

Congress of the United States  
Washington, DC 20515

July 15, 2004

The Honorable Lester A. Heltzer  
Executive Secretary  
National Labor Relations Board  
1099 14th Street, N.W.  
Washington, DC 20570

Re: Dana Corporation, et al.,  
Case No. 8-RD-1976  
Metaldyne Corporation, et al.,  
Case No. 6-RD-1518, 1519

Dear Mr. Heltzer:

We are writing in response to the National Labor Relations Board's ("the NLRB's" or "Board's") June 14, 2004, invitation to file *amicus* briefs in the above-captioned cases. Please accept this letter brief as our strong statement of support for the Board's longstanding rule that voluntary recognition of a union based on demonstrated majority status will bar a decertification petition for a "reasonable" period of time, regardless of whether or not the employer has previously agreed with the union to grant recognition upon proof of majority support. A contrary determination by the Board would undercut the Act's dual goals of protecting employees' freedom of choice in selecting and designating their bargaining representative, and promoting stable collective bargaining relationships. Moreover, an abandonment of this rule would reverse decades of the agency's own, as well as Federal court, precedent supporting voluntary

recognition, and would undermine the Act's encouragement of voluntary recognition, so as to effectively usurp Congress' exclusive authority to amend the NLRA.

## INTRODUCTION

To protect employee free choice through self-organization and to promote stable, peaceful collective bargaining relationships, the National Labor Relations Act ("NLRA" or "the Act") has, from its inception, authorized employers and employees to enter into bargaining relationships voluntarily. These relationships enjoy the same stature as relationships formed through the election process. To effectuate this endorsement of voluntary recognition, the Board has long granted parties "a reasonable period of time" to establish their new relationships, during which they may bargain free from the threat of disruption by decertification petitions. *See, e.g., Keller Plastics Eastern*, 157 NLRB 583, 587 (1966) ("*Keller Plastics*"). A reversal of this longstanding rule would undermine the stability of newly established collective bargaining relationships, and leave the choice already made by a majority of employees open to immediate attack by a minority of employees – a result patently contrary to the fundamental democratic principles of the Act.

### I. THE LEGISLATIVE HISTORY OF THE ACT DEMONSTRATES CONGRESSIONAL INTENT TO ENCOURAGE VOLUNTARY RECOGNITION OF UNIONS UPON A SHOWING OF MAJORITY SUPPORT.

It is well established that the NLRA authorizes an employer to voluntarily recognize a union so long as a majority of its workers have chosen the union as their designated bargaining representative. The Act states that "[r]epresentatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representative of all the employees in the unit." NLRA §

9(a), 29 U.S.C. § 159(a). The Act lays out a process for Board-conducted elections, but does not require such Board certification to establish an employer's collective bargaining obligation. *See* NLRA § 9(c), 29 U.S.C. § 159(c). Rather, the employer's obligation to bargain is triggered whenever a majority of employees designate or select a representative. *See* NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5).

The legislative history of the Act additionally demonstrates Congress' clear intent that a bargaining relationship established pursuant to voluntary recognition be afforded the same degree of stability as a relationship established pursuant to Board involvement. When Congress first considered the Taft-Hartley Act of 1947, the original House bill would have required that an employer bargain only with "representatives of his employees currently recognized by the employer or certified as such under Section 9." *See* H.R. 3020, 80<sup>th</sup> Cong., 1st Sess. (1947) as reprinted in *Legislative History of the Labor Management Relations Act, 1947*, prepared for the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, 93d Cong. 2d Sess. [hereinafter *Legislative History of the LMRA, 1947*], 31-98, at 51 (1974).

As the initial House report explained:

Under this language, if an employer is satisfied that a union represents the majority and wishes to recognize it ... under section 9, he is free to do so as long as he wishes, but as long as he recognizes it, or when it has been certified, he must bargain with it. If he wishes not to recognize an uncertified union, or, having recognized it, stops doing so, the union may ask the Board to certify it under section 9.

H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947) as reprinted in *Legislative History of the LMRA, 1947*, 292-354, at 321. In other words, under the proposed language of the House bill, although an employer would be statutorily required to bargain with a union that was

certified by the Board, an employer that voluntarily recognized a union would be free to withdraw recognition at any time.

This scheme was rejected in the final bill. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947) as reprinted in *Legislative History of the LMRA, 1947*, 505-573, at 545. While the final bill included new and detailed procedures for Board-conducted elections, it did not require a union to gain certification through those procedures before an employer would be obligated to bargain. Instead, Section 8(5) of the original Wagner Act remained intact, now as Section 8(a)(5), requiring employers to bargain “with the representatives of his employees, subject to the provisions of section 9(a).” NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5).

Section 9(a) continued to hold that representatives be selected or designated by a majority of employees. A separate section altogether, Section 9(c), which is not referenced by Section 8(a)(5), laid out the Board certification process. Thus, under the NLRA as enacted, the employer’s obligation to bargain with the employees’ representative is the same, regardless of *how* that representative was “designated or selected” by the majority of relevant employees.

In short, the Act *encourages* voluntary recognition. This method of gaining representation fulfills two keystone principles of the Act: the fundamental right of self-organization, allowing employees to organize themselves and obtain a collective bargaining relationship with their employer without governmental supervision, and the goal of industrial peace, permitting employees and employers to avoid the workplace conflict that would ensue if the majority’s will were denied.

II. CARD CHECK AGREEMENTS PROMOTE THE POLICIES OF THE ACT BY VERIFYING MAJORITY SUPPORT FOR AN EMPLOYER'S VOLUNTARY RECOGNITION OF A UNION, AND THE BOARD MUST CONTINUE TO ENCOURAGE THESE AGREEMENTS.

The Act's sole criteria for establishing a collective bargaining relationship is whether the union has been selected or designated by the majority of employees. Accordingly, unions have utilized a variety of means of proving their majority support when seeking voluntary recognition. As the U.S. Supreme Court itself has recognized, a union may prove its majority status with authorization cards. *See, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 595-99 (1969). A collective bargaining relationship reached with a "card check" is as binding as any formed through a Board-conducted election, and is established with none of the contentiousness or delays frequently associated with elections. *See Gissel Packing*, 395 U.S. at 598-99.

Because an employer may voluntarily recognize a union, it follows that an employer may agree to the terms upon which a voluntary recognition will occur.<sup>1</sup> As a result, unions and employers have negotiated voluntary recognition agreements, utilizing card check methods, by which the union's showing of majority support is verified. The employees in both the *Dana Corp.* and *Metaldyne Corp.* cases selected their union representatives with the commonly used card check procedure.

A card check agreement typically provides that, once an independent third party confirms that the union has obtained support from a majority of the bargaining unit, the

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<sup>1</sup> In fact, given the Board-created rule permitting an employer to insist on an election, *see Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974), agreements between employers and unions are now crucial to preserving voluntary recognition. Neither the *Linden* case nor any other limits an employer's right to voluntarily recognize a union, or agree on terms spelling out the circumstances by which voluntary recognition will occur.

employer will recognize the union. *See generally* Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMPL. & LAB. L. 369 (2001). Card check agreements avoid the contentious, divisive, and delay-ridden NLRA representation process and allow employees to make an untrammelled choice on the important decision of whether to join a union. These agreements thus promote the ideals of the NLRA's bill of rights and fulfill employees' "right to self-organization, to form, join, or assist labor organizations . . . and . . . the right to refrain from any or all of such activities." 29 U.S.C. § 157 (2000).

The Act and its legislative history clearly demonstrate that Congress intended to encourage voluntary recognition. Card check agreements facilitate the voluntary recognition process by ensuring that the union has, in fact, obtained majority support. There is no rationale for distinguishing between voluntary recognition accomplished as a result of a prior card check agreement and voluntary recognition reached by some other means. Moreover, by agreeing beforehand on a process for verifying majority support, employers and unions avoid the very kind of destabilizing labor conflict that the Act seeks to minimize.

III. THE NLRB MUST CONTINUE TO UPHOLD VOLUNTARY RECOGNITION BY PRESERVING ITS LONGSTANDING REFUSAL TO ENTERTAIN DECERTIFICATION PETITIONS DURING THE CRUCIAL EARLY STAGES OF THE BARGAINING RELATIONSHIP.

In passing the NLRA, Congress encouraged employees and employers to establish bargaining relationships voluntarily, free from government intervention. Given Congress' strong support for voluntary recognition, we caution the Board against writing

voluntary recognition out of the statute by placing newly recognized unions under an immediate threat of decertification.

In the instant cases, employees filed decertification petitions *barely one month* after majorities selected representation by authorization cards. If these petitions are allowed—permitting a minority of the unit to upset the reasoned decision of the majority—it will render voluntary recognition meaningless. This result would abrogate Congress’ endorsement of voluntary recognition as a vital means of self-organization, and significantly change a key element of the Act.

The immediate threat of decertification following recognition disrupts the collective bargaining process at its very inception. It refocuses the parties’ activities away from the question of what kind of contract should be negotiated to whether a contract need be negotiated at all, undermining the Act’s central goal of promoting stable collective bargaining relationships.<sup>2</sup> As the NLRB stated in *Keller Plastics*, “negotiations can succeed . . . and the policies of the Act can thereby be effectuated, only if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time.” *Keller Plastics*, 157 NLRB 583, 587 (1966). Moreover, if a minority of the employees in a unit could demand an election within mere weeks or days of the majority’s decision to unionize, as they sought to do in

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<sup>2</sup> As the Board has recognized, building a bargaining relationship takes time, particularly when parties are negotiating a first contract. See *Keller Plastics*, 157 NLRB at 587. Reaching a first contract is so difficult that one study found that 32 percent of unions and employers are unable to negotiate a first agreement within a year of recognition or certification. See Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing*, U.S. TRADE DEFICIT REVIEW COMMISSION (2000).

this case, the majority will of employees would be thwarted by the minority, in direct violation of the Act's basic democratic principles.

Accordingly, the Board must continue to give effect to the Act's clear legislative intent encouraging voluntary recognition, by maintaining the current NLRB policy prohibiting dissenting employees from immediately calling into question their fellow employees' decision to select union representation. *See, e.g., Keller Plastics Eastern*, 157 NLRB 583, 587 (1966) (the Board will not entertain representation petitions for a "reasonable time" after voluntary recognition occurs); *see also Seattle Mariners*, 335 NLRB 563, 565 (2001) (the voluntary recognition bar "both promot[es] voluntary recognition and effectuat[es] the free choice of the majority of the unit employees").

#### IV. THE NLRB MAY NOT USURP CONGRESS' EXCLUSIVE AUTHORITY TO AMEND THE NLRA.

Agencies may not usurp legislative intent by interpreting the statute they enforce in a manner contrary to its clear meaning. *See, e.g., Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (agencies and courts must "give effect to the unambiguously expressed intent of Congress"); *see also Burlington Northern Railroad Co. v. Surface Transportation Bd.*, 75 F.3d 685, 694 (D.C. Cir. 1996) (ICC lacked authority to issue order deemed an "end-run around the statutory scheme"). Here, by denying meaningful majority status to relationships arising out of recognition agreements, the Board would effectively be writing voluntary recognition out of the Act.

Only Congress can amend the NLRA, and Congress has not done so. Indeed, while these cases are rushed in relative haste through the NLRB, Congress is presently entertaining bills dealing with either voluntary recognition agreements or card check

generally as a means of establishing majority support. See "Employee Free Choice Act," S. 1925 and H.R. 3619 (introduced Nov. 21, 2003, by Sen. Kennedy and Rep. Miller, respectively); "Secret Ballot Protection Act of 2004," H.R. 4343 (introduced May 12, 2004, by Rep. Norwood). The questions the Board proposes to entertain here must be properly left to Congress.

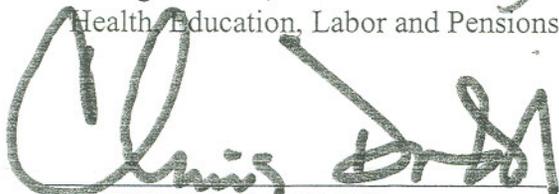
### CONCLUSION

We urge the Board to maintain its current rule barring consideration of decertification petitions for a reasonable time following an employer's voluntary recognition of its employees' choice of bargaining representative. Preserving the rule will ensure the Board's continued adherence to well-established labor-management relations principles at the NLRB's core, and to the Board's statutory obligation to uphold voluntary recognition as a vital means for employees to freely designate and select their bargaining representatives.

Respectfully submitted,



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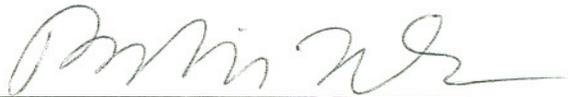
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