UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Michael E. Lopez,
(Petitioner)

and

Lamons Gasket Company,
a Division of Trimas Corporation,
(Employer)
and

United Steel, Paper and Forestry
et al. Union (USW),
(Union)

Case No. 16-RD-1597

AMICUS BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

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The National Right to Work Legal Defense Foundation is a nonprofit, charitable organization that provides free legal aid to employees whose rights are infringed upon through compulsory union representation and membership. Foundation attorneys represented the individuals who first secured the right of employees to vote on whether they wanted the representation of a union chosen by their employer in *Dana Corp.*, 351 N.L.R.B. 534 (2007). Foundation attorneys subsequently represented numerous employees who exercised their rights to secret-ballot elections under *Dana.* This includes the Petitioner in *Lamons Gasket Co.,* 16-RD-1567 (2010), the case in which the Board majority now apparently seeks to overturn *Dana* and deny employees their right to vote on whether they want to be unionized.

The right of employees to a secret-ballot under *Dana* must be upheld. While compelled representation is itself wrongful—every citizen should be free to choose *individually* with whom they associate—at the very least compelled representation should reflect the will of a majority of employees. *Dana* elections are essential to ensuring that an employee representative selected by an employer and union is also the representative desired by a majority of employees.

The necessity of *Dana* elections is established by one simple, indisputable fact: the Board has no knowledge whether unions recognized by employers have the actual and uncoerced support of a majority of employees. A recognition agreement is a *private* agreement between an employer and union. The Board is not a party to a recognition agreement, and has no first-hand knowledge whether it reflects the true will of employees.

Indeed, there are strong reasons to doubt that private recognition agreements reflect employee free choice. Employer recognition is often the product of a pre-arranged "organizing agreement" in which an employer agrees to unionize its employees as quid pro quo for consideration from the

union. The recognition that results from these collusive arrangements is inherently suspect, as it merely reflects the perceived self-interests of the employer and union.

Because the Board does not know if a private recognition agreement reflects employee free choice—and has strong reasons to suspect that it does not—it only makes sense for the Board to resolve the issue in a secret-ballot election upon employee request. This imminently rational policy was announced in *Dana*: to process employee election petitions up to 45 days after notice of an employer-union recognition agreement.

By contrast, the recognition bar policy in effect prior to *Dana* was wholly irrational: to quash employee election petitions based on blind deference to private recognition agreements that may not (and probably do not) reflect employee free choice. The policy was not only logically absurd, but turned the Act's policies on their head. Instead of protecting employee rights *from* employers and unions by investigating disputes concerning representation, the Board was squelching employee rights to further employer and union self-interests by refusing to investigate representational disputes.

There are no legitimate reasons for the Board not to permit employees to vote in secret-ballot elections over whether they truly want the representation of a union privately selected by their employer and that union. The policy announced in *Dana* must be upheld or, in the alternative, expanded to completely rescind the recognition bar in its entirety.

ARGUMENT

As established below, *Dana* must be upheld because the Board (1) does not know if private recognition agreements accurately reflect employee free-choice and (2) has strong reasons to

suspect that the agreements do not, so therefore (3) must determine if recognition agreements reflect employee free choice by conducting secret-ballot elections upon employee request.[1]

I. The Board Does Not Know If a Union Recognized by an Employer Actually Enjoys The Uncoerced Support of a Majority of Employees

Voluntary recognition is a private agreement between an employer and union in which the employer agrees to recognize the union as the monopoly bargaining representative of its employees. The Board itself is not a party to a recognition agreement. It does not review such agreements either before or after the parties enter them into them. When employees petition for an election after a recognition agreement, the Board has *no knowledge* whether the employer-recognized union actually enjoys the true and uncoerced support of a majority of employees.

Employers and unions usually claim in recognition agreements that the union had employee support by citing to a review of union authorization cards conducted by a third party. But the Board has no knowledge of the truth or falsity of this claim. Most importantly, the Board has no knowledge of the conditions under which the cards were procured from employees.

Even the third-parties used to verify "card checks" under most organizing agreements have no knowledge of how the union authorization cards were obtained from employees. The third-party is little more than a human calculator, whose role is merely to count the cards provided by the union against a list of employees provided by the employer. Their verification of a card-check says nothing about the conditions under which the union and/or employer obtained the cards from employees or the validity of the list of employees provided by the employer.

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[1] Note that there are numerous reasons for upholding *Dana,* including those stated in *Dana* itself and in the dissent to the grant of review in this case. The Foundation's amicus brief simply focuses on the most obvious grounds for preserving the policy.

In short, "[t]he fact that an employer bargains with a union does not tell us whether *the employees* wish to be represented by the union." *Seattle Mariners*, 335 N.L.R.B. 563, 567 n.2 (2001) (Member Hurtgen, dissenting). This indisputable fact alone requires that the Board conduct secret-ballot elections, upon employee request, to determine if the union that an employer bargains with is actually the union that employees want to have represent them.

II. The Board Cannot Blindly Presume That Private Recognition Agreements Reflect The Uncoerced Will of a Majority of Employees

A. *Board Deference to Employer and Union Determinations as to Employee Representational Preferences Would Turn the Act on its Head*

The Board not only does not know if private recognition agreements accurately reflect employee free choice, but has strong institutional reasons to treat the agreements with suspicion. The purpose of the Act is to protect employee rights *from* employers and unions. Section 7 of the Act grants "employees" the right to choose or reject union representation. 29 U.S.C. § 157. Sections 8(a) and 8(b) protect employee § 7 rights from the machinations of employers and unions. 29 U.S.C. § 158(a)-(b). For the Board to blindly trust employer and union decisions about how employees want to exercise their § 7 rights will invert the structure of the Act. It would be akin to putting foxes in charge of guarding a henhouse.

Deferring to recognition agreements is also inconsistent with the fact that Congress empowered *the Board* to protect employee rights and decide representational matters. *See* 29 U.S.C. §§ 153-54, 159(c); *see also General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948). The Board will effectively abdicate its statutory responsibilities to employers and unions if it permits these self-interested parties to privately determine representational issues as they please. Indeed, given the explosive growth of private organizing agreements between employers and unions, the Board's representational procedures will become obsolete if they cannot be used in the wake of

recognition agreements. The Board will render itself irrelevant if it chooses to blindly assume that private recognition agreements reflect the true will of employees.

B. *The Board Cannot Blindly Defer to Recognition Agreements Because Employers and Unions Enter into These Agreements to Satiate Perceived Self-Interests Unrelated to Employee Free Choice*

The Board cannot trust recognition agreements because, at their most basic level, they are agreements in which two parties agree to take something from a third-party. A recognition involves Party A (employer) and Party B (union) agreeing that Party B (union) shall obtain rights over Third-Parties C (employees). The very construct of the arrangement makes it an inherently unreliable indication of the desires of the third-party employees, as both parties to the agreement can satiate their self-interests at the expense of third-parties who are not privy to the agreement.

As a practical matter, unions and employers have a number of self-interested reasons to enter into recognition agreements that have nothing to do with effectuating employee free choice. The union self-interest is obvious: to add more employees to the union which, in turn, results in more money in union coffers through compulsory dues payments and more power for union officials. Unions have an overwhelming self-interest in being declared representatives of employees irrespective of whether employees actually support the unions.

Employers recognize unions, or agree to do so in the future, to satiate perceived business interests. Employers enter into recognition and organizing agreements to obtain unions' promises to cease or not begin coercive "corporate campaigns" against them;[2] provide political assistance

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[2] *See, e.g.,* Laura J. Cooper, *Privatizing Labor Law: Neutrality/CheckAgreements and the Role of the Arbitrator,* 83 Ind. L.J. 1589, 1591-93 (2008); Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 Empl. Rel. L.J. 21 (Spring 1999); Herbert R. Northrup, *Union 'Corporate Campaigns' as Blackmail: the RICO Battle at Bayou Steel*, 22 Harv. J.L. & Pub. Pol'y 771, 779-93 (1999); *Pichler v. UNITE,* 228 F.R.D. 230, 234-40 (E.D. Pa. 2005), *aff'd*, 542 F.3d 380 (3d

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on issues important to the employers;[3] cut off organizing campaigns of unions less-favored by the employers;[4] obtain union concessions at the expense of employees the unions already represent in collective bargaining;[5] and/or obtain union concessions at the expense of employees whom the unions organize in the future.[6] Employers also wish to recognize and deal with subservient "company unions." Employers motivated by these perceived business interests—which would include almost every employer coerced or induced to enter into an organizing agreement—are apt to recognize unions irrespective of true employee support for a union. Indeed, there is a long history of employers recognizing unions that lack uncoerced support of a majority of employees.[7]

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[2](...continued)
Cir. 2008); *Smithfield Foods v. UFCW,* 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008).

[3] *See, e.g., Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1289 (11th Cir. 2010).

[4] *See, e.g., Price Crusher Food Warehouse*, 249 N.L.R.B. 433 (1980).

[5] *See, e.g., Adcock v. Freightliner*, LLC, 550 F.3d 369, 372 (4th Cir. 2008); *Aguinaga v. UFCW*, 993 F.2d 1463, 1471 (10th Cir. 1993); *Kroger Co.*, 219 N.L.R.B. 388 (1975).

[6] *See ,e.g.,* Cohen, 20 Notre Dame J.L. Ethics & Pub. Pol'y at 533-34; *Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964), *enforcement denied on other grounds,* 355 F.2d 854 (2nd Cir. 1966); *Patterson v. Heartland Indus. Partners*, 428 F. Supp. 2d 714, 716 (N.D. Ohio 2006) (moot on appeal); *Plastech Eng. Prod., (Int'l Union, UAW)*, 2005 WL 4841723, *1-2 (N.L.R.B. Div. of Advice Memo. 2005); Agreement on Preconditions to Card Check Procedure Between Freightliner and UAW (at http://www.nrtw.org/20050228freightliner.pdf); Letter of Agreement between Dana Corp. and UAW, at pp. 8-10 (at http://www.nrtw.org/20050215letter.pdf) *see also* Hiatt & Jackson, 12 Lab. Law. at 176-77 ("Negotiations over non-Board recognition procedure often spill over to discussing the terms of a future collective bargaining agreement.").

[7] *See e.g., Duane Reade*, 338 N.L.R.B. No. 140; *Fountain View Care Center*, 317 N.L.R.B. 1286 (1995), *enf'd*, 88 F.3d 1278 (D.C. Cir. 1996); *Brooklyn Hospital Center*, 309 N.L.R.B. 1163; *Famous Casting Corp.*, 301 N.L.R.B. 404 (1991); *Systems Management, Inc.*, 292 N.L.R.B. 1075 (1989), *remanded on other grounds*, 901 F.2d 297 (3rd Cir. 1990); Anaheim Town & Country Inn, 282 N.L.R.B. 224 (1986); *Meyer's Cafe & Konditorei*, 282 N.L.R.B. 1 (1986); *SMI of Worchester*, 271 N.L.R.B. 1508 (1984); *Price Crusher Food Warehouse*, 249 N.L.R.B. 433; *Vernitron Electrical Components*, 221 N.L.R.B. 464 (1975) *enf'd* 548 F.2d 24 (1st Cir. 1977); *Pittsburgh Metal Lithographing Co., Inc.*, 158 N.L.R.B. 1126 (1966).

Given that unions and employers pursue their own perceived self-interests in recognition and organizing agreements, it would be foolish for the Board to defer to their judgments about the true desires of employees. Employees are little more than chattel in these employer/union arrangements—the consideration the employer traded for something from the union.

It is for good reason that the Supreme Court warned decades ago that deferring to even ostensibly "good faith" employer and union beliefs about employee preferences "would place in *permissibly careless* employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." *International Ladies Garment Workers v. NLRB*, 366 U.S. 731, 738-39 (1961) (emphasis added). The D.C. Circuit reiterated this warning in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003), when overruling a Board decision to blindly defer to a recognition agreement between an employer and union without independently verifying whether employees actually supported the union. "By focusing exclusively on employer and union intent, the Board has neglected its fundamental duty to protect employee § 7 rights, opening the door to even more egregious violations than the good faith mistakes at issue in *International Ladies Garment Workers*." *Id.* at 537.

The Board has generally heeded these warnings in the past, and treated employer and union determinations about employee representational preferences with suspicion.[8] So too here, the Board must treat with the utmost suspicion private agreements between self-interested employers and unions concerning the ostensible desire of employees to be represented by those unions.

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[8] *See, e.g.*, *Auciello Iron Works v. NLRB*, 517 U.S. at 790 ("nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom"); *Levitz Furniture*, 333 N.L.R.B. 717 (employer determinations as to employee opposition to union representation disfavored); *Underground Service Alert*, 315 N.L.R.B. 958, 960-61 (1994) (same).

C. *The Board Cannot Blindly Defer to Recognition Agreements Because They Are Usually Products of Organizing Agreements That Do Not Protect Employee Rights*

Recognition agreements are usually the product of employer-union organizing agreements, in which an employer agrees in advance to assist a union with obtaining from its employees the union authorization cards that will later be used to justify the employer's recognition of the union. By their terms, organizing agreements establish conditions inhospitable to employee free choice. Employee experience demonstrates the abusive nature of the organizing campaigns conducted under these schemes. It is inconceivable that the Board could blindly presume that recognition agreements that result from these top-down organizing schemes actually reflect employee free choice.

1. The purpose of an organizing agreement is to supplant the NLRA's representational procedures with a private agreement that nullifies the employee protections the Act affords. It is no secret that gaining more dues-paying members is a top priority for unions, as their membership has been in general decline for decades.[9] But unions have been unable to convince employees to choose unionization voluntarily at union-desired rates under the "bottom up" organizing procedures the NLRA favors, *i.e.*, secret-ballot elections that feature free and open debates about unionization.[10] Consequently, unions have turned to organizing employees from

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[9] *See* Laura J. Cooper, *Privatizing Labor Law: Neutrality/Check Agreements and the Role of the Arbitrator,* 83 Ind. L.J. 1589, 1591 (2008).

[10] *See* Cooper, 83 Ind. L.J. at 1591-92 (unions blame NLRA election procedures and employer opposition for decline in membership); *see also Chamber of Commerce v. Brown*,128 S. Ct. 2408, 2413-14 (2008) (NLRA encourages free and robust debate between management and unions); *Dana Corp.*, 341 N.L.R.B. 1283 (2004) (secret-ballot elections preferred under NLRA).

the "top-down" through private agreements with employers that remove several protections of employee free choice the Act provides that unions found incompatible with their ambitions.[11]

First, the Act favors an "uninhibited, robust, and wide-open debate" between employers and unions so employees can make an informed decision about whether to support or oppose unionization. *Chamber of Commerce v. Brown*, 554 U.S. 60, 128 S. Ct. 2408, 2413-14 (2008).[12] Indeed, "the right of employees to refuse to join unions . . . implies an *underlying right* to receive information opposing unionization." *Id.* at 2414 (emphasis added). Inconsistently, through gag-clauses on any employer speech regarding unionization, organizing agreements almost always deliberately squelch the free speech that the NLRA fosters.[13] Some organizing agreements go even further, requiring that employers conduct captive audience meetings for the unions.[14] The

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[11] *See* Cooper, 83 Ind. L.J. at 1593-94; Charles I. Cohen et al., *Resisting its Own Obsolescence–How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements,* 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 522 (2006); A. Eaton & J. Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42 (2001); *see also* Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 Lab. Law. 165, 176 (AFL-CIO General Counsel urging that unions "use strategic campaigns to secure recognition . . . outside the traditional representation processes").

[12] *See also* 29 U.S.C. § 158(c) (speech cannot constitute an unfair labor practice absent threat or promise of benefit); *Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir. 1967) ("The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available"); *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986) (employer speech "aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their unions' performance"); *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971) ("it is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right").

[13] *See* Cohen, 20 Notre Dame J.L. Ethics & Pub. Pol'y at 522-23; Eaton & Kriesky, 55 Indus. & Lab. Rel. Rev. at 47-48.

[14] *See, e.g., Thomas Built Buses (Int'l Union, UAW)*, Case No. 11-CA-20038 *et seq.*, at

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intent is to deprive employees of their "right to receive information opposing unionization," *id.*, so that employees hear only one side of the story during an organizing campaign—that spun by the union.

Second, the Act does not grant unions any right to employer assistance with organizing their employees, such as a right to campaign in the employees' workplace, *see Lechmere v. NLRB*, 502 U.S. 527, 532-34 (1992), or a right to personal information about employees before petitioning for an election. *See Always Care Home Health Serv.*, 1998 WL 2001253 (NLRB G.C. 1998). Organizing agreements provide unions with both forms of employer assistance, opening the door to employees being harassed by union organizers in both their workplace and homes.

Finally, and most importantly, the Act provides for Board-conducted secret-ballot elections to ascertain the free choice of employees regarding union representation. *See* 29 U.S.C. 159(c). "Secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969). Organizing agreements generally replace secret-ballot elections with "card checks" in which employees, instead of voting their consciences in the privacy of a voting booth, are solicited to sign cards by union organizers.

Employee experience confirms that union organizers frequently harass, mislead, and threaten employees to make them sign cards for the union. Attached as an appendix to this brief are declarations and statements given by employees about their unpleasant experiences with card-check campaigns. These statements are a representative sample of how employees in the maw of

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[14](...continued)
pp. 4-5 (NLRB Div. of Advice Memo. 17 Dec. 2004)

card-check campaigns are subjected to coercive conduct that would never be tolerated during a Board-conducted secret-ballot election.

Overall, the procedure prescribed by organizing agreements for producing recognition agreements—systematic campaigns jointly implemented by unions and employers against employees in their workplace and homes to make them sign union authorization cards in an environment devoid of relevant information about the union—is the antithesis of the process the Act provides. These private organizing procedures certainly do not facilitate employee free choice about unionization, but instead are designed for the opposite purpose: to compel employees to sign cards choosing a union to be their monopoly representative. It would be unconscionable for the Board to blindly assume that the recognition agreements that are the fruit of this poisonous tree actually reflect the true and uncoerced will of employees.

III. The Board Must Conduct Secret-Ballot Elections Upon Employee Request to Determine Whether Recognition Agreements Reflect the Actual and Uncoerced Choice of a Majority of Employees

A. *Unlike Voluntary Recognition, Secret-Ballot Elections Advance Both Employee Free Choice and Lawful Collective Bargaining*

Given that the Board does not know if a recognition agreement reflects the true will of employees, and has strong institutional and practical reasons for doubting that it does, the proper course of action is obvious: the Board must independently determine whether employees truly desire the representation of an employer-recognized union through the representational procedures established in § 9(c) of the Act. This rational policy was announced in *Dana*: to process employee election petitions up to 45 days after notice of an employer-union recognition agreement.[15]

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[15] An even more rational policy would be to dispose of the recognition bar entirely for the (continued...)

Dana is not only consistent with the Act, but is required by it. Section 9(c) of the Act expressly grants employees the right to petition for an election "assert[ing] that the individual or labor organization, which has been certified *or* is being currently recognized by their employer as the bargaining representative, is no longer a representative." 29 U.S.C. § 159(c)(1)(A)(ii) (emphasis added). Congress saw fit to prohibit the conduct of such elections only when, "within a twelve month period, a valid *election* shall have been held." 29 U.S.C. § 159(c)(3) (emphasis added). A similar bar against elections after voluntary recognition was not included in the statute. This omission was intentional, as Congress intended that certified unions enjoy protections not enjoyed by unions merely recognized by employers.[16] Accordingly, Congress did not intend for unions to be shielded from employee election petitions filed under § 9(c)(1)(A)(ii) after employer grant of voluntary recognition. *Dana* partially fulfills this intent.

Dana obviously protects employees' § 7 right to freely choose or reject union representation by helping to ensure that employees actually support any union recognized by their employer.

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[15](...continued)
reasons discussed. The recognition bar is a house built upon sand. It is premised on the notion that a union designated by an employer actually has the uncoerced support of a majority of employees. Deprived of this false premise, the justification for the bar collapses.

[16] For example, the Supreme Court has recognized 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, Congress could determine, should not be dispensed *unless a union has survived the crucible of a secret ballot election*."*Gissel Packing*, 395 U.S. at 598-99 (emphasis added). These special privileges enjoyed only by certified unions include "protection against the filing of new election petitions by rival unions or employees seeking decertification for 12 months (s 9(c)(3)), [and] protection for a reasonable period, usually one year, against any disruption of the bargaining relationship because of claims that the union no longer represents a majority." *Id.* at 599 n.14.

Protecting this employee right is the paramount interest under the Act, which grants rights solely to employees, and not to employers or unions.[17]

Dana also furthers the Act's subsidiary interest in "encouraging the practice and procedure of collective bargaining" for the same reason: it ensures that collective bargaining relationships are built on a foundation of employee support for that relationship. 29 U.S.C. § 151. The legitimacy of collective bargaining is *entirely predicated* on a majority of employees freely exercising their § 7 right to choose to collectively bargain. This is explicitly stated in § 9(a) of the Act, which permits collective bargaining only by representatives selected "by a majority of the employees." 29 U.S.C. § 159(a). By contrast, there is no interest under the Act in an employer and union bargaining in the absence of majority employee support for the union. *See Ladies Garment Workers*, 366 U.S. at 737-38. The Act thereby favors collective bargaining *only* when a majority of employees freely choose to engage in it. As the Board stated in *MV Transportation* when overturning the so-called "successor bar":

> It is well established that two of the fundamental purposes of the Act are (1) the protection and promotion of employee freedom of choice—choice with respect to the initial decision to engage in or refrain from collective bargaining, and choice regarding the selection of a bargaining representative; and (2) the preservation of the stability of bargaining relationships. The first of these is explicitly set forth in Section 7 of the Act. The second is a matter of policy and *operates with respect to those situations where employees have chosen a bargaining relationship.*

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[17] *See See Lechmere*, 502 U.S. at 532 ("By its plain terms, thus, the NLRA confers rights only on *employees,* not on unions or their nonemployee organizers"); *see also Pattern Makers League v. NLRB*, 473 U.S. 95 (1985) (paramount policy of NLRA is "voluntary unionism"); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (employee free choice "core principle of the Act").

337 N.L.R.B. 770, 772 (2002) (citations omitted) (emphasis added); *see also Levitz Furniture*, 333 N.L.R.B. at 731 (Member Hurtgen, concurring).[18] Because *Dana* elections determine whether a majority of employees truly want to collectively bargain through an employer-recognized union, *Dana* elections can only further the Act's interests in encouraging lawful collective bargaining. "In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored." *Linden Lumber v. NLRB,* 419 U.S. 301, 307 (1974).

By contrast, not conducting *Dana* elections will undermine employee free choice and lawful collective bargaining by facilitating illegal bargaining relationships that are not predicated on true majority employee support for unions. This will result in grievous injury to employees, as "[t]here could be no clearer abridgment of § 7 of the Act" than for a union and employer to enter a collective bargaining relationship when a majority of employees do not support union representation. *Ladies Garment Workers*, 366 U.S. at 737. Because there is no interest under the Act in collective bargaining absent majority employee support for such bargaining, there is no interest under the Act that supports not conducting *Dana* elections.

In short, employees must be allowed to vote whether they want the representation of a union their employer recognized to determine whether employees actually want that union's monopoly representation. Ensuring that employees actually want the representation of a union recognized

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> [T]he Act itself, in its substantive provisions, gives employees the fundamental right to choose whether to engage in collective bargaining or not. The preamble and the substantive provisions of the Act are not inconsistent. Read together, they pronounce a policy under which our nation protects and encourages the practice and procedure of collective bargaining *for those employees who have freely chosen to engage in it.*

Levitz Furniture, 333 N.L.R.B. at 731 (Member Hurtgen, concurring) (emphasis added).

by their employer can only advance the Act's primary interest in protecting employee free choice and its secondary interest in lawful collective bargaining.

