UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case Nos. 8-RD-1976; 6-RD-1518; 6-RD-1519

DANA CORPORATION (EMPLOYER)

and

CLARICE K. ATHERHOLT (PETITIONER)

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO (UNION)

METALDYNE CORPORATION (EMPLOYER)

and

ALAN P. KRUG and JEFFERY A. SAMPLE (PETITIONERS)

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO (UNION)

BRIEF *AMICI CURIAE* OF MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES

Butzel Long
John N. Raudabaugh
150 W. Jefferson
Suite 100
Detroit, MI 48226

McGuire Woods
J. Robert Brame III
1050 Connecticut Ave., N.W.
Suite 1200
Washington, DC 20036

Varnum Riddering Schmidt Howlett
Dennis M. Devaney
Suite 810
201 North Washington Square
Lansing, MI 48933

ATTORNEYS FOR THE *AMICI CURIAE*

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BRIEF OF THE *AMICI CURIAE*

INTRODUCTION

On June 7, 2004, the National Labor Relations Board ("NLRB" or "Board") granted Petitioners' Requests for Review. By notice dated June 14, 2004, the Board invited interested *amici* to file briefs on or before July 15, 2004. This brief considers whether recognition pursuant to an agreement reached between an employer and a union providing for card-check voluntary recognition before the solicitation of employee signatures should bar an employee's decertification petition for a reasonable period of time. It is the position of the *Amici* that there should be no voluntary recognition bar in such instance. Indeed, inasmuch as card-check recognition agreements (often combined with neutrality agreements) are "things of value," they are unlawful under the Act, and no presumption or bar based on such agreements should attach. At a minimum, to ensure the protection of employees' Section 7 rights, where an employer and a union have entered into a bargaining relationship by way of a voluntary recognition pursuant to a card-check agreement which precedes the union's solicitation of employees' signatures, there should be a notice to employees and an opportunity to petition for a decertification election to "test" the act of extending voluntary recognition.

INTEREST OF THE *AMICI CURIAE*

Members of the United States House of Representatives have a substantial and critical interest in these proceedings since the matters at issue concern relationships between employers, labor organizations, and the National Labor Relations Act which are subjects within the jurisdiction of the United State House of Representatives Committee on Education and the Workforce and related Standing Committees, and are of interest to elected Representatives to the United States House of Representatives generally.

STATEMENT OF THE CASE

The Act confers on employees the right to freely choose whether to be represented for the purpose of collective bargaining, and the right to exercise their franchise in a free and informed manner. It is widely-recognized that a Board-supervised secret-ballot election is the preferred, indeed superior, method for ascertaining majority support. Changing conditions in the labor relations environment have led to an increased use of card-check voluntary-recognition agreements entered into prior to the union obtaining majority support, and before signed authorization cards are obtained. Unlike the Board's supervised secret-ballot election process, there is no higher standard ensuring "laboratory conditions" for these card-check voluntary recognition agreements. Nevertheless, card-check voluntary recognition enjoys Board-created protection which bars an employee decertification petition to test the claimed majority for "a reasonable period of time." Recently, the "voluntary recognition bar" was interpreted to be only two days short of one year, even though the analogous bar for the certification of results of an NLRB supervised secret-ballot election with attendant "laboratory conditions" protections is one year. The Board's conduct of elections "in a laboratory under conditions as nearly ideal as possible to determine the uninhibited desires of employees" providing "an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasonable choice," is among the "crown jewels of this nation's practice of industrial democracy." Non-Board, voluntary alternatives to ascertain employee choice cannot, indeed must not, render the Section 7 right to choose illusory, and should not enjoy the same protections under the Act.

For these reasons, it is the position of the *Amici* that voluntary recognition should not enjoy protection from challenge for an undefined period or for a period approximating the

certification bar for certified results of a Board supervised secret-ballot election. At a minimum, voluntary recognition should require notice to the employees of the date recognition was voluntarily extended and inform the employees of their right to file, and time and place to file, a decertification petition to seek a Board supervised secret-ballot election to test the claimed majority. Finally, no bar and no duty to collectively bargain upon request should attach to voluntary recognition where card signing solicitations are preceded by a card-check voluntary recognition agreement.

SUMMARY OF CURRENT LAW REGARDING EMPLOYEE FREE CHOICE

A. The Act's Explicit Guarantee and Protection of Employees' Right of Free Choice.

The much quoted words of Section 7 of the National Labor Relations Act ("NLRA" or "Act") declare our national policy on the right of employees to self organization:

> 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 have the right to refrain from any and all such activities . . . .

To guard against employer encroachment, Congress included Section 8(a)(1) of the NLRA: "It shall be an unfair labor practice for an employer 'to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7.'" In 1947 Congress added Section 8(b), declaring it to be an unfair labor practice "for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7." The language of Section 7 indisputably propounds an *employee's* right. It is the fundamental right of *employees* to choose or not to choose a collective bargaining representative, a right underscored by the prohibitory language of Sections 8(a)(1) and 8(b)(1)(A) recognizing unlawful overreaching by employers and unions.

The United States Supreme Court has reiterated the unique rights of employees protected by Section 7 and has repeatedly distinguished between employee and non-employee rights (including union agents). For example, in 1945, the Court recognized that employers could not generally prohibit employees from distributing literature. When the NLRB attempted to extend this "right" to nonemployees, the Supreme Court, in *National Labor Relations Board v. Babcock & Wilcox Company,* held that the employee/non-employee distinction "is one of substance." When the Board continued to ignore this distinction and again granted non-employee organizers similar access rights as employees in *Lechmere Inc. v. National Labor Relations Board,* the Court reaffirmed and extended its *Babcock* holding: "[B]y its plain terms, thus, the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers" (italics in original).

The Court has repeatedly referred to the "Act's goal of protecting employee choice." While the Act has also served to ensure "industrial stability," the Court has made clear that industrial stability may not be achieved at the expense of employee rights. "Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so."

B. Exclusive Representation is Established by Designation or Selection by NLRB Supervised Secret-Ballot Election or Voluntary Recognition.

Under the NLRA, employees enjoy the protected right to choose whether to be represented exclusively by a labor organization for purposes of collective bargaining regarding pay, wages, hours of employment, or other conditions of employment. Representation is exclusive covering all employees in the unit, provided a majority of employees in that unit designate or select a particular labor organization as their representative. Once a majority of employees in an appropriate unit designates or selects an exclusive representative, it is an unfair

labor practice under the NLRA for an employer or a labor organization to refuse to bargain collectively upon request.

Under current law, employee designation or selection may be by a Board supervised secret-ballot election, or may come by way of voluntary recognition based on card checks, petitions or polls. Among these various means of employee designation, both the United States Supreme Court and the NLRB have long recognized that a Board-conducted secret-ballot election is the most satisfactory, indeed the preferred, method of ascertaining employee's support for unions:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our [Board's] duty to establish those conditions; it is also our duty to determine whether they have been fulfilled…. Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative.

The "laboratory conditions" doctrine sets a considerably more restrictive standard than the unfair labor practice prohibitions of interference, restraint and/or coercion. Under the doctrine, the question before the Board is whether potentially determinative "electioneering activity substantially impaired the exercise of free choice so as to require the holding of a new election." A party objection to an election on such grounds may file objections with the Board, which may subject them to an administrative investigation, hearing, or both.

Over many years, the Board has addressed many issues of election misconduct and has developed specific rules and multi-factored tests to evaluate and rule on election objections. In

Harsco Corp., 336 N.L.R.B. 157, 158 (2001), the Board noted that the proper objective test for evaluating party misconduct tending to interfere with employee free choice considers:

> (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

In contrast to the extensive protections afforded recognition by way of secret ballot detailed above, recognition predicated on the demonstration of majority status through means other than a Board-supervised secret-ballot election is without the significant substantive and procedural "laboratory condition" protections. Yet unless conduct in the absence of a secret-ballot election amounts to an unfair labor practice, there is no remedy for overreaching behaviors interfering with employee free choice.

C. Privileges of Recognition – By Statutory Mandate or Board Creation.

In the 1947 Taft-Hartley Amendments, Congress provided that Board certification of a bargaining representative could only be granted as a result of an election. Equally important, Congress codified the proposition that the Board could not hold a second election in the same bargaining unit until a year had elapsed after a valid certification. In so doing, Congress recognized the primacy of and protections attendant to a Board-conducted secret-ballot election by statutorily enacting the one-year "election bar."

While the election bar was mandated by Congress, the Board has created additional "bars" to election petitions based on administrative considerations and policies that are not rooted in the statute, including the voluntary recognition bar imposed when an employer

recognizes a union in the absence of a secret ballot election. In *Keller Plastics E.*, 157 NLRB 583 (1966), the Board noted that collective bargaining relations normally arise out of a Board certification, as the result of a Board remedial order following a finding of an unlawful refusal to bargain, from a settlement agreement, or from voluntary recognition of a majority union. The Board relied on language in *Brooks, supra*, quoting the Court's approval of the Board's Rules and Regulations relating to the continuity of union representative status including its rules 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. The Board also noted that the same principle had been followed after a Board issued bargaining order or settlement agreement.

The Board-created voluntary recognition bar was further refined by the Board in cases dealing with simultaneous organizing campaigns conducted by two unions. Initially, the Board's policy precluded the application of a recognition bar in all cases where a petitioner had conducted an active organizing campaign simultaneously with that conducted by the recognized union. In *Smith's Food & Drug Centers*, the Board modified its voluntary recognition bar doctrine and held that despite the existence of active and simultaneous organizing campaigns, an employer's voluntary recognition of a union bars the processing of a subsequent petition unless the petitioner demonstrates that it had a 30 percent showing of interest at the time of recognition. The rule in *Smith's Food* was premised on the importance of employee free choice in the selection of a bargaining representative as the paramount concern.

More recently, in *Seattle Mariners, 335 N.L.R.B. 563* (2001*)*, the employer and union entered into a written neutrality/card check agreement. The agreement provided that the card check be conducted by a neutral arbitrator at the union's request. At the same time that the union was gathering authorization cards, a group of employees who opposed the union was soliciting

signatures. The petitioner sent to the arbitrator a petition signed by 186 employees indicating that they did not desire representation by the union and a letter requesting that the signing employees not be included in any card count by the arbitrator in favor of representation. The arbitrator did not receive the petitioner's letter and petition until after he had completed the card check. The arbitrator certified that the union possessed majority status among approximately 453 unit employees. Based on these facts, the NLRB Regional Director took administrative notice that the petitioner had garnered a 30 percent showing of "disinterest" in representation at the time of the arbitrator's certification of the union, and relying on *Smith's Food*, held that the arbitrator's certification of the union's majority status did not create a recognition bar to the processing of the decertification petition.

The Board majority reversed the Regional Director, finding *Smith's Food* inapplicable to the case, and concluded that the employer's voluntary recognition of the union constituted a bar to the processing of the decertification petition. Although acknowledging that the fundamental concern of the Board in *Smith's Food* was the effectuation of employee free choice, the Board majority held that when only one union is organizing the employees and there has been a demonstration of union majority status, the employer's voluntary recognition warrants the application of the recognition bar.

A third type of Board-created bar is the contract bar doctrine, whereby a current and valid collective bargaining agreement will ordinarily establish a conclusive presumption of majority status and prevent the holding of an election for the term of the contract or three years, whichever is less.

ARGUMENT

A. Employees Must Have an Uncoerced Right To Choose or Request a Collective Bargaining Representative to Protect Their Statutory Right of Free Choice.

During its first ten years, the NLRB allowed employees to demonstrate their "choice" of a collective bargaining representative by a number of different means, including "authorization cards, union membership cards, strike votes, strike participation and the acceptance of strike benefits." Over time, however, the Board came to recognize that the secret ballot was the preferred method:

> Although in the past we have certified representatives without an election … we are persuaded by our experience that, under the circumstances of this case, any negotiations entered into pursuant to determination of representatives by the Board will be more satisfactory if all disagreements between the parties regarding the wishes of the employees have been, as far as possible, eliminated. We shall therefore direct that an election by secret ballot be held.

Indeed, Congress has directed that where a question involving representation is raised, the Board shall conduct a hearing; if the Board finds that such a question exists, "it shall direct an election by secret ballot…." The Board similarly has recognized that its secret ballot elections constitute one of its two key functions. The Board's 2003 Annual Report states:

> [T]he NLRB has two principal functions: (1) to determine and implement, through secret-ballot elections, the free democratic choice by employees as to whether they wish to be represented by a union in dealing with their employers and, if so, by which union; and (2) to prevent and remedy unlawful acts, called unfair labor practices, by either employers or unions or both.

Finally, unions themselves recognize this fact. In *Levitz Furniture Co.,* 333 N.L.R.B. 717 (2001), the Board referenced an amicus brief filed by the AFL-CIO, in which the union reiterated the importance and primacy of the secret ballot: "[W]here the employer has made a sufficient showing, employees will be permitted to make their views known in an election. *It is hard to*

imagine a clearer example of a new rule better furthering the Act's purpose promoting employees free choice." Moreover, the AFL-CIO acknowledged that the Board's secret ballot election process allows, in the case of questions of representation, "the [Board] to deal speedily with any charges filed which may be designed to manipulate election timing, and to take into account the full range of valid interests present in any given circumstances." In short, although voluntary recognition may, in recent history, have become more prevalent, the secret ballot election conducted by the NLRB continues to be the "gold standard."

The preference for secret ballot elections is based not only on the Board's extensive regulation and protection, but also on the practical implications of an election campaign. In an election, competition between the employer and union for the employees' votes guarantee that the employees—whose choice is at issue—are courted by both parties (and more, if another union intervenes). This competition guarantees a substantial flow of information and assistance to the voters. The information would consist of one party's own position and a critique or refutation of the other party's positions, and the other party would provide similar information on its adversary. Assistance would include dissections of the other party's materials, warnings about the consequences of a vote, and a ready willingness to bring, or assist the employees in bringing, to the Board's attention the rival's ULP's or breaches of laboratory conditions.

In contrast, card checks, particularly when accompanied with neutrality agreements, eliminate this competition. Employees are asked to take some step which may commit them to a collective bargaining representative, but they may be furnished no or inaccurate information. There is no competing party willing to admit or provide contrary information, to warn of the consequences, or to advise employees regarding their rights and possible violations.

The Board's procedures in a contested situation imply that the greatest danger to employee free choice is posed by the employer, but NLRB decisions illustrate that unions as well as employers can take actions that impede employee choice, and they can undertake this interference singularly or in consort with employers. Indeed, improper union pressures were documented in the Congressional record leading to the 1947 addition of Section 8(b)(1)(A), and the Board itself has recognized the risk that "sweetheart" deals between a union and consenting employer pose to employee Section 7 rights, especially when the terms of the agreement are determined before recognition is extended.

Notwithstanding all of these facts, the Board has created a disingenuous disparity in protections afforded employees in contested and uncontested elections, and the Board's abdication in the case of voluntary recognition are more serious because there is no competition to provide extra-Board correctives. The Board should eliminate this disparity.

1. The Extensive Protections Attendant to Board-Conducted Elections.

Recognizing its responsibility to see that employees are able to make an uncoerced choice on a crucial aspect of their employment, in 1948, the Board announced its goal of establishing "laboratory conditions" in representation campaign proceedings: "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." Beginning with that decision, the Board has fashioned an ever increasing series of rules to implement that vision and commitment.

Recognizing that the time from the filing an election petition through the election is an especially "critical period," the Board subjects critical period conduct to close scrutiny. The Board sets aside elections in which racial or religious prejudices have been injected. It sets aside

elections because of employer promises, and even ambiguities which can be read as implied promises. As the election date grows near, the Board's "laboratory standards" become more demanding. Paycheck electioneering enclosures or payment with two checks, one net of anticipated union dues and one equaling the withheld dues, are grounds for setting aside an election. Payments or awards to employees for coming to the election are grounds for setting aside elections.

At least three days prior to a Board-conducted election, the employer must post a Notice of Election Form NLRB-707 in conspicuous places. This notice provides the time and place of balloting, the name of the union(s) seeking representation, a summary description of the employees' Section 7 rights and examples of prohibited election conduct. Examples include promising or granting promotions or pay raises or fining or threatening employees to discourage or encourage union activity; captive audience speeches within 24 hours of the election; incitement of racial or religious prejudice; and threats of physical force or violence by union or employer. The notice sets forth the responsibility of the Board to protect employees and concludes with the following assurance:

> If agents of Unions or Employers interfere with your right to a free, fair and honest election, the election can be set aside by the Board. Where appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including back pay from the party responsible for their discharge.
>
> The National Labor Relations Board protects your right to free choice.
>
> Improper conduct will not be permitted….

Similarly, raffles conducted during the 24 hour pre-election period are grounds for setting aside the election. In *Milchem, Inc.*, 170 N.L.R.B. 362 (1968), the Board addressed its election

day rule prohibiting electioneering within close proximity to the polling area. Even campaign songs and slogans transmitted from public roadways by sound trucks into the polling area may be grounds for setting a union win aside under *Milchem*.

Any person may challenge the election results by filing an objection, which is heard on an expedited basis by a Hearing Officer who prepares a report for the Regional Director. The standard of review is whether the conduct potentially affected the election outcome. Broad categories of (ULPs) are presumed to influence the outcome, and election interference is generally easier to establish than a ULP – the Board has used its authority over the election process to extend and even transcend the protections Congress established in Sections 8(a)(1) and 8(b)(A)(1). The Regional Director's decision may be appealed to the Board where it is heard expeditiously by a super-panel. Generally, no further appeal is allowed, and time to resolution is measured in weeks and, at worst, months.

In short, today, when employees are better informed, better educated and more independent than ever before, the Board has continued to add protections to the secret ballot process, further insuring that the voters will not be coerced or mislead.

2. The Lack of Protections Incumbent in Voluntary Recognition Schemes.

Although in cases of voluntary recognition, the employees lack an alternative source of information (and protection), the Board has not provided appropriate balance or safeguards. Indeed, the Board has denied employees the protections it deems essential in contested elections. Employees face either the union alone or multiple unions. Additionally, employer campaigns have no formal notice of rights, and no expedited procedure to oversee and protect employees' right of free choice. Inexplicably, the Board carefully requires the posting of an election notice informing employees of their rights where the competing self-interest of the employer and union

would provide at least some information to employees and has not seen fit to provide any information to employees in the context of voluntary recognition when no competition exists.

In a line of cases summarizing the evolving *Midwest Piping* doctrine, the Board prohibited an employer from preemptively selecting one particular union over another. To date, however, the Board has established no comparable protection where there is only one union suitor for the employees. In short, the Board has taken a hands-off policy regarding union recognition outside of the secret-ballot election process. In light of these facts, it is not surprising that card checks, coupled with neutrality agreements, have become increasingly popular organizing devices.

This increased use of voluntary "card check" recognition, and the absence of substantive and procedural protections which they are afforded, is particularly troublesome in that the Board's own records disclosed the dangers to employees of collusion between the employer and a hand-selected union. In a recent decision involving an improper voluntary recognition, *Duane Reade, Inc.,* 338 N.L.R.B. No. 140 (2003), the Board acknowledged the Administrative Law Judge's (ALJ's) credited testimony that the employer chose between two competing unions for certain stores "because they could get a better deal with UNITE, a purely economic decision."

Unlike voluntary recognition, an election "conducted secretly…after the employees have had the opportunity for thoughtful consideration, provides a more reliable basis for determining employee sentiment." Indeed, as the Second Circuit recognized, "an informal card designation procedure" creates a situation "where group pressures may induce an otherwise recalcitrant employee to go along with his fellow workers." Even misleading statements, such as assurance that the cards are only going to be used to get an election, do not limit their use for recognition purposes. Indeed, where representation purposes are included on the written purposes of the

card, it will be disallowed only if the signee is explicitly told to disregard the language or is told the card will only be used to obtain an election.

Finally, a review of Board cases provides ample evidence that card checks are less reliable indicators of employee desires than a Board election. For example, in *Rollins Transportation System*, 296 N.L.R.B. 793 (1989), where both competing unions "assuredly had secured authorization cards from a majority of the employer's employees." The Board stated: "An election by secret ballot is normally a more satisfactory means of determining employees' wishes, although authorization cards signed by a majority may also evidence their desires." The Supreme Court recognized that "secret elections are generally the most satisfactory – indeed the preferred – method of ascertaining whether a union has majority support."

The voluntary recognition process operates with little guidance, without notice to the employees of their rights, and without the benefit of competing parties. To fulfill its mandate and protect employees' free choice, the Board should not allow the voluntary recognition bar to attach in the absence of a secret ballot election. At a minimum, the Board should establish at procedures and standards before allowing such a bar to attach, to ensure that employees' right to freely choose whether to unionize is protected.

B. <u>In Balancing the Employee's Statutory Right of Free Choice and the Policy of Preserving Bargaining Relations, the Board Must Adjust the Scales Acknowledging the Inferiority of Indicators of Majority Status Other Than By Board Supervised Secret Ballot Elections</u>.

As discussed above, without question, authorization cards are inferior to the Board's election process. It is the secrecy of the process and the "laboratory conditions" protections that distinguishes the Board's election process. Indeed, the NLRB General Counsel and unions

acknowledge "that Board elections are the preferred means of establishing whether a union has the support of a majority of the employees in a bargaining unit."

The Board's duty is "to choose amongst permissible interpretations of the Act to best effectuate its overarching goals." Board analysis regarding alternatives to Board supervised elections varies depending, in part, on whether the issue is "front end" organization or "back end" decertification or rival unions. If there is to be a law or policy difference between withdrawing recognition from an incumbent union and granting recognition to a new union, logic dictates that employees entering into a semi-permanent relationship require and are entitled to time for consideration, reflection, and unfettered choice. Unfortunately, Board caselaw is to the contrary.

For example, in *Levitz Furniture Co. of the Pacific*, 333 N.L.R.B. 717 (2001), the Board recently revisited the question of employer withdrawal of recognition. The Board noted that it "has been guided by the Act's clear mandate to give effect to employees' free choice of bargaining representatives." In resolving the withdrawal question and considering "a multitude of options," the Board held that an employer's withdrawal of recognition was dependent on proving the incumbent union's in fact loss of majority support. Notably, the Board approved the lesser, more lenient standard of reasonable good-faith uncertainty for an employer to obtain a Board election to test an incumbent union's continued majority status.

The *Levitz* Board reasoned that Board conducted elections "are the preferred way to resolve questions regarding employees' support for unions." Therefore, regarding withdrawals, the Board reasoned that anything short of proof in fact, like employer petitions (RMs) and employee decertification petitions (RDs), must proceed by Board supervised secret ballot elections "to prevent an employer from impairing [the express statutory right of employees to

designate a collective-bargaining representative of their own choosing]… without some objective evidence [to the contrary]…." The Board treated good faith but mistaken withdrawal equally with the unwitting extension of recognition to a minority union – in either case, an invasion of employees' Section 7 rights.

Oddly, however, the Board's scales tilt against employee free choice when weighing law and policy regarding initial recognition. In *Smith's Food & Drug Centers*, 320 N.L.R.B. 844 (1996), the Board revisited the issue of voluntary recognition in rival union initial organizing situations. The Board revised prior precedent that would allow processing of a petition if filed within a reasonable period after lawful recognition. The Board held that if the recognition is based on an unassisted and uncoerced showing of majority interest, a rival petition will be barred unless the petitioner demonstrates a 30 percent showing of interest predating the recognition.

The Board commented on its policy choice:

> The recognition-bar rule that we prescribe today in 'two-union' situations will prevent the employer from co-opting employee free choice by extending recognition to a less effective union in an effort to freeze out, via recognition and contract bar, a stronger union with whom it may not want to deal even though this union has a 30-percent showing of interest sufficient to raise a question concerning representation.
>
> We believe that any minor uncertainty created by this slight interruption is reasonable and necessary to ensure that employees' representation desires are carried out.
>
> We find…that requiring a petitioner to demonstrate a 30-percent showing of interest that predates the employer's voluntary recognition of a rival union appropriately balances competing interests by effectuating employee free choice, while at the same time promoting voluntary recognition and reasonably protecting the stability of collective-bargaining relationships.

> The 30-percent figure is not chosen at random. It is the traditional figure for a showing of interest that is sufficient to raise a question concerning representation. [And], the 30-percent figure seeks to harmonize "C case" law and "R case" law.

In stark contrast to the *Smith's Foods* rival unions fact pattern, the Board held in *Seattle Mariners*, 335 N.L.R.B. 563 (2001) that where only one union is gathering authorization cards, there is no impediment to an employer's grant of voluntary recognition despite active signature solicitation in opposition to the union exceeding a 30-percent showing of disinterest. The Board majority reasoned no exception to the recognition bar was warranted:

> [W]here only one union is engaged in organizing an employer's employees, voluntary recognition by the employer of the union upon a demonstration of its majority status only serves to effectuate free choice. The possibility that fortuitous timing or undue employer interference…could thwart the employees' choice of their bargaining representative is simply not present.

In dissent, former Board Chairman Hurtgen stated:

> [T]he 'recognition bar' principle is an exception to the general rule that elections are favored as a means of resolving questions concerning representation.
>
> I cannot understand, from either a logical or legal perspective, how employee free choice can be circumscribed where the choice is between representation and nonrepresentation, but not when the choice is as to which union will represent employees.

Not only is the Board majority's declaration in *Seattle Mariners* that there should be a difference between the rival union organizing situation and the case of single union organizing with employee opposition illogical, it is wrong. One need look no further than *Duane Reade, Inc.*, 338 N.L.R.B. No. 140 (2003) to see employee free choice thwarted by both the employer and the union. Whether the choice is between multiple unions with or without employee

opposition organizing, there remains a choice. Moreover, the extant choice can be thwarted by the union, employer, or a third party.

The problem with extending voluntary recognition is the attendant bar, a presumption of continuing majority status. In theory, the bar period accommodates an equally important policy goal of stability to nurture the collective bargaining relationship. Unfortunately, the present voluntary recognition bar is for a "reasonable period of time" which has expanded over time from three weeks to two days short of the one year certification bar obtainable only through a majority vote in a Board supervised secret-ballot election with attendant "laboratory conditions" protection. Should a collective bargaining agreement be reached, the contract bar attaches effectively precluding employee choice for nearly four years.

Except for the voluntary recognition bar, each of the Board's bar doctrines has a specific time period precluding challenge to a union's majority presumption. The obvious imbalance between the Board's highly regulated election process and the "any other" approach to majority status, and the significant potential for compromising the statutory right of free choice by operation of the elastic recognition bar with the add-on contract bar, necessitates a reassessment and rebalancing of doctrine in this area.

C. <u>An Agreement Reached Between a Union and an Employer Prior to Obtaining Employee Signatures to Recognize the Union Should Majority Status Be Achieved is Void and/or No Voluntary Recognition Bar Should Attach</u>.

For the reasons set forth above, and in light of the demonstrated superiority of secret-ballot elections to voluntary "card-check" recognition agreements, the Board should disallow the attachment of a voluntary recognition bar. Indeed, as discussed herein, to the extent such agreements represent "things of value," they are unlawful under the Act thus void, and *cannot* form the basis for such a bar.

An employer may elect to remain silent in response to union organizing. An employer may agree to voluntarily recognize a union upon proof of majority. An employer and/or union may involve themselves in the ongoing organizing campaign short of unlawful assistance, interference, restraint, and/or coercion. Although the Board's policy is to not consider matters pertaining to unfair labor practices in representation proceedings, the Board, in weighing, balancing, and fashioning national labor policy must consider extant law and the broader policies of our nation's law. In *Majestic Weaving Co., Inc.*, 147 N.L.R.B. 859 (1964), the Board found negotiation with a nonmajority union unlawful support. In *Duane Reade*, supra, the vice was improper recognition - up-front, deliberate, economic decision-making based on the parties self interests. Submitting "written demands for recognition based on a claimed majority even before [the union] signed up any employees "is coercive prerecognition communication and collusion between the union and the employer. In *Smith's Foods*, supra, the Board notes the role of employer pressure to "freeze out" a stronger union contender with whom the employer would not want to deal in favor or a less effective more manageable union. In *Brylane, L.P.*, 338 N.L.R.B. No. 65 (2002), the majority found *New Otanni Hotel & Garden*, 331 N.L.R.B. 1078 (2000) controlling, holding that a neutrality and card check agreement did not constitute a demand for recognition and denied review of the employer's petition for an election. In dissent, former Member Cowen noted that a neutrality/card check agreement is a "thing of value" and, therefore, a request for such agreement is unlawful under Section 302.

Unions pursue neutrality/card check agreements for a variety of reasons – to avoid NLRB election procedures and perceived attendant delay, to reduce perceived employer hostility (by silencing employer counter-campaigns), to reduce the direct costs of mounting a traditional campaign. Whether direct or indirect cost savings to the union, the *quid pro quo* of such

agreements are real – the union saves money and the employer obtains current or prospective favorable treatment in avoiding counter-campaign costs, operations related relief, future contract concessions, and/or relief from onerous obligations in other contractual settings. Viewed in such a light, neutrality/card-check agreements are "things of value" and, therefore, illegal under the Act. Accordingly, no presumption or bar based on such agreements should attach.

CONCLUSION

For the reasons set forth above, particularly the demonstrated superiority of secret ballot elections administered and scrupulously overseen by the Board, the Board should hold that no "recognition bar" attaches in their absence. Indeed, to the extent agreements providing for voluntary recognition in the absence of an election are "things of value" they are unlawful under the Act, and *cannot* form the basis for such a bar. At a minimum, if the Board declines to reject the bar and issue a *per se* rule, the Board should establish minimum standards to protect employee free choice. Such standards would include, at a minimum, notice to employees that voluntary recognition was requested and granted and an immediate "open" period following the grant of voluntary recognition, e.g., 45-60 days allowing for the filing of a petition to "test" the claimed majority. The voluntary recognition bar should run concurrently and for a stated period (certainly for a period less than the certification one year bar). Also, the Board should consider extending the "laboratory conditions" processes to voluntary recognition settings and extend the same antisepsis to voluntary recognition scenarios as it affords to its supervised secret-ballot elections and pre-election campaigning oversight. Finally, there should be no bar or presumption

or duty to recognize or bargain where an employer and union agree to neutrality and/or voluntary recognition in advance of obtaining employee authorizations.

Respectfully submitted,

Butzel Long	McGuire Woods	Varnum Riddering Schmidt Howlett
John N. Raudabaugh	J. Robert Brame, III	Dennis M. Devaney
150 W. Jefferson	1050 Connecticut Ave., N.W.	Suite 810
Suite 100	Suite 1200	201 North Washington Square
Detroit, MI 48226	Washington, DC 20036	Lansing, MI 48933

ATTORNEYS FOR THE *AMICI CURIAE*

Dated: July 15, 2004

APPENDIX A

AMICI MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES

The Honorable John A. Boehner
Chairman
Committee on Education
and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Sam Johnson
Chairman
Subcommittee on Employer-
Employee Relations
Committee on Education
and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Charlie Norwood
Chairman
Subcommittee on Workforce Protections
Committee on Education
and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Cass Ballenger
Committee on Education
and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Peter Hoekstra
Committee on Education
and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Howard "Buck" McKeon
Committee on Education
and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Joe Wilson
Committee on Education
and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable John Kline
Committee on Education
and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Marilyn Musgrave
Committee on Education
and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Marsha Blackburn
Committee on Education
and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Max Burns
Committee on Education
and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Gresham Barrett
Member of Congress
U.S. House of Representatives
Washington, DC 20515

The Honorable Roscoe P. Bartlett
Member of Congress
U.S. House of Representatives
Washington, DC 20515

The Honorable Kevin Brady
Member of Congress
U.S. House of Representatives
Washington, DC 20515

The Honorable Michael Burgess
Member of Congress
U.S. House of Representatives
Washington, DC 20515

The Honorable Trent Franks
Member of Congress
U.S. House of Representatives
Washington, DC 2051

The Honorable Jeb Hensarling
Member of Congress
U.S. House of Representatives
Washington, DC 20515

The Honorable C.L. "Butch" Otter
Member of Congress
U.S. House of Representatives
Washington, DC 20515

The Honorable Mike Pence
Member of Congress
U.S. House of Representatives
Washington, DC 20515

The Honorable Jim Ryun
Member of Congress
U.S. House of Representatives
Washington, DC 20515

The Honorable Pat Toomey
Member of Congress
U.S. House of Representatives
Washington, DC 20515

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July 2004, a true and correct copy of the foregoing Brief *Amicus Curiae* of Members of the United States House of Representatives was served via Hand Delivery and U.S. Mail, addressed as follows:

James M. Stone, Esq.
David E. Weisblatt, Esq.
McDonald Hopkins Co., LPA
2100 Bank One Center
600 Superior Avenue
Cleveland, Ohio 44114-2653
Counsel for Metaldyne Corporation

Stanley J. Brown, Esq.
Susanne Harris Carnell, Esq.
Hogan & Hartson
8300 Greensboro Drive
McLean, Virginia 22012
Counsel for Dana Corporation

Betsy A. Engel, Esq.
International Union, United Automobile, Aerospace and Agriculture Implement Workers of America, AFL-CIO
8000 Jefferson Avenue
Detroit, Michigan 48214
Counsel for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO

Glenn M. Taubman, Esq.
William L. Messenger, Esq.
c/o National Right to Work Legal Defense Foundation
8001 Braddock Road, Suiate 600
Springfield, Virginia 22160
Counsel for Petitioners

Gerald Kobell, Regional Director
National Labor Relations Board, Region 6
William S. Moorehead Federal Building
Room 1501
1000 Liberty Avenue
Pittsburgh, Pennsylvania 15222-4173

Mr. Frederick J. Calatrello, Director
National Labor Relations Board, Region 8
Anthony J. Celebreeze Federal Building
1240 East 9th Street
Room 1695
Cleveland, Ohio 44199-2086

_____
J. Robert Brame III