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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DANA CORPORATION (Respondent Employer), and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, (Respondent Union), and GARY L. SMELTZER, JOESEPH MONTAGUE, and KENNETH GRAY (Employee Charging Parties).	Judge William G. Kocol Case Nos. 7-CA-46965, 7-CA-47078, 7-CA-47079, 7-CB-14083, 7-CB 14119, and 7-CB-14120.

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H.R. Rep. No. 74-1147 (1935) 16

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79 Cong. Rec. 2332 (Rep. Boland) 15
79 Cong. Rec. 7483 (Sen. Wagner) 16
79 Cong. Rec. 9329 (1935) (Rep. Marcantonio) 16

Roger C. Hartley, Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement,
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Jonathan P. Hiatt and Lee W. Jackson, Union Survival Strategies for the Twenty-First Century,
12 Lab Law. 165, at 176 (1996) 22,30

Andrew Strom, Rethinking the NLRB's Approach to Union Recognition Agreements,
15 Berkeley J. Emp. & Lab L. 50, at 58 (1994) 22

Charging Parties Gary L. Smeltzer, Joseph Montague, and Kenneth Gray, hereby file a Brief in Support of their Exceptions to Administrative Law Judge's ("ALJ") William G. Kocol's decisions at the February 8, 2005 hearing, and written decision of April 11, 2005.

STATEMENT OF THE CASE

The issue presented is whether a union can lawfully enter into an agreement with an employer governing how the Union will conduct itself upon becoming the exclusive bargaining representative of employees. As discussed below, an employer having contractual authority over a current or future representative of its employees is contrary to the basic construct of collective bargaining under the National Labor Relations Act ("NLRA" or "Act").

This case involves what is known as a "bargaining to organize" agreement, wherein a union agrees to bargaining concessions in exchange for employer assistance with organizing its employees. The contract at issue is the "Letter of Agreement" between Dana and the UAW.[1]

In the Letter of Agreement, Dana agreed to assist UAW organizing campaigns against its employees. More specifically, Dana agreed to: conduct captive audience meetings on company time and property on behalf of the UAW, *see* Letter of Agreement, § 2.1.3.5; provide UAW organizers with access to Dana facilities, *see* id.; provide the UAW with personal information about employees targeted for unionization, *see* id., § 2.1.3.1; inform employees that the UAW will help Dana secure business from its customers, *see* id., § 2.1.2.7; forbid its supervisors from saying anything negative about the UAW, *see* id,. § 2.1.2; and recognize the UAW pursuant to a "card check" and without an NLRB conducted secret-ballot election, *see* id., §§ 3.1.4 - 3.1.8.

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[1] Respondent International Union, United Automobile and Agricultural Implement Workers of America, AFL-CIO, shall be referred to as the "UAW" or "Union." Respondent Dana Corporation shall be referred to as "Dana."

In exchange for Dana's organizing assistance, *quid pro quo*, the UAW made commitments regarding how it would conduct itself upon becoming the bargaining representative of Dana employees. The UAW agreed to not seek employee health insurance coverage superior to that implemented by Dana on January 1, 2004, id., §§ 4.2.1 and 4.2.4; to several mandatory contract terms, *see* id., § 4.2.4; to effectively cap total wages and benefits to those of organized facilities' competitors and comparable Dana facilities, *see* id., § 4.2.6; and to not strike in support of bargaining demands in the first contract, *see* id., § 2.1.3.1. Dana can compel the UAW to comply with its commitments through a binding arbitration procedure. Id., § 5.

Charging Parties are employees at Dana's facility in St. John's, Michigan ("St. John's facility"). The UAW is not the bargaining representative of Charging Parties and their co-workers, but seeks to become their representative, as the St. John's facility is targeted for unionization under the Letter of Agreement.

The focus of the case is on the "bargaining" portion of Respondents' "bargaining to organize" agreement. The overarching issue is whether Respondents can lawfully enter into an agreement governing how the UAW can conduct itself upon becoming the exclusive bargaining representative of Dana's employees.[2]

Dana enjoying contractual control over the UAW's conduct as the representative of Dana's employees is fundamentally incompatible with the basic construct of collective

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[2] The ALJ failed to understand the issue in this case. The ALJ's decision of April 11, 2005, primarily addresses whether Dana literally recognized the UAW as the representative of its employees at the St. John's facility. *See* ALJD, pp. 6-8. But, the issue is not premature recognition, but rather pre-recognition bargaining. *See* Complaint, ¶ 10. A basic element of the Complaint is that the UAW was *not* the representative of Dana St. John's employees when it entered into the Letter of Agreement. Id., ¶ 10. The ALJ's decision is inapposite because it addresses the wrong issues.

bargaining under the Act. Unions are to represent employee interests vis-a-vis their employer. "[C]ollective bargaining is a sham where the employer sits on both sides of the bargaining table." Valley Mould & Iron Corp. v. NLRB, 116 F.2d 760, 764 (7th Cir. 1940).

Respondents' conduct violates the Act in three specific ways. First, the contractual authority the Letter of Agreement provides Dana over the UAW violates § 8(a)(2)'s prohibition against an employer "dominat[ing] or interfer[ing] with the formation or administration of any labor organization." 29 U.S.C. § 158(a)(2).

Second, pre-recognition bargaining disregards employee free choice in violation §§ 8(a)(1) and 8(b)(1)(A) of the Act, 29 U.S.C. §§ 158(a)(1) and (b)(1)(A), as recognized by the Board in Majestic Weaving Co., 147 N.L.R.B. 859 (1964), *enforcement denied on other grounds,* 355 F.2d 854 (2nd Cir. 1966).

Third, the Letter of Agreement constitutes a prospective breach of a union's duty of fair representation under § 8(b)(1)(A). A union agreeing to concessions at the expense of employees it represents in exchange for things from that employer that further the union's self-interests is a prototypical breach of fiduciary duty.

The ALJ held that Respondents' conduct is saved from the Act's prohibitions by Kroger Co., 219 N.L.R.B. 388 (1975). *See* ALJD, p. 9. This is untenable, as Kroger regards the distinguishable situation wherein an existing collective bargaining agreement–negotiated by a union on behalf of represented employees–is applied to another bargaining unit. Here, the UAW made commitments solely regarding employees it did not represent. However, in the event Kroger is not distinguishable, it must be overruled as incompatible with the plain text of § 8(a)(2), the Board's decision in Majestic Weaving, and a union's duty of fair representation.

In short, the UAW agreed to be subservient to Dana's corporate interests upon becoming the representative of Dana employees in exchange for Dana's assistance with organizing its employees. This conduct is flatly unlawful under §§ 8(a)(2), 8(a)(1), and 8(b)(1)(a) of the Act.

FACTS

The facts in this case are straight-forward. On August 6, 2003, Dana and the UAW negotiated a secret 20-page Letter of Agreement. As the terms of the contract make plain, it is a classic example of a "bargaining to organize" agreement. Dana agreed to assist UAW organizing drives against its employees. In exchange, *quid pro quo*, the UAW agreed to concessions at the expense of future represented employees.

The Letter of Agreement's language speaks for itself. However, Charging Parties will briefly review the "organizing" provisions of the agreement, the "bargaining" terms of the agreement, the contracts' enforcement mechanisms, and then address the ALJ's misconstruction of some terms of the Letter of Agreement.

I. "Organizing" Terms of the Letter of Agreement. (Exception 7).

Prohibition on Employer Speech Unfavorable to UAW. Section 2.1.2 of the Letter of Agreement purports to require "neutrality," but in actuality it only prohibits Dana from saying anything negative about the UAW or unionization (even if it is truthful).[3] Dana is free to make statements supportive of the UAW, and is required to do so during mass employee meetings.

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[3] *See* Letter of Agreement, § 2.1.2.1 (no "communication or conduct that evidences, either directly or indirectly, a negative, derogatory, or demeaning attitude toward the Company or Union"); id., § 2.1.2.2. ("The Company will not engage in any communications or conduct that directly or indirectly, demonstrates or implies opposition to unionization of its employees"); id., § 2.1.2.7 ("The Company will not make any statements or representations as to the potential negative effects or results of representation by the Union on the Company, the employees or any group of employees").

