

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CLARICE K. ATHERHOLT,
(Petitioner)

DANA CORP.,
(Employer)

Case No. 8-RD-1976

and

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

ALAN P. KRUG AND JEFFREY A. SAMPLE
(Petitioners)

Cases Nos. 6-RD-1518
and 6-RD-1519

METALDYNE CORPORATION (METALDYNE SINTERED
SINTERED PRODUCTS)
(Employer)

INTERNATIONAL UNION, UAW,
(Union)

BRIEF OF DANA CORPORATION

Stanley J. Brown, Esq.
Aaron J. Longo, Esq.
Hogan & Hartson
8300 Greensboro Drive
Suite 1100
McLean, Virginia 22102
(703) 610-6150

Gary M. Golden, Esq.
Dana Corporation
4500 Dorr Street
P.O. Box 1000
Toledo, OH 43697-1000
(419) 535-4847

Attorneys for Employer
Dana Corporation

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Statement of the Case

This case presents an issue vital to the administration of the National Labor Relations Act. On December 4, 2003, following an authorization card check conducted by a neutral third party, a Federal Mediation and Conciliation Service mediator, the Dana Corporation (hereafter, "Dana") recognized the International Union, United Automobile, Aerospace and Agricultural Workers of America (hereafter the "UAW" or "Union") as the collective bargaining representative of the employees at its Upper Sandusky, Ohio manufacturing plant. That recognition followed the mediator's certification that a majority of Dana's Upper Sandusky employees had signed authorization cards designating the UAW as their representative. On January 7, 2004, little more than a month later, the Right to Work Legal Defense Foundation (hereafter the "Right to Work Foundation"), filed a decertification petition on behalf of a discontented Dana employee, Clarice K. Atherholt, supposedly supported by some 35% of the Upper Sandusky bargaining unit. The petition was filed before Dana and the UAW had even commenced bargaining, much less had time to negotiate a collective bargaining agreement.

Acknowledging that she could not argue that the parties had a reasonable time to bargain a contract under the Board's voluntary recognition bar policy, the Petitioner contends that the policy, reaffirmed time and time again by the Board and the courts over the course of decades, should be abolished or, alternatively, modified in such a way that it would be eviscerated.

The Petitioner has set forth no empirical evidence, no case law, and no other reason justifying this drastic change in the law. Rather, Petitioner relies on her own unfounded suppositions and vague and conclusory allegations about the conduct of the parties; allegations which are totally unsupported by the facts. Indeed, if employees were subject to harassment to force them to join the UAW, if employees had suffered threats and if Dana had improperly assisted the UAW, all the Petitioner would have had to do was to file unfair labor charges with the nearest Region. That no charges were filed, much less found to have merit, only confirms that the concerns raised by the Petitioner through the Right to Work Foundation are nothing more than a mischievous attempt to undermine the collective bargaining process.

As we show below, the process of voluntary recognition through authorization card checks and the voluntary recognition bar arising out of that process are important doctrines which protect both the collective bargaining process and employee representation rights. They are rooted in the express language of the National Labor Relations Act and Board and court precedent that has not been questioned up until now because that precedent is consistent with the purposes of the Act to prevent "industrial strife." See 29 U.S.C. § 151 et. seq. (2004).

ARGUMENT

I. The Voluntary Recognition Bar serves the purposes of the National Labor Relations Act by providing stability in collective bargaining relationships, and promoting industrial peace.

A. Voluntary recognition is an essential element of national labor policy arising out of the express terms of the National Labor Relations Act.

For more than half a century, the National Labor Relations Board and the courts have acknowledged that an employer may recognize a union as an employee bargaining representative without an election conducted by the Board. Voluntary recognition arises out of Section 9(a) of the Act itself, which provides that a union may become a bargaining representative when it is “designated or selected for purposes of collective bargaining” by a majority of employees. See 29 U.S.C. § 159(a)(2004). When interpreting this section in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), the United States Supreme Court held that “a Board election is not the only method by which an employer may satisfy itself as to the union’s majority status.” Id. at 597 (quoting United Mine Workers v. Ark. Flooring Co., 351 U.S. 62, 72 n.8 (1956)). As the Court stated in Gissel:

Since Section 9(a), in both the Wagner act and the present Act, refers to the representative as the one ‘designated or selected’ by a majority of the employees without specifying precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented ‘convincing evidence of majority support.’ Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of a Section 8(a)(5)—by showing convincing support, for instance, by a union-called strike or strike vote, or, as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.

Id. at 596-597 (quoting NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756, 757 (2d Cir. 1940)).

The decision in Gissel was hardly surprising. Since the inception of the Wagner Act, the Supreme Court has held that the use of authorization cards to gain majority status is permitted under Section 9(a). See United Mine Workers, 351 at 71-72 n.8; cf. NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318, 339-340 (1940).

Further, as the Court noted in Gissel, when Congress was debating the enactment of the Taft-Hartley Act of 1947, it specifically rejected an amendment of the Wagner Act that would have eliminated the use of authorization cards. 395 U.S. at 598 (citing Section 8(a)(5) of H.R. 3020, 80th Cong., 1st Sess. (1947); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947)).