B. *Unfair Labor Practice Proceedings Are No Substitute for Secret-Ballot Elections for Determining Whether Employees Want an Employer-Recognized Bargaining Agent*

Some may argue that the Board should not conduct elections to determine whether employees support employer-recognized unions because it can analyze the propriety of recognition agreements through unfair labor practice proceedings. That argument is without merit.

Foremost, unfair labor practice proceedings do not exist to gauge the representational preferences of employees. They are designed only to determine whether employers and unions committed unfair labor practices. It is impossible for the Board to divine the true wishes of employees by trying to piece together the myriad events and circumstances that occurred prior to a recognition agreement with an after-the-fact investigation. By contrast, Congress provided for secret-ballot elections for the very purpose of resolving a "question of representation." 29 U.S.C. § 159(c). A secret-ballot election is clearly a superior means for determining whether a majority of employees truly support a union their employer recognized.[19]

Second, conduct that does not rise to the level of an unfair labor practice can interfere with employee free choice under the "laboratory conditions" standard for representation proceedings. *See General Shoe Corp.*, 77 N.L.R.B. at 127. Secret-ballot elections are thus a superior means for determining the true choice of employees in the wake of a recognition agreement. In contrast,

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[19] Moreover, the General Counsel has unreviewable prosecutorial discretion over whether to issue unfair labor practice complaints. *See* 29 U.S.C. § 3(d); *NLRB v. UFCW*, 484 U.S. 112 (1987). Because Congress empowered only the Board to decide representational issues, it would be incongruous for it to defer to the General Counsel over what is effectively a representational question, *i.e.*, whether an employer-recognized union enjoys employee support.

relying only on unfair labor proceedings will permit unions to get away with conduct antithetical to employee free choice that would not be tolerated in a secret-ballot election.

Third, a secret-ballot election is a faster means for resolving whether employees support an employer-recognized union. Elections are generally conducted in under forty (40) days, while unfair labor practice proceedings can grind on for months or years. An election is a far superior means for: (1) protecting employee § 7 rights by promptly removing a union that employees do not support, and (2) fostering collective bargaining by solidifying the status of a union that a majority of employees actually support. In contrast, relying solely upon unfair labor practice proceedings can leave both employee rights and collective bargaining negotiations in limbo for months or years as charges are processed.

Fourth, the Board favors elections over unfair labor practice proceedings to determine employees' choice as to union representation when an employer seeks to withdraw recognition from a union. *See Levitz Furniture*, 333 N.L.R.B. at 725. To be consistent, Board policy must favor elections to determine employees' choice when an employer recognizes a union.

Finally, even if one accepts *arguendo* the premise that unfair labor practice procedures sometimes are an adequate means of determining whether employees support an employer-recognized union, it does not follow that the Act's representational procedures must be unavailable to employees. That premise only leads to the conclusion that *both* unfair labor practice procedures and representational procedures must be available to employees who believe that a union recognized by their employer is not supported by a majority of employees. That is the policy that the Board announced in *Dana*. This rational policy must be preserved, because it is the only policy consistent with the Act.

CONCLUSION

Dana was carefully crafted by a five-member Board only three short years ago based on numerous amicus briefs filed by interested parties on both sides of the issue. In a rational world, the commonsense policy announced in *Dana* would be beyond dispute: that employees can vote on whether they truly want to be represented by a union designated by their employer. After all, the purpose of the Act is to effectuate employee free choice and protect employees from the machinations of employers and unions. Unfortunately, union officials have a vested interest in avoiding secret-ballot elections that reveal employees' true desires. The Board should not sully its already-tattered reputation by transparently flip-flopping away from its *Dana* policy and quashing employees' right to secret-ballot elections to satiate the agenda of union officials, a special interest group. Employee rights should not be sacrificed on the altar of union self-interest. *Dana* should be reaffirmed.

Respectfully submitted,

/s/ Raymond J. LaJeunesse, Jr.
Raymond J. LaJeunesse, Jr.
Vice President & Legal Director
William L. Messenger
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DATED: November 1, 2010

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2010, I caused a copy of the foregoing Brief to be filed electronically with the National Labor Relations Board's Office of the Executive Secretary through the NLRB's e-filing program. Additionally, I further certify that on November 1, 2010, I served a true and correct copy of this document by e-mail on the following parties:

Brad Manzolillo, Esq.
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/s/ William L. Messenger

William L. Messenger

APPENDIX TO AMICUS BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Lamons Gasket Company,
a Division of Trimas Corporation,
Employer

Case No. 16-RD-1597

and

Micahel E. Lopez,
Petitioner

and

United Steel, Paper and Forestry
Rubber, Manufacturing, Energy,
Allied Industrial & Service Workers
International Union,
Union

Position Statement of Larry Getts in Opposition to the Request for Review and in Response to the Invitation to File Briefs

I am submitting this position statement in response to the Board's Notice and Invitation to File Briefs, dated August 31, 2010, and in Opposition to the Union's Request for Review. I speak from personal and bitter experience in urging the Board to reaffirm the ruling in Dana Corp., 351 NLRB 434 (2007).

I am the Petitioner in one of the first successful Dana decertification election cases, Case No. 25-RD-1511, also on the Board's docket as 25-VR-01 (see http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/Dana.xls).

Sometime in October 2007, my employer (Dana Corp.) granted voluntary recognition to the UAW for my small unit of employees in Albion, Indiana. This "voluntary recognition" was based upon a secret "neutrality and card check" agreement between my employer and the UAW. The employees were never told about the existence of such an agreement or given its terms. Indeed, I later learned that this secret agreement is legally suspect and is being challenged by the NLRB General Counsel in a pending case out of Michigan, Dana Corp., NLRB Case Nos. 7-CA-46965 and 7-CB-14083.

On or about October 29, 2007, because of the Board's decision in Dana Corp., NLRB notices were posted in my workplace, informing employees of their right to file a petition for a secret ballot election to overrule the employer's grant of voluntary recognition to the UAW. This "Dana notice" was the first and only notice we ever received informing us that we – the flesh and blood employees – actually had a say in whether or not the UAW should be our union. By November 9, 2007, I collected more than enough signatures to file for the Dana decertification election. I promptly filed a decertification petition that was docketed as Case No. 25-RD-1511. The NLRB Regional office held a secret ballot election shortly thereafter, and the UAW union was voted out!

In fact, the process utilized by the UAW to collect cards and demand voluntary recognition from Dana Corp. was shameful, misleading, harassing, and threatening to all employees in the bargaining unit in Albion.

I have read the Board's Order Granting Review in this case, and several points are troubling me. First, the concurring opinion of Chairman Liebman mentions "the rarity of Dana elections, and the even greater rarity of cases where employees reject the recognized union." Speaking as one of those "rarities," I would not call a nearly 25% decertification rate of those cases going to secret ballot, rare or insignificant.

Second, the concurring opinion of Chairman Leibman mentions that the Board is "interested in what members of the labor-management community have to say about this data and its lessons." Voicing my thoughts as an average American worker, not a labor expert, I think we all have a pretty good idea what each side would say – and I feel that the Board is spending way too much time worrying about which side is getting the upper hand instead of focusing on what really matters, which is "what do the *employees* really want?"

Third, the dissenting Board members challenged the other Board members to "ask the voting majority [of employees] in the 14 cases where the recognized union lost" which method they would have preferred. I challenge the Board to take this approach a step further and also include those 40 cases in which the union won. I am confident that if the Board would ask any American worker who has been through both the card check method and the secret ballot election which one they would prefer, the secret ballot election would win hands down.

The decision whether or not to be represented by a union is a personal one. And

once that individual choice is made, for or against the union, the employees should be able to vote their conscience in private and without fear of any repercussions from making that choice. They should not have to experience the adversarial and confrontational atmosphere that we had here in Albion while going through the card check process. Three years later, still there are hard feelings.

Furthermore, before rendering any decision in this case, I urge the Board to carefully review the statements and testimony of other Dana employees from Albion, which can be found on the following websites: "Workers Experience Card Check, Warn About Lies, Harassment and Intimidation," accessible at http://www.youtube.com/watch?v=-Z7FyYRmyEU&feature=player_embedded and "Fox News Interviews Card Check Victims in Albion, Indiana," accessible at http://www.youtube.com/watch?v=ibEAya5apoE&feature=related. The statements made by my fellow employees are all true, and prove that Dana employees in Albion were harassed, coerced and mislead into signing UAW authorization cards. If the NLRB wants "empirical evidence" (e.g., evidence based upon practical experience and observable proof) as it claims, Rite Aid Store 6473/Lamons Gasket Co., 355 NLRB No. 157 (2010), it is respectfully suggested that the NLRB Members watch these videos to see that actual and observable union card check campaigns work through harassment, intimidation, stalking and misrepresentations. The secret ballot process is the only proper way to protect employees' freedom to choose or reject a union. Indeed, without the secret ballot

election provided by the Dana Corp. decision, my fellow employees and I would, to this day, be saddled with a union that we did not want. This is unfair and un-American.

I want to add that on March 10, 2009, I testified before the U.S. Senate Committee on Health, Education, Labor & Pensions, about the UAW's card check campaign. I attach a copy of that testimony as Exhibit 1, and I fully adopt and reiterate that testimony in this Position Statement.

In conclusion, I urge the Board to reaffirm the ruling in Dana Corp., and allow employees – not unions and companies – to have the final say as to whether or not they wish to be unionized.

Respectfully submitted,

Larry Getts

Larry Getts

Testimony of Larry Getts
Employee of Dana Corporation
March 10, 2009

Mr. Chairman, members of the Senate Committee on Health, Education, Labor and Pensions, thank you for the opportunity to speak to you today regarding my experience as an employee in a so-called "Card Check" organizing drive.

Before I begin, I'd like to say that, as many workers have learned first hand, I believe "Card Check" organizing drives put the interests of union officials ahead of those of workers.

While the bill has been officially named the "Employee Free Choice Act" by its proponents in Organized Labor and their allies in Congress, my own personal experience shows a more appropriate name would be the "Worker Coercion Act."

My story begins in 2006, when I was hired to work in a small plant in Fort Wayne, Indiana, owned by Dana Corporation that packed and shipped auto parts.

Of course, after taking the job at Dana Corporation, I had been told by other employees that there had never been any push to form a union in our plant in anyone's memory.

But all that changed in October of 2007 when a number of meetings were called for all employees.

At the second meeting, after I and my coworkers waited patiently for about fifteen minutes, an official from the United Auto Workers (UAW) finally arrived.

He spent several minutes explaining to us that he had cards for us to sign that would unionize our plant, and then spent a few more minutes explaining why he thought we should sign the cards.

Of course, at that time, none of my coworkers knew that our company, Dana Corporation, had signed a so-called "neutrality agreement," which meant that not only was the UAW given workers' personal information without our consent, but that we were only going to hear one side of the story throughout the organizing drive -- the UAW's.

Looking back on how that first meeting was handled, I believe the UAW official viewed the meeting as a simple

formality -- as if the matter had already been decided between the UAW and Dana Corporation, and the my views and the views of my coworkers were almost irrelevant.

In fact, it was easy to see from the get-go that the UAW representative was hardly concerned at all with how he came off to our group and thought he could railroad us all into the union.

The UAW official was even so bold as to curse constantly throughout the presentation, which appalled the elderly women who made up about 80% of our plant.

After this first attempt to organize our shop failed, the UAW changed tactics and sent in a whole new crew.

At that point, it became clear to all of us that the UAW was going to do whatever was necessary to get the required number of signatures.

Union organizers waited for us in the break room, sat with us at lunch whether we wanted them to or not, and walked us to our cars at the end of the day.

The entire time they were constantly badgering us to sign the cards.

One of the things the UAW officials would say is that they would start negotiating the moment the cards were signed.

One official told me that our small shop would make the same as the workers in the other -- much larger -- Fort Wayne plant.

Of course, to many of us, that didn't seem plausible because we were making twelve dollars an hour, and in Fort Wayne they were making twenty-one dollars an hour.

I refused to sign the card every time they asked, and I know many others shared my sentiment.

But none of that mattered to the UAW, because the pressure did not let up.

In fact, one day, an official approached me again claiming fifty percent of the plant had signed -- so now I was going to have to sign the card to "get my information in the system."

I signed the card then because I thought I had to.

I didn't learn until later that even then, I should not have been forced to sign the card.

In the end, the UAW did succeed in organizing our plant, but I thought they succeeded only because of their confrontational tactics and not because the majority of our workers wanted UAW representation.

So immediately after the union came in, I began a decertification effort.

The only reason I was able to fight back was because other Dana Corporation employees in Ohio appealed to the National Labor Relations Board after facing aggression from the UAW, and the NLRB decided that workers should be allowed to seek decertification.

Of course, the UAW responded to my effort by increasing the pressure, and even started visiting my coworkers at home.

Despite their intimidation, my coworkers and I voted to decertify the UAW forty-five days after the Card Check drive ended in a secret ballot election.

I believe the results of the secret ballot election showed the true "free choice" of my coworkers regarding UAW representation.

We didn't want the UAW representation that was foisted on us through "Card Check."

At the end of the day, the voice of the worker needs to be considered. Union officials say they speak for workers, and they say passage of the Card Check Bill is needed to "give workers a free choice."

In reality, they only want the power to harass workers like me into joining their union, paying dues and increasing the union bosses' power.

That's why I hope you'll vote to defeat the mis-named Employee Free Choice Act.

NATIONAL LABOR RELATIONS BOARD
REGION 6

Jeffrey A Sample and Alan P. Krug,
(Petitioners)

Metaldyne Corp. (Metaldyne Sintered Pro.)
(Employer)

International Union, United Automobile Aerospace and Agricultural Implement Workers of America, AFL-CIO
(Union)

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

DECLARATION OF LORI YOST

I, Lori Yost, pursuant to Section 1746 of the Judicial Code, 28 U.S.C. § 1746, declare as follows:

I have first hand knowledge of all of the facts set forth herein, and if called to testify could do so competently.

1. My name is Lori Yost. I live at 331 Bunker Hill, St. Marys, Pennsylvania 15857. My phone number is (814) 781-1386. I am employed by Metaldyne Corp. (Metaldyne Sintered Pro.) ("Metaldyne") at its facility in St. Marys, Pennsylvania ("Metaldyne St. Marys").
2. I am one of the main employees at Metaldyne St. Marys who was involved in initiating a petition for a decertification election and circulating the accompanying showing of interest against the UAW union in our plant.
3. Metaldyne and the UAW are parties to some sort of "neutrality agreement." However, even though we employees are the targets of the agreement, it has been kept secret from us. Employees at Metaldyne St. Marys know very little of what is contained in the "neutrality agreements" the UAW signing with Metaldyne.
4. Our local management was not allowed to inform any of us about the specific details of the neutrality agreement. We were only told that the union organizers would have access to employees and the plant.
5. I have grave concerns about what deal the UAW cut in exchange for Metaldyne giving it a "neutrality agreement." Certainly, Metaldyne would not hand over one of its plants to the UAW for nothing. I am deeply concerned that the UAW may have made advance

concessions or agreed in advance to sell out the interests of future-organized employees in exchange for Metaldyne assistance with taking over non-union plants.

6. Apparently pursuant to the neutrality agreement, UAW organizers came into our plant and have stayed there. Metaldyne management had a mandatory meeting and played a video of one of our owners telling us that we needed to accept the UAW into our plant, that it was a "win—win situation for all of us"

7. The UAW's "card check" drive was nothing like an election. UAW organizers did everything they could to make people sign union cards. The UAW put constant pressure on some employees to sign cards by having union organizers bother them at work, visit them repeatedly at their homes, and call them at home. I believe that the UAW organizers also misled many employees as to the purpose and the finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back.

8. On or about December 2, 2003, Metaldyne suddenly announced that the UAW was our Union representative. There was no vote. Myself and the vast majority of my co-workers were very upset that this union could be thrust upon us without a chance to vote in a secret ballot election. I don't understand how Metaldyne and the UAW can sign away my rights to an election and bring in a union without giving employees the right to vote. This is a largely union based town to begin with and most of the employees here have parents, friends or other relatives who belong to local unions. They were all under the belief and understanding that the card check was just a step towards our right to a vote for or against the UAW. Everyone was shocked when they found out there wasn't going to be a vote.

9. Metaldnye and the UAW spliced the bargaining unit so as to ensure that the UAW would prevail in a card count. They split up departments--before the card check count was even held--based upon whether employees supported or did not support the union.

10. For example, Metaldyne and the UAW split up the quality department based on the degree of union support. The quality depart is supervised by Ron Morelli and is made up of the final audit department, the molding quality technicians, quality engineering technicians, tool inspection analysts, metrology, material testing and myself (tool engineer /cmm programmer). I am also included in the tool inspection department. To my knowledge, no one in the quality department signed a union card. We were very much against UAW representation. The only exceptions were two people in the metrology section of the quality department who were union supporters. Guess what? Only the metrology section of the quality department is part of the bargaining unit. The rest of the quality department is not.

11. Another example is the tooling machine shop. Mike Glatt is the supervisor of this department. It is made up of several small departments, one of which is called the "tool room." This area includes people who transfer the tooling and cut orders for where the

tooling goes to be worked on in the shop. To my knowledge, not one of the people in the "tool room" signed a card for the UAW. Yet, I know that some employees in the tooling machine shop in general signed union cards. Guess what? The tooling machine shop is part of the bargaining unit, except for everyone in the tool room.

12. I am not aware, as of the date of this Declaration, of Metaldyne and the UAW engaging in any negotiations or bargaining sessions for a collective bargaining agreement since the UAW was recognized on or about December 2, 2003.

13. I strongly believe that is wrong that management declared that the UAW was our representative without our vote. Judging by the fact that over 50% of employees in the plant signed a decertification within days after recognition, I am not alone.

14. I fail to see how the UAW union can properly be considered our representative without our vote. If the UAW really believes that they have the support of over 50% of employees, then they have nothing to fear by giving employees a chance to vote. If we vote and the union wins, then by all means they are our representatives as stated and we move forward... But, if the UAW loses then they and Metaldyne must concede to the fact and they must leave as per our request.

15. Metaldyne employees at my plant want an election. There was incredibly strong support for the decertification petition amongst employees. Over 50% signed the showing of interest. This support came just days after Metaldyne declared that we were under UAW control.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 2, 2004

Lori Yost

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SAGE HOSPITALITY RESOURCES, LLC, Appellant, *v.* H.E.R.E. LOCAL 57, Appellee.	CASE NO. 03-4168

DECLARATION OF FAITH JETTER IN SUPPORT OF MOTION TO INTERVENE OR, ALTERNATIVELY, TO FILE A BRIEF AMICUS CURIAE

Faith Jetter, pursuant to Section 1746 of the Judicial Code, 28 U.S.C. §1746, declares as follows:

1) I am an employee of Sage, employed at the Renaissance Hotel ("Hotel") in Pittsburgh. I became employed at the Hotel in February, 2001, as part of the initial employee orientation. The Hotel opened for business shortly after I was hired. At the Hotel, I work as a housekeeping inspectress.

2) I know that Local 57 of the Hotel Employees and Restaurant Employees Union ("HERE") has been trying to unionize myself and other employees of the Hotel.

3) I heard that the Hotel and the HERE union signed an agreement covering the union's attempt to organize the employees of the Hotel. I also learned that this agreement required my employer to give the HERE union a list of employees' names and addresses, and access to the employees inside of the Hotel. No one asked me if I approved of this, and I do not. I am opposed to the Hotel giving the HERE union a list with my name and personal information, and allowing them access to me in the workplace.

4) I was called at home and also contacted in person by HERE union representatives and urged to sign a union authorization card. These union representatives already had my name and home address and telephone number. I was asked if the union representatives could come to my home and make a presentation about the union. I allowed them to come, as I was willing to listen.

5) Two union representatives came to my home and made a presentation about the union. They tried to pressure me into signing the union authorization card, and even offered to take me to out dinner. I refused to sign this card as I had not yet made a decision at that time.

6) Shortly thereafter, the union representatives called again at my home, and also visited my home again to try to get me to sign the union authorization card. I finally told them that my decision was that I did not want to be represented by this

union, and that I would not sign the card.

7) Despite the fact that I had told the union representatives of my decision to refrain from signing the card, I felt like there was continuing pressure on me to sign. These union representatives and others were sometimes in and around the hotel, and would speak to me or approach me when I did not want to speak with them. I also heard from other employees that the union representatives were making inquiries about me, such as asking questions about my work performance. I found this to be an invasion of my personal privacy. Once when I was on medical leave and went into the hospital, I found that when I returned to work the union representatives knew about my hospitalization and my illness. I felt like their knowledge about me and my illness was also an invasion of my personal privacy.

8) I also saw the union representatives try to coerce another employee to sign a card, even though they never explained to the employee what this card meant, or told her that the union could be able to be automatically recognized as the representative of the employees without a secret ballot election. It was clear to me that this employee had no idea what this card meant when the union tried to get her signature.

9) I do not care what decision any employee makes regarding whether or not to

be represented by the HERE union, but I think it is each employee's individual choice, to be made with full knowledge of what that choice means. I also believe that an employee's decision to say "no" should be respected, without pressure or coercion by the union.

10) If this union was going to come into the workplace, I would absolutely want to have a secret ballot election so that me and my fellow employees could vote our consciences in private, without being pressured by the union representatives. I would also want to hear all sides of the story, not just the union's side.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 19, 2003.

Faith Jetter

Faith Jetter

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SAGE HOSPITALITY RESOURCES, LLC, Appellant, *v.* H.E.R.E. LOCAL 57, Appellee.	CASE NO. 03-4168

DECLARATION OF DAVID HARLICH IN SUPPORT OF MOTION TO INTERVENE OR, ALTERNATIVELY, TO FILE A BRIEF AMICUS CURIAE

David Harlich, pursuant to Section 1746 of the Judicial Code, 28 U.S.C. §1746, declares as follows:

1) I am an employee of Sage, employed at the Renaissance Hotel ("Hotel") in Pittsburgh. I became employed at the Hotel in February, 2001, as part of the initial employee orientation. The Hotel opened for business shortly after I was hired. At the Hotel, I work as a part-time bartender.

2) I know that Local 57 of the Hotel Employees and Restaurant Employees Union ("HERE") has been trying to unionize myself and other employees of the Hotel.

3) I was approached several times by HERE union representatives and urged to sign a union authorization card. I was told by the HERE union representatives that this was the union that would be coming in to represent the employees. However, at no time was I told that by signing this union authorization card, the HERE union and my employer could waive a secret ballot election and bring in the union automatically.

4) I did not sign the union authorization card because I do not want to become a member of the HERE union or be represented by this union in any manner.

5) I hear rumors, but do not know for sure, about the existence of any agreements that the HERE union may have signed with my employer regarding the unionization of the hotel. However, I do know that if the HERE union was going to come into my workplace, I would absolutely want to have a secret ballot election so that myself and my fellow employees could vote our consciences in private, without being pressured by the union representatives. I would also want to hear all sides of the story, not just the union's side.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 19, 2003.

David Harlich

David Harlich

NATIONAL LABOR RELATIONS BOARD
REGION 8

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)

DECLARATION OF CLARICE K. ATHERHOLT IN SUPPORT OF HER DECERTIFICATION PETITION

I, Clarice K. Atherholt, pursuant to Section 1746 of the Judicial Code, 28 U.S.C. § 1746, declare as follows:

1. My name is Clarice K. Atherholt. I have first hand knowledge of all of the facts set forth herein, and if called to testify could do so competently. I live at 302 S. Fifth Street, Upper Sandusky, OH. 43351. I am employed by Dana Corporation ("Dana") at its facility in Upper Sandusky, OH. ("Dana Upper Sandusky").

2. I am the Petitioner in this case, and circulated on non-work time the showing of interest against the UAW union that accompanied the filing of the Petition. I am part of a bargaining unit of approximately 180 employees at Dana Upper Sandusky.

