

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC**

<hr/> DANA CORPORATION)	
Employer)	
and)	Case 8-RD-1976
)	
CLARICE K. ATHERHOLT)	
Petitioner)	
and)	
)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO)	
Union)	
)	
METALDYNE CORPORATION (METALDYNE SINTERERD PRODUCTS))	
Employer)	
and)	Cases 6-RD-1518 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)	
Union)	
)	
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**BRIEF OF *AMICI CURIAE* [LISTED INSIDE COVER]
IN SUPPORT OF PETITIONERS**

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LIST OF AMICI

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National Association of Manufacturers

National Restaurant Association

Printing Industries of America

Society for Human Resource Management

State Associations

Capital Associated Industries (North Carolina)

Employers Association of Florida

Employers Association of the NorthEast (Massachusetts)

Employers Group (California)

Employers Resource Association, Inc. (Ohio)

Hawaii Employers Council

Mountain States Employers Council (Colorado)

MRA-The Management Association, Inc. (Wisconsin)

Nevada Association of Employers

Racine Area Manufacturers and Commerce (Wisconsin)

The Employers Association (Michigan)

The Management Association of Illinois

The Manufacturers (Pennsylvania)

TOC Management Services (Oregon)

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PRELIMINARY STATEMENT AND INTEREST OF THE AMICI

This case presents the important question of whether the Board should apply its "recognition bar" to employee election petitions challenging union claims to majority status resulting from employer neutrality or card check agreements. The present joint *amicus* brief is being filed by a diverse combination of business groups and professional organizations who believe that the Board should not bar employee election petitions under such circumstances. As further explained below, the thousands of employers represented by the *Amici* include both unionized and non-union companies, large and small businesses, and industrial and service industries. Some of the *Amici's* members have signed employer neutrality or card check agreements, while many others have been pressured by various unions to do so.

The *Amici* share the view that the primary objective of the National Labor Relations Act is to preserve employee freedom of choice through democratic processes, including secret ballot elections and freedom of expression for all parties. The recent proliferation of employer neutrality and card check agreements threatens to undermine the fundamental protections of employee rights under the NLRA, to the detriment of both employees and employers. The Board should act now to preserve the right of employees to petition for a secret ballot election testing the majority status of any union whose representational claims rest on cards obtained under the auspices of an employer neutrality or card check agreement. Only in this manner can the proper balance of employee, employer and union rights be maintained under the Act.

The *Amici* are:

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 185,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in more than 100 countries.

The Printing Industries of America, Inc. (PIA) is the world's largest graphic arts trade association representing an industry with more than 1 million employees, \$156 billion in sales.

The Associated Builders and Contractors, Inc. (ABC) is a national trade association of more than 23,000 construction contractors and related firms, including both unionized and non-union companies. ABC's members share the view that work should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC strongly supports the right of employees to choose freely whether to be exclusively represented by a labor organization, or to refrain from doing so. ABC is filing as an *amicus* in the present case because the Board's present policies on card check recognition

infringe on the right of employees to freely choose or disavow union representation through the electoral process, to the detriment of both employers and employees. The experience of ABC members under the analogous "pre-hire" provisions of Section 8(f) of the Act, further demonstrates that the Board's voluntary recognition bar to an election is an unnecessary infringement of employee rights under Section 9. Preservation of the right of employees to petition for a secret ballot vote under Section 8(f) has not interfered in any noticeable way with the ability of construction industry unions to organize significant percentages of the construction industry.

The National Restaurant Association is the largest trade association representing restaurants in the United States. Association membership includes over 300,000 foodservice establishments, restaurants and hotels, some of which have certified bargaining representatives representing their employees. The industry employs some 12 million employees, making it the largest private-sector employer in the United States.

Capital Associated Industries, Inc. is a membership association based in North Carolina representing 850 member companies.

The Employers Association of Florida, an association representing approximately 650 employers, was organized to provide a forum for the purpose of creating and maintaining a stable environment of positive employee/employer relations in the Florida business community.

The Employers Association of the NorthEast, with headquarters in Massachusetts, was formed with the goal to promote sound employee/employer relations by assisting member companies in improving their policies and practices in personnel and labor relations, and by assisting with management development via consultation and training.

The association currently represents over 750 organizations, including manufacturers, financial institutions, hospitals, colleges, insurance companies, health care, retail, human services, business services, libraries and cities/towns from Connecticut, Massachusetts and Vermont.

The Employers Group, based in Los Angeles, California, is one of the nation's largest and oldest nonprofit employers associations dedicated to human resource management. Representing thousands of California employers and millions of employees, Employers Group offers comprehensive services and products for HR executives and other professionals.

The Employers Resource Association, Inc., based in Ohio, is a trade association specializing in Human Resource Management, designed to complement the HR departments of its 1,235 member companies.

The Hawaii Employers Council is an employer association based in Honolulu, HI, representing 780 member companies and organizations. It is committed to assisting its members in creating and maintaining stable, peaceful, and harmonious relations with their employees.

The Nevada Association of Employers provides its members services in HR, labor relations, management development and other services that impact the employer/employee relationship. NAE currently has 390 members.

The Employers Council, based in Salt Lake City, Utah, is an association of nearly 500 employers throughout the Intermountain West. For over 60 years, the Council has served the business community by helping its members achieve management excellence in the complex fields of human resources and labor relations.

The Mountain States Employers Council, Inc., based in Denver, Colorado, represents over 2,100 companies and organizations in the Mountain States region.

The Management Association of Illinois is an 800 member employers' association formed in 1898 as a collective resource available to provide accurate, practical and cost-effective expertise on management-employee relations. The Association provides Human Resource, Compensation, Legal, Organization Development, and Training services to its members.

The Manufacturers Association is a regional trade association based in Reading Pennsylvania. The association provides training, employee relations and employee development services to 370 member companies in Berks, Lancaster, Lebanon and Lehigh counties.

TOC Management Services is an Oregon-based association providing its over 500 member companies with employer advocacy and timely, practical human resource solutions. TOC specializes in human resource management, employment law, labor relations, employee benefits, workplace safety, management training and leadership development.

The Racine Area Manufacturers and Commerce (RAMAC) is a voluntary, non-profit association based in Wisconsin which serves as a central source of information and data on a wide variety of business problems and issues affecting its 800 member companies. It helps its members manage more effectively by providing them with personnel, research, management training and workforce development services.