The Courts of Appeal have also routinely upheld the use of signed authorization cards by unions to gain majority recognition. For example, in NLRB v. Parma Water Lifter Co., 211 F.2d 258 (9th Cir. 1954), the Ninth Circuit rejected an argument that, because of the potential for union coercion, Board elections were the only appropriate means under which a union is entitled to recognition. On the contrary, the court found that “it is well settled that the designation may be made by other means, one of the most common of which is the signing of union authorization cards.” Id. at 261. Later, the Ninth Circuit reiterated that “[v]oluntary recognition is a favored element of national labor policy.” NLRB v. Broadmoor Lumber Co., 578 F.2d 238, 241 (9th Cir. 1978); see also, NLRB v. Creative Food Design Ltd., 852 F.2d 1295, 1299 (D.C. Cir. 1988) (“[a]n employer’s

voluntary recognition of a majority union also remains a favored element of national labor policy) (quoting Broadmoor Lumber Co.); NLRB v. Broad Street Hosp. & Med. Ctr., 452 F.2d 302, 305 (3d Cir. 1971) (“Voluntary recognition by employers of bargaining units would be discouraged, and the objectives of our national labor policy thwarted if recognition were to be limited to Board-certified elections.”).

Voluntary recognition has not only been accepted law for decades, but serves to promote the policies championed by the Board. In the thirty-five years since the Gissel decision, the Board has continued to reaffirm voluntary recognition as an important element of labor-management relations: “It is a long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations.” MGM Grand Hotel, Inc., 329 N.L.R.B. 464, 466 (1999). And while there may be incremental benefits provided by a Board conducted election, “[t]he law is well settled that the benefit of utilizing Board election procedures does not outweigh the important role that voluntary recognition plays in expeditiously resolving representation issues.” Motion Picture & Videotape Editors Guild, Local No. 776, 311 N.L.R.B. 801, 804 (1993). By granting employers and employees alike the ability to rely on the collective bargaining representative designated as such by the employees through a valid card check, both parties may avoid the inherent “uncertainty potentially generative of strife and discord in industrial relations.” NLRB v. Broad Street Hosp. & Med. Ctr., 452 F.2d at 305.

Nor, as the Right to Work Legal Defense Foundation argues so stridently, does card check recognition interfere with employee representational rights. On the contrary, the Board has held that “where only one union is engaged in organizing an employer’s employees, voluntary recognition by the employer of that union upon a demonstration of its majority status only serves to effectuate employee free choice.” Seattle Mariners, 335 N.L.R.B. 563, 565 (2001) (emphasis added).

In summary, the right of unions to establish representational rights through authorization cards and the right of employers to recognize unions through the process of a so-called card check is an incontestable part of our labor law and arises out of the express language of the National Labor Relations Act itself. It serves important purposes: stable and harmonious labor relations and the expeditious resolution of representation issues. While the Right to Work Legal Defense Foundation states that its issue is the voluntary recognition bar, its real attack is on authorization card recognition itself. But the only place that this doctrine can be changed is in the Congress because it is engrained in the National Labor Relations Act.

- B. The policies behind the voluntary recognition bar serve the interests of employees, unions and employers in all respects by allowing the legitimately chosen bargaining representative time to craft a collective bargaining agreement.

Once a union has been lawfully recognized as a bargaining representative, whether through an election or authorization cards, the law has long required that the collective bargaining relationship must be given sufficient time to succeed.

Indeed, when the Board certifies a union after an election, the Act provides that “no election shall be held in any bargaining unit within twelve months of a preceding election.” NLRB v. Universal Gear Serv. Corp., 394 F.2d 396, 397 (6th Cir. 1968).¹ In upholding the Board’s finding that an employer violated Section 8(a)(5) of the Act by refusing to bargain with a union based upon its loss of majority status during the certification year, the Supreme Court noted that Congress passed the certification year rule “so that there shall not be a constant stirring up of excitement of continual elections.” Brooks v. NLRB, 348 U.S. 96, 101, n.8 (1954) (quoting 93 Cong. Rec. 3838 (1947)).

The Brooks court cited the following factors set forth by the Board and other courts for the enforcement of a one-year bar:

(a) In the political and business spheres, the choice of the voters in an election binds them for a fixed time. This promotes a sense of responsibility in the electorate and needed coherence in administration... (b) since an election is a solemn and costly occasion, conducted under safeguards to voluntary choice, revocation of authority should occur by a procedure no less solemn than that of the initial designation... (c) a union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hot-house results or be turned out... (d) it is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time... (e) in situations, not wholly rare, where unions are competing, raiding and strife will be minimized if elections are not at the hazard of informal and short-term recall.

Id. at 100.

¹ See 29 U.S.C. § 159(c)(3)(2004) (“No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.”).

Similarly, the Board has applied a decertification bar to voluntary recognition situations in order to achieve these same objectives. But unlike the one-year bar after a union has been certified by the Board, the voluntary recognition bar only applies for a “reasonable period” of time. Thus, as the Board stated in Keller Plastics Eastern, Inc., 157 N.L.R.B. 583, 586 (1966), “[a] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.” (citing NLRB v. Appalachian Elec. Power Co., 140 F.2d 217, 220-222 (4th Cir. 1944); NLRB v. Botany Worsted Mills, 133 F.2d 876, 881-882 (3d Cir. 1943)). See also MGM Grand Hotel, 329 N.L.R.B. at 466; Ford Ctr. for the Performing Arts, 328 N.L.R.B. 1 (1999); Blue Valley Mach. & Mfg. Co., 180 N.L.R.B. 298, 304 (1969).

The voluntary recognition bar was enacted in order to foster stability in labor-management relations and to promote industrial peace. See MGM Grand Hotel, 329 N.L.R.B. at 465-466. In one of the first pronouncements on the bar, the Sixth Circuit found that two of the policies enumerated in Brooks were highly applicable to the voluntary recognition setting as well. See Universal Gear Serv. Corp., 394 F.2d at 398.

Persuaded by the argument put forward by the Board, the Court held that the policies of giving the union time to negotiate without the pressure of having to produce results and discouraging employers from “dillydallying” in order to allow the union’s strength to erode necessitated the application of the decertification bar. Id. The Court approved the Board’s conclusions that bargaining could succeed and

the policies of the Act could be effectuated only if the parties could rely on the continuing representative status of the lawfully recognized union for a reasonable period of time. Id. Since then, Courts of Appeal have consistently endorsed the voluntary recognition bar principle. See, e.g., Exxel/Atmos, Inc. v. NLRB, 28 F.3d 1243 (D.C. Cir. 1994); Randall Div. of Textron, Inc. v. NLRB, 965 F.2d 141, 145 (7th Cir. 1992); Royal Coach Lines, Inc. v. NLRB, 838 F.2d 47, 51-52 (2d Cir. 1988); NLRB v. Cayuga Crushed Stone, Inc., 474 F.2d 1380, 1383-1384 (2d. Cir. 1973); NLRB v. Frick Co., 423 F.2d 1327, 1332 (3d Cir. 1970); NLRB v. San Clemente Publ'g Corp., 408 F.2d 367, 368 (9th Cir. 1969); NLRB v. Montgomery Ward & Co., 399 F.2d 409, 411-413 (7th Cir. 1968).

The Board has reaffirmed the efficacy of the voluntary recognition bar in a number of relatively recent cases. Thus, in MGM Grand Hotel, the Board stated:

This presumption of continuing majority status is not based on an absolute certainty that the union's majority status will not erode. Rather, it is a policy judgment which seeks to ensure that the bargaining representative chosen by a majority of employees has the opportunity to engage in bargaining to obtain a contract on the employees' behalf without interruption. The ability to select a bargaining representative would otherwise be meaningless. At a minimum, then, this presumption allows a labor organization freely chosen by employees to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and be decertified. This presumption also removes from the employer the temptation to delay the bargaining process in the hope that such a delay will undermine the majority support of the union.

329 N.L.R.B. at 466 (citing Brooks, 348 U.S. at 101; Keller Plastics, 157 N.L.R.B. at 587); accord Ford Ctr. for the Performing Arts, 328 NLRB 1; Seattle Mariners, 335 N.L.R.B. 563. ^{2/}

Unlike the certification bar following an election, the voluntary recognition bar does not protect majority status indefinitely, or for a fixed period of time. Instead, parties are given “a reasonable time to bargain and to execute the contracts resulting from such bargaining.” Keller Plastics, 157 N.L.R.B. at 587 (emphasis added). “What constitutes ‘a reasonable time’ is not measured by the number of days or months spent in bargaining, but by what transpired and what was accomplished in the bargaining sessions.” Ford Ctr. for the Performing Arts, 328 N.L.R.B. at 1 (quoting Royal Coach Lines, 282 N.L.R.B. 1037, 1038 (1987)); MGM Grand Hotel, 329 N.L.R.B. at 466. This factual analysis is made on a case-by-case basis so that the Board is given ample opportunity to determine whether the parties “had sufficient time to reach agreement.” MGM Grand Hotel, 329 N.L.R.B. at 466. Factors considered by the Board include progress made in negotiations, whether the parties were negotiating for a first contract, and whether the parties were at an impasse. See id. at 466; Ford Ctr. for the Performing Arts, 328 N.L.R.B. 1; N.J. MacDonald & Sons, Inc., 155 N.L.R.B. 67, 71-72 (1965).

^{2/} While Member Brame dissented from the Board’s decision in MGM, supra, he reaffirmed the rationale of the voluntary recognition bar. Id. at 471. Member Brame’s dissent was based only upon his analysis of the facts of the case under accepted Board law. He dissented only from the dismissal of a decertification petition filed almost a year after the union had been recognized. He did not quarrel with the dismissal of petitions filed approximately five and ten months after recognition. Dana recognizes that a card check is not the same as a secret ballot election and has no argument with careful application of the principles enunciated by the Board to determine whether the parties have had sufficient time to develop a fruitful collective bargaining relationship.

In the name of employee representation rights, the Right to Work Legal Defense Foundation would have the Board abolish this carefully balanced approach. It offers two untenable alternatives. First, abolish the voluntary recognition bar altogether, so that a decertification petition could be filed at any time and there would be no consideration of the efforts of the parties to bargain a collective agreement. Alternatively, grant a forty-five day window period following recognition to file a decertification petition; in other words, allow for the disruption of a decertification petition just as the collective bargaining efforts of the parties have commenced. Either approach not only interferes with collective bargaining, but the representation rights of the majority of employees who have asked a union, in this case the UAW, to represent them and negotiate on their behalf. They should have the opportunity to have that process go forward without disruption. If, under current board law, the employees determine that union representation has been a failure after a reasonable period to bargain, then they have the right to have a decertification petition processed.

The impact of the Right to Work Foundation's proposal would be severe. Employees select a union so that it can negotiate a contract governing their terms and conditions of employment. Such a process, particularly where a first contract is involved, takes time. Allowing that process to be shortcut by a decertification petition will have the most negative practical consequences. Unions operating under the possibility of a decertification petition that could be filed at any time will be tempted to structure their bargaining strategy to avoid a decertification attempt.

On the one hand, a union may take an unduly militant approach to collective bargaining to show employees that they will aggressively represent them, thus increasing the chance of a strike. The potential damage to companies like Dana, their customers, shareholders and to the economy would be significant. Or, on the other extreme, a union may reach a quick contract, one that may not be in the best interest of employees, to foreclose a decertification petition. In any case, the disruption to the work place caused by a decertification petition when negotiations for a first contract are on-going would be severe, impacting on productivity and team work. Dana manufactures products and systems for automotive, commercial and off-highway vehicles. It operates in a globally competitive marketplace. Neither Dana nor its employees can afford such disruptions.

The Legal Defense Foundation's approach would have other detrimental results. Some employers would certainly take advantage of the new rule to slow the negotiating process in the hope that frustrated employees will file a decertification petition. The large majority of employers operating in good faith will face a conundrum, particularly when a decertification petition was filed. An employer would have an obligation to bargain in good faith, even while the decertification petition is pending. ^{3/} But what employer would want to expend its energy on a bargaining process that may be futile, and indeed, result in an unfair labor practice if it later is determined that the union is a minority union. See Int'l Ladies'

^{3/} Radisson Plaza Minneapolis, 307 N.L.R.B. 94 (1992) (holding that the employer's actions were unlawful when it refused to bargain with a union that was initially recognized following a card check, after receiving notice that a decertification petition was filed).

Garment Workers' Union (Bernhard-Altman) v. NLRB, 366 U.S. 731, 739 (1961)

("prohibited conduct cannot be excused by a showing of good faith"). ^{4/} As a practical matter, the filing of a decertification petition would likely put the bargaining process in limbo.

In sum, rather than protect employee rights, the result advocated by the Legal Defense Foundation would have a mischievous impact on the collective bargaining process and thereby employee rights and likely lead to an increase in labor disputes. A disaffected employee could file a petition, disrupt the bargaining process and effectively frustrate the desires of the majority who sought union representation. The employees who have selected union representation in a manner provided by the Act will have their collective bargaining rights compromised.

Given the uncertainties in recognizing a union as a result of a check of authorization cards, employers will always demand a Board election. In short, the approach advocated by the Legal Defense Foundation would effectively abrogate Section 9 of the Act, which allows unions to be selected by some other manner other than a Board conducted election. It would effectively accomplish, through a new legal rule, a result that Congress expressly rejected: union recognition through the single means of an election conducted by the National Labor Relations Board. To put it another way; by abolishing the voluntary recognition bar, the Board will be effectively abolishing voluntary recognition. This is the real goal of the Right to Work Foundation, which spends most of its Request for Review setting forth the

^{4/} Given the Supreme Court's decision in Bernhard-Altman, the Right to Work Foundation's alleged concerns about employers recognizing minority unions are unfounded at best.

alleged perils of voluntary recognition with very little challenge to the policies behind the voluntary recognition bar itself.

Petitioners' argument completely ignores the fact that the bar is not absolute. Employees who seek to decertify the union are free to file a decertification petition at any time. Once filed, a factual determination is made regarding the conduct of the union and the employer in the post-recognition phase in order to determine whether the two parties have had sufficient time to negotiate an agreement. As opposed to the certification bar, which is a per se ban on two elections within twelve months, the voluntary recognition bar simply requires a factual analysis to determine whether an election is warranted. This "flexible" bar furthers the balance sought by the Board between employee rights to select their representatives and the stability of bargaining relationships.

In granting the Request for Review in the instant case, Chairman Battista and Members Schaumber and Meisburg distinguish the compelling decisions in MGM Grand Hotel, 329 N.L.R.B. 464, and Seattle Mariners, 335 N.L.R.B. 563, by arguing that "[b]oth cases *assume* the very proposition that it is at issue here, viz., whether voluntary recognition of the kind involved herein should give rise to a recognition bar." As far as it goes, that statement is correct. But it also proves a point supporting the continuation of this principle of law. In forty years, not a single Board Member has argued against this policy. Moreover, in both MGM Grand Hotel and Seattle Mariners, the Board reaffirmed the compelling reasons for the policy. Thus in MGM Grand Hotel, the Board reiterated the "policy judgment

which seeks to ensure that the bargaining representative chosen by a majority of employees has the opportunity to engage in bargaining to obtain a contract on the employees' behalf without interruption. The ability to select a bargaining representative would otherwise be meaningless." 329 N.L.R.B. at 466.

The Board's decision in Seattle Mariners is also of significance. In that case, the Board refused to extend to single union situations its holding in Smith's Food & Drug Ctrs., 320 NLRB 844 (1996), that in rival union initial organizing situations, an employer's recognition of one union will not bar a petition by a competing union if the petitioner union demonstrates a 30% showing of interest that predates the recognition. 335 NLRB at 565. Thus, the Board dismissed a decertification petition, based upon a petition signed by more than 30% of the Seattle Mariner's employees prior to a neutral arbitrator's finding that a majority of the employer's employees authorized union representation. Id. ⁵

In dismissing the petition, the Board held that "where only one union is engaged in organizing an employer's employees, voluntary recognition by the employer of that union upon a demonstration of its majority status only serves to effectuate employee free choice." Id. The Board took note of the fact that in an organizing drive, it is likely that a minority of employees do not favor union representation. Unanimous support of a union is rare. The Board held that

[u]nder such circumstances, to...find that an election is required based on the fact that 30 percent of the employees did not support the Union at the time of the recognition would be tantamount to a repudiation of recognition bar

⁵ The arbitrator's finding was pursuant to a card check resulting from a neutrality agreement entered into by the Seattle Mariners and the union that the employees sought to decertify.

principles. Indeed, requiring an election any time there is a considerable minority of employees that opposes union representation would abrogate the 'long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations.'

Id. (quoting MGM Grand Hotel, 329 N.L.R.B. at 466).

This rationale is even more compelling in cases like this one, where the decertification petition follows lawful recognition. As in a Board election, after a card check there is always likely to be a minority, and sometimes even a substantial minority, opposed to recognition. To allow that disaffected minority to disrupt collective bargaining by filing a decertification petition is to foster an unstable environment that would make any rational employer reluctant to agree to a card check recognition process. ^{6/}

Nor, as Petitioners contend, does Levitz Furniture Co. of the Pac., 333 N.L.R.B. 717 (2001) buttress their position. On the contrary, Levitz is supportive of the collective bargaining process as is the voluntary recognition bar rule. First, it should be noted what Levitz did not involve. It did not involve voluntary recognition. The union in that case had been certified pursuant to a Board election. Second, it did not involve the issue of when a decertification petition can be filed. The union in Levitz had been certified in 1973. The case involved an employer's

^{6/} While Chairman Hurtgen dissented from the Board's decision, he carefully distinguished that case from cases involving the voluntary recognition bar. As he noted, in Seattle Mariners the election petition was filed before voluntary recognition had occurred. "Accordingly, the predicate for the petition must exist before recognition (and hence before any bargaining lawfully can occur)." Id. at 566 (emphasis added). In short, his approach provides no support for the Right to work Foundation's position in the instant case where the decertification petition followed lawful recognition of the UAW.

refusal to bargain in 1994 following its receipt of a petition from a majority of its employees stating that they no longer desired representation. Id. at 718-719.

Rather, Levitz stands for two principles. First, the Board held that an employer may unilaterally withdraw recognition from an incumbent union only where the union had actually lost majority support. Id. at 725. The Board overruled its prior decision in Celanese Corp. of America, 95 NLRB 664 (1951), which permitted withdrawal of recognition based upon a good faith doubt of a union's majority status. Id. at 724-25. In doing so, the Board used words that clearly support the continuation of the present voluntary recognition bar rule. The decision states:

The Board has also recognized that, for employees' choices to be meaningful, collective-bargaining relationships must be given a chance to bear fruit and so must not be subjected to constant challenges. Therefore, from the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective-bargaining relationships, as well as employee free choice, by presuming that an incumbent union retains its majority status.

Id. at 720.

Second, the Board held that an employer could obtain an RM election by a minimally lesser standard than in the past: by demonstrating good-faith reasonable uncertainty rather than good-faith belief. That holding in no way undermines the Board's prior decisions relating to the time when a decertification petition may be filed. Indeed, the Board cited its decision in Keller Plastics with approval. Id. at 720 n. 17.

II. Unfair labor practice proceedings effectively redress allegations of improper conduct during an organization drive, thus making it unnecessary to overturn the delicate balance of labor-management relations that has been crafted by the Board.

The Right to Work Foundation argues that allowing employees to file a decertification petition at any time is necessary to protect employees against coercion or otherwise prevent improper union recognition. Yet, as the Foundation concedes, see Request for Review at pages 19-20, coercion or other misconduct by either a union or an employer may be addressed through the unfair labor practice provisions of the Act. Indeed, it is telling that despite the Petitioner's totally unfounded and conclusory allegations of improprieties in the recognition of the UAW at Dana, neither the Petitioner nor the Foundation filed any unfair labor practice charge against either Dana or the UAW in the instant case. ^{7/}

In fact, employees have a full panoply of rights regarding unlawful coercion by either a union or employer, unlawful union assistance, and the unlawful recognition of a minority union. The Board has not been reluctant to deal with employer and union unfair labor practices in circumstances involving the procuring of authorization cards and has a full range of remedies that it can impose on unions and employers to protect employee rights, including orders requiring employers and unions to cease coercing or discriminating against employees in an attempt to

^{7/} The Right to Work Foundation argues that "[t]he NLRB has never investigated the circumstances under which Dana hand-picked and then recognized the UAW, to determine if rights guaranteed by the NLRB were trampled". Request for Review at page 9. But, if they really thought employees were coerced, all they had to do was file an unfair labor practice charge and obtain the investigation they claim that they are being denied.

impose a favored union on them,⁸ back pay and reinstatement,⁹ the return of dues, initiation fees and assessments paid to a union,¹⁰ prohibitions on recognizing the assisted union,¹¹ and an order barring the parties from giving effect to a collective bargaining agreement procured through unlawful assistance.¹² Of course, employers who recognize and bargain with a minority union also violate the Act.¹³ The Right to Work Foundation states that an employer “can voluntarily recognize a union that has majority support, does not have majority support, or whose employee support is obtained through coercion.” Request for Review at page 11. But what it does not say and what the cases it cites in support of that statement show, is that recognition in the latter two circumstances is unlawful. See NLRB v. Windsor Castle Healthcare Facilities, Inc., 13 F.3d 619, 623 (2d Cir. 1994); Duane Reade, Inc., 338 N.L.R.B. *2; Vernition Elec. Components, Inc., 221 N.L.R.B. at 465. In

⁸ See, e.g., Gulf Caribe Mar., Inc., 330 N.L.R.B. 766, 773 (2000); Kosher Plaza Supermarket, 313 N.L.R.B. 74, 93 (1993); St. Helens Shop ‘N Kart, 311 N.L.R.B. 1281, 1287 (1993).

⁹ See, e.g., Gulf Caribe Mar., Inc., 330 N.L.R.B. at 774; Kosher Plaza Supermarket, 313 N.L.R.B. at 93; Sav-On-Drugs, Inc., 227 N.L.R.B. 1638, 1648 (1977).

¹⁰ See, e.g., Duane Reade, Inc., 338 N.L.R.B. No. 140, *14 (2003); Sav-On-Drugs, Inc., 227 N.L.R.B. at 1648; Vernitron Elec. Components, Inc., 221 N.L.R.B. 464, 466 (1975).

¹¹ See, e.g., Duane Reade, Inc., 338 N.L.R.B. at *14; Gulf Caribe Mar., Inc., 330 N.L.R.B. at 773; St. Helens Shop ‘N Kart, 311 N.L.R.B. at 1281; Sav-on-Drugs, Inc., 227 N.L.R.B. at 1648; Vernitron Elec. Components, Inc.; 221 N.L.R.B. at 466.

¹² See, e.g., Duane Reade, Inc., 338 N.L.R.B. at *14; Gulf Caribe Mar., Inc., 330 N.L.R.B. at 773; St. Helens Shop ‘N Kart, 311 N.L.R.B. at 1281; Vernitron Elec. Components, Inc., 221 N.L.R.B. at 466.

¹³ See, e.g., Int’l Ladies’ Garment Workers’ Union v. NLRB, 366 U.S. 731, 738-739 (1961) (holding that an employer commits an unfair labor practice by bargaining with a minority union, regardless of whether an employer had a good faith belief as to the union’s majority status).

short, the Board should and does protect employees from being coerced into the selection on a collective bargaining representative.

As to the Petitioner's argument that employees are entitled to the "laboratory conditions" required in a Board conducted election, the short answer is that their challenge to the voluntary election bar is really a challenge to voluntary recognition itself. The Board and the Courts have repeatedly rejected such challenges.

Moreover, Petitioners overstate the meaning of laboratory conditions. As the Board has stated,

In deciding whether the registration of a free choice is shown to have been unlikely, the Board must recognize that Board elections do not occur in a laboratory where controlled or artificial conditions may be established. We seek to establish ideal conditions insofar as possible, but we appraise the actual facts in the light of realistic standards of human conduct. It follows that elections must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial standards.

The Liberal Market, Inc., 108 N.L.R.B. 1481, 1482 (1954). See also, Case Farms of N.C., Inc. v. NLRB, 128 F. 3d 841, 844 (4th Cir. 1997).

Indeed, even in Board elections, there is a wide range of acceptable conduct and Board allows for wide and free ranging debate. See, e.g., Certainteed Corp. v. NLRB, 714 F.2d 1042, 1063 (11th Cir. 1983) ("The Board's desire to maintain 'laboratory conditions' does not mean that it will maintain a perfect environment."); NLRB v. Klingler Elec. Corp., 656 F.2d 76, 89 (5th Cir. 1981); Morganton Full Fashioned Hosiery Co., 107 N.L.R.B. 1534, 1538 (1954) ("While the Board has frequently referred to its elections as conducted in a 'laboratory atmosphere,' the adoption of a laboratory standard should not be construed to mean that the Board

will ignore the realities of industrial life.”) (citation omitted); Decorated Prods., Inc., 140 N.L.R.B. 1383, 1385 (1963) (finding that employers can respond to prior union propaganda and make comments regarding the advantages and disadvantages of unionization), See also 29 U.S.C. § 158(c). And while employees do not have all the benefits of a Board conducted election in a card check,¹⁴ the unfair labor practice provisions of the Act protect them from coercion and ensure that they can freely determine whether or not to sign an authorization card.

