

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

DANA CORPORATION)	
)	Case 8-RD-1976
	Employer)
and)	
CLARICE K. ATHERHOLT)	
	Petitioner)
and)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO)	
	Union)
METALDYNE CORPORATION (METALDYNE SINTERED PRODUCTS))	
	Employer)
and)	
ALAN P. KRUG AND JEFFREY A. SAMPLE)	
	Petitioners)
)	Case 6-RD-1518
and)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO)	
	Union)
)	Case 6-RD-1519

BRIEF OF AMICUS CURIAE ALLIED SECURITY IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE ALLIED SECURITY IN SUPPORT OF PETITIONERS

Allied Security respectfully submits this brief amicus curiae in response to the National

Labor Relations Board's June 14, 2004 Notice inviting parties and interested amici to submit amicus curiae briefs on issues raised in the above-captioned cases.

I. STATEMENT OF INTEREST

Allied Security is the largest independently held contract security officer company in the United States with over 60 offices serving more than 2,000 customers in states nationwide. Allied Security's interest in the issues presented by the *Dana* and *Metaldyne* ("*Dana/Metaldyne*") cases comes as a result of recent attempts by the Services Employees International Union (SEIU), a mixed guard, non-guard union, to obtain neutrality and card check agreements from Allied Security. Because of the unavailability of elections under section 9(b)(3), guard employees are particularly disadvantaged in the exercise of their section 7 rights by the use of neutrality and card check agreements.

II. STATEMENT OF THE CASE

The statement of the cases and facts are set forth in the parties briefs.

III. SUMMARY OF ARGUMENT

In this case the Board granted a Request for Review to examine whether voluntary recognition of a Union through a card check agreement bars a decertification petition for a reasonable time. The specific concern expressed by the Board is the extent to which the voluntary recognition obtained through neutrality and card check agreements with the employers should be accorded "bar quality" and prevent employees from exercising their section 7 rights to reject the union and/or choose a different one.

The Board also raised serious legal concerns about neutrality and card check agreements in general. Among the concerns raised by the Board are: (1) the increased usage of recognition agreements; (2) the varying contexts in which recognition agreements can be reached; (3) the

superiority of Board supervised secret ballot elections; and (4) the importance of section 7 rights of employees. Specifically, the majority observed that:

Although no party here challenges the legality of voluntary recognition, the fact remains that the secret-ballot election remains the best method for determining whether employees desire union representation. In such an election, employees cast a secret vote under laboratory conditions and under the supervision of a Board agent. By contrast, card-signing guarantees none of these protections.

See Order Granting Review in Dana Corp. and Metaldyne Corp., Cases 8-RD-1976, 6-RD-1518, 6-RD-1519, 2004 NLRB LEXIS 300 (June 7, 2004); *see also Cequent Towing Products*, Case 25-RD-1447 (June 9, 2004) (granting review in a case raising similar issues).

This brief address the unique concerns raised by neutrality and card check agreements of the type discussed in the *Dana/Metaldyne* cases in the context of guard employees governed by Section 9(b)(3).

Regardless of the principles developed by the Board for non-guard employees, section 9(b)(3) requires that neutrality and card check agreements be prohibited in the guard employee context. With respect to non-guard employees, neutrality and card check agreements interfere with employees' section 7 rights and violate sections 8(a)(2) and 8(b)(1)(A) of the National Labor Relations Act ("NLRA" or "Act").¹ The National Labor Relations Board ("NLRB" or "Board") has recognized that its paramount duty is to protect employee rights, including the right to make a free and uncoerced choice to select, or not select, a bargaining representative. Neutrality and card check agreements are inconsistent with longstanding Board precedent governing the selection of representatives.

¹ Section 8(a)(2), 29 U.S.C. § 158(a)(2), prohibits employer interference with employee rights to organize and bargain collectively. Section 8(b)(1)(A) prohibits Union interference with such rights.

IV. STATUTORY AND HISTORICAL BACKGROUND

A. The NLRA Election Process

In order to ensure that the selection of representatives reflects employee free choice, Congress provided for secret ballot elections. 29 U.S.C. § 159(e). That was not always the case, as Section 9(c) of the NLRA originally provided that the NLRB could certify a union as representative of employees either through a secret ballot election or through “any other suitable method.” National Labor Relations (Wagner) Act, ch. 372, § 7, 49 Stat. 449, 452 (1935). Even under this language, however, Congress intended that the secret ballot election would be used to determine employee desires. As stated by Senator Wagner:

[A]s to . . . representation of the workers you cannot have any more genuine democracy than this. We say under Government supervision let the workers themselves . . . go into a booth and secretly vote, as they do for their political representatives in a secret ballot, to select their choice.

National Labor Relations Board: Hearings on S. 1958 Before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess. 642, 642 (1935) (statement of Harvey J. Kelly, American Newspaper Publishers Association), *reprinted* in 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 1617, 2028 (1949).

During the early years of the Act, the Board frequently certified unions without an election, applying various methods, but primarily card checks, to determine whether majority support existed for a union. Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 Minn. L. Rev. 495, 506-07, n.45 (1993). The Board’s practice of certifying unions without elections drew intense criticism.² In the face of this

² Harold L. Varney, *The Case Against the Labor Board*, 43 Am. Mercury 129, 129 (1938) (calling the Board a “nightmare”); Editorial, *Collier’s*, Nov. 5, 1938, at 54 (labeling NLRA the “Strained-Relations Act”); James A. Gross, *The Reshaping of the National Labor Relations*

criticism, the Board abruptly changed course and decided to rely almost exclusively on secret ballot elections. *Cudahy Packing Co.*, 13 N.L.R.B. 526, 531-32 (1939); *Hearin*, 66 N.L.R.B. 1276, 1283 (1946). In so doing, the Board stated that “[a]lthough in the past we have certified representatives without an election . . . we are persuaded . . . that the policies of the Act will best be effectuated if the question of representation . . . is resolved by secret ballot election. *Cudahy Packing Co.*, 13 N.L.R.B. at 531-32. In the Taft-Hartley amendments to the Act, Congress codified these Board rulings by striking the “any other suitable method” language, eliminating the Board’s authority to certify a union without an election. The result was that secret ballot elections became the primary means by which unions gained representative status under the Act.

The Act also makes clear that the representation process would be initiated by employees or an entity with sufficient support among employees that it would be acting in the employees’ interests. Section 9(c)(1)(A) of the Act provides that an employee, an individual, or a labor organization *acting on behalf of employees* may file a petition for a secret ballot election.