Mass Employee Meetings. Section 2.1.3.5 of the Agreement states that Dana and the UAW shall conduct a joint meeting, on company time and property, during which Dana must make statements supportive of the UAW.[4] Such meetings were held at the St. John's facility in December 2003. (TR 48, Smeltzer). Several high-level Dana and UAW officials jointly conducted these meetings. (Id.). Offers of proof were made by the General Counsel that the UAW solicited employees to sign union authorization cards at these meetings.[5]

Employee Lists. Section 2.1.3.1 of the Agreement requires that Dana provide the UAW with an alphabetical list of the employees it is seeking to organize. This list must include personal information about the employees and be updated upon request by the UAW. Id.

Access. Section 2.1.3.5 requires that Dana provide UAW organizers with access to its facilities during work hours.

Card Check. Sections 3.1.4 - 3.1.8 of the Letter of Agreement require that Dana recognize the UAW based upon authorization cards collected by the UAW. An NLRB conducted secret-ballot election is not required to determine if a majority of employees actually

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[4] *See* Letter of Agreement, § 2.1.3.5 ("The Company shall provide the Union with access for a meeting with its employees on the Company's premises during work time as mutually agreed upon at the time of the Union's request. The Company will introduce the Union at the meeting. The Company will advise its employees that it has a constructive and positive relationship with the UAW and that a National Partnership Agreement with the UAW exists in which both parties are committed to the success and growth of the facility.").

[5] The General Counsel's offers of proof were that Mr. Smeltzer and Mr. Montague would have testified that UAW Vice President Bob King solicited employees to sign union authorization cards at the December 2003 meetings at the St. John's facility. *See* TR 55 ("Bob King . . . took the podium and began to speak, just asking employees to sign union cards"); TR 49 ("Bob King . . . talked about the reasons that the employees would want to join the UAW"); TR 56 ("The only thing distributed were cards, UAW membership cards, that were distributed at the meeting. And that a lot of employees did sign cards at the meeting").

desire UAW representation.

The UAW Controls the Total Number of Employees Considered to Be in a Unit. Section 3.1.3 of the Agreement permits the UAW to pick and choose the date on which the total employee population of a proposed bargaining unit is determined, which in turn controls the total number of employees who constitute a majority of the bargaining unit.

II. "Bargaining" Terms of the Letter of Agreement.

The Letter of Agreement grants Dana significant control and leverage over the terms and conditions of employment the UAW can secure for Dana employees upon being recognized as the employees' exclusive bargaining representative. By virtue of its authority over the UAW, Dana effectively sits on both sides of the bargaining table during any contract negotiations.

Limitation on Health Care Benefits. Section 4.2.1. of the Letter of Agreement states:

> Therefore the Union commits that in no event will bargaining between the parties erode current solutions and concepts in place or scheduled to be implemented January 1, 2004, at Dana's operations which include premium sharing, deductibles, and out-of pocket maximums.

See also id., § 4.2.4 (additional limits on health care terms).

Mandatory Contract Terms. Section 4.2.4. of the Letter of Agreement requires that certain terms "must be included" in any future collective bargaining agreement:

- Healthcare costs that reflect the competitive reality of the supplier industry and products involved.
- Minimum classifications.
- Team-based approaches.
- The importance of attendance to productivity and quality.
- Dana's idea program . . .
- Continuous improvement.
- Flexible compensation.
- Mandatory overtime when necessary (after qualified volunteers) to support the customer.

A minimum contract duration of four years is also required. Id., § 4.2.2.

Interest Arbitration Cap on Employee Wages and Benefits. The Letter of Agreement provides for an "interest arbitration" procedure if Dana and the UAW are unable to agree on a first collective bargaining agreement within six months after Dana recognizes the UAW as the representative of its employees. Id., §§ 4.2.5 - 4.2.7. In "interest arbitration," the arbitrator must select one of the parties' final contract offers. The arbitrator is to choose the offer most reasonable compared to total wages and benefits provided by facility competitors and comparable Dana facilities. Id., § 4.2.6. The total wages and benefits provided in OEM[6] collective bargaining agreements are not to be considered in this competitive analysis. Id.

Benchmarking the "interest arbitration" procedure in this manner effectively caps the total wage and benefits future-organized Dana employees to those of facility competitors or a comparable Dana facility. If the UAW were to seek wages or benefits superior to this level, Dana could simply submit the contract to interest arbitration to obtain the contract terms it desires.

Right to Strike Waived. The UAW sacrifices its (and employees') right to strike in the Letter of Agreement, thereby relinquishing an economic "weapon" for obtaining favorable terms and conditions of employment for represented employees. Id., § 6.1.[7]

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[6] "OEM" stands for Original Equipment Manufacturers, and includes companies such as General Motors, Ford Motor Co., and DaimlerChrylser.

[7] *See* Pattern Makers League v. NLRB, 473 U.S. 95, 129 (1985) ("The strike or the threat to strike is the workers' most effective means of pressuring employers, and so lies at the center of the collective activity protected by the Act") (Blackmun, J., dissenting); *see also* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967) ("The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms").

UAW's Right to Organize Additional Dana Facilities Conditioned on the Collective Bargaining Agreements the Union Negotiates. Section 9.1.2 states that "[i]n order for the Union to commence the organizing of Phase #2 Level #1 facilities under this Partnership Agreement, a majority of the Partnership Committee must concur that the overall impact of these labor agreements[8] must not have materially harmed the financial performance of the facilities covered by these labor agreements." *See also* id., §§ 9.1.3 - 9.1.3.6. Half of the members of the "Partnership Committee" are appointed by Dana. Id., § 9.1.

Thus, the UAW's ability to organize Dana facilities is dependent upon Dana's pleasure or displeasure with the collective bargaining agreements the Union enters into on behalf of Dana employees. This provides Dana with great leverage over the UAW in contract negotiations, as the UAW's self-interest in organizing more Dana facilities is pitted against whether the UAW agrees to contractual terms that Dana believes to be in its corporate interests.[9]

III. The Letter of Agreement Is Binding and Fully Enforceable.

The Letter of Agreement is enforceable under § 5 of the Agreement, which establishes a dispute resolution procedure wherein issues are submitted to a "Neutral" whose decision "shall be final and binding," and is not appealable. Id., § 5.1.2.4. The limitations on health care benefits, id., § 4.2.1, the mandatory contract terms, id., §§ 4.2.2 and 4.2.4, the prohibition on strikes, id., § 6.1, and the prohibition on the UAW organizing "Phase #2" facilities until a "Partnership Committee" approves of the contracts the Union has negotiated, id., § 9.1.6, are

[8] "Labor agreements" refers to the collective bargaining agreement the UAW enters into on behalf of employees at newly organized facilities.

[9] Considering the significant concessions the UAW agreed to in the Letter of Agreement in exchange for Dana's assistance with organizing, this is undoubtedly powerful leverage.

enforceable by Dana against the UAW under the binding procedures of § 5.[10]

Terms of the Letter of Agreement not enforced under § 5 include disputes regarding the scope of a bargaining unit, which are resolved under § 3.1.2, and the interest arbitration procedures of § 4.2, which is its own enforcement mechanism.

IV. Exceptions to ALJ Decisions Regarding Questions of Fact and Evidence.

A. The Letter of Agreement Does Not Establish "General Principles" (Exceptions 13, 17, and 28).

The ALJ stated that several terms of the Letter of Agreement set forth "general principles" or "touch upon terms and conditions of employment." ALJD p. 7. The notion that the Letter of Agreement sets forth amorphous, precatory "principles" that the parties are free to follow or ignore is belied by the strict, non-permissive language of the Letter of Agreement.

- *Limitation on Health Care Benefits*: "[T]he Union *commits that in no event* will bargaining between the parties erode current solutions and concepts in place or scheduled to be implemented January 1, 2004, at Dana's operations." Letter of Agreement, § 4.2.1. (emphasis added).

- *Mandatory Contract Terms*: "The parties *agree* that in labor agreements bargained pursuant to this letter, the following conditions *must be included* for the facility to have a reasonable opportunity to succeed and grow." Id., § 4.2.4 (emphasis added).

- *Waiver of Right to Strike*: "The Union *agrees that it will not* engage in any strike or work stoppage." Id., § 6.1. (emphasis added).

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[10] Moreover, the terms of the Letter of Agreement would be fully enforceable under § 301 of the NLRA, 29 U.S.C. § 185, if the agreement were otherwise lawful (which they are not). *See* International Union, UAW v. Dana Corp., 278 F.3d 548 (6th Cir. 2002) (federal court enforces a prior "neutrality agreement" between Dana and the UAW); *see also* Service Employees Int'l Union v. St. Vincent Medical Center, 344 F.3d 977 (9th Cir. 2003); New York Health & Human Serv. Union, 1199/SEIU v. NYU Hosp. Center, 343 F.3d 117 (2nd Cir. 2003); HERE, Local 2 v. Marriott Corp., 961 F.2d 1464 (9th Cir. 1992); Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561 (2nd Cir. 1993).

