voluntary recognition agreement. The two terms will be used interchangeably throughout this brief.

[3] The Metaldyne cases, 6-RD-1518 and 6-RD-1519 were consolidated with Dana Corporation, 8-RD-1976. Metaldyne Corporation is not affiliated in any way with Dana Corporation.

II. FACTS[4]

Pursuant to the terms of the Neutrality Agreement between Metaldyne and the UAW, the Union began an organizing drive at Metaldyne's St. Mary's, PA. facility in October, 2002. The UAW organizing drive continued through the end of 2002 and throughout most of 2003. On or about November 26, 2003, the UAW notified Metaldyne that it had achieved majority status (a majority of employees in the unit had signed an authorization card selecting the UAW as their bargaining representative) in the proposed bargaining unit. A card-count hearing was scheduled and held on December 1, 2003. After reviewing UAW authorization cards and company provided exemplars of signatures (W-4 forms) against a list of employees in the proposed bargaining unit, FMCS mediator James W. Statham (the "neutral" selected pursuant to the terms of the Neutrality Agreement) certified that a majority of the employees in the proposed bargaining unit desired representation by the UAW.

Upon notice to the Company that FMCS Mediator Statham's certified the UAW as the bargaining agent of the employees in the unit, Metaldyne signed a recognition agreement (recognizing the Union as the collective bargaining representative) with the UAW for employees in the St. Mary's facility. On or about December 3, 2003, the Company posted an announcement in the St. Mary's plant that the UAW had been certified as the bargaining agent for the employees in the bargaining unit.

On or about December 23, 2003, Metaldyne employees Alan P. Krug ("Krug") and Jeffrey A. Sample ("Sample") (together identified as the "Petitioners") each filed an RD-Decertification Petition with Region 6 of the NLRB. These identical petitions both stated that

[4] The facts of the Dana Corp case (8-RD-1976) are not known to Metaldyne Corp. and thus will not be addressed in the Company's Brief on the merits.

more than 30% of the employees in the bargaining unit in the St. Mary's plant supported the decertification petition. Both petitions were assigned a case number in Region 6 for processing an investigation. After investigating both petitions filed by Krug and Sample, the Regional Director of NLRB Region 6 dismissed the two petitions finding that they were "untimely under the recognition bar doctrine enunciated in *Keller Plastics Eastern, Inc.* 157 NLRB 583 (1966)." *See* www.nlrb.gov/nlrb/shared_files/decisions/dde/2004/6-RD-1518(1-29-04).pdf.

Bargaining for a first contract between the Company and the Union began in January 2004 (and concluded with a ratified contract in June, 2004). The Petitioners filed a Request for Review of the Regional Director's notice of dismissal in February 2004. Petitioners also contemporaneously filed a Joint Motion to Consolidate the two Metaldyne cases with Case No. 8-RD-1976 (a separate voluntary recognition bar case involving Dana Corp. and the UAW).[5]

III. ARGUMENT

Metaldyne finds itself in a rather unique situation in this matter. Like most, if not all other companies, Metaldyne desires to make responsible corporate decisions and maintain a goal to be a positive addition in communities where its employees work and its plants are located. At a time when the country continues to hear news of corporate misconduct on an almost daily basis, "big business" is an easy target for groups that believe that companies such as Metaldyne care only about its profits and not about its employees.

Commentators have stated that neutrality agreements between companies and unions create "better labor relations" and "can help polish up the corporate image." Roger C. Hartley, NON-LEGISLATIVE LABOR LAW REFORM AND PRE-RECOGNITION LABOR NEUTRALITY AGREEMENTS: THE NEWEST CIVIL RIGHTS MOVEMENT, 22 Berkley J. Emp. & Lab. L. 369, 390 (2001). Finding

[5] Attorneys for the National Right to Work Legal Defense Foundation represent the Petitioners in both the Metaldyne cases and Clarise K. Atherholt, the Petitioner in the Dana Corp. case.

that corporate neutrality in union organizing drives can have a positive economic impact on a community, some cities have passed ordinances that require companies doing business with them to commit to neutrality (and card-check recognition) in the event of a union organizing drive. John P. Furfaro & Maury B. Josephson, NEUTRALITY AGREEMENTS, 9/1/2000 NYLJ 3, (col. 1).

The effect of neutrality agreements in assisting unions in producing a higher rate of success in organizing employees is well documented. *See e.g.* Brent Garren, THE HIGH ROAD TO SECTION 7 RIGHTS: THE LAW OF VOLUNTARY RECOGNITION AGREEMENTS, www.bna.com/bnabooks/ababna/annual/2003/garren.doc (2003). Many unions and their officials believe that organizing new employees through neutrality agreements is the only viable method that provides employees with a "level playing field." These officials believe that the NLRB secret-ballot election process is now so flawed that employees who desire union representation are being denied their Section 7 rights because of these flaws to the NLRB process. *Id.*

In light of many unions' new found success in organizing using neutrality agreements, those ideologically opposed to unions have started media campaigns or created task forces to fight what these groups refer to as "compulsory unionism" or "top-down organizing." *See e.g.* www.nrtw.org/d/na_1.htm (The National Right to Work Legal Defense Foundation established a "Neutrality Task Force" to help employees who find themselves forced (or potentially forced) into unwanted union representation as a result of these devices). Groups such as National Right to Work ("NRTW") believe that voluntary recognition agreements rob employees who are opposed to unions of their Section 7 rights to refrain from joining a labor organization. With allegations of coercion and threats by union organizers to "force" employees to sign union

authorization cards, NRTW argues that the NLRB secret-ballot election process is the only way to truly gauge employee support for (or opposition to) union representation in the workplace.

Caught between "Scylla and Charybdis" is a company such as Metaldyne. The Company's goal has been, and certainly remains for employees to be allowed to exercise their Section 7 rights and decide in a free and untrammeled manner whether they wish to be represented by a labor organization. A review of the case law (both Board and Federal courts) establishing the voluntary recognition bar shows that it serves a valid and necessary purpose in the workplace and in labor law. This purpose assists employees in exercising their Section 7 rights. Thus, the Board should decline Petitioners' request to change or modify the doctrine and instead find that voluntary recognition deserves "bar quality" for a reasonable period of time.

A. Legal Precedent Establishing the Board's Voluntary Recognition Bar

The legitimacy of an employer's recognition of a union's majority status through card check recognition or means other than an NLRB election is well-grounded in the plain meaning of the relevant statutory provisions. The Supreme Court has long made clear that "[a] union is not limited to a Board election." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 596 (1969). Under Section 8(a)(5) of the Act, "it [is] an unfair labor practice for an employer…to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title." 29 U.S.C. § 158(a)(5). Section 9(a) of the Act defines the term "representative of its employees" as:

> Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining. 29 U.S.C. § 159(a).

In interpreting this plain language, the Supreme Court has explained that:

> Since Section 9(a), in both the Wagner Act and the present Act, refers to the representative as the one 'designed or selected' by a majority of the employees without specifying precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented 'convincing evidence of majority support.' Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of Section 8(a)(5) – by showing convincing support, for instance, by a union-called strike or strike vote, or, as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.

NLRB V. Gissel Packing, Co., supra at 596.

In *United Mine Workers v. Arkansas Flooring Co.* 351 U.S. 62 (1956), the Supreme Court found that the union was the chosen representative when it obtained cards signed by the majority of employees in the bargaining unit. The Court reasoned that a Board election is not the only method by which an employer may satisfy itself as to the union's majority status since Section 9(a), 'which deals expressly with employee representation, says nothing as to how the employee's representative shall be chosen.' *United Mine Workers, supra* at 71. Further, the Court in *Gissel* noted that Congress, while enacting the Taft-Hartley amendments in 1947, specifically rejected a proposed change that would have eliminated the use of authorization cards as the basis for majority recognition. *Gissel, supra* at 598.

Various courts of Appeals have long found the Board to be justified in honoring majority recognition obtained through signed authorization cards. In *NLRB v. Indianapolis Newspapers, Inc.,* 210 F.2d 501 (7th Cir. 1965) the Seventh Circuit court stated that:

> Although the prize of recognition must not be employed coercively to influence the employees in making their decision, once indisputable proof of majority choice is presented to the employer, the Act imposes on him a duty to award recognition to the agent so chosen by his employees. (citations omitted)

Id. at 503-504

In the same year, the Ninth Circuit in *NLRB v. Parma Water Lifter Co.,* 211 F.2d 258 (9th Cir. 1954) found that the Board correctly determined that employees had effectively designated the union as their bargaining representative. The court rejected the employer's argument that the union had secured its majority status through coercive measures when it wrote:

> Finally, it seems to be urged that a Union is entitled to recognition as bargaining representative only after board-conducted representation election. It is well settled, however, that the designation may be made by other means, one of the most common of which is the signing of Union authorization cards.

Id. at 216. (citations omitted).

Under the Board's recognition bar doctrine first established in *Keller Plastics Eastern Inc.***,** 157 NLRB 583 (1966), the lawful voluntary recognition of a union based on a demonstration of majority support allows the union and the employer a reasonable period of time for bargaining without challenges to the union's continued majority status. *Keller Plastics* simply extended to the context of voluntary recognition the Board's already established rule that "a certification must be honored for a reasonable period, ordinarily one year in the absence of unusual circumstances, despite any interim loss of majority," where a union is certified after an NLRB election, Board order, or settlement agreement. *Id.* at 586. In so holding, the Board found that,

> [L]ike situations involving certifications, Board orders, and settlement agreements the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining. Such negotiations can succeed, however, and the policies of the Act can thereby be effectuated, only if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time.

Id. As noted by Region 6 of the NLRB in its notice of dismissal of the two decertification petitions filed in St. Mary's, the recognition bar doctrine has been approved by U.S. circuit courts of appeal that have considered it.[6]

The logic behind the voluntary recognition bar is that once there has been an actual showing of majority support, the only purpose of an NLRB election is to re-test that support. The Board has determined that such re-testing of majority support should not be permitted before the parties have had a reasonable time to negotiate because it would be disruptive to the bargaining process. *See Keller Plastics, supra* at 586.

Nearly 30 years ago, the Board rejected an attempt to file a decertification petition under circumstances similar to what occurred in St. Mary's. In *Rockwell International Corp.,* 220 NLRB 1262, 1263 (1975), a neutral third party certified that the union possessed majority status based on a card check. Disgruntled employees filed a decertification petition 14 days later with a showing of interest signed by over 50 percent of unit employees. The petitioner in that case alleged that the union had misled employees to believe that they would have the right to vote. The Board rejected those contentions and followed the recognition bar doctrine enunciated in *Keller Plastics***.**

Recently, the Board dismissed a decertification petition in *Seattle Mariners***,** 335 NLRB 563 (2001). In that case, the union and employer entered into a neutrality agreement. The agreement provided that a specified neutral arbitrator would conduct a card check at the union's request. The union submitted authorization cards to be neutral arbitrator pursuant to the agreement.

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[6] *NLRB v. Cayuga Crushed Stone, Inc.,* 474 F.2d 1380 (2nd Cir. 1973); *NLRB v. Frick Co.,* 423 F.2d 1327 (3rd Cir. 1970); *NLRB v. Montgomery Ward & Co.,* 399 F.2d 409 (7th Cir. 1968).

At the same time, however, a group of employees opposed to the union sent the arbitrator a petition signed by over 40% of employees indicating that they did not want to be represented by the union. The arbitrator did not receive the anti-union petition until after he completed the card check. The anti-union employees then filed an unfair labor practice charge alleging that the employer violated Section 8(a)(2) by recognizing the union based on the arbitrator's certification. That charge was dismissed so the petitioner next filed a decertification petition that he claimed was supported by more than 50 percent of unit employees.

Presented with the above facts, the Board chose to adhere to its long-standing recognition bar policy. The Board held that requiring a decertification election any time a considerable group of employees opposes union representation would abrogate the "long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations." *Seattle Mariners, supra quoting MGM Grand Hotel,* 329 NLRB at 466.

Thus, for almost forty years, the Board has recognized the "voluntary recognition bar" as an important precedent that, when challenged, has been consistently upheld on review. One particular reason for the staunch support that the Board has shown for the voluntary recognition bar is its effect in strengthening industrial peace in the workplace.

B. Industrial Peace in the Workplace is a Guiding Principle Under the NLRA

The United States Supreme Court has consistently held that the overriding policy of the National Labor Relations Act ("NLRA") is industrial peace. *See Brooks v. NLRB*, 348 U.S. 96, 103 (1954); *Fall River Dyeing v. NLRB*, 482 U.S. at 39 (1987); *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996). To further this goal of industrial peace, the Court has emphasized the need to insulate new bargaining relationships to enable a union to devote its energies to

obtaining a contract and representing employees without worrying that, unless it produces immediate results, it will be decertified. *See* Ellen Dichner, MV TRANSPORTATION: ONCE AGAIN THE BOARD REVISITS THE ISSUE OF WHETHER AN INCUMBENT UNION IS ENTITLED TO AN IRREBUTTABLE PRESUMPTION OF CONTINUING MAJORITY STATUS IN SUCCESSORSHIP SITUATIONS, 19, Lab. Law 1, 3 (2003).

In *Franks Bros. v. NLRB*, the Supreme Court held, "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." 321 U.S. 702, 705-06 (1944). In *Brooks v. NLRB*, a case upholding the Board's one-year "certification bar" doctrine, the Court stated that "[a] union should be given ample time for carrying out its mandate on behalf of its members, and should not [be] under exigent pressure to produce hothouse results or be turned out." 348 U.S. at 100.

The Board itself has stated that:

> T[he] presumption of continuing majority status is not based on an absolute certainty that the union's majority status will not erode. Rather it is a policy judgment which seeks to ensure that the bargaining representative chosen by a majority of employees has the opportunity to engage in bargaining to obtain a contract on the employees' behalf without interruption. The ability to select a bargaining representative would otherwise be meaningless. At a minimum then, this presumption allows a labor organization freely chosen by employees to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and be decertified.

MGM Grand Hotel, Inc., 329 NLRB at 466 *citing Ray Brooks v. NLRB*, 348 U.S. 96, 101 (1954).

In his dissent in *MGM Grand Hotel*, Member Brame wrote:

> Today's case compels the Board to balance the competing goals of, first, protecting employees' Section 7 right to reject or retain a union[7] as their

[7] Member Brame's language choice is an interesting interpretation of the actual text of the Act, which reads:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such

> collective bargaining representative, and, second, giving an employer and a union a reasonable opportunity to execute a collective-bargaining agreement. Employees' Section 7 rights comprise the core of the Act and, in applying the balancing process, the Board must show special sensitivity toward employees' rights. Sadly, my colleagues in the majority have abandoned employees' Section 7 rights in favor of "industrial stability," and, in the process, have enabled the Employer and the Union to deprive employees of their right to decide, in a secret-ballot election, whether to retain the Union as their collective bargaining representative.

MGM Grand Hotel, Inc., 329 NLRB at 472 (Brame, dissenting). In the same case, Member Hurtgen wrote, in his dissent:

> This case, and others like it, requires a balance between (1) giving the employer and union a reasonable opportunity to reach a collective-bargaining agreement and (2) protecting Section 7 rights of employees to reject or retain the union as their representative. While the first factor represents a policy choice, the latter one is expressly in the Act, and indeed lies at the heart of the Act.

MGM Grand Hotel, Inc., 329 NLRB at 468 (Hurtgen, dissenting).

What both Members Hurtgen and Brame ignore is that the employees in St. Mary's did make a choice. The employees exercised their Section 7 rights by selecting, voluntarily and in an uncoerced fashion, the UAW as their bargaining representative through the signing of authorization cards[8]. These authorization cards state, in part:

> **I, _____ authorize the United Auto Workers to represent me in collective bargaining.**

Clearly employees exercised their Section 7 rights to "join a labor organization of their own choosing." The signing of these cards by a <u>majority</u> of the employees must have weight and meaning in any analysis of the voluntary recognition bar. The idea that the voluntary recognition bar is strictly a balancing of industrial peace between the company and the union against Section

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activities.

[8] No evidence was ever presented to Metaldyne or Region 6 of the NLRB that employees were coerced, threatened or intimidated into signing the UAW authorization cards. Indeed in none of the "voluntary-recognition bar" cases currently pending before the Board (including Cequent Towing Products (Case No. 25-RD-1447) is there evidence of this type of behavior.

7 rights of the employees is misguided and conveniently sidesteps a critical fact – on the day that the neutral fact finder examined the cards, a majority of the employees desired representation by the UAW. Thus, the real question is whether the Board should allow the employees, in the context of voluntary recognition, a second bite at the apple. Should employees be allowed to possibly "change their minds" and decide, in a Board authorized election, whether a majority of employees still desire the Union to be their representative in collective bargaining. The Board has long required that in the absence of unusual circumstances a certified union's majority status must be honored for one year and that a petition filed within that period will ordinarily be barred. *Chelsea Indus.*, 331 NLRB No. 184 (2000). Thus, after a secret-ballot election, employees clearly don't have the right to make a second choice. There is no rationale as to why voluntary recognition should now be treated differently than election certification in this context. There is no good reason to give employees a second chance in one circumstance and not in the other.

The Board has stated repeatedly that the "secret-ballot election remains the best method for determining whether employees desire union representation." *Dana Corp.* 341 NLRB No. 150, slip op. at 1 *citing Linden Lumber v. NLRB*, 419 U.S. 301 (1974). While this may be true, the fact remains that the Act allows for an employer to voluntarily recognize a union after being presented with authorization cards from a majority of employees in a bargaining unit. *Parma Water Lifter Co.,* 211 F.2d 258.

The Board's Order granting Petitioners' Request for Review states, in part:

> [N]o party here challenges the legality of voluntary recognition.
>
> [. . .]
>
> The issue raised here is the extent which, if any, a voluntary recognition should be given election "bar quality." The issue is significant because "bar quality" means that, for some period, the employees will not be able to exercise their Section 7 right to reject the union and/or choose a different one.

Dana Corp. 341 NLRB No. 150, slip op. at 1. By removing the "bar quality" of voluntary recognition however, the Board is challenging the legality of voluntary recognition. In essence, the Board will assign a different degree or level of recognition to voluntary recognition as opposed to recognition by secret ballot election. Employees will be allowed to "change their minds."

The Board's Order further states in part:

> We acknowledge current precedent. But, that precedent is based upon a union's obtaining signed authorization cards from a majority of the unit employees before entering into the agreement with an employer while in both of the instant cases, an agreement was reached between the union and the employer before authorization cards, evidencing majority status, were obtained.
>
> *Dana Corp*., 341 NLRB No. 150, slip. Op. at 1 (2004).

It is unclear how this fact changes the analysis in any way. Nothing in the Neutrality Agreement between Metaldyne and the UAW requires or forces employees to sign authorization cards. Their Section 7 rights remain intact regardless of the provisions of the Neutrality Agreement. In addition, the Neutrality Agreement does not allow Metaldyne to favor the UAW to the detriment of other labor organizations. *See e.g. Ella Industries*, 295 NLRB 976, 979 (1989) (Illegal Section 8(c)(2) assistance found based upon a denial of second union's request for meetings with employers after it learned rival union had met with employees). In the event that a rival union approached the Company and demanded equal access to the employees, Board law would require Metaldyne to treat the rival union in the same way as the UAW.

In addition, the Neutrality Agreement does not set initial terms and conditions for employment in any potential bargaining unit as such an agreement would violate the law. *See Majestic Weaving Co*., 147 NLRB 859 (1964), *enforcement denied on other grounds*, 355 F. 2d 854 (2nd Cir. 1966). Instead, the agreement requires the parties to submit to binding arbitration

in the event that an initial contract cannot be reached within six months. A similar agreement could certainly be reached by a company and union prior to any Board sanctioned secret ballot election. Thus, the timing of the Neutrality Agreement signed by Metaldyne and the UAW is not significant when analyzing the bar quality of voluntary recognition.

C. In Balancing Competing Values, the Board and the Supreme Court Have Consistently Prioritized the Act's Underlying Purpose of Labor Peace

Even assuming, *arguendo,* that the Board's analysis in this case will ultimately balance "industrial peace" against employees' Section 7 rights (and thus ignore the fact that a majority of employees did sign union authorization cards), the Board and the U.S. Supreme Court have, at times, trumped Section 7 rights in favor of other policy concerns. The very genesis of the National Labor Relations Act was Congress' view that industrial stability and labor peace would be furthered by enabling employees to have their leveraged interests represented in collective bargaining by a union of their own choosing. As the Supreme Court observed in *NLRB v. American National Insurance Company*:

> The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers…The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.

343 U.S. 395 at 401-402 (1952). While protecting both employees' organizing and bargaining rights is inarguably essential to ensuring the integrity of the collective bargaining process, when these rights come in conflict with one another, the threshold consideration must be to determine which of the competing interests best serves the Act's underlying purpose of labor peace. While the Board has rightly recognized the importance of protecting an employee's right to join or not join a union under NLRA Section 7, the creation of an exception to the voluntary recognition bar, however narrow, would effectively prioritize employees' organizing rights over the ability

of a legally selected union to effectively bargain on behalf of its members. As the Board recognized in accepting this request for review, the abolition or qualification of the voluntary recognition bar would represent a significant re-evaluation of existing Board policy with regards to employee decertification efforts. In a more overarching sense, such a decision would also constitute a significant break from past precedent insofar as it is fundamentally inconsistent with the Act's underlying purpose of industrial stability.

In *Emporium Capwell v. Western Addition Community Organization*, the Supreme Court addressed the question of "whether, in light of the national policy against racial discrimination in employment, the National Labor Relations Act protects concerted activity by a group of minority employees to bargain with their employer over issues of employment discrimination." 420 U.S. 50, 52 (1975). In that case, two African American employees, concerned with what they perceived to be a discriminatory assignment and promotion policy, attempted to circumvent established grievance procedures by way of direct meetings with management and unauthorized picketing. Fired as a result of their continued agitation, the employees filed a charge with the Board, claiming that their actions represented protected concerted activity under Section 7.

At a time when the American labor movement, like much of the nation, was struggling with changing racial politics, the *Emporium Capwell* Court disregarded the popular sentiments of the time and interpreted Section 7 in a manner consistent with the Act's stated purpose of labor peace through collectively bargained agreements. Affirming the Board's finding that the employees' actions were not protected concerted activities, the Court reasoned that:

> An employer confronted with bargaining demands from each of several minority groups would not necessarily, or even probably, be able to agree to remedial steps satisfactory to all at once. Competing claims on the employer's ability to accommodate each groups' demands…could only set one group against another even if it is not the employer's intention to divide and overcome them.

420 U.S. at 66. While recognizing that "national labor policy embodies the principles of nondiscrimination as a matter of the highest priority," the Court declined to read Section 7 expansively, ever mindful of the effect that sanctioning divisive minority protest, racial or otherwise, might have on union discipline and, by extension, the overall collective bargaining process.

The Court's sensitivity to the political reality that unions often represent diverse constituencies with varied interests, whether found in more directly applicable cases such as the aforementioned *Brooks* decision or in merely analogous case law like *Emporium Capwell*, is instructive in the case at bar. Invalidating or creating an exception to the voluntary recognition bar would let loose political forces not easily reigned in, creating, as the *Brooks* Court termed it, "exigent pressure to produce hot-house results or be turned out." 348 U.S. at 100. Such volatility over the question of representation is clearly not in the interest of labor peace and industrial stability, nor is it ultimately in the interest of employees forced to endure continued uncertainty in the workplace. Like the Court in both *Emporium Capwell* and *Brooks*, the Board should opt for a more balanced reading of Section 7 in the overall interest of a viable collective bargaining process and, by extension, labor peace.

The subordination of certain rights in the larger of interests of labor peace is not reserved to employees. In *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), the Supreme Court dealt with the question of whether a corporate employer was obligated to honor the arbitration provisions of a collective bargaining agreement between a union and another corporation with which it had merged. The *Wiley* Court made clear that:

> While the principles of ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. "It is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The collective agreement covers

> the whole employment relationship. It calls into being a new common law of a particular industry and a particular plant." Central to the peculiar status and function of a collection bargaining agreement is the fact, dictated both by circumstance and by the requirements of the National Labor Relations Act, that it is not in any real sense a consensual relationship. Therefore, although the duty to arbitrate must be founded on contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.