The Petitioner’s contention that an election and not authorization cards is the only way “to determine the true representational desires of the employees” (Request for Review at pp. 10-11) is also misplaced. She contends that authorization card recognition subjects employees to harassment and group pressure. The Supreme Court rejected that argument long ago in Gissel, 395 U.S. at 602-603. As the Court stated, “the same pressures are likely to be equally present in an election, for election cases arise most often with small bargaining units where virtually every voter’s sentiments can be carefully and individually canvassed.” Id. at 604. More importantly, the Court observed:

We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told their act of signing represents something else. In addition to approving the use of

¹⁴ The focus of the cases cited by the Petitioners in support of their laboratory conditions argument, at heart go to the protection of the Board’s election mechanisms and ensuring Board neutrality and fairness. See Michem, Inc., 170 N.L.R.B. 362, 363 (1968) (holding that blanket prohibitions against conversations with voters immediately before they cast a ballot has a salutary effect on the conduct of elections); Piggly-Wiggly, 168 N.L.R.B. 792 (1967) (finding that when a union or employer keeps a list of employees who has voted at the election place, the conduct of the election was affected); Claussen Baking Co., 134 N.L.R.B. 111, 112 (1961) (holding that it is the province of the Board to be zealous in preventing intrusions upon the conduct of elections). These protections are not necessary where there is no federally conducted election.

cards, of course, Congress has expressly authorized reliance on employee signatures alone in other areas of labor relations, even where criminal sanctions hang in the balance, and we should not act hastily in disregarding congressional judgments that employees can be counted on to take responsibility for their acts.

Id. at 607 (citations omitted).

In short, a majority of Dana's employees signed authorization cards designating the UAW as their collective bargaining representative. Absent a showing that those cards were obtained through coercion, a showing that the Petitioner did not even try to make, it must be presumed that they have in fact expressed their "true representational desires" and those desires should be given a reasonable time to be effectuated through the collective bargaining process. Again, the current Board rules strike a balance in that the parties are given a reasonable time to negotiate a contract. If after that time period, an agreement has not been reached, then the Board will entertain a decertification petition.

III. Petitioners have made no showing demonstrating as to why the Board should overrule long-standing precedent.

Petitioners have not articulated any logical reason why the Board should ignore the well-established Board principles regarding the voluntary recognition bar. They have presented no empirical evidence and there has been no showing that the voluntary recognition process breeds employee coercion or results in the trampling of Section 7 rights. ^{15/} In addition, Petitioners have provided no evidence

^{15/} Their tendency towards hyperbole is illustrated by the statement that "[h]istory bears out that employers and unions have a propensity to impose union representation on employees even where the union does not enjoy uncoerced majority support." That overblown pronouncement is supported by a total of eleven cases decided in the course of the 69-year history of the National Labor Relations Act.

that the current framework of unfair labor charges does not adequately protect employee rights when an employer and union overstep the bounds of the law.

The Right to Work Foundation seems most offended by the fact that the card check in the instant case resulted from a neutrality agreement. First, as Members Liebman and Walsh observed, the Board has applied the voluntary recognition bar in both circumstances where the parties have agreed in advance to a card check before a neutral and where a union had obtained authorization cards from a majority of the employees before entering into a card-check agreement with the employer. Compare Seattle Mariners, 335 N.L.R.B. 563 and MGM Grand Hotel, 329 N.L.R.B. 464, with Rockwell International Corp., 220 N.L.R.B. 1262 (1975). The Board has not focused on whether the cards were obtained before or after the agreement with the employer. If anything, the present circumstances, where the parties enter into an agreement providing for a neutral to check authorization cards to ensure that they are authentic and to determine the union's majority status, is the most protective of employee rights.

The fact that the voluntary recognition was preceded by a neutrality agreement providing for a card check recognition process does not raise any novel issue of law; in fact, such agreements are routinely upheld on the ground that they “advance the national labor policy of promoting voluntary recognition and of honoring voluntary agreements reached between employers and unions.” Gen. Couns. Mem., NLRB, Verizon Wireless/Communication Workers of Amer. Advice Memorandum (Jan. 7, 2002); see also Verizon Info. Sys., 335 N.L.R.B. 558 (2001)

(dismissing an NLRB election petition because the union had invoked the arbitration provisions of a neutrality agreement providing for card check recognition); Goodless Elec. Co., Inc., 332 N.L.R.B. No. 96, slip op. at 4 (2000). See Kroger Co., 219 N.L.R.B. 388 (1975).

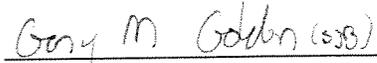
Petitioners have not shown any evidence that card check provisions contained in neutrality agreements have a harmful effect on employee free choice. Further, Petitioners have not demonstrated how the unfair labor practice system inadequately addresses their concerns.

Finally, relying on the Board's analysis in Levitz, 333 N.L.R.B. No. 105, the Right to Work Foundation alleges that there are three "criteria" that the Board should look at in determining whether to overrule the voluntary recognition bar. Request for Review at pp. 31-37. First, they argue that the bar is inconsistent with the plain text of the Act. On the contrary, as previously shown, it arises out of and is a necessary concomitant to Section 9(a) of the Act. Second, they argue that it undermines the central policies of the Act. But the Board and the courts have repeatedly stated that it promotes the collective bargaining process and effectuates employee representation rights. Third, they argue that is not necessary to give effect to other policies of the Act. Once more, they are incorrect. The voluntary recognition bar is necessary to effectuate the decision of Congress to allow employees to select union representation through means other than a Board conducted election.

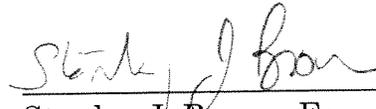
CONCLUSION

In summary, current Board law incorporates a delicate and careful balance of important policies involving employee representation rights, stable collective bargaining and industrial peace. The Right to Work Foundation has made no showing that the current balance does not work. The approach it indicates will severely and negatively upset that balance and effectively end voluntary recognition. The Congress, the Board and the courts have all recognized the importance of voluntary recognition to our national labor policy. The Right to Work Foundation should not be allowed to do indirectly what all of these institutions have refused to do directly. For all the foregoing reasons, Dana respectfully requests that the Board uphold the finding of the Regional Director and order the petition dismissed.

Respectfully Submitted,

 (535)

Gary M. Golden, Esq.
Dana Corporation
4500 Dorr Street
P.O. Box 1000
Toledo, OH 43697-1000
(419) 535-4847



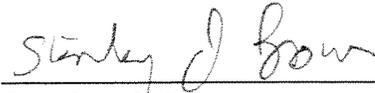
Stanley J. Brown, Esq.
Aaron J. Longo, Esq.
Hogan & Hartson L.L.P.
8300 Greensboro Drive
Suite 1100
McLean, Virginia 22102
(703) 610-6150

Attorneys for Employer
Dana Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief was sent by facsimile and first-class mail on July 15, 2004, on the attached service list.

Respectfully submitted,



Stanley J. Brown
Hogan & Hartson L.L.P.
8300 Greensboro Drive, Suite 1100
McLean, Virginia 22102
(703) 610-6150

Attorney for Employer
Dana Corporation

Attachment

Atherholt and Dana and UAW, Case 8-RD-1976
Krug and Sample and Metaldyne Corp. and UAW, Cases No. 6-RD-1518/1519

Glenn Taubman, Esq.
National Right to Work Legal
Foundation Defense Fund
8001 Braddock Road, Suite 600
Springfield, VA 22160
Fax: (703) 321-9319

William Messenger, Esq.
National Right to Work Legal
Foundation Defense Fund
8001 Braddock Road, Suite 600
Springfield, VA 22160
Fax: (703) 321-9319

Clarice K. Atherholt
302 S. Fifth Street
Upper Sandusky, OH 43351-1412 (by U.S. mail)

Jeffrey A. Sample
148 School Street
Kane, PA 16735 (by U.S. mail)

Betsey A. Engel, Esq.
International Union United Automobile
Aerospace and Agricultural Implement
Workers of America, AFL-CIO
8000 Jefferson Avenue
Detroit, MI 48214
Fax: (313) 926-5236

Thomas A. Lenz
Atkinson Andelson Loya Roud
& Roy
17871 Park Plaza Drive
Suite 200
Cerritos, CA 90703-8597
Fax: (562) 653-3333

Wendy Fields-Jacobs, Representative
International Union United Automobile
Aerospace and Agricultural Implement
Workers of America, AFL-CIO
8000 Jefferson Avenue
Detroit, MI 48214
Fax: (313) 926-4405

James M. Stone, Esq.
McDonald Hopkins Co., LPA
2100 Bank One Center
600 Superior Avenue
Cleveland, OH 44114
Fax: (216) 348-5474

International Union United Automobile
Aerospace and Agricultural Implement
Workers of America, AFL-CIO
8000 Jefferson Avenue
Detroit, MI 48214
Fax: (313) 823-6016

Metaldyne Corp.
Attn: Seanna D'Amore
West Creek Road
P.O. Box 170
St. Mary's, PA 15857
Fax: (814) 781-6329

Frederick J. Calatrello, Regional Dir.
National Labor Relations Board
Region 8
1240 East 9th Street, Room 1695
Cleveland, OH 44199-2086
Fax: (216) 522-2418

Gerald Kobell, Regional Dir.
National Labor Relations Board
Region 6
1000 Liberty Avenue
Pittsburgh, PA 15222-4173
Fax: (412) 395-5986

International Union United Automobile
Aerospace and Agricultural Implement
Workers of America, AFL-CIO
Legal Department
8000 Jefferson Avenue
Detroit, MI 48214
Fax: (313) 926-5240

National Labor Relations Board
Division of Advice
Attn: David A. Colangelo, Esq.
1099 14th Street, NW- Room 10408
Washington, DC 20005
Fax: (202) 273-4480

American Federation of Labor & Congress
of Industrial Organizations
Attn: Craig Becker, Associate G.C.
25 E. Washington Street- Suite 1400
Chicago, IL 60602
Fax: (312) 236-6686

Ronald E. Goldman, Esq.
Kaiser Permanente
22nd Fl. National Legal
1 Kaiser Plaza
Oakland, CA 94612
Fax: (510) 267-2128

John M. O'Donnell, Esq.
Attorney at Law
148 William Drive
Coraopolis, PA 15108
Fax: (412) 859-4448

Michael A. Kolczak, Esq.
Jones Day
1420 Peachtree Street, NE
Suite 800
Atlanta, GA 30309
Fax: (404) 581-8330