The above provisions of the Letter of Agreement are enforceable by Dana under § 5 of the Agreement. Id., § 5.1.2.4 ("The Neutral shall have *complete authority* to remedy any violation of this Agreement and the decision of the Neutral *shall be final and binding*") (emphasis added).

Moreover, common sense dictates that the Letter of Agreement is not just precatory verbiage. The Letter of Agreement is a detailed, seventeen (17) page, single-spaced document negotiated by high-level Dana and UAW officials over the course of three (3) days of face-to-face negotiations. (TR 72, Warders). The notion that Respondents would devote this time and effort to develop a meaningless recitation of "general principles" is untenable.[11]

B. The ALJ's Evidentiary Rulings Were in Error (Exceptions 1-4, 21).

The ALJ prevented the General Counsel and Charging Parties from eliciting information regarding the negotiation of the Letter of Agreement. The ALJ quashed the subpoenas *duces tecum* served by the General Counsel and Charging Parties on Respondents, (*see* Ch. Parties Exs. 1 and 2; GC Exs. 2 and 3), and prohibited witness testimony regarding the negotiation of the Agreement. (*See, e.g.*, TR 58-59, 73, Messenger).

As a result, the only significant evidence in the record is the Letter of Agreement itself, although that evidence alone is sufficient to establish a violation of the Act. However, evidence regarding the negotiation of the Agreement would be probative as to the extent of Respondents' bargaining over employee terms and conditions of employment, the intent of the Respondents under the Letter of Agreement, and the meaning of certain its terms. The Letter of Agreement being highly relevant does not render other evidence as to Respondents' conduct less relevant.

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[11] This is particularly true in light of the organizing assistance Dana agreed to provide the UAW under the Letter of Agreement. Dana certainly would not have accepted hollow promises by the UAW in exchange for the tangible organizing it delivered to the union, and vice versa.

If the Board finds that these factual issues could affect its ruling in this case, Charging Parties request that the ALJ's evidentiary ruling be reversed for all of the reasons discussed in Charging Parties' Opposition to Dana's Petition for Partial Revocation of Subpoena *Duces Tecum* (Ch. Parties Ex. 3) and at the hearing. (TR 28-29, 69-79 Messenger).

C. The "Purpose" of the Letter of Agreement (Exception 6).

The ALJ states that the "purpose" of the Letter of Agreement is that which the Respondents wrote in the Agreement itself. *See* ALJD, pp. 3-4. The Board cannot accept Respondents' self-serving "purpose" at face value. The substantive terms of the Letter of Agreement demonstrate that the UAW's true purpose was to organize more members and dues payers, and that Dana's goal was to ensure that the UAW acted in a manner favorable to Dana's business interests upon becoming the representative of its employees.[12]

D. The Letter of Agreement Is Confidential (Exceptions 27 and 34)

The ALJ erroneously states that Dana employees could evaluate the Letter of Agreement to determine whether they favor UAW representation. ALJD, pp. 9-10. This is belied by the fact that the Agreement states that "[n]either party can disclose this agreement, or its content or any actions taken hereunder, without the consent of the other." Id., § 12.1. As of August 13, 2003, the "[t]erms of the Agreement were not disclosed by agreement of the parties." (Ch. Party Ex. 4, Dana Press Release of August 13, 2004).

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[12] To the extent that Respondents' true purposes under the Letter of Agreement are pertinent, the ALJ's evidentiary rulings must be reversed. *See* Exceptions 1-4.

The ALJ refused to hear testimony that the Letter of Agreement was kept secret from St. John's employees until December 2003, and that employees were not permitted to possess or make copies of the Agreement even after that point. (TR 50, 56-57). If the extent of employee knowledge about the Agreement affects the Board's decision in this case, the ALJ's evidentiary rulings must be reversed. *See* Exceptions 1-4, 21.

ISSUES PRESENTED

The overarching issue presented is whether a union can lawfully enter into an agreement with an employer governing how the union conducts itself upon becoming the exclusive bargaining representative of employees. This issue can be broken down into five, more specific sub-issues:

(1) Does an employer "dominate or interfere with the formation or administration of any labor organization" in violation of § 8(a)(2) when the employer has contractual authority over how the union conducts itself as the exclusive bargaining representative of employees?

(2) Does pre-recognition bargaining between an employer and non-majority union infringe on employees' § 7 rights in violation of §§ 8(a)(1) and 8(b)(1)(A) of the Act, as the Board held in Majestic Weaving Co., 147 N.L.R.B. 859 (1964)?

(3) Does a union violate its duty of fair representation by making concessions at the expense of employees in exchange for things that further a union's self-interest in organizing?

(4) Are "bargaining to organize" agreements, such as the Letter of Agreement, contrary to national labor policy?

(5) Is pre-recognition bargaining permissible under Kroger Co., 219 N.L.R.B. 388 (1975)? If so, should Kroger be overruled as inconsistent with the text of the Act and the Board's decision in Majestic Weaving Co., 147 N.L.R.B. 859 (1964)?

Charging Parties will address each of these issues in turn in the "Argument" section below.

A. Contrary to the ALJ, The Issue in this Case Is Not Premature Recognition. The ALJ's "Procedural Dismissal" and "Dismissal on the Merits" Are Inapposite. (Exceptions 10-13, 15, 20, 22).

It is axiomatic that if you start with a false premise you will reach a false conclusion. Here, the ALJ based his "procedural dismissal" and "dismissal on the merits" on the notion that the issue in this case is whether Dana literally recognized the UAW as the exclusive bargaining representative of employees employed at the St. John's facility. *See* ALJD, pp. 6-8. This premise is false, and as a result the ALJ's conclusions are inapposite and must be reversed.

The Complaint alleges that Respondents violated the Act by entering into an agreement "that sets forth terms and conditions of employment to be negotiated in a collective bargaining agreement *should* [the UAW] obtain majority status as the exclusive bargaining representative of certain of [Dana's] employees." Complaint, ¶ 9 (emphasis added). The Complaint further states that the UAW "did *not* represent a majority of employees of the employees employed by [Dana] at the St. John's facility." Id., ¶ 10 (emphasis added). Thus, far from alleging that Dana violated the Act by "recognizing" the UAW, the Complaint alleges that Dana violated the Act by entering into the Letter of Agreement at a time during which it had *not* recognized the Union.

Yet, the ALJ's "procedural dismissal" is based on the notion that the General Counsel "has failed to comply with the Board's rules by failing to plead unlawful recognition in the Complaint." ALJD. p. 6 lns. 39-40.[13] The ALJ's "procedural dismissal" must be reversed, as the

[13] Contrary to the ALJ, the General Counsel did not argue that Respondents violated the Act by literally recognizing the UAW as the representative of St. John's employees. *See* ALJD, p. 6; Exception 11. A review of the General Counsel's brief on the merits demonstrate that it argued that an employer bargaining with a minority union has the same deleterious affect on employee § 7 rights as a union recognizing a minority union, which is the holding of Majestic Weaving Co., 147 N.L.R.B. 859 (1964).

General Counsel did not fail "to plead unlawful recognition" because the case is not about unlawful recognition, but rather pre-recognition bargaining.

The ALJ's "dismissal on the merits" is similarly based on a misunderstanding of the issues at bar. The ALJ states that the issue on the merits is "whether Dana granted recognition to the UAW by entering into the letter of agreement notwithstanding the disclaimers to the contrary." ALJD, p. 7 lns. 12-13. Starting from this false predicate, the ALJ naturally reached a false conclusion: that the Complaint should be dismissed "[b]ecause the evidence fails to show that Dana has recognized the UAW for employees at the St. Johns facility." ALJD, 8 lns. 42-44.[14]

Again, the allegation in this case is not that Dana recognized the UAW before it enjoyed majority employee support, but rather whether it was unlawful for Respondents to enter into the Letter of Agreement at a time during which the UAW did not enjoy majority support. The ALJ's "dismissal on the merits" addresses an allegation that the General Counsel has not made, and is therefore inapposite.

ARGUMENT

I. An Employer "Interfere[s] with the Formation or Administration of Any Labor Organization" in Violation of § 8(a)(2) When it Has Contractual Authority Over How the Union Conducts Itself as the Exclusive Bargaining Representative of Employees. (Exceptions 35-36).

Section 8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other

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[14] The ALJ misconstruing Majestic Weaving Co., 147 N.L.R.B. 859 (1964) by holding that the decision only prohibits premature recognition, but not pre-recognition bargaining, is addressed in this brief at pages 19-24, *supra*.

support to it." 29 U.S.C. § 158(a)(2). The purpose of this provision is to prevent employers from exercising control over labor organizations. The Letter of Agreement is unlawful under § 8(a)(2) because it grants Dana contractual authority over how the UAW can conduct itself when acting as the exclusive bargaining representative of employees vis-a-vis Dana.

The most glaring inadequacy of the ALJ's decision is its failure to address the legality of the Letter of Agreement under the plain text of § 8(a)(2). The Complaint flatly alleges a violation of § 8(a)(2). The ALJ not addressing this allegation is inexplicable.

A. Legislative Purpose of § 8(a)(2) Is to Prevent Employers from Exercising Control Over Labor Organizations.

The prohibitions of § 8(a)(2) are rooted in the basic construct of American labor relations: unions are to represent employees vis-a-vis their employer. *See, e.g.*, 29 U.S.C. § 159(a). Acting as the agent of employees with regard to their employer, a union "is responsible to, and owes complete loyalty to, the interests of all whom it represents." Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). A union being under the control of the employer with which it bargains is incompatible with the union's ability to function as the representative of employees.

Section § 8(a)(2) was enacted to ensure that unions act solely in the interests of represented employees, and not in the interests of employers (or in the union's self-interest). A union under the influence of an employer would have "two masters."

> In a word, the company-dominated union is one which is lacking in independence, and which owes a dual obligation to employers and employees. It is an agent which possesses two masters. It attempts to sell the labor of its employee members to the employer member.

79 Cong. Rec. 2332 (February 20, 1935) (Rep. Boland), *reprinted at* 2 Legislative History of the

National Labor Relations Act 1935 (hereinafter "LHNLRA"), 2443.[15]

"[C]ollective bargaining is a sham where the employer sits on both sides of the bargaining table." Valley Mould & Iron Corp. v. NLRB, 116 F.2d 760, 764 (7th Cir. 1940); *see also* H.R. Rep. No. 74-969 (1935), *reprinted in* 2 LHNLRA, 2925-26 ("Collective bargaining is a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals"); *see also* H.R. Rep. No. 74-972 (1935), *reprinted at* 2 LHNLRA at 2971-73 (same); H.R. Rep. No. 74-1147 (1935), *reprinted in* 2 LHNLRA, 3066-68 (same). Senator Wagner himself recognized as much when he moved the Senate to consider his bill:

> The third defect of the company-dominated union is that it is supported, in whole or in part, by the employer. I cannot understand how those so well schooled in the doctrines of Americanism can sanction a practice whereby the person on one side of the bargaining table pays the attorney of those with whom he speaks. *Collective bargaining becomes a mockery when the spokesmen of the employee is the marionette of the employer.*

79 Cong. Rec. 7483 (March 15, 1935) (Sen. Wagner), *reprinted in* 2 LHNLRA at 2334 (emphasis added).[16]

Accordingly, the legislative purpose of § 8(a)(2) is to ensure that employers–whether through domination, interference, or provision of support–do not gain control or influence over

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[15] *See also Hearing on S. 2926 Before Senate Comm. on Educ. & Labor*, 73d Cong., (2d Sess., March 13, 1934) (Statement of Sen. Handler), *reprinted in* 1 LHNLRA, 68 ("the specific prohibitions in the bill against the participation of the management in any labor organization . . . are predicated on the principle that an agent cannot serve two masters").

[16] *See also* 79 Cong. Rec. 9329 *et seq.* (1935) (Rep. Marcantonio), *reprinted in* 2 LHNLRA at 3152 ("if we believe in collective bargaining, as we say we do, then I submit that we have a proper right to prevent an employer from taking over a union or forming one or dominating such union so that when they sit on the opposite sides of the table, there is no collective bargaining, but only one-sided bargaining–the employer bargaining with itself. That is what we are trying to prevent."); 78 Cong. Rec. 3444 (March 1, 1934) (Sen. Wagner), *reprinted in* 1 LHNLRA at 16 ("only representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees").

the conduct of labor organizations. This, in turn, is critical to protecting the basic construct of collective bargaining under the Act: that the union represents *only* employee interests vis-a-vis their employer.

B. The Contractual Authority Granted to Dana in the Agreement "Interfere[s] with the Formation and Administration of" the UAW in Violation of § 8(a)(2).

The Letter of Agreement provides Dana with contractual authority over how the UAW can act upon being recognized as the exclusive bargaining representative of Dana's employees. The Agreement prohibits the UAW from demanding or obtaining certain terms and conditions of employment during collective bargaining negotiations with Dana, even if the employees the UAW "represents" desire such terms. *See, e.g.*, Letter of Agreement, § 4.2.1 (limit on health care benefits); § 4.2.2 (minimum contract duration); § 4.2.4 (mandatory terms to be included in future bargaining agreements).

For example, Section 4.2.1 of the Letter of Agreement states that:

> [T]he Union commits that in no event will bargaining between the parties erode current solutions and concepts in place or scheduled to be implemented January 1, 2004, at Dana's operations which include premium sharing, deductibles, and out-of pocket maximums.

This term precludes the UAW from demanding or obtaining a health care benefits package superior to the one Dana established on January 1, 2004, even if the employees the UAW organizes consider reducing their share of health care costs to be their top priority in negotiations. If the UAW were responsive to desires of the employees it ostensibly "represents," and demanded lower health care costs for employees during negotiations, Dana could compel the UAW to drop its demands under the binding arbitration procedures of § 5 of the Agreement.

The contractual authority the Letter of Agreement grants Dana over the union with which it bargains places Dana squarely on "both sides of the bargaining table." The UAW cannot act solely in the interests of represented employees (even if it wanted to), as it is bound by the limitations of the Letter of Agreement.

The power Dana exercises over the UAW far exceeds the degree of employer involvement the Board has found violative of § 8(a)(2) in the past. For example, it is well established that an agent of the employer merely participating in union negotiating efforts "interfere[s]" with a union under § 8(a)(2). *See* General Steel Erectors, 297 N.L.R.B. 723 (1990), *enforced,* 933 F.2d 568 (7th Cir. 1991) (supervisor served in union and had substantial responsibilities for union-employer dealings, including the authority to engage in negotiations); Vanguard Tours, 300 N.L.R.B. 250 (1990), *enforced in part*, 981 F.2d 62 (2nd Cir. 1992) (supervisors were union shop stewards who participated in negotiations).

In Nassau & Suffolk Contractors Ass'n., 118 N.L.R.B. 174, 187 (1957), the Board found that an employer interfered with the administration of a union when two master mechanics, who were found to be statutory supervisors, served on a union's twelve-member negotiating committee. This was despite the fact that the mechanics were strong union supporters and did not exert any significant power over the union.

> [W]e do believe that it is improper for supervisors, even those with predominantly union loyalty, to serve as negotiating representatives of employees; and to the extent that the employer acquiesces in such participation the employer is guilty of unlawful interference with the administration of the Union.

Id. The Board supported its decision by recognizing that "[e]mployees have the right to be represented in collective-bargaining negotiations by individuals who have a *single-minded loyalty* to their interests." Id. at 187 (emphasis added).

If an agent of the employer merely participating in union negotiating efforts "interfere[s]" with the administration of a union, then certainly the Letter of Agreement granting Dana contractual control over what the UAW can negotiate for as the representative of Dana employees constitutes "interfere[nce]" under § 8(a)(2). The Letter of Agreement deprives Dana employees of a representative that has a "single-minded loyalty to their interests." Id.

II. Pre-recognition Bargaining Infringes upon Employees' § 7 Rights in Violation of §§ 8(a)(1) and 8(b)(1)(A) of the Act under Majestic Weaving Co., 147 N.L.R.B. 859 (1964) (Exceptions 13 and 19).

A. Majestic Weaving Holds That Pre-Recognition Bargaining Is Unlawful.

In Majestic Weaving Co., 147 N.L.R.B. 859 (1964), *enforcement denied on other grounds,* 355 F.2d 854 (2nd Cir. 1966), the Board held that it was unlawful for an employer to negotiate with a union over the terms and conditions of employment of employees the union does not lawfully represent, even if such bargaining is conditioned on the union later attaining the support of such employees. The Board follows this precedent to this day. Respondents' conduct is flatly unlawful under Majestic Weaving.

The case law regarding pre-recognition bargaining begins with Ladies Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731 (1961). Ladies Garment Workers involved an employer recognizing a union that lacked majority employee support, and negotiating a partial agreement with that union. Id. at 734. The Supreme Court held that "[t]here could be no clearer abridgment of § 7 of the Act" than for an employer to grant "exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority." Id. at 737.

Three years later, the Board in Majestic Weaving took the Ladies Garment Workers' precedent to its next logical step by applying it to a situation where an employer bargained with a minority union, but did not recognize it until after the Union gained majority support. In Majestic Weaving, an employer began "to negotiate and discuss a proposed contract provided [the union] could show at the 'conclusion' that they represented a majority of the employees." 147 N.L.R.B. at 860. The employer and union held four "conferences" between February and April 1963 at which they negotiated over various terms of employment. Id. at 867.[17] At the fourth conference, the parties reached an agreement on employee terms and conditions of employment.

During the bargaining "conferences," the union did *not* enjoy the support of a majority of employees. Id. at 866-67. The employer also did not formally extend recognition to the union during the "conferences." Id. at 873 ("the record is completely barren of any evidence that [the union] was granted exclusive recognition prior to April 26 [when recognition was formally bestowed by the employer]"). Instead, the parties merely bargained over the terms and conditions of employment of employees the union sought to represent in the future.

On April 26, 1963, the union claimed that it had the support of a majority of employees based on union authorization cards. Id. The employer recognized the union at that time, and promptly executed their pre-negotiated collective bargaining agreement. Id.

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[17] In the first conference in February 1963, there "was a general discussion on various clauses, such as holidays, vacations, and pension and welfare." 147 N.L.R.B. at 867. At the second conference, the employer and union "began to refine their discussions on such matters as holidays, breaks, vacations, rates of pay, checkoff clauses, and arbitration." Id. A third conference was held in March 1963, and a final conference in early April 1963. Id.

Relying on the Board's [now overruled] decision in Julius Resnick, Inc., 86 N.L.R.B. 38 (1949), the ALJ in Majestic Weaving found that the negotiations between the employer and minority union were not unlawful because the employer had not formally recognized the union. *See* Majestic Weaving, 147 N.L.R.B. at 873.[18]

The Majestic Weaving Board overruled the ALJ and flatly stated: "we hold that the Respondent's *contract negotiation* with a nonmajority union constituted unlawful support within the meaning of Section 8(a)(2) of the Act." Id. at 860 (emphasis added). The bargaining between the employer and minority union was held to be unlawful, even though the negotiations were contingent on the union later demonstrating majority employee support. Id. ("the fact that [the employer] conditioned the actual signing of a contract with [the union] on the latter achieving a majority at the 'conclusion' of negotiations is immaterial").

The Board expressly overruled its previous decision in Julius Resnick, stating:

> We hereby overrule our decision in Julius Resnick, Inc., 86 N.L.R.B. 38 relied upon by the Trial Examiner, to the extent that it holds that an employer and a union may agree to terms of a contract before the union has organized the employees concerned, so long as the union has majority representation when the contract is executed.

147 N.L.R.B. at 860 n.3.

The holding in Majestic Weaving is clear: Pre-recognition bargaining is unlawful. The plain language of the decision is not amenable to any other interpretation.[19]

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[18] Perhaps ironically, the ALJ reached the same conclusion in this case. ALJD, pp. 7-8.

[19] In Majestic Weaving, the Board found that the majority employee support claimed by the union at that time was tainted and invalid due to unlawful employer assistance with the procurement of authorization cards. This holding does not affect the case's other holding that pre-recognition bargaining is unlawful.

Majestic Weaving's prohibition on pre-recognition bargaining was reiterated by the Board in American Bakeries Co. (Teamsters Local Union No. 51), 280 N.L.R.B. 1373 (1986),[20] was recognized by an ALJ in SMI of Worchester, 271 N.L.R.B. 508, 519 (1984),[21] and has been acknowledged by the General Counsel's Office. *See* LaForge North America Chicago Slag, Case 13-CA-39980 (2002); American Federation of Musicians, (MMG Arena Productions, Inc.), Cases 31-CB-7951, 31-CE-203, A.D. 03236 (1990).

Even high-level union attorneys, such as Jonathan P. Hiatt, General Counsel to the AFL-CIO, recognize Majestic Weaving prohibits pre-recognition bargaining. *See* Jonathan P. Hiatt and Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 Lab. Law. 165, 176-77 (1996) ("Negotiations over non-Board recognition procedure often spill over to discussing the terms of a future collective bargaining agreement, should the union demonstrate majority support. Under Majestic Weaving, however, this is an unfair labor practice.").[22]

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[20] "The Board has even held that bargaining prior to achievement of the union's majority status is violative despite the fact that the contract is not enforced or is conditioned upon the union's ability to demonstrate majority standing at some later time." 280 N.L.R.B. at 1374 n.5, *citing* Majestic Weaving; Wickes Corp., 197 N.L.R.B. 860 n.2 (1972); Margaret Anzalone, Inc., 242 N.L.R.B. 879, 887 (1979).

[21] "In Majestic Weaving, the Board held, reversing the rule of Julius Resnick, 86 N.L.R.B. 38 (1949), that negotiating with a union prior to the achievement of majority representative status constitutes "impressing upon a nonconsenting majority an agent granted exclusive bargaining status," even though the negotiations may be conditioned on the union being able to "show at the 'conclusion' that they represented a majority of the employees." 271 N.L.R.B. at 519, *citing* Majestic Weaving, 147 N.L.R.B. at 860, 866.

[22] *See also* Andrew Strom, *Rethinking the NLRB's Approach to Union Recognition Agreements*, 15 Berkeley J. Emp. & Lab. L. 50, 58 (1994) ("if the union does not yet represent any company employees, then Majestic Weaving prevents the parties from engaging in preliminary negotiations prior to recognition") (citations omitted); id. at 60 ("The holding in Majestic Weaving [is] that it is a violation of section 8(a)(2) of the NLRA for an employer to
(continued...)

B. The ALJ's Misconstruction of Majestic Weaving. (Exceptions 18-19).

The ALJ erroneously states that the Board in Majestic Weaving "concluded that the employer recognized the union apart from negotiating a contract; that is the very element of this case." ALJD, p. 8 lns.9-11. Nothing in Majestic Weaving hinges on formal employer recognition of a minority union, as it is the pre-recognition bargaining that was plainly held to be unlawful. *See* 147 N.L.R.B. at 860 ("we hold that the Respondent's *contract negotiation* with a nonmajority union constituted unlawful support within the meaning of Section 8(a)(2) of the Act") (emphasis added).[23] Indeed, "the record [in Majestic Weaving] is *completely barren* of any evidence that [the union] was granted exclusive recognition prior to April 26 [when recognition was formally bestowed by the employer]." Id. at 873 (emphasis added).

The Majestic Weaving Board also expressly overruled its prior decision in Jules Resnick, which held "that an employer and a union may agree to terms of a contract before the union has organized the employees concerned," 147 N.L.R.B. at 860 n.3, and overruled the ALJ's decision that the respondents' pre-recognition bargaining was lawful under Jules Resnick. It is thereby clear that the Board held that pre-recognition bargaining was itself unlawful.

The ALJ also attempts to distinguish Majestic Weaving on the grounds that "the collective agreement there was complete and whole." ALJD, p.8 lns. 11-13. Majestic Weaving does not turn on progress of pre-recognition negotiations, for it is the very act of negotiating prior

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[22](...continued)
bargain with a union before it attains majority status.") (citations omitted).

[23] The Second Circuit similarly recognized that the "basis" of the Board's decision in Majestic Weaving is "that negotiation with a minority union of an agreement purporting to bind all employees, although conditioned on the union's achieving majority status before execution, was itself a violation of § 8(a)(1) and (2)." Majestic Weaving, 355 F.2d at 859.

to union recognition that is unlawful. 147 N.L.R.B. at 860. In Majestic Weaving, each of the four bargaining "conferences" conducted prior to recognition were unlawful, not just the final conference that resulted in a complete, tentative collective bargaining agreement.[24]

C. Application of Majestic Weaving to the Facts.

An application of Majestic Weaving to the facts demonstrates that Dana and the UAW violate §§ 8(a)(1) and 8(b)(1)(A) of the Act. In the Letter of Agreement, Respondents negotiated and entered into a contract regarding the terms and conditions of employment to be included in a collective bargaining agreement upon the UAW being recognized by Dana as the representative of certain of its employees. This includes agreements on employee health insurance, including "premium sharing, deductibles, and out of pocket maximums," id., §§ 4.2.1 and 4.2.4; several mandatory terms that must be included in any future collective bargaining agreement, *see* id., § 4.2.4; and an effective cap on employees' total wages and benefits to those of the organized facilities' competitors and comparable Dana facilities, *see* id., § 4.2.6.

Dana and the UAW entering into the Letter of Agreement is blatantly unlawful under Majestic Weaving. *See* 147 N.L.R.B. at 187 (parties in Majestic Weaving reaching an agreement on terms prior to recognition). Moreover, the negotiations between Dana and the UAW that

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[24] The ALJ's contention is particularly inapposite under § 8(a)(2). Any contractual control an employer has over a union will "interfere with the formation or administration of" a union in violation of § 8(a)(2). *See* pp. 14-18, *supra*. The degree of employer control only determines whether the unlawful conduct rises to the level of domination or interference under § 8(a)(2).

Here, the Letter of Agreement provides Dana with significant contractual authority over the UAW's conduct as the bargaining representative of Dana's employees. While Dana may not have the power to dictate each and every term of a collective bargaining agreement to the Union–which would constitute employer domination under § 8(a)(2)–it's authority over the UAW in the Letter of Agreement easily constitutes employer interference under § 8(a)(2).

produced the Letter of Agreement are similarly unlawful under this precedent. Id. ("conferences" held in Majestic Weaving where the employer and minority union bargained over employees' terms of employment held unlawful).

D. Pre-Recognition Bargaining Violates § 8(a)(1) of the Act Because it Promises Benefits or Threatens Reprisals Based On Employees' Exercise of Their § 7 Rights. (Exceptions 13, 30-31).

Pre-recognition agreements also run afoul of Board precedent holding that is unlawful under § 8(a)(1) for an employer to promise benefits, or threaten reprisal, based on employees' exercise of their § 7 rights.[25] A pre-recognition agreement inherently promises benefits or threatens reprisal based on whether employees select a particular union to be their representative, as the agreement establishes (in whole or in part) what employees' terms of employment will be if they choose union representation. *See* Sunbeam Corp. 99 N.L.R.B. 546 (1952);[26] NLRB v. Exchange Parts, 375 U.S. 405, 409 (1964) ("Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and

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[25] Section 8(a)(1) "prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect." NLRB v. Exchange Parts, 375 U.S. 405, 409 (1964); *see also* NLRB v. Gissel Packing, 395 U.S. 575, 618-19 (1969) (threats of reprisal); Allegheny Ludlum Corp., 320 N.L.R.B. 484 (1995) (same); Medo Photo Supply v. NLRB, 321 U.S. 678, 686 (1944) ("The action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination") and Rich's of Plymouth, Inc., 232 N.L.R.B. 621 (1977), *enforced*, NLRB v. Rich's of Plymouth, Inc., 578 F.2d 880, 883 (1st Cir. 1978) (promise of benefits); 29 U.S.C § 158(c) (exempting from Board's remedial authority only employer speech which "contains no threat of reprisal or force or promise of benefit").

[26] In Sunbeam Corp., it was recognized "[t]hat the making of a contract with a union is the most potent kind of support imaginable cannot be doubted." 99 N.L.R.B. at 550. In that case, a union with an agreement with the employer was able to gain an unlawful advantage over other unions because it "receive[d] the credit for the substantial wage increases which it guaranteed to the employees it could procure." Id. at 554.

which may dry up if it is not obliged.").

For example, a pre-recognition agreement between an employer and union stating that employees will receive a $1 an hour raise upon the union obtaining majority support would be nothing short of a bribe to sign a union authorization card. *See* Coca Cola Bottling Co., 132 N.L.R.B. 481 (1961) (unlawful under § 8(a)(1) for employer to offer money in exchange for selecting or rejecting a particular union); Del Rey Tortilleria, 272 N.L.R.B. 1106 (1984), *enforced,* 787 F.2d 1118 (7th Cir. 1986) (same).

The ALJ refused to address this issue, holding that it was outside the Complaint. *See* ALJD, p.10 lns. 6-9. This is untenable. The Complaint alleges that Dana negotiating terms to be included in a future collective bargaining agreement with the UAW violates § 8(a)(1) of the Act. Complaint, ¶¶ 9 and 11. The unlawful threat of reprisal and promise of benefits implicit in Dana so doing is a reason this conduct violates § 8(a)(1).

III. The UAW Violates Its Duty of Fair Representation Under § 8(b)(1)(A) by Agreeing To Concessions at the Expense of Employees in Exchange for Organizing Assistance from Dana (Exceptions 32-33).

The UAW agreed to violate its duty of fair representation to employees when it entered into the Letter of Agreement. The Union made concessions at the expense of employees in exchange for things from Dana that further the Union's self-interest in organizing. A fiduciary placing its selfish interests before those it represents is a prototypical breach of fiduciary duty.

The ALJ erroneously concludes that the UAW's breach of fiduciary duty is outside of the Complaint. *See* ALJD, p. 10 lns. 10-12. The Complaint alleges that the UAW entering into those portions of the Letter of Agreement which regard employees' terms and conditions of employment violates § 8(b)(1)(A). Complaint, ¶¶ 9 and 12. One reason this conduct violates

§ 8(b)(1)(A) is because it is contrary to the union's fiduciary duty to employees. *See* Rubber Workers Local 12, 150 N.L.R.B. 312 (1964) (breach of duty of fair representation constitutes a violation of § 8(b)(1)(A)). The issue is therefore safely within the ambit of the Complaint.

The Act grants labor organizations the privilege of acting as the exclusive bargaining representative of employees. 29 U.S.C. § 159(a). "[T]he exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 202 (1944). "The bargaining representative . . . is responsible to, and owes complete loyalty to, the interests of all whom it represents." Ford Motor Co., 345 U.S. at 338.

It is well established that a union violates its duty of fair representation if it sacrifices employee interests to further the union's own self-interest. *See* Aguinaga v. United Food & Commercial Workers, 993 F.2d 1463 (10th Cir. 1993) and cases cited therein.[27] In Aguinaga, a union entered into "side letter" agreements allowing an employer to close a plant, and then to reopen it with a different workforce. The evidence indicated that the union's "motives in sacrificing Plaintiffs' rights" were partially "to obtain status as the bargaining representative for the reopened [plant] employees at the expense of the former [plant] employees." Id. at 1471. The Aguinaga court held that the union breached its duty of fair representation by compromising the interests of represented employees to further its own interests in becoming the representative

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[27] *See* Ooley v. Schwitzer Div., Household Mfg., 961 F.2d 1293, 1303 (7th Cir. 1993) (union sacrificing individual's rights to protect itself); Bennett v. Local Union No. 66, 958 F.2d 1429, 1436-39 (7th Cir. 1992), (union may not trade away individual's rights based on internal union politics); Shatto v. Evans Prod. Co., 728 F.2d 1224, 1227 (9th Cir. 1984) (union prohibited from trading away individual's vested interests without individual's consent); Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975) (union prohibited from sacrificing individual's grievance rights to further union's institutional interests).

of the employees at the new (re-opened) facility. Id.

A fiduciary sacrificing the rights of those it represents to further its own self interests is a prototypical breach of fiduciary duty. The Supreme Court has recognized that a union's duty to employees is "akin to the duty owed by other fiduciaries to their beneficiaries," including "the duty a trustee owes to trust beneficiaries," "the responsibilities of corporate officers and directors toward shareholders," and the relationship "between attorney and client." Air Line Pilots v. O'Neill, 499 U.S. 65, 74-75 (1991) (citations omitted). Any of these fiduciaries would violate their fiduciary duty if they compromised the interests of those they represent in exchange for things that satisfied their narrow self-interest.

For example, I (the undersigned attorney) am the legal representative of Charging Parties in this case. I have a fiduciary duty to solely represent Charging Parties' interests in this case. If I had an agreement with Dana governing how I conduct myself as Charging Parties' representative–for example, if I agreed not to pursue certain remedies in exchange for Dana assisting me with recruiting new clients–I certainly be breaching my fiduciary duties.[28]

The facts in this case are *functionally identical* to the hypothetical. Here, it is the UAW that seeks to become the representative of Charging Parties and their co-workers. It is the UAW that will have the legal duty to solely represent the interests of Charging Parties and their co-workers vis-a-vis Dana. *See* Ford Motor Co., 345 U.S. at 338; Air Line Pilots, 499 U.S. at 75.

Yet, the UAW has an agreement with Dana to not pursue certain terms of employment for represented employees when bargaining with Dana. The UAW agreed to these concessions at the expense of future-represented employees in return for captive audience meetings, *see* Letter of

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[28] Of course, no such agreement exists. This is purely a hypothetical.

Agreement, § 2.1.3.5; access to Dana facilities, *see* id.; information about Dana employees, *see* id., § 2.1.3.1; a prohibition on unfavorable employer speech, *see* id., § 2.1.2; and a "card check" recognition process, *see* id., §§ 3.1.4 - 3.1.8.

It could not be more clear that UAW has placed its selfish desire to organize employees before the interests of the Dana employees it seeks to represent. This constitutes a prospective breach of the UAW's duty of fair representation in violation of § 8(b)(1)(A) of the Act.[29]

IV. Respondents' Conduct Is Contrary to The National Labor Policy. (Exception 37).

A union negotiating with an employer over the terms and conditions of employment of employees the union does not represent carries grave consequences to employee rights and national labor policy. If pre-recognition bargaining is not held unlawful, unions will be free to negotiate "sweetheart" deals with employers at the expense of employees' the union seeks to organize in exchange for employer assistance with organizing those employees.

A consequence will be the proliferation of "bargaining to organize" agreements like the Letter of Agreement. Unions and employers both have a strong incentive to engage in these schemes, as both entities benefit and all costs are placed on a third party–employees. Union's have a self-interest in obtaining employer assistance with organizing.[30] An employer's business

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[29] The UAW not yet being the representative of Dana St. John's employees does not render this violation of the Act not ripe for adjudication. The Board's remedial authority is to "*prevent* any person from engaging in any unfair labor practice." 29 U.S.C. § 160(a) (emphasis added). Here, the UAW has contractually agreed to violate the Act in the future. This violation will occur the moment the Union is recognized as the representative of Dana employees. The Board does not have to wait until employees are injured to "prevent" this violation of law.

[30] The AFL-CIO's General Counsel has written that unions should "use strategic campaigns to secure recognition . . . outside the traditional representation processes." Jonathan P. Hiatt and Lee W. Jackson, Union Survival Strategies for the Twenty-First Century, Lab. L.J.,
(continued...)

interests dictate that it obtain as many bargaining concessions as possible in exchange for providing a union with such assistance (just as Dana did in this case). Agreeing to these concessions costs the union nothing, as the "price" is imposed on employees who have no voice in the negotiations and likely are unaware that their interests are being traded away.[31]

Here, the terms of the Letter of Agreement were kept secret from employees for months after the Agreement was signed. *See* Letter of Agreement, § 12.1 ("Neither party can disclose this agreement, or its content or any actions taken hereunder, without the consent of the other"); Dana Press Release of August 13, 2004 (the "[t]erms of the Agreement were not disclosed by agreement of the parties") (Ch. Party Ex. 4). This refutes the ALJ's statement that "employees are free to make what they will of the letter of agreement." ALJD, p. 9, lns. 40-42.

In Merk v. Jewel Food Stores, Div. of Jewel Co., 945 F.2d 889 (7th Cir. 1991), the Seventh Circuit acknowledged the "grave dangers posed by a backroom deal that is secretly negotiated between union officials and company management." Id. at 899. "Union officials and management would then be free quietly to barter away basic guarantees contained in the collective bargaining agreement." Id. at 894. The court recognized that secret agreements are "certainly in derogation of national labor policy." Id. at 895.

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[30](...continued)
Summer/Fall 1996, p. 176; *see also* Roger C. Hartley, Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement, 22 Berkeley J. Emp. & Lab. L. 369 (2001).

[31] Competition amongst unions for organizing assistance will exacerbate the spread of "bargaining to organize" schemes. Savvy employers will select their preferred union based on which offers the best "sweetheart" deal in exchange for their assistance, just as Dana selected the UAW as its "partner" based on the bargaining concessions the Union was willing to pre-negotiate. This could trigger a "race to the bottom" among unions to offer the greatest concessions to employers so as to become the employer's preferred union.

It is therefore critical that the NLRB ensure that all bargaining be done *after* a majority of employees properly choose an exclusive bargaining representative, as envisioned under the Act. *See* 29 U.S.C. §§ 159(a), 158(a)(5), and159(b)(3). If bargaining is permitted to occur *before* a union is lawfully recognized as the representative of employees (as in this case), it opens the floodgates to "bargaining to organize" schemes, abuse of employee rights, and the corruption of labor-management relations.

V. Pre-recognition Is Not Permissible under Kroger Co., 219 N.L.R.B. 388 (1975). To the Extent That It Is, Kroger Must Be Overruled as Inconsistent with the Text of the Act and Majestic Weaving. (Exceptions 23-26).

The ALJ erroneously held that Defendants' conduct is lawful under Kroger Co., 219 N.L.R.B. 388 (1975). *See* ALJD, p. 9. The ALJ reasoned that if an employer and union could agree to apply a current collective bargaining agreement to a newly organized unit under Kroger, then an employer and union could enter into an agreement regarding only unorganized employees' future terms of employment. Id., p. 9 lns. 1-27.

First, the Kroger and Majestic Weaving lines of cases deal with distinct factual circumstances. It is the Majestic Weaving doctrine that is applicable here. Second, in the event that Kroger is found to shelter Respondents' conduct in this case, it must be overruled as inconsistent with the text of the Act and Majestic Weaving.

A. Kroger and Majestic Weaving Apply to Distinct Factual Circumstances. (Exception 23).

Kroger has application where an employer and union's negotiations apply equally to employees represented by the union *and* employees not represented by the union. By contrast, Majestic Weaving involves situations where an employer and union's negotiations apply *only* to employees not represented by the union. Respondents' negotiation of the Letter of Agreement

falls into the latter category.

Kroger involved an "after acquired store" that applied the entirety of a collective bargaining agreement–which was negotiated for employees already represented by the union–to employees the union might organize in the future. The key feature of a Kroger clause is that the terms and conditions of employment negotiated by the employer and union apply equally both to represented employees and future organized employees. Kroger did not involve bargaining or contractual terms that applied only to future organized employees.

By contrast, Majestic Weaving involved bargaining between the employer and union that pertained only to employees that the union did not represent. The case did not involve the application of an agreement covering represented employees to newly organized employees.

The facts of this case fit under the rubric of Majestic Weaving. The Letter of Agreement is applicable only to Dana employees organized by the UAW after August 6, 2003. It does not apply to employees that the UAW already represented as of August 6, 2003.[32] Majestic Weaving, not Kroger, is therefore the controlling authority in this case.

B. Kroger Must Be Overruled If It Is Found to Permit Pre-Recognition Bargaining. (Exception 25-26).

In the event that Kroger and Majestic Weaving are not found distinguishable, or that Kroger permits Respondents' conduct in this case, Kroger must be overruled. The Board has indicated its intention to undertake a discerning review of the propriety of Kroger. *See* Shaw's Supermarket, 343 N.L.R.B. No. 105 (2004); Dana Corp., 341 N.L.R.B. No. 150 (2004).

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[32] Moreover, Respondents admitted that the Letter of Agreement is not related to the Master Collective Bargaining Agreement between the entities. (TR 70-71).

Kroger should be overruled for the same reasons that Respondents' conduct violates the Act: (i) it is contrary to the text and intent of § 8(a)(2); (ii) it is incompatible with employee § 7 rights and Majestic Weaving; (iii) it is incompatible with a union's duty of fair representation; and (iv) it is contrary to national labor policy.[33]

1. Kroger Is Contrary to the Text and Purpose of § 8(a)(2). A Kroger clause provides employers with the contractual power to "dominate or interfere with formation or administration of [a] labor organization" under § 8(a)(2). The clause empowers an employer to compel a union to sign a particular collective bargaining on behalf of the employees that the union ostensibly represents. The employer therefore not only "sits on both sides of the bargaining table," *see* Valley Mould, 116 F.2d at 764, but actually has complete control over the union "side of the bargaining table." This is contrary to the text and underlying purpose of § 8(a)(2): to prevent employers from exercising control over union representatives. *See* pp. 14-16, *supra*.

The fact that a union may be willing to submit to an employer's authority under an "after-acquired store" clause–the union does have to agree to the clause–is irrelevant. Employer domination or interference with a union is not excused just because a union welcomes such domination or interference. A union cannot agree to violate the Act and, in particular, cannot agree to employer domination, employer interference, or to accept employer support without violating § 8(b)(1)(A) of the Act. In fact, most violations of § 8(a)(2) likely involve a union that is a willing accomplice of the employer.

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[33] Kroger is contrary to national labor policy for all the reasons discussed at pp. 29-31, *supra*. To avoid redundancy, the reasons will not be reiterated.

Moreover, Congress enacted § 8(a)(2) based on the principle that a union cannot serve "two masters." *See* pp. 14-16 and authorities cited therein, *supra*. Kroger creates this conflict of interest, as an "after acquired store" clause provides an employer with the power to prohibit a union from serving the wishes of newly organized employees who may want their union representative to negotiate a different contract on their behalf.

A union cannot simultaneously serve employee interests and be bound to execute a particular bargaining agreement on behalf of represented employees at the request of their employer. The situation is akin to an attorney having an agreement with a company to settle the claims of future client against the company according to a pre-negotiated settlement.[34] An employer having the power to dictate what contract a union will execute on behalf of newly organized employees is fundamentally incompatible with the text and intent of § 8(a)(2).

2. Kroger Is Incompatible with Employee § 7 Rights and Majestic Weaving. The privilege of bargaining on behalf of a unit of employees is strictly reserved for unions that enjoy the support of a majority of such employees. *See, e.g.*, 29 U.S.C. §§ 159(a) and 158(d). A union negotiating with an employer over the terms and conditions of employment of employees it does not currently represent–as a union does in an "after acquired store" clause–violates employees' § 7 rights under Majestic Weaving Co., 147 N.L.R.B. 859 (1964). Kroger should be overruled as inconsistent with Majestic Weaving.

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[34] *See* Air Line Pilots, 499 U.S. at 74-75 (union duty to employees akin to relationship "between attorney and client").

Furthermore, an employer's commitment to extend a particular collective bargaining agreement to newly organized employees inherently promises benefits, or threatens reprisal, based on employees' choice as to union representation.[35] For example, if the collective bargaining agreement contains a $1000 per employee signing bonus, then the employer is effectively promising all employees $1000 if they choose a particular union to be their representative. An employer's promise of such a benefit based on employees' exercise of their § 7 rights is flatly unlawful under § 8(a)(1) of the Act. *See* pp. 25-27, *supra.*

3. Kroger Is Incompatible with a Union's Duty of Fair Representation. Kroger is incompatible with a union's duty of fair representation for two reasons. First, a Kroger clause prevents a union from being completely loyal to newly organized employees. As discussed above, a union cannot simultaneously represent the interests of employees and be subject to an employer's contractual authority to sign a particular collective bargaining agreement on those employees behalf. *See* pp. 32-33, *supra*. A Kroger clause forces a union to serves "two masters" –employees and an employer–which is incompatible with a union's fiduciary duty to employees.

Second, a union violates its duty of fair representation to the bargaining unit employees whose collective bargaining agreement contains an "after acquired store" clause. A union breaches its fiduciary duty if it makes concessions at employee expense in exchange for things that further the union's own selfish interests. *See* pp. 26-29, *supra*; *see also* Aguinaga, 993 F.2d at 1470-71. A Kroger clause serves only the self-interests of a union and an employer, and does not serve the interests of bargaining unit employees. *See* Pall Corp. v. NLRB, 275 F.3d 116,

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[35] The only exception would be if the non-union employees terms of employment were identical to the those provided for in the prospective bargaining agreement.

120-22 (D.C. Cir. 2002) (union organizing not a mandatory subject of bargaining). The Board recognizes that unions often attain Kroger clauses by making "concessions in other areas" to the employer. 219 N.L.R.B. at 389. A union making concessions at employee expense in exchange for a Kroger clause, which serves only the self-interest of the union and/or employer, constitutes a breach of a union's fiduciary duty to employees.

REMEDY
(Exception 39)

The remedies sought by the General Counsel in the Complaint are proper. However, any remedy in this case must include the following. First, the "narrow" cease and desist remedy must require that the Letter of Agreement be expunged as to *all* Dana facilities covered by the Letter of Agreement. Second, a "broad" remedy must be imposed requiring Dana to cease recognizing the UAW as the exclusive bargaining representative of employees at all facilities organized by the UAW under the Letter of Agreement.[36]

I. A Narrow Cease and Desist Order Must Require That the Letter of Agreement be Expunged As to All Dana Facilities.

A narrow cease and desist order is the minimum remedy for a violation of the Act. *See* 29 U.S.C. § 160(c); NLRB v. Express Publ. Co., 321 U.S. 426 (1941). The order requested by the General Counsel requires that Respondents "cease and desist from engaging in the conduct described in paragraphs 9 and 10 or in *any like or related manner* interfering with or coercing employees in the exercise of rights guaranteed in Section 7 of the Act." (emphasis added).

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[36] These remedies are within the ambit of the remedies sought by General Counsel, who has requested "that the order provide all other relief as may be just and proper to remedy the unfair labor practices herein alleged." In any event, it is well established that a charging party can request remedies additional to, or different from, those requested by the General Counsel. *See* Kaumagraph Corp., 313 N.L.R.B. 624, 625 (1993).

The maintenance of the Letter of Agreement violates the rights of all Dana employees in the exact same manner as it violates the rights of Dana St. John's employees. Any order requiring that Respondents cease and desist from engaging in the conduct alleged to be unlawful in the Complaint, much less "any like or related" conduct, necessarily requires that Respondents cease giving effect to the Agreement. Otherwise, Respondents are not ceasing and desisting from their engagement in unlawful conduct.

The UAW and Dana are literally following a script calling for an unlawful course of conduct. The Letter of Agreement lists approximately 70 Dana facilities covered by the Agreement, all of which were not represented by the UAW when the agreement was entered into on August 6, 2003. *See also* Complaint, ¶ 9. The Agreement denotes the order in which the UAW is to organize Dana facilities. *See* Letter of Agreement, §§ 9 and 13. Any cease and desist order must require that Respondents stop their systematic violation of the Act.

The expungement of the Letter of Agreement is a necessary component of any cease and desist order. The Board routinely orders that written policies establishing a course of conduct in violation of § 8(a)(1) and (b)(1)(A), or in violation of § 8(a)(2), be expunged. The Board does not merely order respondents to cease enforcing the policy against charging party(s), but otherwise allow the unlawful policy to remain. The same result is necessary here.

1. <u>Board Orders Expungement of Written Policies That Cause or Require Conduct Coercive to Employee § 7 Rights</u>. Written policies that result in coercive conduct unlawful under §§ 8(a)(1) and (b)(1)(A) are expunged. For example, an overly broad no-solicitation policy that violates § 8(a)(1) is ordered expunged. *See* <u>Stanco, Inc</u>., 244 N.L.R.B. 461, 469 (1979); *see also* <u>Custom Trim Products</u>, 255 N.L.R.B. 787, 788 (1981). The Board does not

merely order that the employer cease and desist from enforcing the no-solicitation policy against the charging party(s), while otherwise allowing the employer to maintain the policy.

Similarly, a union violating employees' § 7 rights in violation of § 8(b)(1)(A) pursuant to language in the union's constitution or by-law sis ordered to expunge the unlawful language from the union's governing documents.[37] The Board does not merely order that the union cease and desist from enforcing the constitutional term or by-law against the charging party. Instead, the unlawful language is expunged in its entirety from all constitutions and by-laws over which the Respondent union has control, not just the one that affected charging party(s). *See* Auto Workers Local 73 (McDonnell Douglas), 282 N.L.R.B. 466 (1986).[38]

For example, in Machinists Local 1414 (Neufeld Porsche-Audi), 270 N.L.R.B. 1330 (1984), the union fined an employee for working during a strike after he resigned his membership. The union constitution prohibited resignation during a strike. The Board found that the union violated § 8(b)(1)(A) by fining the employee after his resignation. Relief was granted not only with regard to the individual employee (a refund of the fine paid), as the Board "order[ed] the Respondent to cease and desist from maintaining the restriction on resignations found invalid and to expunge the provision from its governing documents." Id. at 1336.

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[37] *See* Autoworkers Local 148 (Douglas Aircraft Co)., 296 N.L.R.B. 970 (1989) (expunction of provision of UAW constitution restricting right of employees to resign membership); Elevator Constructors Local 8 (San Francisco Elevator), 243 N.L.R.B. 53 (1979) (expunction of a union bylaw which required payment of fines and assessments prior to dues).

[38] *See also* