October 26, 2010

Lester A. Heltzer
Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0071

RE: Lamons Gasket Co. Case 16-RD-1597, and
UGL-Unico Service Co. Case 1-RC-22447, and
Grocery Haulers, Inc. Case 3-RC-11944

Dear Mr. Heltzer,

I respectfully submit this amicus brief letter in response to the National Labor Relations Board’s August 31, 2010 invitations to file amicus briefs in the above captioned cases. I have a PhD in economics as well as a Juris Doctorate and been a professor of labor and employment law for 25 years. During my academic career I have served as the Chair of the Labor Law Group and the Secretary for the ABA’s Section on Labor and Employment Law. I have also written seven books and fifty-five articles, most on labor law and the economic analysis of law, and almost a third involving empirical analysis. A copy of my curriculum vitae is enclosed for your reference.

As stated in the Board’s invitation, “The Board must hold fast to the objectives of the statute using an empirical approach to adjust its decisions to the evolving realities of industrial progress and the reflection of that change in organizations of employees.” The Board continues to believe that it is its obligation under the Act to continually evaluate whether its decisions and rules are serving their intended purposes.” (quoting American Cyanamid Co., 131 NLRB 909 (1961)). I write this amicus brief letter because I think that some of my research on the theory of American labor law can shed some light on both the theoretical and empirical questions raised in these cases. In particular I believe that my work demonstrates the importance of stability in bargaining relationships and the presumption of continuing majority status to promoting cooperative labor relations and industrial peace.

In my article, A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace, I construct a simple game theoretic model of

collective bargaining and discuss the existing empirical literature on how the process of collective bargaining can be regulated to encourage cooperation and promote industrial peace. I model collective bargaining as a dilemma game in which the parties suffer a divergence between their individual interests in being intransigent and benefiting at the expense of the other side, with the possible outcome being a strike, and their collective interest in being cooperative and settling their differences without recourse to industrial strife. I survey the empirical literature on ways to promote cooperation between the parties in dilemma games like collective bargaining and outline several possible means by which the government might regulate the process of collective bargaining to encourage cooperative labor relations; each of which corresponds to existing doctrine in American labor law. Of greatest relevance to the issues in these cases I find both theoretical and empirical support for the idea that promoting stability in bargaining relationships encourages cooperative bargaining and industrial peace. Accordingly I conclude that in balancing the interests involved in deciding whether to reinstate a full voluntary recognition bar and successor bar, or to reaffirm the later precedents of Dana Corp. and MV Transportation, the Board should weigh heavily the parties’ and state’s interests in fostering stability in collective bargaining relationships to promote cooperative bargaining and fulfill the NLRA’s purpose of promoting industrial peace.

A Simple Game Theoretical Model of Collective Bargaining

The problem of promoting cooperation in collective bargaining and industrial peace can be represented by a simple bargaining game in which the employer and the union can each individually benefit from being recalcitrant in bargaining. Take a simple example in which an employer and a union have to decide how to divide a surplus of $10 after all costs are paid and each party has two possible bargaining strategies: cooperation or intransigence. Assume that if both parties are cooperative, they split the surplus at $5. This “split the difference” assumption comports with common ideas of fairness and cooperation. Assume that intransigence can yield individual benefits for each party in that, if one side is intransigent while the other is cooperative, the intransigent side gets $8 of the surplus while the cooperative side gets $2. This is a plausible assumption that is consistent with common experience that one side can benefit at the expense of the other through hard bargaining. However, also assume that if both sides are intransigent, the result is a strike that wastes a portion of the surplus ($4) and then the parties divide the remaining surplus cooperatively at $3 each. This is also a plausible assumption consistent with common experience that mutual intransigence leads to the breakdown of negotiations and industrial strife. The actual representative dollar amounts assigned above are not important to the implications of the model, the implications are driven only by the very plausible assumption that the parties can individually benefit from intransigence, but that intransigence can lead to waste through industrial strife. The payoffs to the parties associated with each possible bargaining situation are depicted in Matrix 1.

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2 The analysis presented in this amicus brief letter is based on Dau-Schmidt, at 442-50, 483-490, 492-505.
The payoffs presented in Matrix 1 present the “dilemma” of collective bargaining and the problem of regulating collective bargaining to promote industrial peace. In Matrix 1 we see that each side has an individually “dominant strategy” of being intransigent in bargaining. Regardless of what the other side does, each party always does better by being intransigent. If the employer decides to be cooperative, the union does better by being intransigent (8 > 5) and if the employer decides to be intransigent the union still does better by being intransigent (3 > 2). Similarly the employer’s dominant individual strategy is also to be intransigent. The problem, or “dilemma,” in this bargaining game is that if both parties follow their individually dominant strategy and are intransigent, they end up in a strike that wastes a portion of the surplus, and they end up with less money than if they had acted on their collective interest in cooperating (3 < 5). Dilemma games like that outlined above are endemic to collective bargaining and arise in a variety of contexts including organizing, negotiating the collective agreement and enforcing the agreement. The problem in regulating collective bargaining is how to get the parties to act on their collective interest in cooperation, rather than acting on their individual interest in being intransigent; in other words how to move the parties from an equilibrium in the southeast quadrant of Matrix 1 (payoffs 3, 3) up into a solution in the northwest quadrant of Matrix 1 (payoffs 5, 5).


Social scientists have done a variety of empirical studies to learn how best to help parties engaged in dilemma games, like those found in collective bargaining, to act on their collective interest in cooperation rather than their individual interest in intransigence. They have found that cooperation between the parties in dilemma games can be promoted by: promoting homogeneity among the constituencies of the players of the game; limiting the number of players; requiring exchanges of information; prohibiting certain bargaining strategies, including lying, committing to third parties, or cutting off negotiations; promoting repeated play and stability in the dilemma game; and enforcing explicit private agreements to refrain from undertaking intransigent strategies. Promoting homogeneity and reducing the number of players simplifies the game so

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that the players are more likely to see their collective interest in cooperation. Reducing the number of players also prevents a few uncooperative players from free riding on the cooperative efforts of others. Requiring exchanges of information on the game allows the parties to see their collective interest in avoiding escalation and promotes trust. Bargaining strategies such as lying, committing to third parties, and cutting off negotiations are themselves strategic acts that can jeopardize the larger game. Repeated play and stability in the parties helps engender trust, lowers the costs of bargaining and increases the costs of intransigence by making such behavior a threat not only to current negotiations but also to future negotiations. Finally, making explicit private armistices enforceable encourages the parties to negotiate such armistices and changes the payoffs of the game to make cooperation individually rational.

The results of these empirical studies can be summarized in two basic strategies that Congress, the courts and Board might adopt to promote labor and management cooperation and industrial peace: directly prohibiting costly strategic behaviors that undermine cooperation, for example lying, committing to third parties or refusing to meet; or formulating the game of collective bargaining in such a way that it facilitates the parties’ ability to see and act on their collective interest in cooperation rather than their individual interest in being intransigent, for example limiting the number of players to each game, requiring exchanges of information and promoting stability in bargaining relationships. In reading the results of the empirical studies, an astute practitioner of American labor law cannot help but identify various results that find representation in our doctrines under the NLRA. For example, the empirical findings that homogeneity in constituents and limiting the number of players to a game simplifies bargaining and improves the chances of cooperation is consistent with the congressional mandates of section 9 of the NLRA that employees be organized in “appropriate bargaining units” and represented by unions who are their “exclusive representative.” Similarly, the empirical findings that exchanges of information promote comprehension and trust which in turn engender cooperation between the parties, are consistent with the Supreme Court’s holding in Truitt and other cases that good faith bargaining requires certain exchanges of information. Indeed, all of the empirical results outlined above find some representation in American labor law as part of a doctrine that is designed to help achieve the NLRA’s purpose of promoting industrial peace. Of particular importance to the cases being considered by the Board today are the findings that promoting stability in the bargaining relationship promotes the parties’ ability to cooperate in collective bargaining and thus furthers that NLRA’s purpose of promoting industrial peace.


4 Dau-Schmidt, at 493-505.
Promoting Industrial Peace Through Stability in Bargaining Relationships

An important benefit of fostering stability in collective bargaining relationships is that it facilitates cooperative bargaining and thus promotes industrial peace. If the employer thinks that the union is about to become defunct, she has little incentive to bargain cooperatively, and indeed has incentive to make an “end game defection” on past cooperation and grab whatever she can in negotiations. Alternatively, if the employer believes that the union’s position is secure, he has incentive to bargain cooperatively because he would reasonably believe that current cooperation might be rewarded by present and future union cooperation and current intransigence might bring present and future union retaliation. Stability in bargaining relationships also facilitates exchanges of information and trust between the parties. Lester B. Lave, in his pioneering study of dilemma games, found that the parties to such games are much more likely to reach a cooperative solution when there is a reasonable prospect of “repeat play” or continuity in the relationship than when the parties think their negotiations are a one-time thing. Empirical work by Robert M. Axelrod and others is consistent with this finding. More recently, Duvall has argued that, in bargaining relationships where there is an expectation of continuity, the parties are more likely to engage in “integrative bargaining” rather than “adversarial bargaining.” As demonstrated in her case study of the negotiations over the Kaiser-Permanente collective bargaining agreement, under integrative bargaining the parties are more likely to disclose information and seek solutions for their mutual benefit than to engage in adversarial bargaining where one side wins at the expense of the other. As a result, the integrative bargaining found in continuing bargaining relationships is more likely to result in cooperative negotiations and industrial peace.

The presumption of continuing majority status for a reasonable period of good faith bargaining that underlay the Board’s voluntary recognition bar doctrine prior to Dana Corp., 351 NLRB 434 (2007), and the Board’s successor bar doctrine prior to MV Transportation, 337 NLRB 770 (2002), served the important purpose of promoting stability in the collective bargaining relationship which theoretical and empirical work suggests will promote cooperative bargaining and fulfill the NLRA’s purpose of promoting industrial peace. Such stability in the bargaining relationship would seem particularly important to cooperative bargaining when the bargaining relationship has just begun, as in the case of voluntary recognition, or when the employer is in some turmoil, as is the case in successorship. Accordingly in weighing the different issues involved in deciding whether to reinstate a full voluntary recognition bar and successor bar, the Board should weigh heavily the parties’ and states’ interest in stability in the bargaining relationship because such stability will encourage cooperation in collective bargaining and help to fulfill the NLRA’s purpose of promoting industrial peace.

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8 Dau-Schmidt, at 504-05.
Conclusion

Theoretical and empirical work in game theory suggests that stability in collective bargaining relationships is important to promoting cooperation in bargaining and fulfilling the NLRA’s purpose of promoting industrial peace. In the absence of stability in the bargaining relationship, employers have little incentive to bargain cooperatively and indeed have some incentive to act strategically and exploit the situation. This is particularly true in the situations in which there is already some uncertainty because the bargaining relationship is new or because the employer is in flux due to successorship. Accordingly a strong presumption of continuing majority status is important to promoting cooperative collective bargaining and industrial peace in these cases and the Board should act to reinstate full voluntary recognition and successorship bars overturning the recent Board precedents in Dana Corp. and MV Transportation.

Respectfully submitted,

[Signature]

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CURRICULUM VITAE

OF

KENNETH G. DAU-SCHMIDT

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EDUCATION: Ph.D., Economics, University of Michigan, 1984
J.D., University of Michigan Law School, 1981
M.A., Economics, University of Michigan, 1981
B.A., Econ. and Poli.Sci., Univ. of Wisconsin, 1978

SPECIALIZATION:
Research Interests -- law and economics, labor and employment law, antitrust

Courses Taught -- Law and Economics, Labor Law, Antitrust, Employment Law, Criminal Law, Collective Bargaining, Labor Economics

Dissertation -- The Effect of Consumption Commitments on Labor Supply

Ph.D. Fields -- Labor, Industrial Organization

ADMINISTRATIVE EXPERIENCE:

Associate Dean of Faculty Research, School of Law, Indiana University at Bloomington. Responsible for promoting law school faculty research, promoting applications for grants, mentoring untenured faculty, advising the Dean, sitting ex-officio on the law school’s Promotion and Tenure Committee and Speakers Committee and representing the Law School in the greater University on matters of research. (August 2005 - August 2007)

Director, Center for Law, Society and Culture, School of Law, Indiana University at Bloomington. Responsible for running the law school’s law & society program including our annual symposium and university wide workshop series. Responsible for founding and editing several SSRN electronic journals for working papers in law & society research. August 2002 - 2007. (Director August 2002- August 2004, Co-Director August 2004 - August 2007)
TEACHING AND
RESEARCH EXPERIENCE:


PRACTICE EXPERIENCE:

Arbitrator, Private and Public Sector Labor and Employment Law Cases, 1991-Present.


SCHOLASTIC HONORS:

The Industrial Relations Research Association Excellence in Education Award (2004)

The Leon H. Wallace Teaching Award (2003) (This is the Indiana University School of Law’s top teaching award).

Sylvia Bowman Award for Teaching Excellence, Indiana University (2003) (This is a University-wide award, only one is granted a year).

Willard and Margaret Carr Professor of Labor and Employment Law (1999 - present).

Teaching Excellence Recognition Award (Indiana University School of Law, 1998)

John S. Hastings Faculty Fellowship for Scholarly Achievement (Indiana University School of Law, 1998)

Leonard D. Fromm Public Interest Faculty Award (Indiana University School of Law 1997)

John S. Hastings Faculty Fellowship for Scholarly Achievement (Indiana University School of Law, 1997)

Ira C. Batman Faculty Fellowship for Scholarly Achievement (Indiana University School of Law, 1996)

Charles L. Whistler Faculty Fellowship for Scholarly Achievement (Indiana University School of Law, 1995)

Louis F. Niezer Faculty Fellowship for Scholarly Achievement (Indiana University School of Law, 1993)

Winner of the Association of American Law Schools' 1990 Scholarly Paper Competition

Commendation for Teaching Excellence (Goldman Committee, University of Cincinnati College of Law, 1990)

Parker Award for the best paper in labor economics (Michigan Dept of Economics, 1984)

Ely Award for Academic Achievement (Wisconsin Dept of Economics, 1978)

Davis Award for Work in Constitutional Law (Wisconsin Dept of Political Science, 1978)

Graduated with honors from the University of Michigan Rackham Graduate School, University of Michigan Law School and the University of Wisconsin

Coif, Phi Beta Kappa, Phi Kappa Phi, and Omicron Delta Epsilon Honor Societies
GRANTS AND FELLOWSHIPS:

Law School Admissions Council Grant-$163,503 (for work on *The Production, Content, and Consumption of Legal Scholarship: A Longitudinal Analysis*, 2006-09) (with William Henderson, Andrew Morrisey and Olufunmilayo Arewa)

Law School Admissions Council Grant-$163,503 (for work on *Gender and the Legal Profession*, 2004-07) (with Marc Galanter and Kathleen Hull)

President's Council on International Programs Grant-$500 (Indiana University, 1994)

Center for West European Studies Grant-$500 (Indiana University, 1994)

Fund for Labor Relations Grant-$1,300 (for work on *A Bargaining Analysis of American Labor Law*, 1991)

Humphrey and Sharfman Fellow-$10,000 (University of Michigan's Joint Program in Law and Economics, 1978-82)

BOOKS:


ARTICLES AND PAPERS:


**The Definition of “Employee” in American Labor and Employment Law**, 53 BULL. COMP. LAB. REL. 59 (2004) (with Michael D. Ray). This article was written as the USA National Paper for an International Seminar on Comparative Labour Law hosted by the Japan Institute for Labour Policy and Training, available at


Dividing the Surplus: Will Globalization Give Women a Larger or Smaller Share of the Benefits of Cooperative Production?, 4 IND.J. GLOBAL L. STUD. 51 (1996). This comment was written at the invitation of the Indiana Journal of Global Legal Studies as part of a symposium on feminism and globalization.

Employment Security: A Comparative Institutional Debate, 74 TEX. L. REV. 1645 (1996). This comment was written at the invitation of the University of Texas Law Review as part of a symposium on employment law.

The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Workforce, 52 WASH. & LEE L. REV. 879 (1995). This essay was written at
the invitation of the Washington and Lee Law Review as part of a symposium on contingent workers.


*Relaxing Traditional Economic Assumptions and Values: Towards a New Multidisciplinary Discourse on Law,* 42 SYRACUSE L. REV. 181 (1991). This essay was written at the invitation of the Syracuse Law Review as part of a symposium on law, economics and semiotics.


Comments on Commercial Speech, Constitutionalism, Collective Choice, 56 U. CIN. L. REV. 1383 (1988). This comment was written at the invitation of the University of Cincinnati Law Review as part of a symposium on commercial speech and the First Amendment.


CONFERENCE PROCEEDINGS
PUBLISHED PRESENTATIONS:


PRESENTATIONS:

"The Economic and Political Environment for Labor under Barak Obama: The Economy, Can Obama Bail Out Workers?," Discussant, Maurer School of Law Symposium on Labor and Employment Law Under Obama, Indiana University, Bloomington, IN (November 12, 2010).

"You're not Welcome Here: NLRA Preemption and Removal," Moderator and Discussant, ABA Section on Labor Law annual Meeting, Chicago, IL (November 5, 2010).

"Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform," Distinguished Speaker, Marquette University Law School, Milwaukee, WI (October 1, 2010).


"Interdisciplinary Interpretation: The Role of Economic Analysis in the Study and Practice of Law," Annual Meeting of the Association of American Law Schools, Section on Legal Interpretation, New Orleans, LA (January 8, 2010).


"Bankruptcy, Consumers and Tax," Chair and Discussant, Midwest Law and Economics Association Annual Meeting, Notre Dame Law School, South Bend, IN (October 10, 2009).

"Review of U.S. Supreme Court Labor and Employment Law Cases from the 2008-09 Term," Los Angeles Bar Association, Los Angeles, CA (July 15, 2009).

"Review of U.S. Supreme Court Labor and Employment Law Cases from the 2008-09 Term," Twenty-Sixth Annual Carl A. Warrs, Jr. Labor and Employment Law Institute, University of Louisville, Brandeis School of Law, Louisville, KY (June 18, 2009).

"Teaching Collective Bargaining as a Simulation," Innovations in Teaching, AALS Midyear Meeting on Transactions Law, Long Beach, CA (June 12, 2009).

“A Conference on the American Law Institute’s Proposed Restatement of Employment Law,” Chair and Organizer, University of California—Hastings, School of Law, San Francisco, CA (February 7, 2009).

“Labor and Employment Law,” Chair, Law and Society Association Mid-year Retreat, University of Wisconsin—Madison, Law School, Madison, WI (September 18, 2008).


“The Use of Simulations to Improve Student Engagement: ‘Labor Law I, Inc.’,” Faculty Colloquium, Northern Kentucky University, Chase College of Law, April 8, 2008.


“Gender and the Legal Profession: The Michigan Law School Alumni Data Set 1967-2004,” Faculty Colloquium, University of Minnesota, School of Law, Minneapolis, MN (November 1, 2007).


“The Pride of Indiana: An Empirical Study of the Law School Experience and Careers of Indiana University School of Law–Bloomington Alumni,” First Annual Conference on Empirical Legal Studies, University of Texas, School of Law, Austin, TX (October 27, 2006).

“Gender and the Legal Profession,” Annual Meeting of the Law and Society Association, Baltimore, MD (July 8, 2006).


“Income and Job Satisfaction in the Legal Profession: Is the Grass Always Greener for Other Lawyers?,” Continuing Legal Education Seminar, Indiana University–Bloomington, Bloomington, IN (September 9, 2005).


“Labor Law in Comparative and Historical Perspectives,” Session Chair, Annual Meeting of the Law and Society Association, Pittsburgh, PA (June 5, 2003).


“Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law,” Inaugural lecture for the Willard and Margaret Carr Professorship of Labor and Employment Law, Indiana University School of Law, Bloomington, IN (September 23, 1999).


"Recent Developments in Labor and Employment Law Scholarship," Participant in Symposium on Labor and Employment Law, University of Texas Law School, Austin, TX (November 10-12, 1995).

“The Importance of Tenure to the Efficient Operation of Modern Universities,” Forum on Tenure at the University of Michigan, University of Michigan, Ann Arbor, MI (February 9, 1995).


“Instructing the Legislature on the Benefits of Collective Bargaining in Public Education,” Key-Note Address, Annual Conference of the Indiana Federation of Teachers, Bloomington, IN (May 1, 1993).


SYMPOSIA ORGANIZED:

“Labor and Employment Law Under the Obama Administration,” Indiana University, Maurer School of Law, Bloomington, IN (November 11-12, 2010).


“The Second Big 10 Aspiring Scholars Conference,” Indiana University School of Law, Bloomington, IN (August 6-7, 2007).
"The First Big 10 UnTENured Conference," Indiana University School of Law, Bloomington, IN (August 1-2, 2006).

"First Annual Meeting of the Midwestern Law and Economics Association (MLEA)," Indiana University School of Law, Bloomington, IN (October 12-13, 2001).


"The Corporation as Employer," Corporate Law Symposium, University of Cincinnati College of Law, Cincinnati, OH (March 8-9, 1989).

"Commercial Speech and the First Amendment," Corporate Law Symposium, University of Cincinnati College of Law, Cincinnati, OH (October 14-15, 1987).

SERVICE:

Law School and University

I have served on the following committees for the faculties of the University of Cincinnati College of Law (1986-'91), the Indiana University at Bloomington, School of Law (1991-1994, 1995 - present), and the University of Wisconsin Law School (1994-1995):

Dean Search (elected 1989-90, selected 2002-03)
Committee on Committees (elected 1989-90, 1990-91)
Policy Committee (elected 1998-99)
Law and Society (Chair 1992-94, Chair 1998-99, Chair 2002-04)
Center for Law Society and Culture (Director 2002-04, Co-Director 2004-2007)
Self-Study Committee (2001-02, 2002-03)
Faculty Development (1987-88, Chair 1990-91, 1994-95)
Educational Policy (Chair 2010-11)
Speaker's Committee (2005-2007)
Admissions (2002-03, 2003-04)
Teaching (2009-10, Chair)
Honor Council (1988-89, 1989-90)
Petitions (1986-87, 1992-93)
Library (1986-87, 1988-89)
Orientation (1988-89, 1989-90)
Foreign Programs Committee (1994-95)

I have also served as the College or Law School representative on: University Tenure Committee (2009-10, 2010-11); the AAUP Executive Committee Indiana University-Bloomington Chapter (1996-98, 2009-
2010); the AAUP Committee A Indiana University - Bloomington Chapter (2003-4); Indiana University's Employee Benefits Committee (2000-03); Indiana University's Ad Hoc Review Committee on Pay Equity (1998-99, 1999-00); the Business School’s Ad Hoc Committee on Pay Equity (1997-98); the Faculty of the Industrial Relations Research Institute (1994-97); the Law School’s Ad Hoc Committee on Clinical Faculty Tenure (1996-97); Faculty Senate (elected 1990-92, 1994-95); Indiana University Diversity Workshops (1992-93); the President's Athletic Advisory Committee (1990-91); and the University Judicial Council (1986-87).

National


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