

**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 THE
AUTOMOTIVE AFTERMARKET SUPPLIERS ASSOCIATION, HEAVY DUTY
MANUFACTURERS ASSOCIATION, MOTOR AND EQUIPMENT MANUFACTURERS
ASSOCIATION, MICHIGAN CHAMBER OF COMMERCE AND THE ORIGINAL
EQUIPMENT SUPPLIERS ASSOCIATION IN SUPPORT OF THE PETITIONERS**

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

McGuire Woods
J. Robert Brame
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 *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 an agreement reached between an

employer and a union regarding card-check voluntary recognition *before* authorization cards are obtained evidencing majority status should bar an employee's decertification petition for a reasonable period of time. This brief argues the negative. There should be no voluntary recognition bar or, alternatively, there should be a notice to employees and an opportunity to petition for a decertification election to "test" the act of extending voluntary recognition, or there should be a prohibition against voluntarily recognizing a union representative where an agreement between the union and an employer precedes the union's solicitation of employee signatures.

INTEREST OF THE *AMICI CURIAE*

The Automotive Aftermarket Suppliers Association, Heavy Duty Manufacturing Association, Motor and Equipment Manufacturers Association, Michigan Chamber of Commerce, and the Original Equipment Supplier's Association (OESA), collectively represent more than 7,200 employers, have a substantial and critical interest in these proceedings since the matters at issue impact their member companies and their more than 2.5 million employees. Most importantly, the outcome of these cases affects the fundamental democratic values of informed free choice.

STATEMENT OF THE CASE

The Act confers on employees the right to freely choose whether to be represented for the purpose of collective bargaining, to exercise their franchise in a free and informed manner. 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, before obtaining signed authorization cards. Unlike the Board's supervised secret-ballot election process, there is no higher standard ensuring "laboratory conditions" for card-check voluntary recognition. 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 (2) days short of one

(1) year, giving it a status comparable to the certification of results of an NLRB supervised secret-ballot election with attendant “laboratory conditions” protections is one (1) year.

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 resulting in a majority favoring representation. Indeed, voluntary recognition in the absence of an advance card-check voluntary recognition agreement 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.

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.

SUMMARY OF EXTANT LAW REGARDING EMPLOYEE FREE CHOICE

A. 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 announces an “employee” right. It is the right of *employees* to choose or not to choose a collective bargaining representative. This is clear even without 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 instructed the Board that the “distinction is one of substance.” When the Board continued to ignore this distinction and again granted non-employee organizers similar access rights as employees, the Supreme 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.” Since its inception, the Act has also served to ensure “industrial stability.” However, 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 by NLRB 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 designate or select 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.

Employee designation or selection may be by a Board supervised secret-ballot election or by voluntary recognition based on card checks, petitions or polls.

Both the United States Supreme Court and the NLRB acknowledge that Board conducted secret-ballot elections are 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 untrammled 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 "the electioneering activity substantially impaired the exercise of free choice so as to require the holding of a new election." The doctrine even distinguishes between a party's misconduct and that of a third party. Objections to the Board supervised secret-ballot election must be

filed within seven (7) days following the ballot tally, and may be the subject of 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.

Pre-election objection cases have resolved misconduct or election-related procedural compliance issues regarding, for example, campaign related speech; threats; predictions; grants of benefits; pay raises; promulgation of rules; failure to pay; filing of lawsuits; application of rules regarding solicitation, distribution, and access; employee meetings; home visits; misrepresentations; appeals to inflame prejudice; timely and accurate voting eligibility lists; election speeches to massed gatherings within 24 hours before the subsequent election; mail ballot protocols; third-party conduct; videotaping; election day conduct at or near polls; Board agent conduct; election mechanics; opening, closing, and conduct of polling place; election notices; election observers; ballot secrecy; opportunity to vote; foreign language voters; ballot counting; payments to off-duty employees to encourage voting; electioneering; ballot reproduction for persuader purposes; raffles, gifts, and contests; campaign-related insignia; and maintaining lists of voters apart from the official list.

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. Unless the card solicitation conduct amounts to an unfair labor practice, there is no remedy for overreaching behaviors interfering with employee free choice.

C. Bars, Presumptions, and Recognition 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. Most importantly, 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. The Board's decision that the one year period runs from the date of certification rather than from the date of election was affirmed by the United States Supreme Court in *Brooks v. National Labor Relations Board*, 348 U.S. 96 (1954). In evaluating issues in the representational context, the Board's certification bar is premised on an explicit statutory provision.

The Board has also adopted additional bars to election petitions based on administrative considerations and policies that are not rooted in the statute. 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.

In *Keller*, the Board was faced with a dispute which involved bargaining status established as a result of voluntary recognition of a majority representative. The Board concluded that “like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to execute the contracts resulting from such bargaining.” Based on stipulated facts, the Board concluded that on February 16 the union was properly recognized voluntarily by the company as the statutory bargaining representative of its employees. As of the execution date of

March 10, the parties stipulated that the union no longer retained the support of the majority of the employees of the unit. It was undisputed that the respondent had nothing to do with the union's loss of majority and that it was unaware at the time that it executed the contract of the union's loss of majority.

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.

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 exception to the general preference for Board elections.

The Board has also recognized a 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.

ISSUES PRESENTED

- A. Whether "laboratory conditions" and related procedural protections should apply to voluntary recognition.
- B. Whether voluntary recognition should be afforded a "bar" in the absence of "laboratory conditions" to protect "free" choice.
- C. Whether the voluntary recognition "bar" should be for a time certain with the right to seek a decertification election during the "bar."
- D. Whether an agreement in advance of obtaining signatures or election should preclude the opportunity to "test" the claimed majority.

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 10 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, 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.

In 1947, Congress rejected an attempt to make the secret ballot the exclusive means of union recognition. However, when a question involving representation was raised, the Board was directed to conduct a hearing. If it determined that a question exists, “it shall direct an election by secret ballot...”

The Board itself 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.

In *Levitz* the Board references an amicus brief filed by the AFL-CIO. In their brief, the union reiterates the importance 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.” The AFL-CIO amicus brief also acknowledges how 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.”

Current practice recognizes two modes of recognition—voluntary and contested. Where a union’s claim to representation is challenged, the Board typically schedules and oversees a secret ballot election. Even beyond the Board’s protection (described below), 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.

By contrast, card checks, especially 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.

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.

The discussion that follows shows that 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.

1. NLRB Elections.

Recognizing its responsibility to see that employees are able to make an unhurried and uncoerced choice on a crucial aspect of their employment, 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).

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 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....

Within 24 hours of the opening of the polls, employers may not speak to assembled groups of employees. 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 “substantially impair the exercise of free choice.” Broad categories of unfair labor practices (ULPs) are presumed to influence the outcome, and election interference is generally easier to establish than a ULP. 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.

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 misled.

2. Voluntary Recognition.

Although in cases of voluntary recognition, the employees lack an alternative source of information (and protection), the Board has not provided appropriate balance. Indeed, it denied employees the protections it deems essential in contested elections. Employees face either the union alone or multiple unions. Employees have no formal Notice of Election-type warning and explication of rights, and no expedited procedure to oversee and protect their 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 but has not seen fit to provide any information to employees in the context of voluntary recognition when no competition exists.

In *Midwest Pipe and Supply Co., Inc.*, 63 N.L.R.B. 1060 (1949), the Board prohibited the employer from preemptively selecting one particular union over another (*Midwest Piping* doctrine). However the Board has not established a comparable protection where only one union is the suitor for the employees.

The Board has, of course, recognized the danger of sweetheart collective bargaining contracts agreed to before recognition (and perhaps conditioned upon recognition), but it has erected no protection when there are no confidentiality or card check agreements.

In short, the Board has taken a hands-off policy regarding union recognition outside of the secret-ballot election process. Understandably, card checks, coupled with neutrality agreements, have become increasingly popular organizing devices.

This absence 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 improper voluntary recognition, *Duane Reade, Inc.*, 338 N.L.R.B. No. 140 (2003), the Board acknowledged the Administrative Law Judge'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.

Moreover, 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), both competing unions "assuredly had secured authorization cards from a majority of the employer's employees." As the Board has 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."

Courts are notorious in their hesitancy in enforcing the Board's *Gissel* bargaining orders. The Second Circuit described bargaining orders as an "extreme remedy," *Vincent Industrial Plastics* and courts frequently require the NLRB to establish that conducting a "fair" or untainted election is unlikely.

MGM-Grand Hotel illustrates the effect of the Board's uncritical endorsement of voluntary recognition. Soon after the employer recognized the union on the basis of a supposed 52.6 percent majority (1494 out of 2900) eligible employees, employees began to petition in ever larger numbers for an election. The petitions began with 1500 signatures and increased until the 4th petition was signed by 1900 out of 3100 eligible workers. The contract for 3100 employees was signed in the shadow of the last petition and ratified by only 704 votes (103 voted against it).

Competitive collusion in the business world signals a need for scrutiny. Labor-management collusion regarding recognition should similarly cast a shadow over the claimed benefits to employees and the public.

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 must establish at least minimum procedures and standards.

B. 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.

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 statutory duty is "to choose amongst permissible interpretations of the Act to best effectuate its overarching goals." Board analysis regarding alternatives to Board supervised elections, however, 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.” The Board acknowledged that, absent serious unfair labor practices or an agreement to test the union’s support by other means (e.g., card check), an employer could refuse to extend initial recognition short of the results of a Board election. 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, 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.

One 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. First, there should be notice to employees that voluntary recognition was requested and granted. Second, there should be 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. Third, the voluntary recognition bar

should run concurrently and for a stated period (perhaps six months and certainly for a period less than the certification one year bar). A post-recognition window for filing is necessary because employees have no idea when voluntary recognition will be requested and/or granted.

Alternatively, the Board should consider extending the “laboratory conditions” processes to voluntary recognition settings.

C. 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.

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) *enforcement denied on other grounds*, *NLRB v. Majestic Weaving Co.*, 355 F.2d 856 (1966), 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. Neutrality/card-check agreements are “things of value” and, therefore, illegal. No presumption or bar based on such agreements should attach.

CONCLUSION

A voluntary recognition bar should be for a defined period, significantly less than the certification bar duration, with notice to affected employees of the grant of recognition and with the opportunity for affected employees to file a petition for a Board supervised secret-ballot election to “test” the claimed majority. Alternatively, the Board should adopt “laboratory conditions” procedures extending the same antiseptis 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
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 *AMICI CURIAE*

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July 2004, a true and correct copy of the foregoing Brief *Amici Curiae* of the Automotive Aftermarket Suppliers Association, Heavy Duty Manufacturers Association, Motor and Equipment Manufacturers Association, Michigan Chamber of Commerce and the Original Equipment Suppliers Association in Support of the Petitioners was served by 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, Suite 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