UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DANA CORPORATION
Employer

and Case No. 8-RD-1976

CLARICE K. ATHERHOLT
Petitioner

and

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

METALDYNE CORPORATION (METALDYNE SINTERED PRODUCTS)
Employer

and Case No. 6-RD-1518
Case No. 6-RD-1519

ALAN P. KRUG AND JEFFREY A. SAMPLE
Petitioners

and

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

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

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The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO replies as follows.

I. The Board Should Not Overrule Keller Plastics and Its Progeny

The sole issue raised by the Petitioners in their Petitions for Review and the Board in its order granting review is whether the "recognition bar rule" announced in Keller Plastics Eastern, Inc., 157 NLRB 583 (1966), should be overruled in whole or in part. Nothing in the briefs of the Petitioners or their amici justifies this dramatic departure from the rule of *stare decisis*. In fact, the Board's own General Counsel urges the Board not to overrule Keller Plastics: the "reasons given by the Board and courts in support of certification bars are generally applicable to the bar protecting voluntary recognition pursuant to a card check agreement. Therefore, the recognition bar should be retained." G.C. Brief at 8.

A. The Recognition Bar Furthers the Act's Objectives

The recognition bar is an integral part of a broader jurisprudence, rooted in the policies underlying the statute, governing when questions concerning representation may be raised. This coherent system regulating the timing of petitions, one element of which is expressly mandated by the Act, see 29 U.S.C. § 159(e)(2), has been repeatedly and without exception endorsed by the courts, including the Supreme Court in Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944).

The statutory objective served by this body of jurisprudence is no different after voluntary recognition than it is after certification or an order to bargain. The objective is to provide the majority's choice to be represented a reasonable period in which to bear fruit before employees decide whether they wish to revisit their choice. The Supreme Court has approved this objective: "a bargaining relationship once rightfully established must be permitted to exist and function for a

reasonable period in which it can be given a fair chance to succeed." Id. at 705-06. The bar gives due respect to the majority's initial choice and insures that any subsequent choice about whether to retain or reject representation will be an informed one.

Dana and Metaldyne and the amici employers supporting them – spanning the economy from heavy manufacturing to health care – speak eloquently to the practical objective served by the bar in the context of initial recognition. Uncertainty about the continued status of the union and the duration of the employer's duty to bargain with it would place great stress on the already difficult process of bargaining a first contract. The "Big Three" automakers explain the dilemmas that employers would face if the bar was abolished. "*Amici* cannot feel secure in discussing sensitive economic information with a union, that may or may not be around the following week or month." Brief at 10. Metaldyne describes the pressures abolition of the bar would place on unions. "Exposing unions and the negotiation process to the political pressures . . . would make . . . innovation, and the peace that creative approaches might offer, impossible." Brief at 18. It would "make the already difficult task of brokering labor peace that much more difficult." Brief at 18. Levi Strauss points out that the bar has "enabled the parties to focus upon their common interests. Ultimately, it has facilitated mature, responsible collective bargaining." Brief at 2. "Allowing decertification petitions early in these relationships risks disrupting initial contract negotiations and distracting the parties from finding common ground." Id. at 3. Dana sums up: "as a practical matter, the filing of a decertification petition would likely put the bargaining process in limbo." Brief at 13. The General Counsel recognizes the difficulties that would be created for employers attempting to fulfill their duty to bargain if the bar is abolished when he notes that, "if the Board adopts an exception to the recognition bar principle, in future cases it will have to decide the

bargaining obligations of the parties during the pendency of the election petition." Brief at 12 n. 31.[1]

The Board cannot overrule Keller Plastics without undermining an entire body of its own jurisprudence regulating when a question concerning representation can be raised and placing the parties to a legally sanctioned bargaining relationship in an untenable position. It should not do so.

B. Voluntary Recognition Was Authorized by Congress and Effectuates the Will of the Majority

At its core, the argument of the Petitioners and their amici is that voluntary recognition is an unauthorized procedure that does not effectuate the will of the majority. This is not so.

While some of the amici supporting Petitioners argue that the Taft-Hartley Congress disapproved of voluntary recognition, in fact, the reverse is true. As in NLRB v. Gissel Packing Co., 395 U.S. 575, 598 (1969), "the 1947 amendments weaken rather than strengthen the position taken by" the Petitioners and their amici. While the 1947 amendments codified what was by then the Board's practice of not certifying a union absent an election, Congress rejected an amendment that would have prevented the Board from holding that an employer had unlawfully refused to bargain with a union that had established majority support by means other than an election. The original House bill would have prevented the Board from imposing a duty to bargain on employers except with a representative "currently recognized by the employer or certified as such under Section 9." H.R. 3020, § 8(a)(5), 80th Cong., 1st Sess., in Leg.Hist 51. The purpose of the House language was to prevent the Board from imposing a duty to bargain on employers based on a card showing of majority support. Its rejection clearly evidences Congress' specific consideration of: (1) whether a card showing was a valid measure of employee sentiment and (2) whether it could serve as the basis

[1]The General Counsel thus foresees a tension between the obligation to bargain despite the pendency of a decertification petition under current law, see Underground Service Alert, 315 NLRB 958 (1994), and the elimination of the recognition bar.

of a bargaining relationship protected by the Act, and Congress' affirmative answer to both questions. Congress' endorsement of the validity of nonelectoral measures of majority support is explicit in the language of § 8(a)(5), making it an unfair labor practice for an employer to refuse to bargain with "the representatives of his employees, subject to the provisions of section 159(a)," which, in turn, refers to "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees" and not solely those certified by the Board following an election.

Moreover, this history reveals that it was an unquestioned, bedrock principle in Congress that an employer could voluntarily recognize a union based on cards. The House Report on the above-described bill stated, "Under this language, if an employer is satisfied that a union represents the majority and wishes to recognize it without it being certified under section 9, he is free to do so." H.R REP. No. 245, 80th Cong., 1st Sess. 30, in Leg.Hist. 321.

Finally, the rejection of the House language evidences Congress' intent that recognition based on cards bind employers for some period of time. The use of the word "currently" in the rejected language reveals that a specific objective of the House bill was to prevent employers from being bound by initial recognition based on cards. The House Report on the bill explained that it would allow an employer to voluntarily recognize a union for "as long as he wishes," but if "having recognized it, [he] stops doing so, the union may ask the Board to certify it under section 9 [but cannot file an unfair labor practice charge]." Id. The rejection of this language demonstrates that Congress intended voluntary recognition to be binding and protected for a reasonable period of time.

Petitioners and their amici repeatedly, but erroneously assert that the process of voluntary recognition does not insure that a representative has been selected by a majority of employees. They

assert that this is a form of "top down" organizing. But voluntary recognition must be based on signed and dated cards from a majority of the employees authorizing the union to serve as their exclusive representative or similar evidence of majority support. See International Ladies' Garment Workers Union v. NLRB, 366 U.S. 731 (1961). There is nothing "top down" about a process that requires such an expression of majority will.

Indeed, it is Petitioners who adopt a paternal attitude, casting doubt on whether employees can be trusted to read, understand, and decide whether to sign an authorization card. But the Supreme Court has stated, "We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign." Gissel, 395 U.S. at 607. Congress has found that "employees can be counted on to take responsibility for their acts." Id. Indeed, "employees should be bound by the clear language of what they sign." Id. at 606.[2]

The Petitioners and their amici attempt to undermine the validity of the expression of majority will required for all lawful voluntary recognition by arguing that unions routinely coerce and trick employees into signing cards. They cite unproven allegations from declarations submitted by the Petitioners as if they were proven facts. For example, Amici Associated Builders & Contractors, et al., state, "In the instant cases, the record indicates that some employees were intimidated or coerced into signing union authorization cards." Brief at 10. But there is no such evidentiary record in this case and no finding of any form of coercion. Misstatement is combined with overstatement. For example, Amicus Associated Industries of Kentucky states that employees

[2]At its base, the argument of the Petitioners and their amici is that both employees and employers must be protected from themselves. Both are mere dupes of unions, according to the Petitioners and their amici, the former signing clear authorization cards when, in fact, they do not wish to be represented, and the latter entering into recognition agreements when, in fact, they do not wish to agree. But neither employees nor employers are so easily swayed.

"were effectively forced into accepting union representation." Brief at 10. But these statements are wrong. There was no finding of misconduct in these cases.

In fact, the Petitioners deliberately chose not to make their allegations of misconduct in the proper form so they could be investigated and tested in an adversarial, evidentiary hearing. Petitioners admit, "Clearly Petitioners could have filed unfair labor practice charges, but chose not to." Brief at 41. The Board has long held that allegations of coercion and misrepresentation in the collection of cards are properly made through the filing of an unfair labor practice charge and cannot be litigated in a representation case.[3] Indeed, in a case dismissing a decertification petition pursuant to Keller Plastics, the Board explained:

> The Board normally refuses to receive evidence in representation cases that signatures on cards were unlawfully obtained or were otherwise invalid or fraudulent. Such issues may be litigated, however, upon appropriate charges and a complaint in an unfair labor practice proceeding. [Dale's Super Valu, Inc., 181 NLRB 698, 698-99 (1970).]

This procedural rule is based on "a long line of precedents." Id. at 698. Petitioners did not challenge the holding of Dale's before the Regions and do not do so now. Thus, Petitioners have deliberately chosen not to make their allegations of misconduct and misrepresentation in the proper form.

As we demonstrated in our opening Brief at 25-27, the allegation that voluntary recognition is generally marred by improper conduct has no empirical support. In fact, the empirical evidence that is available refutes the contention. Nevertheless, Petitioners and their amici continue to rely on a handful of Board cases finding such misconduct, without acknowledging that the Board provided a full and complete remedy for the misconduct found in those cases under the Act's unfair labor

[3]In a representation case, a party seeking dismissal of a petition under Keller Plastics must demonstrate only (1) "that the employer extended recognition" and (2) that it was "on the basis of a . . . showing of majority support." S. Abraham & Sons, Inc., 193 NLRB 523, 523 (1971).

practice procedures. This "evidence" proves that the minimal amount of coercive and misleading conduct that has been found in the past was not successfully used to produce the evidence of majority support that is essential to voluntary recognition, not the reverse.[4]

Coercive conduct also occurs during the course of election campaigns. See, e.g., Fieldcrest Cannon, 318 NLRB 470 (1995) (multiple discriminatory discharges and over 40 independent violations of the Act). In fact, available, empirical evidence indicates such conduct is more prevalent before elections than before card checks. But citing representation cases in which such conduct was found and held to be objectionable would not demonstrate that elections are generally influenced by improper conduct and therefore are unreliable indicators of majority will.

Moreover, in an election following an RC or RM petition where such misconduct occurs, if neither the employer or the union objects within seven days (29 C.F.R. § 101.19(b)), the results will be certified, even if an individual employee files an unfair labor practice charge. Thus, while the Petitioners and their amici praise the Board's regulation of election conduct, if neither the union nor the employer object, the Board will not apply its laboratory conditions standards. In contrast, after voluntary recognition, any employee can file an unfair labor practice within 180 days to remedy misconduct in the acquisition of majority support.

Petitioners argue that the question of whether a union has uncoerced support from a majority of employees is always an open one after voluntary recognition. But this is also true after an

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[4]Some amici assert that current law allows misrepresentation about the effects of signing a card, but that is incorrect. Both the Supreme Court and the Board have held that "employees are bound by the clear language of what they sign unless there is a deliberate effort to induce them to ignore the card's express language by telling them that the sole and exclusive purpose of the card is to get an election." DTR Industries, Inc., 311 NLRB 833, 840 (1993) (citing Gissel). In contrast, no misrepresentation about the effects of a yes vote in an election is objectionable.

election. We do not live in the world of absolute certainty imagined by the Petitioners. Both election and card check procedures are fallible. Both procedures merely provide evidence about the true sentiments of employees. If that evidence has been tampered with, both procedures provide remedies. After voluntary recognition, the remedy is the filing of unfair labor practice charges. After an election, the remedy is the filing of objections. If misconduct is proven in either context, the initial results are voided -- after an election by overturning the results and ordering a rerun and after voluntary recognition by ordering the employer to cease recognizing unless and until the union is certified after an election. In neither case is the remedy an election absent proof of misconduct as requested by Petitioners.

The argument that objectionable conduct is inherent in the collection of cards proves too much because card signing is a prerequisite to an election. See 29 C.F.R. § 101.18(a). Moreover, the Board has repeatedly held that union agents may ask employees whether they support the union and to register their support on cards or petitions and at least four courts of appeals have agreed with none dissenting. See Springfield Hospital, 281 NLRB 643, 692-93 (1986), enf'd, 899 F.2d 1305 (2d Cir. 1990); Kusan Manufacturing Co., 267 NLRB 740, 746, enf'd, 749 F.2d 362 (6th Cir. 1984); J.C. Penney Food Dept., 195 NLRB 921, 921-22 n. 4 (1972), enf'd, 82 LRRM 2173 (7th Cir. 1972); Maremont Corp. v. NLRB, 177 F.3d 573, 578 (6th Cir. 1999); Melrose-Wakefield Hospital Ass'n v. NLRB, 615 F.2d 563, 569 (1st Cir. 1980). Finally, while the rules governing elections and card checks differ, the latter are significantly stricter in several respects, most importantly in requiring a majority of all employees in the unit rather than merely of those voting.

The veracity of the card check process is further evidenced by the fact that it often results in a finding that a majority of employees do not wish to be represented. This is the case even though

unions will not typically present cards unless they believe they have them from a majority of employees. Professors Eaton and Kriesky found in their research that 20% of card checks result in a finding that a majority of employees do not wish to be represented. Eaton & Kriesky letter brief at 2. See also Kaiser Brief at 2 (in five of 23 card counts – over 20% -- union did not have a majority); Liz Claiborne letter brief ("we have also had card checks where insufficient support for the union was established").[5]

The encomiums to the election cited by the Petitioners and their amici in no way diminish the status or undermine the propriety of voluntary recognition.[6] As the Board has explained, "[T]he law is settled that the benefit of utilizing Board election procedures does not outweigh the important

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[5]The Tennessee Chamber adds a technical argument against the accuracy of card checks, relying on studies of lay identification of handwriting. But the studies actually suggest that there is likely to be very little error due to this factor. In Kam, Gummadidala, Fielding & Conn, "Signature Authentication by Forensic Document Examiners," J. of Forensic Sciences 884 (2001) (Brief Attach. A), the authors found that laypersons mistakenly found nongenuine signatures genuine in only 6.47% of cases. Id. at 884. In order to evaluate this finding, one would have to know the percentage of nongenuine signatures that are submitted in card checks. This data does not exist. Assuming what is clearly a far too high percentage of nongenuine signatures, for example, 10%, reveals that only .647% of signatures are likely to be wrongly considered genuine. Such an error rate is highly unlikely to effect the outcome of card checks and is probably comparable to the error rate arising from a variety of factors in the casting and counting of ballots. Moreover, the study also found a higher rate of error in the rejection of valid signatures (26.1%). Id. This form of error is thus likely to more than cancel out the other form and result in laypersons finding that a majority of employees have authorized representation in too few cases rather than too many.

[6]Certification following an election vests the union with unique status even though voluntary recognition also results in a bar. Most importantly, it is the only means by which employees can compel an unwilling employer to bargain with their chosen representative. Second, it results in a one year bar in contrast to a bar lasting only a reasonable period. Finally, certification provides a set of immunities and protections not enjoyed by a voluntarily recognized union under 29 U.S.C. §§ 158(b)(4)(B), (c), and (D) and (7). That is why for over 50 years the Board has permitted a voluntarily recognized union to petition for certification – because "significant advantages . . . accrue to [a] certified union, as distinguished from those that enjoy recognition without certification." General Box Co., 82 NLRB 678, 681 (1949).

role that voluntary recognition plays in expeditiously resolving representation issues." Cosgrove/Meurer Productions, Inc., 311 NLRB 801, 804 (1993). Similarly, there is no inconsistency between the position taken by the AFL-CIO in Chelsea Industries and Levitz Furniture Co. and our position in this case. Indeed, the outcome of those cases squares the law concerning withdrawal of recognition with the law governing voluntary grant of recognition. Levitz, 333 NLRB 717, 722 n. 23, 724-25 (2001). After ILGWU, an employer could not grant recognition unless the recognized representative actually had majority support at the time of recognition and now an employer cannot withdraw recognition unless the representative had actually lost majority support at the time of the withdrawal. Levitz, 333 NLRB at 725.

While elections may be the "crown jewel" of Board processes, they are not an infallible reflection of employee sentiment. Despite the ideal of "laboratory conditions," the Board has recognized that its "elections do not occur in a laboratory where controlled or artificial conditions may be established." The Liberal Market, Inc., 108 NLRB 1481, 1482 (1954). Whether it flows from certification following an election or voluntary recognition after a card check, "T[he] presumption of continued majority status is not based on an absolute certainty that the union's majority status will not erode." MGM Grand Hotel, Inc., 329 NLRB 464, 466 (1999). Rather, it is based on reliable evidence that a majority of employees wished to be represented and a policy judgment that the majority's choice must be respected for a reasonable period so that collective bargaining will have a meaningful opportunity to succeed. This judgment is a sound one.

C. The Recognition Bar Orders, But Does Not Unduly Limit, Employee Free Choice

Petitioners and their amici suggest that the recognition bar deprives employees who do not wish to be represented of their right to petition for an election. But the rule merely controls the

timing of such a petition. On its own, the rule merely requires that employees wait a reasonable period of time, ordinarily between six and 12 months, to file a petition. Contrary to the contentions of many of the amici, it is far from certain that the bar will be extended beyond that by the execution of a contract. Only half of newly certified unions ever reach a collective bargaining agreement. See P. Weiler, Governing the Workplace 240 (1990). While this percentage may or may not be higher after voluntary recognition, a subsequent contract bar is not a given. Moreover, the contract bar applies whether a contract is reached following certification, an order to bargain or voluntary recognition. It is not unique to this context.[7] Finally, even if a contract is reached, a petition will be timely no later than 3 years after its execution.

D. No Party Explains Why the Board Should or How the Board Could Distinguish Between Ad Hoc Voluntary Recognition and Recognition Pursuant to a Prior Agreement

Just as the Board should not overrule Keller Plastics, it cannot distinguish that decision or its progeny on the grounds that recognition in these cases was the product of a prior agreement between the Union and the Employers binding the latter to recognize the Union if it presented specified evidence of majority support. The General Counsel can find no basis for finding a prior agreement relevant to the outcome of these cases. "[W]e see no basis for distinguishing – for purposes of whether to apply the voluntary recognition bar in general, and the exception to it proposed here – between voluntary recognition granted pursuant to a neutrality/card check agreement entered into before an organizing campaign and one reached after a majority of employees had signed cards." Brief at 15.

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[7]Thus, under the contract bar, employees in a unit where there is a long-standing bargaining relationship founded on certification may file for an election only once every three years even though most if not all of them did not vote in the original election because of turnover. Petitioners have no less opportunity to file a petition than these employees.

There is not one word in Keller Plastics or any of the decisions that applied its holding that suggests they are based on the absence of a prior agreement. Indeed, as we demonstrate in our opening Brief at 33, several of Keller's progeny involved such agreements. Moreover, neither Petitioners nor their amici dispute the fact that the Board and federal courts have routinely enforced the terms of such agreements as demonstrated in our initial Brief at 30-31. See also Textile Workers v. Facetglas, 845 F.2d 1250, 1253 (4th Cir. 1988) (enforcing private election agreement).

Nor can Petitioners or any of their amici coherently explain why a simple prior agreement to recognize based on cards should prevent lawful voluntary recognition pursuant to the agreement from creating a bar.[8] The arguments that are made are all based on factors other than a simple prior agreement to recognize based on cards. For example, Petitioners and their amici assert the agreements here established terms and conditions of employment contrary to Majestic Weaving Co., 147 NLRB 859 (1964), or discriminated among unions contrary to § 8(a)(2). But there is no evidence, much less any factual findings, that the agreements here did either of these things.[9] Moreover, if they did, a remedy exists through the unfair labor practice process.

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[8]Several amici assert that such agreements violate § 302. But the enforceability of the recognition agreements are not at issue here, only the question of whether their existence somehow undermines the showing of majority support that was the necessary predicate for recognition. Moreover, even the dissent of Member Cowen in Brylane, L.P., 338 NLRB No. 65 (2002), the sole "authority" they cite, makes this wholly unsupported assertion only about a "neutrality/card check agreement" and not a mere card check agreement. The only court to actually rule on this assertions found it "meritless" and based on a "reading of the statute [that] is clearly out of context and irrelevant to the current matter." Hotel Employees and Restaurant Employees v. Sage Hospitality Resources, 299 F.Supp.2d 461, 465 (W.D.Pa. 2003). Moreover, the Board rejected a similar assertion in BASF Wyandotte Corp., 274 NLRB 978, 979 (1985). Adoption of this casual suggestion would level decades of Board and court precedent. See our opening Brief at 29-31.

[9]There is no evidence that any other union was interested in organizing these employees or requested a parallel recognition agreement. Thus, the discrimination issue is not before the Board. See Tecumseh Corrugated Box Co., 333 NLRB 1, 5 (2001).

The only fact that is in the record of these cases is that the parties agreed that the Employers would recognize the Union if a card count verified majority support. No rationale has been offered for why this fact should serve to distinguish Keller Plastics and cases following it. If the agreement was not disclosed to employees, as is alleged in these cases, its existence could in no way have undermined the validity of employees' expression of support through the signing of cards. If the agreement was disclosed, it clearly informed employees about the potential consequences of their signing a card and thus enhanced rather than undermined the validity of the expression of support evidenced by such signing.

Finally, the point we made in our opening Brief, that employers enter into such agreements in order to avoid the disruption and contention of an election, is well-supported by the employer briefs filed in support of the Regional Directors' decisions. The Big Three automakers explain that they have entered into such agreements because they have "experienced . . . disruptions and distractions during the course of contentious organizing campaigns, as well as the impact such campaigns have on the overall labor-management relationship." Brief at 1. Levi Strauss explains that it "prefers quick, definitive resolutions of recognition issues" and that through its recognition agreements it has "avoided antagonistic, disruptive recognition disputes." Brief at 2. Kaiser Foundation Health Plan agrees that "the protracted and often adversarial NLRB election processes frequently undermined the ability of everyone involved to focus on the primary mission of providing quality health care." Brief at 2. These employers as well as others have entered into recognition agreements in order to avoid disruptions and lasting antagonisms. They bargained not only for an expeditious, nondisruptive, noncontentious process for ascertaining the majority's will, but also a subsequent reasonable period in which to bargain if a representative was selected. As Dana explains,

"the disruption to the work place caused by a decertification petition when negotiations for a first contract are on-going would be severe, impacting on productivity and team work. Dana manufactures products and systems for automotive, commercial and off-highway vehicles. It operates in a globally competitive marketplace. Neither Dana nor its employees can afford such disruptions." Brief at 12.[10]

II. The Board Should Not Create an Exception to Keller Plastics

For the reasons set forth above, the Board should not adopt any of the proposed exceptions to the recognition bar. We discuss them here only to point out their unique defects.

The suggestions of several amici that a decertification petition should be treated the same as a petition by a rival union under Smith Food & Drug Centers, Inc., 320 NLRB 844 (1996), which allows a rival union's petition if the showing of interest was gathered prior to recognition, is not properly made in these cases because Petitioners do not claim they obtained a 30% showing of interest prerecognition. Moreover, this argument is before the Board in Cequent Towing Products, Case No. 25-RD-1447. The Union in that case has persuasively explained why employees opposed to a union stand in a different position prerecognition under the express terms of § 9 than a rival

[10]Petitioners' amici make a host of unsupported assertions about why employers agree to recognize a union based on cards. In essence, these employers suggest that these agreements are not voluntarily entered into but are the product of coercion. But there is no record evidence, much less finding, of any coercion of the Employers in these cases. In addition, these amici cite no reliable evidence that such coercion is anything other than an isolated occurrence adequately addressed under existing law. See, e.g., Zoladz Construction Co., 2003 NLRB GCM 75 (2003) (authorizing the issuance of a complaint under § 8(b)(7)(c) when a union pickets for longer than 30 days in order to obtain a recognition agreement). Rather, they resort to mere assertions, anecdotal evidence and even citations to statements by advocates in this case as "evidence." See, e.g., Brief of Associated Industries of Kentucky at 25 (citing Daniel Yager, counsel to Amici HR Policy Association). Finally, these amici's definition of coercion includes clearly noncoercive, protected speech. See, e.g., Wackenhut Brief at 9 (citing as evidence of coercion distribution of flyers "attacking Wackenhut for its failure to sign the neutrality/card check agreement").

union seeking to represent the employees.

The Petitioners' alternative suggestion that the Board create a 45-day window period subsequent to recognition during which a decertification petition could be filed is similarly flawed. As discussed above, it does not accord the majority's choice the respect it is due, places bargaining under a cloud at its very inception, and is not likely to result in an informed choice of whether to retain representation.

The General Counsel's proposes a 30-day window period during which a decertification petition could be filed if supported by a 50% showing of interest. The General Counsel's more modest proposal differs from that of the Petitioners in two respects. First, the 30-day window period parallels existing window periods, for example, prior to expiration of an agreement. See Leonard Wholesale Meats Co., 136 NLRB 1000 (1962) (window period reduced to 30 days "without thereby lessening employees' freedom of choice"); Trinity Lutheran Hosp., 218 NLRB 199 (1975) (same 30-day period in healthcare industry). The Board has found through extended experience that 30 days is a sufficient window. "[W]e see no reason to provide more than a 30-day open period." Id. at 199.

Second, the General Counsel's proposal recognizes that there is ordinarily no reason to question the card showing of majority support. The mere fact that a minority of employees opposes representation is not a sufficient reason to lift the bar and frustrate or defer the effectuation of the majority's express desire to engage in collective bargaining. The requirement of a 50% showing is responsive to this concern even though it fails to recognize that support for a union often fluctuates, particularly during the early stages of bargaining when employers assume a tough initial position and the union has yet to produce any results.

However, if the Board were to adopt the General Counsel's proposal, it should be modified

to require that the 50% showing of interest be gathered post-recognition. Prior to recognition, employees' signatures on an anti-union petition or card are simply an expression of opinion not a request for a decertification election because the Act expressly provides that an RD petition must "assert that the . . . labor organization, which . . . is being currently recognized by their employer . . ., is no longer a representative." 29 U.S.C. § 159(c)(1)(A)(ii) (emphasis added). Similarly, the Board Representation Case Manual provides, "The showing of interest for a RD petition is clear as to its intent if it indicates that the employees signing the showing no longer wish to be represented by the union." § 11022.2 (emphasis added). In other words, employees cannot express an interest in an election to decertify their representative until they have a representative. Moreover, employees who were initially against representation may have changed their minds during the course of the organizing and even subsequently signed authorization cards. Their initial expression of opinion thus may not cast any doubt on the latter showing of majority support and using it as an expression of interest for a decertification election would impair employees' right to change their mind. See Manila Mfg., 171 NLRB 1259, 1260 (1982).

III. The Board Cannot Decide Any Other Issue in These Cases

The Board cannot consider any issue in these cases other than those raised in the Petitions for Review and cannot rule on any set of facts other than those found and relied on by the Regional Directors. The only issue raised by the Petitions is whether the Board should overrule, distinguish, or create an exception to Keller Plastics. The only facts that the Regional Directors found and relied upon in dismissing the petitions are (1) that the Employers entered into agreements with the Union to recognize the Union if it claimed majority support and its claim was verified by an independent third party and (2) that the Union claimed such support, its claim was so verified, and the Employers

honored their agreement to recognize the Union.[11]

The Petitioners' amici urge the Board to announce a broad set of rulings going far beyond the questions presented by these cases and assuming numerous facts that were not found or even considered by the Regional Directors. The Board will deprive the parties of due process and violate both the Labor Act and the Administrative Procedure Act if it does as they ask.

While the Board can announce new rules in the course of adjudication, it cannot use an adjudicative proceeding as an occasion to announce new rules not necessary to the resolution of the case before it, out of impatience with waiting for an appropriate case, without following the notice and comment requirements of rulemaking. In NLRB v. Bell Aerospace Co. Div. of Textron Inc., 416 U.S. 267 (1974), the Court stated that "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act." Id. at 294. The Court found that the Board had properly proceeded by adjudication in that case because it had "proceed[ed] with caution, developing its standards [for exclusion of managerial employees] in a case-by-case manner with attention to the specific character of the buyers' authority and duties in each company." Id. In addition, the parties " most immediately affected" were "accorded a full opportunity to be heard before the Board ma[de] its determination." Id. at 295. Neither of these factors would be present here. The Petitioners' amici urge the Board to adopt novel, indeed, radically new policies without any attention to the specific facts of this case. Moreover, because these arguments were not made in the Petitions for Review and thus were not referenced in the Board's order granting review, the parties who will be affected have not had an adequate opportunity

[11]As explained supra, these were the only facts the Regional Directors were permitted to investigate and required to find under existing Board law.

to be heard.

In NLRB v. Wyman-Gordan Co., 394 U.S. 759 (1969), the plurality opinion held that while "in an adjudicatory hearing, the Board could validly decide the issue [before it in that case --] whether the employer must furnish a list of employees to the union," the Board may not evade the requirements of the APA "by the process of making rules in the course of adjudicatory proceedings." Id. at 765, 764. Three other Justices concurred in the result, but disagreed with the application of the APA, finding that "all the procedural safeguards required for 'adjudication' were fully satisfied in connection with the Board's *Excelsior* decision. . . . The Board did not abstractly decide out of the blue to announce a brand new rule of law to govern labor activities in the future, but rather established the procedure as a direct consequence of the proper exercise of its adjudicatory powers. . . . [T]he *Excelsior* order was . . . an inseparable part of the adjudicatory process. The principal issue before the Board in the *Excelsior* case was whether the election should be set aside on the ground, urged by the unions, that the employer had refused to make the employee lists available." Id. at 772-73 (Black, J., concurring). In contrast, the principal, indeed, the sole issue in this case is whether Keller Plastics should be overruled in whole or in part. A ruling on any other issue would not be an inseparable or proper part of the adjudicatory process here and would thus be an abuse of discretion violating the Act as well as the APA.

Specifically, many of Petitioners' amici argue that agreements requiring that employers remain neutral about whether their employees should be represented in negotiations with them should be held unlawful or, at least, to preclude application of the recognition bar. But such an agreement is not at issue in these cases for four reasons. First, there are no factual findings that the agreements at issue required neutrality. Second, there are no factual findings or evidence of any sort

concerning whether any requirement of neutrality was formally altered after the initial agreements or honored in whole or in part by the Employers. Third, agreements that employers will remain neutral are neither essential elements of card check agreements nor are they limited to the nonelectoral context. Agreements limiting employers' campaigns can lawfully be and sometimes are entered into before Board-supervised elections. See, e.g., Service Employees International Union v. St. Vincent Med. Ctr., 344 F.3d 977 (9th Cir. 2003), cert. denied, 124 S.Ct. 1878 (2004); New York Health and Human Service Union v. NYU Hospitals Center, 343 F.3d 117 (2d Cir. 2003). Finally, no form of agreement necessarily underlies employers' decision not to campaign or to campaign in favor of representation. Employers can unilaterally decide not to campaign for reasons of principle, economy, or disinterest, with exactly the same effect on employee choice alleged by the Petitioners' amici. For each of these reasons, the issue of neutrality agreements is not before the Board and cannot properly be considered in these cases.

The proper role of employers in seeking to influence their employees' decision about whether to be represented in bargaining with them is one of extraordinary importance. The arguments of the Petitioners' amici that employers cannot agree not to attempt to influence their employees' choice without rendering that choice suspect and not entitled to protection for a reasonable period of time is novel and would have far reaching implications for the Board's case law and federal labor policy.[12]

[12]Do any agreed restrictions on employer speech, for example, simply to forgo captive audience meetings, impair the validity of employee choice? Why does an agreement to remain neutral have any more effect on employee choice than a unilateral employer decision to remain neutral? Must the Board force employers to campaign against representation and can it do so under the Act and the First Amendment? If agreed limitations on employer speech implicate employee free choice, must the Board grant union agents equal or at least greater access to the workplace to campaign in order to insure free and informed choice? These questions (and many others that space does not allow) reveal the radically destabilizing implications of accepting these arguments and the (continued...)

The arguments should not and cannot be addressed in these cases where there is no evidence concerning what the employers agreed to and whether they communicated in any manner with employees about their choice concerning representation and where the parties and other interested entities have not had an adequate opportunity to address the issue.

Conclusion

The Board should affirm the Regional Directors' dismissal of the petitions.

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[12](...continued)
extraordinary complexity of applying the rule they suggest. They make clear why the argument cannot be considered on these bare records without adequate notice.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Brief of the UAW was served on the following parties by overnight express, postage prepaid, on July 29, 2004:

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