The Employers' Association, based in Grand Rapids and representing over 500 companies, is dedicated to enhancing the employer-employee relations climate in West

Michigan, and to promoting excellence in the management of people, optimizing the ability of each employee to contribute to their organization's profitability and continued success.

The Management Association, Inc. (MRI), based in Waukesha, Wisconsin, is a not-for-profit association founded in 1901. Today, MRI represents more than 2,100 employers in Wisconsin, Illinois and Iowa.

SUMMARY OF THE ARGUMENT

As the *Amici* argue below, the Board should not equate neutrality/card check recognition with certification pursuant to secret ballot elections, nor accord the two similar status. There are significant statutory, practical and national labor policy reasons for not applying the "recognition bar" to deny or delay Board-supervised secret ballot elections where recognition has been attained by neutrality/card check agreements.

First, of course, the "recognition bar" compounds the negative effects of denying informed, uncoerced employee free choice through a secret ballot election on initial union representation. By statute, the Board is charged with the responsibility of protecting employee rights through a policy of encouraging secret ballot elections, *Linden Lumber Div. v. NLRB*, 419 U.S. 301, 307 (1974), the core principle of "voluntary unionism." *Pattern Makers v. NLRB*, 473 U.S. 95, 102-03 (1985).

Second, rather than promoting industrial stability as a national labor policy objective, the "recognition bar" actually feeds the existing, underlying instability of an uncertain majority status based on what the Supreme Court has termed is the "inherent unreliability" of union authorization card signatures. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 594 (1969). As a practical matter, where, as in the instant cases, there is

substantial uncertainty as to the majority status of an employer-recognized union, it is in the interests of all parties to resolve such uncertainty through a secret ballot election.¹

Finally, the "recognition bar" operates in combination with other Board policies and decisions over the past decade to preclude the free expression of employee choice concerning union representation from ever occurring. As a practical matter, it should not be difficult for a union to negotiate a contract with a compliant, "neutral" employer, especially where concessions have been pre-negotiated and labor peace guaranteed as part of a *quid pro quo* for the neutrality/card check agreement. Once a contract is reached, employees and rival unions are foreclosed from challenging the union's majority status for a period of three years under the Board's "contract bar." Also, the neutrality/card check agreement may provide for interest arbitration, so that a "contract bar" is guaranteed to be in place within several months after recognition is granted even if the parties alone have not been able to negotiate a collective bargaining contract.

Thus if the Board applies its "recognition bar" to neutrality/card check agreements, especially if it applies it in the same way as it does a "certification bar", it would preclude employees from seeking a secret ballot decertification election for up to one year. *See MGM Grand Hotel, Inc.*, 329 NLRB 464 (1999). Thereafter, a "contract bar" attaches for up to an additional three years, and employee free choice is stifled for a minimum of four years. After that, union "blocking charges" could further delay a secret ballot election.

¹ For example, such uncertainty exposes the employer to a potential charge, in the language of Section 8(a)(2) of the Act, of "dealing with" bargaining unit employees through a company-dominated union or a union which lacks majority support.

The democratic principle has long been stated "one person, one vote". Where the Board has certified election results, this democratic principle is already frequently restricted by the Board decisions referenced herein to "one person, one vote, one time". Surely the Board will not countenance a complete erosion of the democratic principle to "one person, no vote, perhaps not ever" where the Board's process has been circumvented entirely and employees are locked in, without a secret ballot vote, to union representation which they perhaps never desired in the first place. That result runs afoul of the statutory goals.

Amici submit that the Board should reaffirm the primacy of statutorily-favored, Board-supervised secret ballot elections as the preferred method of protecting employee free choice, and refuse to apply the "recognition bar" where recognition was granted pursuant to neutrality/card check agreements.

ARGUMENT

I. BACKGROUND

Neutrality and card check union recognition agreements entered into between a union and an employer sacrifice employee free choice rights and protections of the National Labor Relations Act (the "Act"). Secret ballot elections supervised by the National Labor Relations Board ("NLRB" or "Board") are the superior and statutorily-preferred method of determining employee free choice on questions of union representation.

In recent years, however, unions have turned their backs on the Board in an effort to gain strategic advantages which facilitate union organizing and increase union membership. In place of Board-supervised secret ballot elections, unions have substituted

less protective, less reliable, private methods of gaining union recognition. Where unions are able to get employers to agree, often through the threat of external pressures and union "corporate campaigns" or, more blatantly, pre-negotiated bargaining concessions before a majority is established, the parties have entered into a variety of neutrality and card check recognition agreements.

"Neutrality agreements" commit the employer to refrain from exercising its "free speech" rights guaranteed under Section 8(c) of the Act, and to agree not to communicate information to its employees, or lawfully express views, arguments, and opinions, which the union perceives as critical of the union. In some agreements, employers are required to speak only positively of the union, if allowed to speak at all, and to assist the union in its organizing campaign in other ways. As a further deterrent to employer free speech, such private agreements are enforceable by the federal courts under Section 301 of the Labor-Management Relations Act.

"Card check" procedures accompanying neutrality agreements mandate that the employer waive its rights to insist on a secret ballot election, and the free choice rights of its employees as well, by recognizing the union as the exclusive bargaining representative of unit employees without those employees ever having voted for union representation in a Board-supervised secret ballot election. In place of a secret ballot election, such agreements compel union recognition based on a private showing of a majority of employee-signed union authorization cards.

Not surprisingly, unions have experienced greater success in organizing groups of unrepresented employees under what unions have described as the "lowered standards," "reduced costs," and strategic advantages of such neutrality/card check arrangements,

rather than under the traditional Board-supervised secret ballot elections. The true cost of such "top-down" union organizing methods, however, is to deny employees their Section 7 rights to cast fully-informed, uncoerced, and government-protected secret ballot votes for or against union representation.

As demonstrated by the record evidence in the *Dana Corp.* and *Metaldyne Corp.* cases presently under review before the Board, neutrality and card check recognition agreements may lead to uncertainty in the majority support of union representatives and instability in the workplace. In the instant cases, the record indicates that some employees were intimidated or coerced into signing union authorization cards. Indeed, as verified by the long history of Board decisions in representation cases, that is not an uncommon experience. In fact, the unreliability of union authorization cards as a true indicia of employee sentiment, and the national labor policy of guaranteeing employee free choice, have always been a strong argument expressed by Congress, the Board, the Supreme Court, and until recently, the unions in support of the statutory preference for secret ballot elections. Now, however, unions exalt the policy of "industrial stability" over the statutorily-preferred protections of "employee free choice." Today, unions seek to deny secret ballot elections in favor of card check procedures in all representation matters except for decertification elections, where their majority representational status is under attack, and then they promote Board policies such as the "recognition bar" and "blocking charges" preventing such elections from ever occurring,

As the record in these cases further reflects, workplace instability is compounded where the unit employees, having once been denied a secret ballot election on initial representation, are again denied that right in a subsequent decertification election. In both

instant cases, shortly following their employer's recognition of the union a substantial percentage of employees—in *Metaldyne* a majority of employees—filed an NLRB petition seeking a secret ballot decertification vote. Those employee-generated petitions were dismissed by NLRB Regional Directors based on the Board's "recognition bar," and the employees thus were once again denied an opportunity to express their desires for or against union representation by secret ballot.

Unions contend that application of the Board-created "recognition bar" policy is necessary to promote industrial stability by affording a "reasonable period" for the employer-recognized union to get established, in a similar way as the statutory "certification bar" operates for a union officially certified by the Board as the exclusive bargaining representative through a secret ballot election among employees.

The main issue before the Board in the instant cases is to what extent, or whether at all, it should apply the "recognition bar" to neutrality/card check agreements. The *Amici* urge the Board to take the opportunity to go further and to critically examine the negative consequences and potential implications for national labor policy of denying employees the free choice of secret ballot elections through neutrality/card check recognition agreements.

It should be noted that the precise issue framed by the Board's grant of the request for review, focusing on the impact of pre-card signing neutrality/card check agreements on employee electoral rights, has never been squarely addressed by the Board. Thus, the dissenting Board members are mistaken in their assertion that a ruling in favor of employee free choice would overturn "decades of Board and court precedent." 341 NLRB No. 150, slip op. at 2. Even if that were true, however, the Board has repeatedly held that

reevaluation and reversal of precedent, even decades of precedent, is justified under circumstances such as are present here. One of many examples of such reversals occurred in *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001), a case in which the present dissenters overruled 50 years of precedent in the name of the Act's "fundamental principle ... of effectuating employee free choice." *Id* at 726. Other examples abound. *See, e.g., John Deklewa & Sons*, 282 NLRB 1375 (1987); *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, 678 (2000). Certainly the Board's reevaluation of precedent is justified here in the face of changed circumstances (the recent proliferation of neutrality/card check agreements) that threaten fundamental principles of employee free choice and where the imposition of a recognition bar against employee petitions is arguably inconsistent with the Act itself.

II. NEUTRALITY/CARD CHECK PROCEDURES RESTRICT EMPLOYEE FREE CHOICE RIGHTS AND DENY THE PROTECTIONS OF BOARD-SUPERVISED SECRET BALLOT ELECTIONS

In recent years, the ways in which unions seek to organize unrepresented workers have undergone fundamental changes. Although the new methods of organizing provide unions with certain short-term strategic advantages, such tactics have serious longer-term consequences both for the Section 7 rights of employees and for the future role of the National Labor Relations Board as well.

In an effort to reverse the steady decline in union density, unions have turned to tactics characterized as "organizing from the top down." For example, as UFCW organizer Joe Crump has written: "Employees are complex and unpredictable. Employers are simple and predictable. Organize employers, not employees." Joe Crump, "The Pressure is On: Organizing Without the NLRB," 18 *Lab. Rel. Rev.* 32 (1991).

The new organizing tactics have turned the Act's time honored commitment to protecting employee rights through open communications and secret ballot elections on its head. "Top down organizing" essentially results in forced unionization by a fiat of union leaders and company executives dealing at a high level even before there is a showing of interest among the employees affected sufficient to trigger a question concerning representation, or to petition the Board for a secret ballot election.

Unions today attack the Board's secret ballot elections as "undemocratic."² Union-sponsored federal legislation is designed to deny employees the right to secret ballot elections, paradoxically entitled the "Employee Free Choice Act."³ It is not only appropriate, but critical, therefore, that the Board now take a critical look at what unions

² For example, the union-sponsored group, American Rights at Work, argues that "NLRB elections are actually less democratic than card check procedures" because "[c]ard check procedures are better at ensuring employee free choice by allowing employees to express their true wishes free from employer coercion" while "avoid[ing] the anti-democratic and inherently coercive anti-union campaigns that are typical of the NLRB process." <http://www.americanrightsatwork.org/takeaction/efca/efcaqa.cfm#jump1> See Testimony of Nancy Schiffer, AFL-CIO Associate General Counsel, before the U.S. House of Representative Subcommittee on Employer-Employee Relations on April 22, 2004.

³ S.1513, "Streamlining the Unionization Process," introduced by Charles Schumer (D-NY), mandates "card check" certification by the NLRB if a union obtains signatures from a majority of employees in an appropriate bargaining unit in most instances. The "Employee Free Choice Act" (S. 1925/H.R. 3619), introduced on November 21, 2003, by Senator Edward Kennedy and Representative George Miller, provides for certification of a union as the bargaining representative if the NLRB finds that a majority of employees in an appropriate unit has signed authorizations designating the union as its bargaining representative; provides that if an employer and a union are engaged in bargaining for their first contract and are unable to reach agreement within 90 days, either party may refer the dispute to the Federal Mediation and Conciliation Service (FMCS) for mediation; and, provides for stronger penalties for violations while employees are attempting to organize or obtain a first contract, including treble damages for back pay and civil fines up to \$20,000 per employer violation.

are substituting in place of the statutorily-preferred Board processes, and the impact these changing practices have on the labor relations environment.

Since 1935, the Act has provided a statutory basis and the NLRB has provided the preferred mechanism for employers to express free choice on unionization.⁴ In 1947, secret ballot elections became the only way for a union to receive Board certification as the exclusive bargaining representative for employees in an appropriate bargaining unit. Thus, the Act expressly grants the right to petition the Board for an election under a variety of circumstances. *See* Sections 9(c)(1), 9(e), and 8(b)(7)(c).