376 U.S. at 550 (quoting, in part, *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960)). While recognizing the employer's legitimate contract rights, the Court again proved sensitive to the peculiar politics of the labor arena, recognizing both the reality of the complex compromises that typically occasion consensus and the reliance of all parties, particularly workers, on final agreements. Again, the Court subordinated the employer's otherwise legitimate contract rights in the interest of industrial stability.

A healthy respect for the complexity of the negotiations that produce any labor agreement, whether found in more directly applicable cases such as the aforementioned *MGM Grand Hotel* decision or in analogous cases such as *Wiley*, is pertinent to the Board consideration of this case. Creating an exception to the voluntary exception bar and, therefore, making a legally selected union instantly accountable to a diverse constituency with varied interests, would make the already difficult task of brokering labor peace that much more difficult. As the Board in *MGM Grand Hotel* observed, "to further the Act's policy of favoring 'sound and stable' labor-management relations, it is incumbent upon the Board to recognize and encourage the efforts expended by both the Employer and the Union in attempting innovative bargaining structures and processes and novel contractual provisions." 329 NLRB at 466. Exposing unions and the negotiation process to the political pressures which are currently insulated by the voluntary recognition bar would make such innovation, and the peace that creative approaches might offer, impossible.

Ultimately, if the policy of the Act is to continue to be labor peace through collectively bargained agreements, the voluntary recognition bar is a necessary check on some workers' Section 7 rights. Since the Act's enactment, Congress, the Courts, and the Board have worked together to create a common ground on which management and workers could collectively bargain, limiting in the process the use of certain weapons such as secondary boycotts and over-inclusive management rights clauses because they skewed collective bargaining as the Act's preferred means of achieving labor peace. While some employees' Section 7 rights may in fact be implicated by recent developments in labor law, the analysis with concern to the voluntary recognition bar remains the same: Allowing employees to challenge a union's certification without first providing reasonable time for the negotiation of collective bargaining agreement does not support the interests of labor peace. The mere threat of a decertification election in the opening months of complex negotiations would effectively make such negotiations impossible, inviting dissension within the ranks of unions at times when a united front is crucial to the employees' leverage as a bargaining party. At worst, abolition of the bar encourages employers to manipulate the bargaining process with the intent of undermining the union. At best, such pressure encourages union leaders to make fast compromises in exchange for instant results not necessarily in workers long-term interests. Whatever the case, none of the possible modifications to the current law, however qualified or limited by the Board, would strengthen an incumbent union's ability to credibly represent its constituents. Only affirming the voluntary contract bar serves the Act's underlying purpose of labor peace through collective bargaining.

D. Petitioner's Arguments to Modify the Voluntary Recognition Bar Are Not Valid

Petitioners argue that in the alternative to the Board completely eliminating the "bar quality" of voluntary recognition for the entire "reasonable period of time" for the employer and union to negotiate a collective bargaining agreement that a "window period" open for the first 45-days after voluntary recognition by the company.[9] Petitioners argue that no real bargaining has occurred at this point, and thus an election would not harm any of the parties and allow for employees to have the opportunity to vote in a Board sanctioned secret-ballot election to truly consider whether they desire representation prior to formal or serious negotiations commencing between the company and the union.

This "alternative," however, is not a true choice for the Board, but is instead an end-run around the established Board law set forth above. The period after voluntary recognition is obviously a time of great transition. The Union must establish itself as the representative of employees, the employer must begin to develop a working relationship with the union; and the employer must begin the transition from a non-union to a unionized workforce with its employees. Allowing anti-union employees to thwart the recognition process by forcing a secret-ballot election so quickly after voluntary recognition would give employers little, if any incentive to try and work with the union to move forward and begin the negotiating process. Instead, such a window would likely create an atmosphere of confusion and mistrust between employer, employees and the union where none of the parties is sure of the outcome until this unstable window period is closed.

[9] Petitioners in the Dana Corp. case made this same argument to create the "45-day window."

IV. CONCLUSION

For all of the foregoing reasons, the Board, after completing its critical look at the issues raised in this matter, should decline to eliminate or modify the bar quality of an employer's voluntary recognition and dismiss Petitioners' Request for Review.

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