3. Several months ago Dana and the UAW announced that they had become parties to some sort of "neutrality agreement." Although the employees at Dana Upper Sandusky (among others) are the targets of the agreement, the agreement was initially kept secret from us, although some of the union's organizers had their own copies. Only after I and many other employees complained, and only after the UAW was recognized by Dana at Upper Sandusky, was I told that I could go to Human Resources and read a copy of this agreement, but could not make any copies and could not take a copy away in

order to consult with an independent legal advisor. (Attached as Exhibits 1 and 2 are true and correct copies of letters exchanged between me and Dana related to this subject). As a result of the secrecy, employees at Dana Upper Sandusky know very little of what is contained in the "neutrality agreements" the UAW signed with Dana.

4. Our local management was not allowed to inform any of us about the specific details of the neutrality agreement. We were told that employees would not be permitted to vote in a secret ballot election and that the union organizers would have access to employees' personal information (like home addresses), and access to employees in the plant. Also, we were strongly encouraged "for our own benefit" to attend one of several "captive audience" speeches while on paid company time. At these meetings, officials from Dana Corporation in Toledo and UAW officials from Detroit told us that the UAW and Dana had entered into a "partnership," and that this partnership would be beneficial to us in getting new business from the Big Three into the plant. The implication was that our plant would lose work opportunities or jobs if we did not sign cards and bring in the UAW. I was an outspoken critic of the UAW at this time, and I tried to attend several of the scheduled meetings. The UAW apparently told Dana Human Resources that they did not want me to attend all of these meetings, that my presence was a threat and a distraction, and that the UAW would turn out more supporters if I attended other sessions. I attended two sessions in total, one on my own time and one while on paid company time.

5. Apparently pursuant to the neutrality agreement, UAW organizers came into our plant and stayed there until the "voluntary recognition" was achieved. But the UAW's "card check" drive was nothing like a secret ballot election. UAW organizers did everything they could to make people sign union cards. The UAW put constant pressure on some employees to sign cards by having union organizers bother them while on break time at work, and visit them at home. I believe that the UAW organizers also misled many employees as to the purpose and the finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back, not because they really wanted the UAW to represent them.

6. On or about December 4, 2003, Dana suddenly announced that the UAW was our union representative. There was no vote. Many of my co-workers and I were very upset that this union could be thrust upon us without a chance to vote in a secret ballot election. I don't understand how Dana and the UAW can sign away my rights to an election and bring in a union without giving employees the right to vote.

7. I am not aware, as of the date of this Declaration, of Dana and the UAW engaging in any negotiations or bargaining sessions for a collective bargaining agreement since the

UAW was recognized on or about December 4, 2003. I understand that the UAW is just now beginning to form a temporary bargaining committee, but nothing else has happened as of this time in terms of negotiating.

8. I strongly believe that it is wrong that Dana management declared that the UAW was our representative without a secret ballot vote. Judging by the fact that over 35% of employees in the bargaining unit signed a decertification petition within just a few days after I began circulating it, I am not alone.

9. I fail to see how the UAW union can properly be considered our representative without a secret ballot vote. If the UAW really believes that it has the support of over 50% of employees, then it has nothing to fear by giving employees a chance to vote. If employees vote and the union wins, then by all means it is our representatives as stated and we move forward. But if the UAW loses, then it and Dana must concede to the fact and the UAW must leave, as per our request.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 13, 2004

Clarice K. Atherholt

Clarice K. Atherholt

Statement of Donna Stinson
Dana Corp employee
Bristol, Virginia

My name is Donna Stinson. I'm here with my co-worker Barry Woods and we work for Dana Corp in Bristol Va.

In July of 2002, we had a NLRB secret ballot election, which the union lost. In early August of 2003, we were suddenly called into a plant meeting to be told that Dana and the UAW had formed a partnership agreement. We were told there would not be an election, this would be a card check and that the UAW would be given access to our plant.

Over the next few weeks we had cell meetings at which members of management told us that the UAW was putting pressure on Ford to require that its suppliers be union suppliers. The work we had now would dry up and no new work would be given to us.

We were told that the old cards – signed to obtain a secret ballot election over a year ago – would now be used as our votes. Anyone who wanted their card back had to go to the Holiday Inn convention center and find a certain union rep, or by calling one of two phone numbers. When ask why they could not bring the cards back to the plant and allow people to get them back there, we were told that this was not their procedure.

When we asked to see the partnership agreement, we were told we could not see it, it was a private business contract, but they would give us "Highlights". The highlights were that we would not get any big wage increase and we would have a no-strike clause. We were given about 15 minutes to ask questions, in which no real answers were given to us. They kept telling us how this was our choice, but at the same time made us feel like this was something that we needed to do to protect our jobs.

The UAW was given our personal information, which most of us thought was illegal, but turns out it is not. They "Home Visited" all Labor Day weekend.

The next Tuesday, we were told that a "Neutral Third Party" had counted the votes and we were now a UAW facility. We were not told who the third party was, what the count was, or who verified the signatures. It is now May of 2004 and we still do not have a contract. One was offered, but it only made people mad and they voted it down – only 3 voted yes and 130 voted no.

Regardless of whether you support a union or not, I cannot see how anyone can think this is right. We should have a right to our privacy, we should have a right to a real union, and we should have the right to make this choice in a secret ballot election. We should not have to explain our decisions to our co-workers or the union, these are important decisions that affect our jobs, our families, our finances and for some people, their religious or political beliefs.

Card checks force you to choose sides out in the open and defend your choices, they divide the work place and create a very hostile environment. The union organizers are allowed to stay and pressure employees until they get enough cards signed, and, feeling the heat, many cave in just to get along.

Testimony of Karen M. Mayhew
Employee of Kaiser Permanente
February 8, 2007

My name is Karen M. Mayhew and I work for one of the nation's largest Health Maintenance Organizations, Kaiser Permanente, in Portland, Oregon. I write today to express my concern over the ironically named "Employee Free Choice Act." This legislation, if passed, will strip from American workers the right to say whether or not they want to have their working lives forever altered. I would like to share my personal experience under "card check" and explain why it is a terrible idea.

Back in the spring of 2005, a local of the Service Employees International Union (SEIU) descended upon my small office of approximately 65 professional employees and launched into an organizing campaign. This union had already signed what they called a "neutrality agreement" with my employer which silenced my employer and made it impossible for my employer to speak truthfully to us about the meaning of the union's activities.

One of the first meetings with the union after the launch of the "card check" campaign was a Q & A session with a local organizer and SEIU organizing director at a large reception hall at one of our Portland campuses. At that meeting, union authorization cards were placed purposely in front of each chair. Some of us, myself included, spoke to our colleagues before the meeting about those cards, and questioned their meaning and purpose. At the meeting, employees asked the union agents questions about the purpose of the cards. The union agents responded by telling us that signing the card only meant that the employee was expressing an interest in receiving more information about the union, or to have an election to decide whether or not to bring the union in.

It was made clear to all of us there in attendance that those authorization cards did NOT constitute a vote right there and then for exclusive representation by SEIU. We were told by the union agents that if 30% of us signed those cards, we would be allowed an election to vote on exclusive representation by the SEIU. Indeed, a collective bargaining agreement between Kaiser and the SEIU specifically provided that there would be a secret ballot election.

For the next 7 months, a union organizer had open and free access to us and our facility in her quest to secure what we thought were cards to get an election. She would incessantly approach us on our breaks, our lunch hours, even in the hall on our way to the restroom. Due to our employer's "neutrality agreement," this union agent was free to do this on our work time.

On October 17, 2005, my department was brought to a meeting with our senior management and told that as of that date, we were officially represented by SEIU. There was never an election and no further information was available to us. About a week later, we had a joint meeting with the regional director of Human Resources and the union organizer. The first questions at that meeting were not about what it meant to be in the union. Instead, many incensed employees complained that we were not given our promised election.

When we were told that 50% + 1 had signed the union's authorization cards, and that no election would be held, it did not take long for many employees to announce that they would not have signed the cards if they had known that there would be no election. Knowing that the union had just a one-person majority in our department at the time of Kaiser's recognition, I filed Unfair Labor Practice charges against Kaiser and the SEIU union with the National Labor Relations Board (NLRB), based in part on the realization that some in our department had signed cards solely due to the union's misrepresentations. Those unfair labor practice charges were docketed as NLRB Case No. 36-CA-9844 and 36-CB-2607.

My charges were filed with assistance from the National Right to Work Foundation, without whom I would have been at a loss as to how to proceed to protect my legal rights. My charges specifically addressed the union's misrepresentations, and the violation of the employer and union's "collective bargaining agreement" to hold an election when the union provided a 30% showing of interest.

In addition, I filed for decertification of the union when I submitted to the NLRB a petition with signatures constituting more than 30% of the bargaining unit. That decertification Petition was docketed as NLRB Case No. 36-RD-1673. Along with three other Kaiser employees from my department, I gave a sworn statement to an agent of the NLRB detailing the events leading up to the "card check" and the unlawful recognition of the SEIU based upon that "card check." In February of 2006, the local office of the NLRB sent my case to the NLRB's Division of Advice in Washington D.C.

The charges remained at the NLRB's Division of Advice until July, 2006. It is my understanding that the Division of Advice found merit to our charges of unfair labor practices, and authorized the issuance of a formal complaint. That is when the union and Kaiser decided to settle the charges. The terms of the settlement included revoking the voluntary recognition of SEIU by Kaiser, and the promise that if SEIU ever desired to represent my department for the next several years, it would have to obtain such status through a National Labor Relations Board-supervised secret ballot election. I accepted this settlement offer because the unlawful recognition was rescinded, and my story made headlines in the local newspaper, The Oregonian.

Within two months of the settlement, the same SEIU union, at the same employer, gained exclusive recognition rights over employees in another department without any election. The employees in that department also filed an Unfair Labor Practice charge with the NLRB. The end result of that charge was another settlement in which Kaiser and SEIU terminated their voluntary recognition, and agreed to only use NLRB-supervised secret ballot elections if the union wishes to return before December 31, 2008.

Throughout this whole ordeal, my colleagues and I were subjected to badgering and immense peer pressure. Some of us even received phone calls at home. While I let my feelings toward this union be known early on, I still was attacked verbally and in e-mail by my pro-union colleagues. I believe this abuse directed towards me was at the request of the union in an effort to intimidate me and have me back down. Union supporters upset with me and my actions were talking about me in language that could only have come from the union. You could easily

assume they were reading from union talking points. Different people all expressing the same sentiment. I exercised my free choice not to be in the union and my work life became miserable because of it.

In sum, I respectfully submit that "card checks" are not the preferred method of union recognition, and that the cases outlined above, filled with union abuses of a wide variety, are the rule in "card check" campaigns, not the exception.

To deny workers the right to choose union representation in secret, without coercion, intimidation, social ostracizing, and misrepresentations, is to deny a fundamental American right. As a worker who was abused under a "card check" process, and had to wage a costly battle to protect my rights, I urge you to reject this ill-conceived special-interest legislation.

Statement of Mike Ivey
Materials Handler
Freightliner Custom Chassis Corporation

Gaffney, South Carolina

My name is Mike Ivey, and I appreciate the opportunity to share with the committee my experiences under an abusive card check organizing drive which is still ongoing after four and a half years.

Freightliner Custom Chassis Corporation (FCCC) in Gaffney, South Carolina, has employed me for approximately seven years. We are a non-union facility and more than the majority of employees are extremely proud of that fact. The problems we have started in the fall of 2002.

During contract negotiations for their union facilities, the UAW and Daimler Chrysler Corporation reached a card check agreement to allow the UAW to try to organize their non-union facilities. This agreement prevents FCCC from doing anything positive for their employees, or discussing the situation with the employees. This agreement also allows the union to recruit and pay FCCC employees at this facility to handle their card check system.

The card check system consists of coercing employees to sign a card for the union. If enough cards are signed, 50% + 1, then the facility is considered to be a union facility. In this process of obtaining the needed signatures, there are a lot of untruths told.

Early on, the employees for a non-union FCCC signed and submitted a petition which clearly states that they want no union representation at this facility. More than seventy percent of all employees signed this petition. The UAW and Daimler Chrysler Corporation received these petitions with no response, nor any halt in the card check drive.

In April of 2003, the CEO of Daimler Chrysler promised the employees of FCCC a wage increase at a plant wide meeting. In August of 2003, when the time came to make good on that promise the union threatened a lawsuit against Daimler Chrysler if the wage increase was implemented. They feared that if

employees got the wage increase they had long been promised, it would reduce support for the union. We obtained free legal aid from the National Right to Work Legal Defense Foundation, and only after we filed charges at the National Labor Relations Board, did the union allow the pay increase.

Employees are told at off-site meetings that signing a card only certifies that they attended the meeting. Employees are also offered a free t-shirt if they sign a card. What they are not told is that these cards are a legally binding document, which states that the employee is pro union -- thus placing the union one step closer to their goal of complete control of the employees' workplace life without the employee even realizing it.

In the work place, the employees running the organizing campaign for the UAW are relentless in trying to get the employees to sign union cards. This has created a hostile work environment, with employees who once were friends who are now at odds with each other.

The employees who are not in support of the Union should have the right to go to work and not be harassed every day. This harassment has been going on more than 4 years with no end in sight. Faced with this never-ending onslaught, we employees feel that the UAW is holding our heads under water until we drown.

In April 2005, the UAW obtained the personal information of each employee. It wasn't enough that employees were being harassed at work, but now they are receiving phone calls at home. The UAW also had Union employees from other facilities actually visit these employees at their homes. The union's organizers refuse to take "no" for an answer. If you told one group of organizers that you were not interested, the next time they would send someone else. Some employees have had 5 or more harassing visits from these union organizers. The only way, it seems, to stop the badgering and pressure is to sign the card.

Moreover, in many instances, employees who signed cards under pressure or false pretenses later attempted to retrieve or void this card. The union would not allow this to happen, telling them that they could not do so.

After four and a half years of trying to organize our facility, the majority of employees are still against the Union by roughly a 3 to 1 ratio.

We feel that the aggressive behavior of UAW organizers will only escalate in 2007. All the union Freightliner facilities are facing major layoffs in the coming months. We expect the UAW to turn up the heat at our Gaffney facility to make up for the dues revenue shortfalls at the union facilities.

I understand that some members of Congress would like to mandate this abusive card check process for selecting a union so that employees everywhere will go through what we continue to experience. Rather than increasing this coercive practice, Congress should ban it.

Everyone in public office is elected by secret ballot vote. Please give us a chance in our work place to make the decision on representation in the same manner.

Statement of Tim Cochrane

Plaintiff in *Adcock et al. v. UAW and Freightliner LLC*

Tuesday, January 24, 2006 – Detroit, Michigan

Gastonia Parts Manufacturing Plant

Gastonia, North Carolina

I am here today because the rights of my co-workers have been violated, and I believe most of my co-workers still don't know the full story of the secret deal between UAW officials and Freightliner.

In March 2002, we had a secret ballot election at my workplace in Gastonia, North Carolina, and the workers chose not to be represented by the UAW. But instead of respecting our wishes, UAW officials cut a secret deal with Freightliner to force us to become a unionized plant. Company management and union organizers worked together to pressure us to sign cards saying we wanted to join the union that we had just voted against.

To get us to sign the cards, we were forced to attend meetings and we were harassed by union organizers at work and at home. One time, I even had to threaten to call the police on a union organizer for trespassing when he showed up at my house. While I refused to sign the cards, many of my coworkers understandably gave in to the constant pressure put on us by management and the union.

Eventually, the company and union announced that the very union we had voted against in an election less than a year ago would now represent us.

But since company management had helped the UAW get into power, the union then had to return the favor by sacrificing our interests at the collective bargaining table. Many of our benefits were cut as a result of the UAW's secret deal. One co-worker I know lost thousands of dollars of disability benefits because the union had agreed to cut long-term disability payments as part of its agreement.

There is something very wrong about a union that betrays the workers it is supposed to represent. UAW officials made a secret deal with our employer to get the power to represent us after we already said no to the UAW. They then used that power to give away our wage increases and benefits.

The UAW kept the agreement secret from us because they know that if we heard the truth we would never allow them to violate our rights like this. That is why I am here today and why I am part of this lawsuit.