Whenever a petition shall have been filed . . . by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees wish to be represented for collective bargaining and that their

Board 20, 73 (1981) (citing statement of Board Chairman J. Warren Madden: “we got very little support from any newspaper or magazine which would be regarded as influential”); Luther A. Huston, *NLRB Under Fire in Congress*, N.Y. Times, Aug. 1, 1937, at 6E (describing a “clamor of legislators against the board. . .”); *Nye Criticizes the NLRB as a “Partisan Body,”* N.Y. Times, July 23, 1937, at 1 (stating Republican Senator criticized board as “adjunct” of the CIO); Rankin *Asks Labor Board Removal for “Red” Plot to Destroy Industry*, N.Y. Times, July 27, 1937, at 1 (citing Democratic Congressman accusing Board of “conspiring with communistic influences to destroy Southern industries”); James A. Gross, *The Reshaping of the National Labor Relations Board* at 73 (1981) (stating as early as the summer of 1938, President Roosevelt uttered dissatisfaction with the Wagner Act and its administration); *Id.* at 251 (stating at its 1938 convention, the AFL requested its Executive Council to assemble proof of Board’s misfeasance and authorized petition to President Roosevelt for “prompt and adequate relief”); *Id.* at 65-66 (stating AFL adopted resolution, at its 1938 convention, calling for amendment of Wagner Act to curtail Board’s power).

employer declines to recognize their representative . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for [a] hearing If the Board finds . . . that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1)(A).

Board supervised elections are conducted by secret ballot with strict procedures designed to protect employee free choice by minimizing outside influence and coercion. The Board agent supervising the election brings an election kit and places signs around the polling place to give directions to employees and to warn observers of prohibited conduct. The Board prohibits electioneering and conversations between parties or observers and voters at the polling place. The Board's procedures prevent the parties from learning of any employee's choice and insure the integrity of the employees' ballots. Employees vote in private booths and are instructed not to sign their ballots. NLRB Practice Manual, Section 11304.3. Additionally, all ballots are furnished by the Board, and "no one, other than a Board agent and the individual voter, is permitted to handle the ballots." NLRB Case Handling Manual, Section 11306. Once the voter completes the ballot, the voter, and no one else, inserts the ballot into the secret ballot box. After the polling place is closed, the ballot box must be sealed and the Board agent must maintain personal custody over it. To the extent possible, similar protections are provided in mail ballots. NLRB Practice Manual, Section 11336.2(c).

After the election, the votes are reviewed to determine whether the employees desire union representation. Where a party's conduct interferes with the employees' ability to make a free and untrammled choice regarding representation, the opposing party may file objections to the election results.

B. The Development of Neutrality and Card Check Agreements

Since the early days of the Act, it has been accepted that voluntary recognition was an appropriate alternative to an election for a union to obtain representative status. *See Linden Lumber Div. v. NLRB*, 419 U.S. 301, 314 (1974) (observing that the Board “continues to permit an employer voluntarily to recognize a noncertified union supported by a majority of his employees”). If a union presented proof that satisfied the employer that the union’s claim of majority representation was valid, the employer could, if it so chose, extend recognition to the union. However, the employer rarely was bound to an agreement to extend voluntary recognition, and remained free to test the union’s claim of majority support by demanding a Board supervised election. *Linden Lumber*, 419 U.S. at 314 (“Under the Board rule approved by the Court, an employer has no obligation” to voluntarily recognize a noncertified union supported by a majority of the employer’s employees.).

Resort to the Board election process preserved the opportunity for employees to express their desires against unionization in an environment free of coercion. As employers became more aggressive in educating employees about the negatives of unionization, union success in election campaigns decreased dramatically. Unions lost over half of the NLRB representation elections held during the years 1995 through 1998. Harry Kelber, *The Labor Educator*, October 20, 2000. From 1980 to 2000, unions failed to win more than 51.2% of Board supervised elections. *Id.* According to the U.S. Department of Labor Bureau of Labor Statistics, from 1998 to 2002, the highest percentage of elections won by unions was 56% in 1998. In 1998, 3,339 elections were held and 1,869 were won by unions. In 2002, only 2,599 elections were held, and only 1,423 (54%) were won by unions.

Unions began seeking ways to overcome what they saw as impediments to their success in the Board’s election process. Specifically, unions have rejected the NLRA and sought to

circumvent the very protections Congress afforded employees under the Act. For example, Mel W. Horton, International Vice President of the 5th District of the IBEW commented in a 2000 speech:

[I]n reality, with the passage of the 1947 Taft-Hartley amendments, along with numerous unfavorable court decisions, our nation's labor law has reached the point where it is not worth, if you will excuse my expression, a tinker's damn!!! The failure of America's labor law to protect workers' rights to engage in collective bargaining is a national tragedy. . . .Sure workers have recourse under the law. However, the remedies are so inadequate as to make the law, as I stated earlier, utterly worthless.

SEIU Director Stephen Lerner has stated that:

We can't engage in successful mass organizing or protect existing collective bargaining if we operate within the confines of the law because activities that allow us to exercise power are increasingly ineffective and/or illegal.

Stephen Lerner Responds, Boston Review (Summer 1996). Thus, union organizing today is premised on the belief that organizing must occur outside the NLRA, and even more insidiously, in contravention of the express intent of Congress.

One tactic used by unions to avoid the act was to expand the use of authorization cards through check agreements, thereby eliminating the ability of employee to involve the statutory election process. These card check agreements became substitutes for the Board's election process and election ballots. Often, unions would seek to compel an employer to agree to a card check before the union had obtained any significant support among employees, so that the agreement was entered into even before a union had the support of a "substantial number" of employees.

Even card checks, however, did not assure a union victory as employers remained free to attempt to persuade employees to reject the union. Consequently, in the mid-1970s, unions began to experiment with neutrality agreements, through which the employer would waive its right to oppose unionization. Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 Berkeley J. Emp. & Lab. L. 369, 377 (2000) (citing a 1976 letter agreement between the UAW and GM). Initially, neutrality and card check agreements were negotiated with employers with whom the union already had a collective bargaining relationship. *Id.* at n.100 (quoting Steve Early, *Organizing Efforts Getting Some Nonunion Help*, Boston Globe, June 27, 1999, at F1, available at 1999 WL 6069534) (“Unions are trying to improve [organizing success] statistics in several ways. One approach is by winning a neutrality agreement in which companies that are already heavily unionized agree not to oppose recruitment of new members in nonunion departments or subsidiaries.”).³

Not until the 1990s, however, did neutrality agreements become a primary focus of a broader union organizing strategy. According to Hartley, of one hundred thirty-two neutrality agreements collected by scholars, approximately 80% of them emerged in the 1990s. *Id.* at 378.

³ Of course, employers were aware of the effect of neutrality and card check agreements and resisted entering into them. Employers with existing agreements with unions were the early targets for neutrality and card check agreements because the bargaining process provided the avenue through which unions could exert the pressure necessary to compel employers to enter into such agreements. The final piece of this puzzle was the corporate campaign, which unions could use to exert pressure on any targeted employer. Unions have even resorted to unlawful behavior. In one instance, SEIU organizers falsely imprisoned employees of a cleaning contractor, resulting in charges being filed by several cleaning contractor employees. T.R. Goldman, *Deals and Suits: Felrice, et al v. SEIU*, Legal Times, April 8, 1996 (1993); *See also Battle Creek Health Systems*, 341 N.L.R.B. No. 119 (2004) (Board holding that “by threatening employees with bodily harm, destruction of their property, loss of employment, and other improper adverse consequences if they supported decertification of the Union or if they crossed a picket line, the Union has engaged in unfair labor practices.”).

Around the same time, unions began seeking agreements from employers with which the union did not have a relationship, but against which the union could bring sufficient pressure to bear to compel the employer to execute the agreement. When combined with a card check, these agreements virtually assured that the union would be unopposed, almost guaranteeing union success.

These new union tactics changed the nature of voluntary recognition by completely circumventing the protections guaranteed employees through the secret ballot election. The union and the employer generally reach agreement before the union has the support of the employees. In this process, a union that has not obtained the support of employees is claiming to act on behalf of the employees in protecting their rights for organization. Meanwhile, the employer is bartering away the right of its employees to an election, usually in exchange for some benefit or to avoid some burden imposed by the union (such as pressure from corporate campaigns). The result is a recognition process that obligates the employer to recognize the union, without any effective assessment of the validity of the union's claim. While this change affects the rights of employees to express their views in secret, employees have no role in the process.

C. Current Law Regarding the Lawfulness of Neutrality and Card Check Agreements

Although neutrality agreements have been used by unions with increasing frequency in the past decade, only two court decisions have dealt directly with their lawfulness. Even in those two federal court decisions, the issue was disposed of summarily, with almost no discussion of the policies underlying the NLRA. The Board has not discussed the issue, although it adopted an opinion of an Administrative Law Judge ("ALJ") who found a card check agreement unlawful.

In *HERE v. Sage Hospitality Res., LLC*, 299 F. Supp. 2d 461 (W.D. Pa. 2004), the court reviewed a challenge to the enforceability of a neutrality and card check agreement in the context of a section 301 action to enforce that agreement. In that case, the employer sought to avoid the agreement by arguing that such agreements were illegal under section 7 of the NLRA because they interfered with employee choice. *Id.* at 464. The court observed that federal courts previously had upheld card check agreements. *Id.* Without any further analysis of the issue, the court held that because it was legal for the parties to enter into an agreement “for union certification through an alternative method,” the court could not “say that the contract was illegal under Section 7 of the NLRA.” *Id.* Notably, the cases cited by the court in support of its decision arose under contract theories, and did not address the legality of neutrality agreements under the Act.

In *UAW v. Dana Corp.*, 278 F.3d 548 (6th Cir. 2002), the court reviewed a challenge to an arbitrator’s decision under the narrow standard of review available for such decisions. Dana sought to overturn the arbitrator’s ruling that certain communications by Dana violated a neutrality agreement. Dana first argued that the arbitrator’s decision violated public policy because it prevented Dana from exercising its speech rights under section 8(c) of the Act. The court dismissed the argument, stating that nothing prohibited Dana from agreeing to remain silent. *Id.* at 558-59. Dana also argued that the arbitrator’s award interfered with employees’ section 7 rights because employees would not “hear all sides of the labor-management debate.” *Id.* at 559. In addition to holding that Dana did not have standing to assert its employees’ rights, the court stated that:

Dana does not point to any specific right under § 7 that [the arbitrator’s] interpretation of the neutrality provision could effectively waive. . . . [I]t is unclear how any limitation on Dana’s

behavior during a UAW organizational campaign could affect Dana's employees' § 7 rights.

Id. at 558. The Court's sweeping statement was made without any discussion of Board precedent concerning the need for employees to obtain information from the parties.

The other federal court cases have assumed, without addressing the issue, that neutrality and card check agreements are lawful. In *Amalgamated Clothing & Textile Workers Union v. Facetglas, Inc.*, 845 F.2d 1250 (4th Cir. 1988), the court held that the neutrality provisions of a private election agreement were enforceable under section 301, which grants the court jurisdiction over labor contract disputes. In *Hotel Employees, Restaurant Employees Union Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1469 (9th Cir. 1992), the court reviewed whether a neutrality and card check agreement was unenforceably vague, but did not consider the validity of the agreement itself. *See also Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993) (court had jurisdiction under section 301 to enforce neutrality, card check, and arbitration agreement).

The Board similarly has decided cases involving neutrality agreements without deciding the legality of such agreements. For example, the Board has held that that a demand for a neutrality agreement is not by itself a demand for recognition that would entitle the employer to seek a Board ordered election. *Brylane LP*, 2002 NLRB LEXIS 581 (2002); *Rapera, Inc.*, 333 N.L.R.B. 1287 (2001); *New Otani Hotel*, 331 N.L.R.B. 1078 (2000). In *Pall Corp.*, 331 N.L.R.B. 1674 (2000), the Board held that neutrality agreements are mandatory subjects of bargaining, again without reviewing the lawfulness of the underlying agreement. The D.C. Circuit reversed the Board and held that such agreements were permissive subjects of bargaining, also without addressing the validity of the underlying agreement. *Pall Corp. v. NLRB*, 275 F.3d 116 (D.C. Cir. 2002). Finally, in a Division of Advice memorandum, the Office of the General

Counsel took the position that an employer did not violate section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2), when it agreed to neutrality with one of two unions seeking to organize its employees. *Riverside Cmty. Hosp.*, 21-CA-35537 (July 8, 2003).

In contrast, voluntary recognition based on authorization cards long has been recognized by the Board and the courts as an acceptable alternative to Board elections, but not in the context of their use as wholesale substitute for elections. In *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 601 (1969), the Supreme Court reviewed a Board decision to issue a bargaining order based on a card majority. While the specific issue in *Gissel* centered on the appropriateness of a bargaining order as a remedy for election interference, the Court made some sweeping statements about the propriety of granting a union representative status based on a showing of a card majority. Acknowledging that card checks were inferior to secret ballot elections for determining the free choice of employees, the Supreme Court nonetheless approved the use of card checks to determine the wishes of employees regarding representation. *Id.* In so doing, the Supreme Court observed that such agreements rarely were used to determine employee choice. *Id.* at 607 (“Elections have been, after all, and will continue to be, held in the vast majority of cases.”).

Despite the Supreme Court’s discussion of the preference for secret ballot elections, the Board before and after *Gissel* generally has accepted card checks as an equivalent alternative. In *The Carnation Company*, the Board observed that:

The Board has long recognized card check agreements with approval. The Board holds that an employer who agrees to such a procedure is bound to follow through with its agreement and is further bound to recognize a union which demonstrates a valid majority during the agreed upon card check process.

The Carnation Co., 1900 NLRB LEXIS 947, at *9-10 (1990); *see also Verizon Info. Sys.*, 335 N.L.R.B. 558 (2001).

On the other hand, in *Wallace Metal Products*, 199 N.L.R.B. 819 (1972), the Board, without discussing the issue, adopted the finding of an ALJ that the employer did not violate the Act when it refused to comply with a card check agreement. The ALJ observed that *Gissel* involved a situation where an employer's unfair labor practices made the holding of a fair election impossible. The ALJ discussed at great length the problems with card checks and held that:

[T]he election is so superior to a card check in determining employee choice that the card check should only be used where the employer's unfair labor practices have severely limited or have made impossible the holding of a fair election.

Wallace Metal Products, 199 N.L.R.B. at 833. The ALJ concluded that because the primary concern of the Board should be the determination of employee desires, the fact that the employer breached the card check agreement was of little relevance.

Addressing the issue of whether the rejection of card check agreements would affect cooperation between unions and employers, the ALJ concluded:

Nor will such a position as we have submitted mean an end to "voluntarism" in dealings between employers and unions. If, at the time, the parties have the disposition to enter into a card check agreement, this disposition should be the same with respect to entering into an agreement for a consent election, *unless either the Union or the Company, or both, have some motives in mind other than the desire to afford the employees their choice of a union or not in a secret ballot election.*

Id. at 834 (emphasis added). The concerns raised by the ALJ in *Wallace Metal Products*, mirror some of those raised by the current Board in the *Dana/Metaldyne*.

D. The Nature of Neutrality And Card Check Agreements

Regardless of the campaign or area in which they are used, certain provisions are common to almost all neutrality and card check agreements. These common provisions seek to avoid components of the law that unions find offensive. The provisions include:

- *The waiver of the right to a secret ballot election.* Despite Congressional and Board recognition of the importance of a secret ballot election, the agreements seek to prevent the employer or its employees from accessing the Board's election process. In an ironic twist, the unions argue that a secret ballot election opens the process to abuse and coercion.
- *The right of access to the employer's premises.* Historically, unions have been frustrated in their attempts to reach recalcitrant employees by the Supreme Court's rulings that an employer's property rights need not give way to organizing rights of unions except in extreme circumstances. Not only does the right of access provide unions with the ability to find and pressure employees in the workplace, it also sends a not so subtle message that the employer favors unionization.
- *The restriction on employer free speech rights.* Section 8(c) of the Act expressly protects the employer's right to educate employees during a union election campaign. Evidence demonstrates that when an employer provides employees with information to counter union propaganda, unions generally lose elections. Through neutrality agreements, unions seek to disable employers so that employees are exposed only to the union's message.

What is conspicuously absent from just about every neutrality and card check agreement is any rules governing the conduct of unions. Because these agreements circumvent the NLRB and its process, the result is that the union's conduct in neutrality and card check agreements is effectively unsupervised. While the Board's unfair labor practice process is theoretically available to address problems, individual employees rarely have the resources to engage in Board litigation and an employer that has agreed to a neutrality agreement will be disinclined to do so.

Neutrality and card check agreements present the opportunity for significant union abuse because the agreements are largely unregulated. Numerous cases demonstrate that unions are not beyond using threats and intimidation to achieve their ends. For example, in *Lamar Advertising of Jainesville*, 340 N.L.R.B. No. 114, 2003 WL 22508072 (2003), a union business manager's told an employee the morning of the election to "think long and hard about his vote because the Union [would] be the one making his wages. . . ." *see also Aircap Manufacturers*, 287 N.L.R.B. 996 (1988) (union threatened employees and engaged in other misconduct). Misrepresentations also are part and parcel of many union attempts to obtain cards. *See Fort Smith Outerwear, Inc. v. NLRB*, 499 F.2d 223 (8th Cir. 1974) (cards represented as being solely for the purpose of obtaining an election); *Nissan Research & Development Inc.*, 296 N.L.R.B. 598 (1989) (same); *The Holding Co.*, 231 N.L.R.B. 383 (1977) (same). Neutrality and card check agreements provide no mechanisms for employees to report those abuses, much less prevent them.

V. ARGUMENT

A. The Use of Neutrality Agreements and Card Checks by a Mixed Union Constitutes an Unreasonable Interference with Employee Section 7 Rights

Regardless of their validity in other contexts, the Board should conclude that neutrality and card check agreements are unlawful in the guard employee context. Any procedure that facilitates organization of guard employees by mixed unions runs counter to the intent of Congress as expressed in section 9(b)(3). In addition, neutrality and guard check agreements are an unreasonable restriction on guard employees' section 7 rights.

In *NLRB v. Jones & Laughlin Steel Corp.*, 53 N.L.R.B. 1046 (1943), the Board rejected the Employer's argument that the bargaining unit was inappropriate because it included plant guards. *Id.* at *13. The Sixth Circuit denied enforcement of the Board's order, based on what it saw as serious conflicts of interest that would be created because guards in mixed-guard unions

owe duties to their employers and communities, and to the unions in which they belong. *NLRB v. Jones & Laughlin Steel Corp.*, 154 F.2d 932, 935 (6th Cir. 1946). The court stated that when guards become members of mixed-guard unions, they “assume[] obligations to the unions and their fellow-workers which might well, in given circumstances, bring them in conflict with their obligation to their employers and their paramount duty as militarized police of the United States Government.” *Jones & Laughlin Steel Corp.*, 154 F.2d at 933. The Supreme Court reversed the Sixth Circuit, holding that the guards were employees under the Act and entitled to selection of a bargaining agent representing non-guard employees. *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 431 (1947).

Congress reacted quickly to the Supreme Court’s decision, enacting section 9(b)(3) to prohibit the Board from certifying unions that admitted both guard and non-guard employees to membership (*i.e.*, a mixed union) as the representative of a bargaining unit of guards. 29 U.S.C. § 159(b)(3). Both the House and Senate agreed that it was inappropriate for guards to be represented by a mixed union because of the loyalty concerns raised by the Sixth Circuit in *Jones & Laughlin Steel Corp.* Conference Report No. 510 on H.R. 3020, 80th Cong., 1st Sess. 48 (1947). Congress chose broad language to encompass “not merely divided loyalties at a company plant, but the potential for divided loyalty that arises whenever a guard is called upon to enforce the rules of his employer against any fellow union member.” *Truck Drivers Local Union No. 807 v. NLRB*, 755 F.2d 5 (2d Cir. 1985). As Senator Taft explained, guards “could have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees.” Congressional Record, Senate—June 5, 1947, at 1544.

The application of neutrality and guard check agreements in the guard context would create an extra-statutory procedure designed to circumvent this expression of Congressional

intent. While the Act appears to permit the voluntary recognition of guard unions, it is completely silent as to the legitimate actions unions may take to obtain to procure such recognition. Whatever the validity of other forms of voluntary recognition, the contractual obligation to recognize a union through a neutrality and card check agreement, often procured through the application of economic pressure, clearly is contrary to Congressional intent.

The Board is not free to ignore this Congressional intent when fashioning any rules or procedures governing mixed-union representation of guards. *Woodlawn Farm Dairy Co.*, 162 N.L.R.B. 48, *70 (1966) (“Board policy is to effectuate wherever possible, the intent of Congress”). As the Board observed in *Electromation, Inc.*:

Whenever we are attempting to determine the application of the statute to particular facts, we must first determine whether the statutory language standing alone answers the question. Here, we cannot properly limit our analysis to the statutory language because the terms are not all self-defining We therefore seek guidance from the legislative history to discern what kind of activity Congress intended to prohibit. . . .

309 N.L.R.B. 990, 992 (1992).

In evaluating the lawfulness of card check and neutrality agreements, the Board should adopt rules and policies that give effect to the expressed statutory disfavor of mixed unions. The Board itself has observed that section 9(b)(3), and the underlying Congressional intent, was to prevent such compulsory recognition of mixed unions. *See The Wackenhut Corp.*, 287 N.L.R.B. 374, 376 (1987) (a mixed union “may do no more than ask . . . for . . . recognition” and “when an employer refuses recognition, the union may press its case no further.”). If the Board permits neutrality and card check agreements in the guard context, it would effectively allow the unions to accomplish by contract what they are prohibited from accomplishing by statute. The Board should not permit this result.

Neutrality and card check agreements in the mixed-union setting also unlawfully interfere with guard employees' section 7 rights because guard employees cannot obtain an election to test the majority claims of a mixed-union. In its order granting review, the Board expressed concern that the recognition bar prevented employees from obtaining an election to test a union claim of majority support based on a card check. *Dana/Metaldyne*, 2004 NLRB LEXIS 300, at *2 (June 7, 2004). If the Board determines in *Dana/Metaldyne* that protection of employee choice requires granting employees access to the Board's election process, that rationale should apply equally to guard employees. In the non-guard context, the Board easily can remedy the problem by waiving its recognition bar policy. That solution would not be a complete solution in the mixed-union context because section 9(b)(3) effectively bars many elections.

Finally, given the limited rights afforded to mixed unions under the Act, card check agreements in the guard context constitute an unreasonable restriction on employee section 7 rights. The Board has held that it will reject agreements between an employer and a union that unreasonably interfere with employee rights. *See Briggs Indiana Corp.*, 63 N.L.R.B. 1270, 1272 (1945). In *Briggs Indiana*, the Board reviewed whether a union's agreement not to represent plant guards for 12 months violated section 8(3) of the Act. *Id.* at 1272-73. The Board enforced the agreement because the agreement was for a "reasonably short period" and therefore did not unreasonably restrict employee rights. *Id.* *See also Lexington Health Care Group, LLC*, 328 N.L.R.B. 894, 897 (1999) (enforcing contract in which a union agreed not to represent employees at one of the employer's facilities for 12 months). In the 9(b)(3) context, any procedure that facilitates representation of guards by a mixed-union arguably unreasonably interferes with employee section 7 rights.

In addition to being unable to test a mixed union's claim of majority support through an election, guards represented by a mixed-union become have significantly diminished rights. *Truck Drivers Local Union No. 807 v. Wells Fargo Armored Serv. Corp.*, 755 F.2d 5, 10 (2d Cir. 1985) (quoting *NLRB v. White Superior Div., White Motor Corp.*, 404 F.2d 1100, 1104 (6th Cir. 1968) ("Although members of a mixed guard union have certain rights under the Act, "the policy of § 9(b)(3) dictates that such membership not bestow all the benefits normally associated with belonging to a labor organization.")). Most importantly, a mixed union representing guards maintains its status as the exclusive bargaining representative at the complete discretion of the employer. *Wells Fargo Armored Serv. Corp.*, 270 N.L.R.B. 787 (1984). The result, as recognized by the Second Circuit is that, "[t]he proscription against certification of mixed guard unions therefore means that there is little sense in an employee remaining a member of such a union." *Truck Drivers Local Union No. 807*, 755 F.2d at 10.⁴

A neutrality agreement also prevents guard employees from fully understanding the disadvantages of being represented by a mixed union. To the contrary, it is reasonable to assume that guard employees would have an understanding of general labor law principles that are not applicable to their situation. Employer participation in this context is critical because it is highly unlikely that a mixed union will be forthcoming about its inability to fully represent guard

⁴ In *General Service Employees Union, Local No. 73*, the Seventh Circuit disagreed with the Second Circuit's holding in *Truck Drivers Local Union No. 807*, 755 F.2d 5 (2d Cir. 1985). The Seventh Circuit held that an employer, having voluntarily recognized a mixed guard union, could not unilaterally terminate the relationship at the expiration of the contract term. *General Service Employees Union, Local No. 73 v. NLRB*, 230 F.3d 909, 915-16 (7th Cir. 2000). The Court did note, however, that "voluntary recognition does not permanently lock the parties into their relationship. An impasse in good-faith bargaining, or a showing, after a reasonable time, of minority rather than majority support, will both allow an employer to end its pairing with a recognized representative (whether that recognition began voluntarily or through more formal processes)." *Id.* at 916.

employees. To the contrary, in the attempts by the Service Employees International Union to organize guards, Jono Shaffer, director of SEIU's national security organizing campaign, stated that the conflict of interest created by mixed guard unions is a "smokescreen" and a "false issue." Nancy Cleeland, *Surprising Opposition to Effort to Organize Guards*, Los Angeles Times, June 4, 2004. Because a neutrality agreement would prevent employees from learning about the unique disadvantages of mixed-unions, such an agreement arguably is an unreasonable interference with employee rights.

In sum, section 9(b)(3) contains unique attributes that require separate consideration in determining the lawfulness of neutrality and card check agreements. Regardless of how the Board treats these agreements in the non-guard context, they arguably should be prohibited under section 9(b)(3).

B. Neutrality and Card Check Agreements Constitute Impermissible Interference With Employee Section 7 Rights

1. Neutrality Agreements Are Inconsistent with the Board's Reliance on Employers to Counterbalance Union Propaganda

One of the primary duties of to the Board under the NLRA is to determine whether an uncoerced majority of employees seek to be represented by a union.⁵ The Act mandates that the Board to insure that the selection of representatives reflects the uncoerced decision of a majority

⁵ The Administrative Procedure Act ("APA"), "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). Administrative agencies are "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *FCC v. Schreiber*, 381 U.S. 279, 290 (1965). While the Board has discretion in developing the rules and processes by which it will fulfill its duty, it must demonstrate that any framework it adopts is consistent with its statutory mandate. *Northwest Res. Info. Ctr. v. Northwest Power Planning Council*, 35 F.3d 1371, 1387 (9th Cir. 1994) (stating agency must "adopt program measures that are consistent with the purposes of the Act" it administers); *Malone v. Bureau of Indian Affairs*, 38 F.3d 433, 437 (9th Cir. 1994) (stating "the duty of the court . . . is to keep the agency within the bounds of its delegated authority. . .").

of employees. *See Gissel Packing Co., Inc.*, 395 U.S. at 607 (observing the obligation of the Board to insure employee choice when reviewing challenges to authorization cards). Because the Board has chosen to fulfill this mandate by enabling an open debate between employers and unions, neutrality agreements interfere with employee section 7 rights.

The Board's reliance on an open debate as the vehicle for protecting employee rights is the direct result of the rejection by Congress of the position that employers did not have a role to play in representation proceedings. Early on in its administration of the Act, the Board adopted two key principles governing the role of employers in elections:

First, that every appeal by an employer in opposition to unions violated the Wagner Act provision against interference, restraint, and coercion because it inevitably created a fear in the minds of employees that the employer would use economic power against those who disregarded the employer's expressed desires. Second, that the choice of a bargaining representative was the exclusive concern of the employees and that the employer did not possess an interest sufficient to permit to intrusion.

NLRB Practice Manual, Section 24-210. In furtherance of these principles, the Board created a statutory obligation of absolute neutrality by the employer.

Congress found that the Board's administration of the Act "subjected literally millions of workers to control by labor unions notwithstanding that the employees did not wish the unions to represent them. . . ." House Conference Rept. No. 510, on H.R. 3020, at 298. Congress addressed this imbalance in the 1947 Taft-Hartley Amendments to the NLRA by amending section 7 of the Act to expressly preserve the right of employees to refrain from engaging in section 7 activities:

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

refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Congress also believed that the Board's restriction on employer speech improperly interfered with the First Amendment rights of employers. Accordingly, Congress added section 8(c), which provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c). As the Supreme Court observed in *Linn v. United Plant Guard Workers*, “the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management.” *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 62 (1966).

It was in the context of these amendments that the Board developed the principles by which it fulfills its duty to protect employee free choice. Shortly after the Taft-Hartley amendments, the Board made clear that its *only* consideration in elections is “for freedom of choice by employees as to a collective bargaining representative.” *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948); *see also Van Dorn Plastic Mach. Co. v. NLRB*, 736 F.2d 343, 347 (6th Cir. 1984) (“[T]he purpose of any rule relating to representation elections is to insure that employees have an opportunity to make a free and fair choice, that their right under section 7 of the Act, to bargain collectively through representatives of their own choosing, is preserved.”). The Board recognized that “[a]n 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.” *General Shoe Corp.*, 77 N.L.R.B. at 126.

In the decades since the Taft Hartley amendments, the Board consistently confirmed that it would rely on the parties to educate and protect employees. For example, in *Babcock & Wilcox*, the Board held that the critical need for employees to obtain information trumped the employer's property rights. *Babcock & Wilcox Co.*, 109 N.L.R.B. 485, 493 (1954).

It is clear that employees cannot realize the benefits of the right to self-organization guaranteed them by the Act, unless there are adequate avenues of communication open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization, *and may have opportunities for the interchange of ideas necessary to the exercise of their right to self-organization.*

Id. (emphasis added). Consequently, the Board in *Babcock & Wilcox* ordered the employer to allow the union to distribute information on the employer's property. *Id.* 486.

Although the Supreme Court found that the Board went too far in granting the union access to the employer's property, it agreed with the Board's conclusion that the right to organize required that employees receive information about representation. The Court stated:

The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property.

NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956); *see also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533-34 (1992) ("Where the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, employers' property rights may be required to yield to the extent needed to permit communication of information on the right to organize.") (internal quotes and citations omitted).

The need for employees to receive information from both sides also is the underpinning for the Board's order in *Excelsior Underwear* that the employer provide the union with the contact information of its employees. 156 N.L.R.B. 1236 (1966). The Board reasoned that:

[W]ithout a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view. . . . In other words, by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation.

Id. at 1240 (footnotes omitted and emphasis added).

The critical importance attached by the Board to employees obtaining the views of all parties is further evident in its reluctance to impose limitations on the parties. The Board has recognized that cases involving speech are to be considered “against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant sharp attacks.” *Linn v. United Plant Guard Workers*, 383 U.S. at 62. The Board has adhered to the principles of robust debate envisioned by Congress even while recognizing that such debate could result in “exaggerations, inaccuracies, partial truths, name-calling, and falsehoods.” *Gummed Prods. Co.*, 112 N.L.R.B. 1092 (1955); *see also Calanese Corp. of America*, 121 N.L.R.B. 303, 306 (1958); *see also NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946) (observing that elections present the “ever-present dangers of abuse and fraud”).

Because it believes employees will be adequately protected by this robust debate, the Board has refused to “police the details surrounding every election.” *General Shoe Corp.*, 77 N.L.R.B. at 126; *see also Maywood Hoisery Mills, Inc.*, 64 N.L.R.B. 146, 150 (1945) (stating it

is not the Board' function to police election propaganda). According to the Board, its refusal to police all election conduct and propaganda is consonant with Congress' intent to "reduce . . . the Board's ability to restrict speech by enacting Sec. 8(c)." *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 129 (1982).⁶

If the Board's precedent regarding the proper role of the employer is to have any meaning, it must find that neutrality agreements attest as currently configured, are impermissible.

As the Supreme Court observed:

[T]he Board does not police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements.

Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. at 60 (quoting *Stewart-Warner Corp.*, 102 N.L.R.B. 1153, 1158 (1953)) (internal quotes omitted).

The Board has repeatedly affirmed its reliance on the opposing parties ability to "correct inaccurate or untruthful statements by any of them." *Midland Nat'l Life*, 263 N.L.R.B. at 129; *see also N.P. Nelson Iron Works, Inc.*, 78 N.L.R.B. 1270, 1271 (1948) ("[W]e refer to opposing parties the duty of correcting inaccurate or untruthful statements by any of them."); *Carrollton*

⁶ In *Hollywood Ceramics Co., Inc.*, 140 N.L.R.B. 221 (1962), the Board held that it would review misrepresentations that "involve[] a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply. . . ." *Id.* at 224. In *Shopping Kart Food Mkt., Inc.*, 228 N.L.R.B. 1311, 1313 (1977), the Board reversed *Hollywood Ceramics* and held that it would intervene only "where a party has engaged in such deceptive campaign practices as improperly involving the Board and its processes, or the use of forged documents which render the voters unable to recognize the propaganda for what it is." *Shopping Kart*, 228 N.L.R.B. at 1314. After a brief return to the *Hollywood Ceramics* standard, the Board returned to its *Shopping Kart* principle in *Midland Nat'l Life Ins. Co.*, 236 N.L.R.B. 127 (1982). Some courts have disagreed with the Board's *Shopping Kart*/*Midland Nat'l* standard on the grounds that it is not sufficiently protective of employee section 7 rights. *Van Dorn Plastic Mach. Co.*, 736 F.2d 343, 348 (6th Cir. 1984); *NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726 (1st Cir. 1983).

Furniture Mfg. Co., 75 N.L.R.B. 710, 712 (1948) (“There is no real danger . . . in referring to the opposing parties the duty of correcting inaccurate or untruthful statements by any of them.”); *Gouzoule*, 117 N.L.R.B. 1026, 1028 (1957) (“The Board leaves it to the opposing party to correct and to the employees themselves to evaluate the distortions, untruths, and half-truths which frequently accompany election campaigns.”). This refusal by the Board to engage in far-ranging investigations of campaign communications is sustainable as an adequate protection of employee rights only if the employer is providing the protective function assigned to it by the Board.

The significance of this open debate to Board policy protecting employee rights is underscored by decisions that evaluate the offensiveness of statements based on whether an opposing party has an opportunity to respond. Even those cases that have considered whether campaign misstatements interfered with employee choice have found a violation only when an opposing party was denied an opportunity to respond. For example, in *Gouzoule*, the Board held that a union’s misrepresentation concerning rates of pay interfered with employee choice because the employer did not have time to correct the misrepresentation. *Gouzoule*, 117 N.L.R.B. at 1026-29; *see also Kawneer Co.*, 119 N.L.R.B. 1460 (1958) (setting aside election because employer had “insufficient time to learn of and point out” misstatements in union propaganda); *The Lundy Packing Co.*, 124 N.L.R.B. 905, 907-08 (1959) (refusing to overturn election where employees “had ample opportunity to verify or seek more information from the [employer]”). In *NLRB v. St. Francis Healthcare Ctr.*, 212 F.3d 945 (6th Cir. 2000), the court trivialized the employer’s threats regarding the effects of unionization because the statements were made “almost two months before the election, giving the Union ample opportunity to respond.” *Id.* at 957.

In sum, any process that prevents employees from obtaining information the Board has found necessary to employee choice necessarily interferes with employee section 7 rights. As currently used by unions, neutrality agreements prevent employers from serving as a counterbalance to Union propaganda that the Board repeatedly has held necessary to protect employee rights. Unless the Board is prepared to overturn decades of precedent based on the principles of open debate, the Board cannot fulfill its statutory duty to protect employee rights by relying on employers to correct union misstatements without also prohibiting neutrality agreements.⁷

2. Card Check Agreements Interfere with Employee Free Choice.

Card check agreements also are suspect under Board law protecting the right if employees to make a representation decision free of coercion. The fundamental problem is that the card in a card check serves as a proxy for a ballot without providing employers with any of the protections for employees that accompany election ballots. *See Montgomery Ward & Co., Inc. v. NLRB*, 668 F.2d 291, 303 (7th Cir. 1982). Existing Board law provides no reasoned basis for distinguishing an election ballot from a card where that card is used as a proxy for a ballot.

⁷ While it may be possible to address the current problems with neutrality agreements without outlawing such agreements entirely, any such solutions would require the Board to be involved in the campaign at such a level that would create the precise situation that the Board has historically rejected as impractical. Neutrality agreements may be less offensive to employee section 7 rights if they are sufficiently limited in scope so that employees can obtain necessary information. For example, if a neutrality agreement limits only statements of opinion, and permits the dissemination of factual information, it arguably does not restrict the employees' ability to make an informed decision. In such case, the Board is likely to be called upon to evaluate what constitutes a permissible "factual" communication. Alternatively, the Board simply may decide to evaluate the quality of the information actually received by employees in campaigns where neutrality agreements are in place to insure that employees received adequate information. Ultimately, these solutions would require the extensive monitoring of speech that the Board has rejected.

In its seminal *General Shoe* decision, the Board stated that “[a]n election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammelled choice for or against a bargaining representative.” *General Shoe Corp.*, 77 N.L.R.B. at 126. The Board concluded that those conditions could prevail only by providing a “laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.” *Id.*; see also *Systems West LLC*, 2003 NLRB LEXIS 198, at *61-62 (2003) (holding laboratory conditions “are required for the unfettered selection of a bargaining representative”). Conduct that violates the laboratory conditions interferes with employee choice. See *General Shoe Corp.*, 77 N.L.R.B. at 126-27.

The Board consistently has found that any conduct that places external pressure on employees violates laboratory conditions. For example, the 24 hour rule prohibits “captive audience” speeches by employers and unions in the 24 hours prior to an election. *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953).

The rule was enacted to prevent last-minute speeches from having an unsettling effect and interfering with a free election. Such tactic is an unfair advantage to the party having the last word and makes no difference whether the remarks have coercive effect or not if addressed to employees gathered on company time.

NLRB v. Excelsior Laundry Co., 459 F.2d 1013, 1014 (10th Cir. 1972). The Board found that the mere “delivery of such speeches on the eve of the election tend to destroy freedom of choice and establish an atmosphere in which a free election cannot be held.” *Peerless Plywood Co.*, 107 N.L.R.B. at 429.

In *Kalin Construction*, the Board expanded *Peerless Plywood* to written messages distributed to employees within 24 hours of the election. *Kalin Constr. Co., Inc.*, 321 N.L.R.B. 649, 652 (1996). Once again, the Board found that the distribution of the message, without

more, has “an unsettling effect on employees and disturb the laboratory conditions necessary for a fair election.” *Id.* at 652. The Board concluded that it was necessary to outlaw such activities in order to protect employee choice. *Id.* at 652 (1996).

Similarly, during secret ballot elections, the Board “prohibit[s] electioneering by either party at or near the polling place.” *Peerless Plywood Co.*, 107 N.L.R.B. at 430. The Board’s Representation Manual states:

No electioneering will be permitted at or near the polling place during the hours of voting, nor should any conversation be allowed between an agent of the parties and the voters in the polling area, or in the line of employees waiting to vote. Indeed, agents of the parties (other than observers) should not be allowed in the polling area during election hours.

NLRB Representation Case Handling Manual (II), Section 11326. The Board has concluded that the mere presence of officials from either the employer or union in the polling area “interfere[s] with employees’ freedom of choice in the election.” *Performance Measurements Co., Inc.*, 148 N.L.R.B. at 1658-59; *Michem, Inc.*, 170 N.L.R.B. 362, 363 (1968).

The Board also has made it clear that an employee cannot make an uncoerced choice if his or her representation decision is known. *See General Shoe Corp.*, 77 N.L.R.B. at 126; *see also Western Elec. Co., Inc.*, 87 N.L.R.B. 183, 185 (1949) (“in the absence of excessive acts employees can be taken to have expressed their true convictions in the secrecy of the polling booth.”). Secrecy of a ballot is of such great importance under Board law that the Board will overturn an election based only on the appearance that the requisite secrecy has been breached. For example, in *Tidelands Marine Services*, the Board set aside a secret ballot election because the ballot box was not sealed before it was transported by the Board agent. 116 N.L.R.B. 1222 (1956). While there was no evidence of tampering with the ballots either by the Board agent or

by third parties, the Board held that the failure to seal the ballot box brought into question the secrecy of the ballots and the integrity of the secret ballot election. *Id.* at 1223-24.

The Board goes to great lengths to assure employees that their decisions are anonymous.

For example, the Board's election notice assures employees that:

[O]nly the Agent handled the blank ballots and only *you* handled your marked ballot. Once your marked ballot is in the ballot box it becomes mixed with all other ballots in the box and cannot be identified. *No one can determine how you have voted.*

See www.nlr.gov (http://www.nlr.gov/nlr/shared_files/brochures/election.asp) (emphasis in original).

The Board's treatment of mail ballot elections is instructive as mail ballots are similar to cards in that they are completed by the employee at a location other than the ballot box. Even in the case of mail ballots, the Board goes to great lengths to insure that mail ballots receive as much of the protections of the ballot box as possible. For example, because mail ballots are in the possession of employees for an extended period of time, the Board extends the *Peerless Plywood* 24 hour rule to the entire time from when the ballots are mailed until the date set for their return. *Oregon Washington Tel. Co.*, 123 N.L.R.B. 339, 341 (1959). The Board also seeks to insure secrecy of the mail ballots. In *Fessler & Bowman, Inc.*, 2004 NLRB LEXIS 241 (2004), the Board held that the mere collection of sealed envelopes containing ballots by the union cast "doubt on the integrity of the election and undermine[d] election secrecy," even absent evidence of tampering.

All these cases make clear the Board's view that employees cannot make an uncoerced choice if the employer of the union even appear to have knowledge of an employee's choice.

Yet, card check agreements which rarely, if ever, provide the conditions that the Board has found are critical to employee free choice, even where the card is a proxy for a ballot. Quite simply, no

rational basis exists for treating election ballots and cards differently where they serve the identical purpose – the selection of a representative. If the mere presence of a union official in the polling area is enough to disturb the conditions necessary for an employee to cast a valid ballot then certainly that same employee cannot make a valid choice to sign a card when a union official is observing and speaking with the employee as s/he completes a card. Similarly, if a ballot is compromised by the mere suggestion that a union official had access to the ballot, the collection and control of cards that serve as a ballot by union officials are no less offensive to employee choice. *See, e.g., HERE v. Marriott Corp.*, 961 F.2d 1464, 1465 n.1 (9th Cir. 1992) (union typically distributes and collects cards).

The anonymity required for free choice is deliberately absent in a card check, where a union official either is present at the time an employee signs the card or collects a card that identifies the employee by name. *See, e.g., Justak Bros. & Co., Inc. v. NLRB*, 664 F.2d 1074, 1081 (7th Cir. 1981) (union obtained authorization cards at the end of a three hour union meeting). It is difficult to reconcile the Board's refusal to allow a union agent to handle a mail ballot, even when the mail ballot is sealed and the vote of the employee cannot be discerned, with that same agent's right to collect a card that is the functional equivalent of the ballot. If the Board's position on secret ballots means anything, then allowing unions control over votes cast by cards must interfere with employee choice.

Where a card is a proxy for a ballot, as it is in a card check agreement, there simply is no reason for the Board not to provide employees with the protections it had deemed necessary to free choice. The card check agreement differs significantly from circumstances where the card is merely the vehicle to an election. In those cases, regardless of how a union obtained a card, employees always retained the option of indicating their true desire in an election. In *Springfield*

Hosp., 281 N.L.R.B. 643, 693 (1986), the board found lawful union polling of employees on the ground that the polling would not influence voting during a secret ballot election. *See Id.* at 692-93; *Randell Warehouse of Arizona, Inc.*, 328 N.L.R.B. 1034, 1036, n.8 (1999). (“Unions, of course, may ask employees to sign authorization cards or some other record of support and, indeed, a union must submit evidence of such support before it may invoke the Board’s election machinery--the formal mechanism by which employees’ preferences are determined.”).⁸ Not surprisingly, the ability of employees to express their true desires at the ballot box is one of the employee protection that card checks agreements are designed to eliminate.

Ultimately, when viewed in the context of the protections that the Board has found necessary to a secret ballot election, the use of card checks as equivalent to a ballot, without affording employees equivalent protections, clearly fails to protect employee rights. That was precisely the conclusion of the ALJ in *Wallace Metal Products*, who found that allowing a card check to substitute for the Board election process without any protections for employees would be inconsistent with the Board’s primary role of protecting employee rights. 199 N.L.R.B. at 834.

The dissent in this case sought to address these concerns by arguing that the unfair labor practice provisions of the Act are available to address any issues. *Dana/Metaldyne*, 2004 NLRB LEXIS at *9. However, this argument does not address the inconsistency between election and

⁸ Card checks may be consistent with the Act if the process adopted by the parties afforded employees with the same protections as in a secret or mail ballot election. However, it is unclear what benefit would accrue to the union or the employer pursuant to such a process. As the ALJ in *Wallace Metal Products* observed, because a consent election supervised by the Board is readily available to the parties, card checks serve little purpose other than to avoid protections granted employees. *Wallace Metal Products*, 199 N.L.R.B. at 834. The fact that an employer and union would seek a card check, rather than a consent election, would suggest that they gain something at the expense of the employees. Thus, the absence of a clear benefit to employees of card check agreements, the Board should not permit such agreements.

card check law. The ability to initiate an unfair labor practice proceeding has little meaning if conduct that is a *per se* violation in the election process is considered inoffensive in a card check. Moreover, such a sweeping argument would obliterate the decades of Board precedent developed under General Shoe that deals specifically with the heightened protection for employees in the selection of a representative.

In addition, the cases approving card checks themselves are based on questionable assumptions or rejected principles. For example, many of the cases approving card checks either cite or refer back to the Board's decision in *Snow & Sons*, 134 N.L.R.B. 709, 710 (1961), which ordered an employer to bargain based on a card check. *See, e.g., Verizon Info. Sys.*, 335 N.L.R.B. 558, 559 (2001); *The Carnation Co.*, 1990 NLRB LEXIS 947, at *9-10 (1990); *Houston Div. of Kroger Co.*, 219 N.L.R.B. 388, 389 (1975); *Summersville Indus. Equip. Co.*, 197 N.L.R.B. 731, 735 (1972). The *Snow* case, however, based its approval of card checks on the now discredited theory that an employer has no right to demand an election if it "entertains no reasonable doubt either with respect to the appropriateness of the proposed unit or the Union's representative status" *Id.*; *see Gissel*, 395 U.S. at 595-96, n.11; *Wallace Metal Products*, 199 N.L.R.B. at 834. *Snow & Sons* is one of the cases relied upon by the dissent in this case. *Dana/Metaldyne*, 2004 NLRB LEXIS 300, at *10.⁹

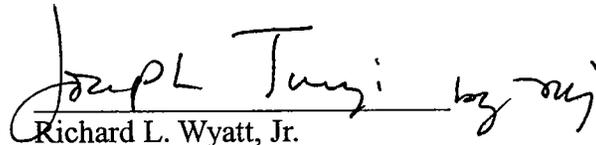
⁹ Other cases stand for the hardly remarkable proposition that once an employer voluntarily recognizes a union it is obligated to bargain with the union. *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 751 (1981) (employer's refusal to bargain, after voluntary recognition, violated 8(a)(5)); *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978) (employer violated 8(a)(5) by refusing to bargain with union after employer voluntarily recognized union); *NLRB v. Montgomery Ward & Co.*, 399 F.2d 409, 410-11 (7th Cir. 1968) (employer violated 8(a)(5) when it refused to bargain with union after voluntary recognition); *Rockwell Int'l Corp.*, 220 N.L.R.B. 1262, 1263 (1975) (employer's voluntary recognition barred employee decertification petition). While the recognition in each of these cases was based on a card check,

Neither the statute nor Board law appears to authorize a card check process that does not adequately protect employee choice. Thus, at a minimum, where the card check process displaces the Board's election process, the Board should adopt procedures similar to its election procedures to insure employee free choice is protected.

VI. CONCLUSION

For the foregoing reasons, the Board should hold that in the unique context of 9(b)(3), mixed unions may not use neutrality and card check agreements to organize guard employees. In addition, the Board should hold that neutrality and card check agreements interfere with employee rights to information and to make an uncoerced choice, in violation of Sections 8(a)(2) and 8(b)(1)(A).

Respectfully submitted,



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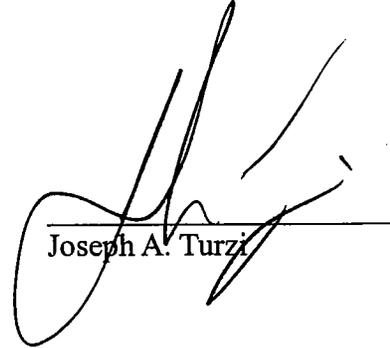
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July 16, 2004

none involved the use of a card check agreement which prevented the employer from testing the union claim of majority support through an election.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 2004, a true and correct copy of the foregoing Brief of Amicus Curiae Allied Security was served by U.S. first class mail, postage prepaid, to the parties listed on the attached service list.



Joseph A. Turzi