In fact, the only statutory exception is confined to the construction industry in Section 8(f), in which Congress admittedly infringed on employee free choice through "pre-hire" agreements due to the transient nature of construction industry workers and the time-sensitive nature of construction projects. Even then, the Act recognizes the right of construction workers subject to 8(f) agreements between their employer and a union, the same rights to petition the Board for a secret ballot decertification election. Thus, under Section 8(f), voluntary recognition has long been held not to bar employees from subsequently petitioning to decertify the union through a secret ballot election. *John Deklewa & Sons*, 282 NLRB 1375 (1987). Preservation of employee rights to file such petitions has not interfered at all with union organizing efforts in the construction industry, a significant percentage of which is in fact unionized. This experience under

⁴ 29 U.S.C. § 159(e)(1) provides:

Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

8(f) belies the concern expressed by the dissenting opinion in the Board's grant of the request for review in this case, in which the dissenters argued that "employers would have no incentive to recognize a union if they know that recognition may be subject to immediate second-guessing through a decertification petition." 341 NLRB No. 150, slip op. at 5. Many employers have recognized unions under 8(f), without any need to further infringe on employee electoral rights. Nor has the right of employees to petition for decertification of 8(f) union recognition "frustrated the Act's fundamental policies of furthering industrial peace and labor relations stability." *Id.*

Amici submit that over these many years, the Board has been justifiably proud of the "crown jewel" of its accomplishments –the conduct of secret ballot elections -- which has ensured the integrity of industrial democracy in the workplace. The Board's proud history is one of advancing workplace democracy, and protecting employees' right to vote in secret ballot elections for or against union representation and thus determine their own workplace destiny. Long before the Voting Rights Act of 1965, the NLRB guaranteed voting rights to employees, many of whom had never before been permitted to vote in any federal, state or local election. The NLRB guaranteed employees' exercise of free choice through "laboratory conditions" surrounding the conduct of elections to assure that employees were fully protected and fairly informed prior to casting their secret ballots.

It is that proud heritage which unions would now toss aside, in effect removing the Board from the process, in favor of a private system which provides unions with strategic advantages and a more certain outcome in union organizing. *See* Charles I.

Cohen, "Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?" *The Labor Lawyer* (Fall 2000).

In place of what the Supreme Court has described as the "solemnity" of a Board-conducted secret ballot election, *Ray Brooks v. NLRB*, 384 U.S. 96, 99 (1954), unions in increasing numbers are now exerting a variety of internal and external pressures on employers in the form of union "corporate campaigns" to force them, in many cases, to agree to neutrality/card check arrangements.

The AFL-CIO describes the use of corporate campaigns as a means of attacking employer "vulnerabilities in all of the company's political and economic relationships – with other unions, shareholders, customers, creditors and government agencies – to achieve union goals." Industrial Union Department, AFL-CIO, "Developing New Tactics: Winning with Coordinated Corporate Campaigns," at 1 (1985).⁵

A company may be compelled to capitulate to the ever-expanding list of coercive union "corporate campaign" tactics—some lawful, some unlawful, and most questionable—which are designed to threaten the target company's very existence to achieve union

⁵ By now, union corporate campaign tactics are well documented by academics and the courts. See Jarol Manheim, "The Death of a Thousand Cuts: Corporate Campaigns and the Attack on the Corporation," (Lawrence Erlbaum Assoc., 2001). See also, Yager and LoBue, "Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century," 24 *Employee Relations Law Journal* 4 (1999); Herbert R. Northrup, "Union Corporate Campaigns and Inside Games as a Strike Form," 19 *Employee Relations Law Journal* 507 (1994); Herbert R. Northrup, "Corporate Campaigns: The Perversion of the Regulatory Process," 17 *Journal of Labor Research* 345 (1996); Charles R. Perry, "Union Corporate Campaigns" (Wharton School, Industrial Research Unit, 1987). See, e.g., *Diamond Walnut Growers v. NLRB*, 113 F. 2d 1259 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 1299 (1998) (generally discussing union corporate campaign tactics); *Food Lion v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997).

organizing goals. In addition, there are a variety of other pressure points, both internal and external, which may compel an employer to enter into neutrality/card check agreements. For example:

- Engaging an employer with whom a union has a dominant representation (generally as a condition of labor peace with that employer or as a *quid pro quo* for a concession desperately needed by that employer), to remain neutral at its other locations and to strongly suggest to its suppliers that it would be in their best interest to be neutral. The message is neither subtle nor lost on the suppliers whose economic livelihood is at stake.

- Inserting language in union contracts that bind not only the employer with whom the union has a relationship, but also any company that subsequently purchases or otherwise becomes “affiliated” with the employer.

- Persuading a government entity (i.e., city, county, or state agencies or representatives) to require neutrality as a condition of bidding for governmental projects.

Also,

- An employer may have a strategic objective to sell its goods or services to one or more entities which prefer to deal with unionized suppliers.

- An employer may be faced with an impending bankruptcy or other financial or business crisis and does not want to be distracted by union organizing or corporate campaigns.

- An employer may have a global position of neutrality because of its heritage in a more heavily unionized country (for instance, Germany) or simply wants to keep peace with its unions in other countries.

Whatever the reason, coerced or not, neutrality/card check agreements are negotiated with the union without the involvement, consent, or even knowledge of the employees to be organized. For that reason, the Board should be extremely wary of permitting a neutrality/card check agreement to operate as a waiver of the employees' right to seek a subsequent Board election. Indeed, the benefits to unions of neutrality/card check agreements are such that the union may forfeit employee rights by pre-negotiating less favorable terms and conditions of employment than through traditional arms-length collective bargaining. Such concessions may, in turn, be a sufficiently valuable inducement for the employer to accept a neutrality/card check agreement.

The strategic advantages of neutrality/card check agreements for unions are obvious, including: (1) the union is able to negotiate an agreement with the employer before the union has been put to the test of collecting authorization cards from employees and, in fact, even before there is any "showing of interest" among employees that they wish to be represented as required under the Act in petitions for secret ballot elections; (2) the agreement precludes meaningful debate on workplace issues affected by union representation, or even the information, if it is critical of the union, necessary for employees to make a fully-informed decision on representational status; and (3) the agreement may include an interest arbitration clause that ensures an early contract which bars subsequent challenges from employees or rival unions under the "contract bar."

Union literature also describes the strategic advantages to unions of neutrality/card check agreements in terms of "lowered standards." Thus, Eaton and Kriesky (ILRR, October 2001) discuss agreements in the steel, auto and auto supply, communications, health care, hospitality, and gaming industries, and associations of

employers as lowering the financial costs of organizing and lowering the standard for success. *See* Eaton and Kriesky, “Dancing with the Smoke Monster: Employers Motivations for Negotiating Neutrality and Card Check Agreements” (September 2002).

During the ill-fated attempt in the 1977-78 Congress to "lower the standards" of Board representation elections and thereby facilitate union organizing, the unions' so-called "Labor Law Reform Act" (H.R. 8410/ S.1883, 95th Cong.) was described by A.H. Raskin, the venerable labor writer for the New York Times, as "push button unionism." As Raskin wrote: "Most unions have got out of the habit of organizing in the years since World War Two. To the extent that they have acquired new members outside the civil service and health fields, it has been primarily through union shop contracts and other kinds of push button unionism in which the employer delivers over workers." *New York Times* (July 24, 1977).

Today's union efforts to coerce neutrality/card check agreements, both in practice and through legislation, is a less-subtle form of "push button unionism" than the so-called 1977-1978 Labor Law "Reform" bill since today's efforts are not designed to expedite the Board's election process, but to silence one of the parties and prevent a secret ballot vote from ever occurring.

The NLRA was not designed to protect the interests of unions or employers, nor to confer upon either a strategic advantage. Rather, the Act was designed to protect employees. *See, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (By “its plain terms...the NLRA confers rights only on employees, not on unions....” *Id.* at 532). Section 7 refers exclusively to the rights of employees to engage in, or refrain from, union representation, collective bargaining, and other forms of concerted activity.

Section 8(c) of the Act is often termed the employer's "free speech" section since it was added by Congress in 1947 to remove the "gag" on employers and permit lawful communications with their employees involving union representation. Yet, even Section 8(c) is, in effect, designed to protect employee free choice in making fully informed, uncoerced decisions concerning union representation.

Why unions are willing to sacrifice employee rights by denying secret ballot elections is borne out by recent statistics. Unions traditionally win just over 50% of NLRB elections. *See* Table 1 below. Yet, in recent years, even absent neutrality/card checks, the union "win-rate" in NLRB-conducted secret ballot elections is the highest it has been since 1970, and has increased substantially since 1996. The steady decline in union membership as a percentage of the eligible private sector workforce over the past fifty years has been the source of numerous union strategies to reverse that trend. AFL-CIO unions, however, have not only stemmed their losses, but have added to their absolute numbers (e.g., 1993, 1995, 1999) – and this primarily through the traditional NLRB secret ballot election.

As Table 1 shows, for the past three decades the union win-rate remained fairly constant at approximately 45 to 49 percent of elections. Since 1997, that number has risen consistently above 50 percent, with results in 2001 (54.1 percent), 2002 (55.9 percent), and the estimate for 2003 (57.3 percent) approaching the union win rates of the mid-1960s when unions did not complain about the Board's secret ballot elections.

TABLE I

NLRB Representation Elections

Year	Number of Elections			Percent of Elections Won by Union
	Held	Won by Union	No Union Chosen	
1936	31	18	13	58%
1937	265	214	44	81%
1938	1,152	945	207	82%
1939	746	574	172	77%
1940	1,675	921	754	55%
1941	2,566	2,127	439	83%
1942	4,212	3,636	577	86%
1943	3,698	2,967	731	80%
1944	4,712	3,983	729	85%
1945	4,919	4,078	841	83%
1946	5,589	4,446	1,143	80%
1947	6,920	5,194	1,726	75%
1948	3,222	2,337	885	73%
1949	5,514	3,889	1,625	71%
1950	5,731	4,223	1,508	74%
1951	6,525	4,785	1,767	73%
1952	6,765	4,933	1,832	73%
1953	6,050	4,350	1,700	72%
1954	4,813	3,108	1,705	64%
1955	4,372	2,904	1,468	66%
1956	5,075	3,270	1,805	64%
1957	4,874	2,988	1,886	61%
1958	4,490	2,695	1,795	60%
1959	5,644	3,484	2,160	62%
1960	6,617	3,814	2,803	58%
1961	6,354	3,563	2,791	56%
1962	7,355	4,305	3,050	59%
1963	6,871	4,052	2,819	59%
1964	7,309	4,229	3,080	58%
1965	7,576	4,608	2,968	61%
1966	8,103	4,995	3,108	62%
1967	7,882	4,722	3,160	60%
1968	7,618	4,412	3,206	58%
1969	7,700	4,268	3,432	55%
1970	7,773	4,367	3,406	56%
1971	7,961	4,323	3,638	54%
1972	8,472	4,653	3,819	55%
1973	8,916	4,648	4,268	52%
1974	8,368	4,273	4,095	51%
1975	8,061	4,001	4,060	50%
1976	8,027	3,993	4,034	50%
1977	8,635	4,159	4,476	48%
1978	7,433	3,578	3,855	48%

Year	Number of Elections			Percent of Elections Won by Union	
	Held	Won by Union	No Union Chosen		
1979	7,266	3,429	3,837	47%	***
1980	7,296	3,403	4,342	47%	***
1981	6,656	3,019	3,637	45%	***
1982	4,247	1,857	2,390	44%	****
1983	3,483	1,663	1,820	48%	****
1984	3,561	1,655	1,906	46%	
1985	3,749	1,745	2,004	47%	
1986	3,663	1,740	1,923	48%	
1987	3,314	1,608	1,706	49%	
1988	3,509	1,736	1,773	49%	
1989	4,413	2,059	2,354	47%	
1990	4,210	1,965	2,245	47%	
1991	3,021	1,414	1,607	46.8	
1992	2,712	1,353	1,359	49.9	
1993	3,038	1,479	1,559	48.7	
1994	3,052	1,501	1,551	49.2	
1995	2,715	1,309	1,407	48.2	
1996	2,817	1,345	1,472	47.7	
1997	3,160	1,591	1,569	50.3	
1998	3,319	1,708	1,611	51.5	
1999	3,110	1,607	1,503	51.7	
2000	3,014	1,592	1,422	52.8	
2001	2,522	1,364	1,158	54.1	
2002	2,587	1,445	1,142	55.9	*
2003**				57.3	*

1935-1990 Data taken from Annual Reports of the National Labor Relations Board Operational Highlights Section, Subsection "Elections" for Each Fiscal Year, except as noted.

1991-2003 Data taken from Bureau of National Affairs Compilation for Each Calendar Year

* NLRB Report made no distinction in Representation Certification (sometimes referred to as 'Collective Bargaining Elections') and Decertification Elections. Decertification numbers (typically relatively few in number, but a large majority against the union) are included in the totals. In years without an asterisk, only Representative Certification Elections are provided.

** Estimate. Some elections including AFL-CIO and unaffiliated unions in same election not included.

*** Statistics from 1968 NLRB Annual Report, Chart 12, Collective Bargaining Elections Closed.

**** Statistics from 1970 NLRB Annual Report.

Yet, despite greater union successes in Board elections, it is clear why unions now want to abandon the Board secret ballot process and exploit private neutrality/card check recognition agreements. According to a recent study, where employers agree to card check recognition, unions win 62.5% of organizing efforts. The study concluded that unions win 78.2% of organizing attempts where employers agree to

both card check recognition and neutrality. Eaton, Adrienne E. and Jill Kriesky, "Union Organizing under Neutrality and Card Check Agreements," 55 Ind. & Lab. Rel. Rev. 42, 49 (2001).

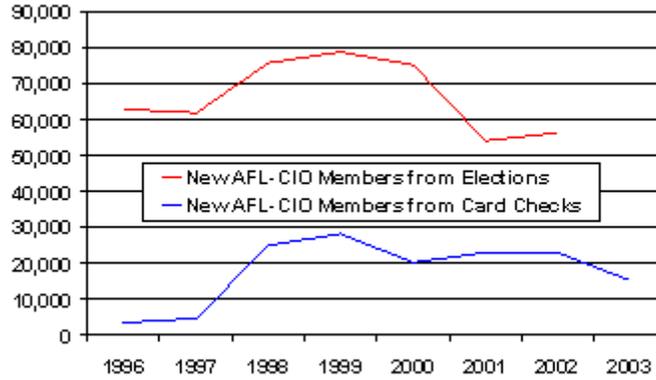
This internal union study, undertaken for the AFL-CIO's George Meany Center for Labor Studies demonstrates why, despite recent union success in winning secret ballot elections, card-check recognition in lieu of secret ballot elections is nevertheless important to unions. For example, in 2002, unions won 55.9 percent of traditional NLRB secret ballot elections, but based on the study's examination of 114 card-check agreements, unions scored victories in 78 percent of union organizing campaigns.

Further, not surprisingly, the study shows that the percentage of first contracts negotiated by unions and compliant employers following neutrality/card check agreements is higher than the percentage of first contracts negotiated following union certification based on NLRB elections.

Figures 1 and 2 below demonstrate the unions' advantage in card check recognition versus secret ballot elections both in terms of "win-rates" and in new membership. Figure 3 reflects the concomitant decline in Board-supervised secret ballot elections.

FIGURE 1

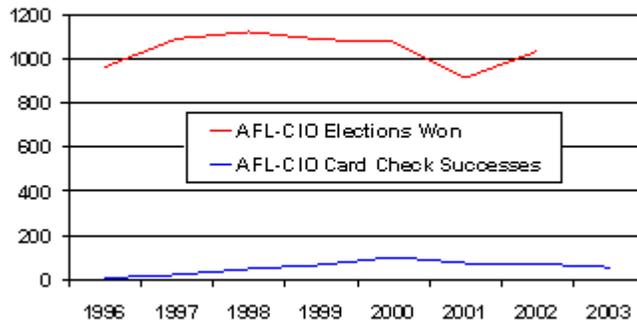
Union Members from Card Checks and Elections



Source: Card-check information reported in AFL-CIO's Work in Progress series, 1996-2003; and AFL-CIO private employer election results published by the Bureau of National Affairs, 1996-2002.

FIGURE 2

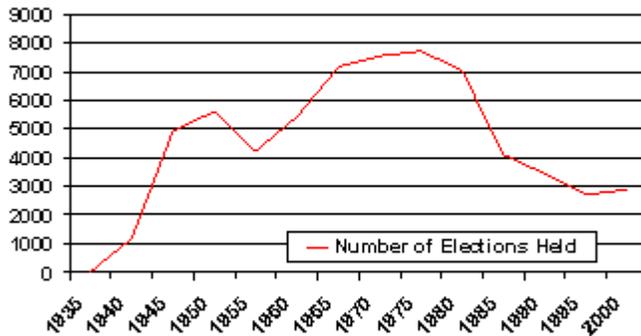
Union Successes in Card Checks and Elections



Source: Card-check information reported in AFL-CIO's Work in Progress series, 1996-2003; and AFL-CIO private employer election results published by the Bureau of National Affairs, 1996-2002.

FIGURE 3

National Labor Relations Board Union Representation Elections, 1935-2000



Source: Bureau of National Affairs

These recent statistics confirm that as the number of Board-supervised representation elections decline, the unions' strategic advantage in neutrality/card-check agreements increases union success and union membership. Rather than being a cause for universal celebration, however, union success through neutrality/card check agreements comes at a heavy price for employee free choice.

Indeed, the Board is fully justified in expressing concern for burden on employee free choice as a result of "the increased usage of recognition agreements, the varying contexts in which a recognition agreement can be reached, the superiority of Board supervised secret-ballot elections, and the importance of Section 7 rights of employees." *Dana Corp.*, 341 NLRB No. 150, slip op. at 1 (June 7, 2004).

Amici submit, as argued below, that neutrality/card check agreements are an inferior, less reliable, and less protective method of ensuring employees' Section 7 rights than Board-supervised secret ballot elections. Such private agreements which deny secret

ballot elections do not balance employee free choice with industrial stability, instead they lessen both. Union recognition which results from such pre-negotiated neutrality/card check arrangements should not be given the same election "bar quality" of Board-certified secret ballot elections. *See, Gissel*, 395 U.S. at 598-99, where the Supreme Court observed that "[a] certified union has the benefit of numerous special privileges which are not accorded unions recognized voluntarily or under a bargaining order ... and which should not be dispensed unless a union has survived the crucible of a secret ballot election." *Id.* at 598-99.

Amici submit that employees should have the unfettered right under Sections 9(c)(1)(A)(ii) and 9(e) to vote in secret ballot decertification elections immediately following such neutrality/card check recognition where they have previously been denied the right to a secret ballot vote.

III. NEUTRALITY/CARD CHECK PROCEDURES ARE UNRELIABLE INDICATORS OF EMPLOYEE SENTIMENT

As the Board majority succinctly stated and correctly observed in its Order Granting Review in the instant cases, "the secret-ballot election remains the best method for determining whether employees desire union representation... By contrast, a card-signing guarantees none of [the Board's] protections [of an election]." 341 NLRB No. 150, slip op. at 1 (June 7, 2004).

That view is beyond cavil. It is in full accord with over forty-five years of consistent statutory, Supreme Court, and Board authority, ever since Congress in 1947 declared through Section 9(a) of the Act that Board certification is restricted exclusively to Board-conducted secret ballot elections. Even prior to the 1947 Taft-Hartley Act amendments, the Board operating under the original Wagner Act of 1935 expressed

preference for secret ballot elections in determining questions of union representation. *Cudahy Packing Co.*, 13 NLRB 526, 527 (1939) (announcing that the Board would no longer base union certification on authorization card signings "in the interest of investing...certifications with more certainty and prestige by basing them on free and secret elections conducted under the Board's auspices."). *See, Joe Harris Lumber*, 66 NLRB 1276, 1283 (1946) (the Board stated that it did "not feel...that a card check reflects employees' true desires with the same degree of certainty" as a secret ballot election.). That view has continued unchallenged at the Board to the present. *See, e.g., Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717(2001) ("[W]e emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions." *Id.* at 723.)

In the seminal Supreme Court decisions *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) and later *Linden Lumber v. NLRB*, 419 U.S. 301 (1974), the Court steadfastly adhered to the view that union authorization cards signed by employees were an inherently unreliable indicator of true employee sentiment. In *Gissel*, the Court observed that "secret ballot elections are generally the most satisfactory, indeed the preferred method of determining employee free choice." 395 U.S. at 602. In explaining the reasons for preferring secret ballot elections, the Court noted with approval a lower court discussion as to the "inherent" unreliability of union authorization cards:

The unreliability of the cards is not dependent on the possible use of threats ... It is inherent as we have noted, in the absence of secrecy and the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees. 395 U.S. at 602

n. 20 (citing with approval *NLRB v. Logan Packing Company*, 386 F.2d 562, 566 (4th Cir. 1967)).⁶

In *Linden Lumber*, speaking for the Court, Justice Douglas traced the history of representation proceedings under the Act, including the variety of circumstances in which the Act expressly grants the right to petition the NLRB for a secret ballot election under Section 9(c) (1), and stated that "[i]n terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret ballot elections under the Act is favored." 419 U.S. at 307.

The lower courts have elaborated on the "inherent" unreliability of card checks. In *NLRB v. Cayuga Crushed Stone*, the Second Circuit explained:

There is no doubt that an election ... conducted secretly ... after the employees have had the opportunity for thoughtful consideration, provides a more reliable basis for determining employee sentiment than an informal card designation procedure where group pressures may induce an otherwise recalcitrant employee to go along with his fellow workers. 474 F.2d 1380, 1383 (2d Cir. 1973)(emphasis supplied).

In *NLRB v. Village IX, Inc.*, the Seventh Circuit commented:

Although the union in this case had a card majority, by itself this has little significance. Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back 723 F.2d 1360 (7th Cir. 1983).

⁶ Subtle peer pressures are not the only types of undue influence exerted on employees in card check recognition campaigns. Threats and intimidation by union adherents and outside union organizers designed to coerce signatures are well documented in Board decisions. For example, in *HCF, Inc. d/b/a Shawnee Manor*, 321 NLRB 1320 (1996), a co-worker soliciting union authorization cards threatened an employee that, if she refused to sign, "the union would come and get her children and it would also slash her tires." *Id.*

Unions, themselves, have acknowledged the superiority of secret ballot elections and the inherent flaws in relying on authorization, cards. For example, an official AFL-CIO Guidebook for Union Organizers stated:

NLRB pledge cards are at best a signifying of intention at a given moment. Sometimes they are signed to “get the union off my back.” ... Whatever the reason, there is no guarantee of anything in a signed NLRB pledge card except that it will count toward an NLRB election. (from the 1961 AFL-CIO Guidebook for Union Organizers, quoted in Woodrow J. Sandler, “Another Worry for Employers,” *U.S. News and World Report*, March 15, 1965).

More recently, in a brief filed with the NLRB in *Chelsea Industries and Levitz Furniture Company of the Pacific, Inc.* (7-CA-36846, 7-CA-37016, and 20-CA-26596) on behalf of the UAW, UFCW, and the AFL-CIO, unions once again acknowledged:

[A] representation election is a solemn ... occasion, conducted under safeguards to voluntary choice ... other means of decision-making are “not comparable to the privacy and independence of the voting booth,” and [the secret ballot] election system provides the surest means of avoiding decisions which are the result of group pressures and not individual decision[s]. In addition ... less formal means of registering majority support ... are not sufficiently reliable indicia of employee desires on the question of union representation to serve as a basis for requiring union recognition. [quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) and *Brooks v. NLRB*, 348 U.S. 96, 98, 100 (1954).]

Now, for their own strategic advantages, these same unions seek to leverage their economic clout with employers to extract neutrality/ card-check agreements and thus avoid secret ballot elections to gain initial recognition. At the same time, in the decertification context, they extol the sanctity of employee free choice which they proclaim can only be preserved and protected by NLRB-supervised secret ballot elections. Thereafter, however, they promote Board policies to delay such decertification elections, or prevent them from ever being conducted. Clearly, therefore, the unions’ approach is purely strategic and result-oriented rather than philosophically or principally-based on employee free choice. The unions are essentially advocating an "easy in, hard

out" paradigm for achieving and maintaining recognition as bargaining representative. While that may be fine for the unions to advocate in their own self-interest, it is not an appropriate foundation for an important principle of Board law, where, as noted above, employee rights should be paramount and *balanced* with the goal of stability in labor relations, rather than subordinate thereto. Thus, to the extent that the Board permits neutrality and card/check agreements as an "easy in" approach, a parallel "easy out" approach by removing the recognition bar would be appropriate and better serve that delicate balance. *See* Samuel Estreicher, "Deregulating Union Democracy," *Journal of Labor Research*, Vol. XXI, Number 2 (Spring 2000)(Professor Estreicher is a proponent of the "easy in, easy out" approach.).

Amici submit that the Board should not apply policies which sacrifice employee Section 7 free choice protections for the purpose of creating a strategic advantage for union organizing. Card check recognition, even following a contested campaign, is inferior to secret ballot elections as a method of determining employee free choice. Where recognition follows pre-negotiated neutrality/card check agreements, the Board's subsequent denial of employees' Section 7 rights to a secret ballot election by operation of a "recognition bar" is even more offensive to the Act.

IV. THE BOARD'S "RECOGNITION BAR" DOES NOT BALANCE COMPETING POLICIES OF INDUSTRIAL STABILITY AND EMPLOYEE FREE CHOICE.

Ever since the original 1935 Wagner Act, Congress, the Board, and the federal courts have struggled with the tensions between policies which preserve industrial stability and policies which protect employee free choice. *See generally*, Charles M. Bufford, *The Wagner Act: Employee and Employer Relations*, Lawyers Co-Operative

Publishing Co., Rochester, NY, 1941; Harry A. Miller and Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations*, University of Chicago Press, Chicago, 1949. To that end, the Board "seeks to balance the competing goals of effectuating free choice while promoting voluntary recognition and protecting the stability of collective-bargaining relationships." *Ford Center for the Performing Arts*, 328 NLRB 1 (1999).

Unlike the one-year election bar imposed in 1947 by the addition of Section 9(c)(3), the "certification bar," "recognition bar," and "contract bar," are not statutorily mandated by the Act; rather, they are solely a creature of Board policy which have been justified as promoting the policy of "industrial stability" even though infringing on the policy of employee free choice. *MGM Grand Hotel, Inc.*, 329 NLRB 563 (1999). Section 7 rights and employee free choice through secret ballot elections, however, are firmly rooted in the Act and its legislative history as a basic tenet of national labor policy. *Id.* at 468 (Members Hurtgen, dissenting).

The Act specifically confers the right of employees to petition for a decertification **election** in Section 9(c)(1)(A)(ii) of the Act. The only limitation on such petitions being held is when, within "the preceding twelve month-period, a valid **election** shall have been held." (emphasis added). This language shows that Congress thereby chose not to enact a similar one-year bar against decertification elections where unions have gained representation status based solely on voluntary recognition.

The "recognition bar" was created out of whole cloth by the Board in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). See *Seattle Mariners*, 335 NLRB 563, 566 (2001) (Chairman Hurtgen, dissenting); *MGM Grand Hotel Inc.*, 329 NLRB 464, 469-75

(1999) (Members Hurtgen and Brame, dissenting). Under the "recognition bar," the Board has declared that it will not conduct an election for a "reasonable time" after an employer recognizes a union as the representative of its employees. Although *Keller Plastics* created a new barrier to employee free choice not mandated by the Act nor debated by Congress, the Board simply stated: "With respect to the present dispute which involves a bargaining status established as the result of voluntary recognition of a majority representative, we conclude that...the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining." 157 NLRB at 587.

If employees are denied access to the statutorily-preferred secret ballot NLRB election to determine their free choice in a decertification context following voluntary recognition, they are relegated to the less than satisfactory route of an unfair labor practice challenge to test the union's majority status. That route is unsatisfactory because: (1) it only affords relief where either the employer, the union, or both have violated the law (for example by coercing card signatures); and (2) it is time consuming and could delay an election for months or years.

There can be little argument that the "recognition bar," as with all of the Board's procedural barriers to election challenges, diminishes employee free choice rights in the purported interest of industrial stability. However, the Board should draw the line at denying or delaying secret ballot elections following pre-negotiated neutrality/card check agreements. The majority status of a recognized union in such circumstances is as unreliable and ephemeral as the authorization cards on which the recognition is based. Such neutrality/card check recognition agreements are unlike secret ballot elections

which support certified unions. Such neutrality/card check agreements operate as severe constraints on employees' Section 7 rights by denying them full information on which to make an informed choice, and denying them the Board's full protections in the uncoerced selection of bargaining representative through a secret ballot election.

In such circumstances, lingering doubts as to the majority status of the union recognized by the employer does not promote industrial stability, "failing to resolve the issue with a Board-conducted election simply aggravates the instability further." *MV Transportation*, 337 NLRB 770, 774 (2002).⁷

Where there is substantial doubt as to the union's majority support at the outset of the bargaining relationship, barring a subsequent secret ballot election until the "neutral" employer and the union bargain and execute a contract, or perhaps until an interest arbitration clause in the neutrality/card check agreement takes effect, creates inherent instability. Moreover, in practice the "recognition bar" does not merely delay election challenges for a "reasonable time." In combination with other Board barriers, it potentially operates to prevent the exercise of employee free choice through a secret ballot election challenge, maybe forever.⁸

⁷ Testing its majority support in a Board election should be a minimal burden on the union if it truly has the support of a majority of the unit employees. An election would only confirm the union's representative status. Of course, during the election process the employer's duty to bargain with the union would continue, and would cease only if the election determined that the union did not have majority status...

⁸ *Amici* note that over the past decade, the Board has consistently restricted employees' ability to challenge a union's majority status once recognition has been granted, making it nearly impossible for employees, employers, and rival unions to invoke the Board's secret ballot election process or to otherwise challenge the recognized union's majority status. See, e.g., *Douglas-Randall, Inc.*, 320 NLRB 431 (1995) (Member Cohen, dissenting); *Liberty Fabrics, Inc.*, 327 NLRB 38 (1998) (Member Hurtgen, dissenting); *Supershuttle of Orange County*, 330 NLRB 1016 (2000) (Member Hurtgen, dissenting); *MGM Grand Hotel*, 329 NLRB 464 (1999) (Members Hurtgen and

"Voluntary unionism" through employee free choice is the "core principle" of the Act. *Pattern Makers v. NLRB*, 473 U.S. 95, 102-03 (1985); *Skyline Distributors v. NLRB*, 99 F.3d 403, 411 (D.C. Cir. 1999). In the context of neutrality/card check agreements, the goal of industrial stability may only be balanced properly against employee free choice by allowing employees to test the union's majority support in a Board election following recognition, without operation of a "recognition bar."

CONCLUSION

For all of the foregoing reasons, the *Amici* urge the Board to hold that the recognition bar does not apply when, as here, recognition was granted pursuant to a neutrality/card check agreement.

Respectfully submitted,

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Brame, dissenting); *Seattle Mariners*, 335 NLRB 563 (2001) (Chairman Hurtgen, dissenting); *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001) (Member Hurtgen, dissenting); *St. Elizabeth's Manor, Inc.*, 329 NLRB 341 (1999) (Members Hurtgen and Brame, dissenting), overruled in *MV Transportation*, 337 NLRB 770 (2002).

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC**

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DANA CORPORATION)	
Employer)	
and)	Case 8-RD-1976
)	
CLARICE K. ATHERHOLT)	
Petitioner)	
and)	
)	
INTERNATIONAL UNION, UNITED)	
AUTOMOBILE, AEROSPACE AND)	
AGRICULTURAL IMPLEMENT)	
WORKERS OF AMERICA, AFL-CIO)	
Union)	
)	
METALDYNE CORPORATION (METALDYNE)	
SINTERERD PRODUCTS))	
Employer)	
and)	Cases 6-RD-1518
)	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)	
Union)	
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of Amici Curiae [listed inside cover] in Support of Petitioners was served by first-class mail, postage prepaid, upon:

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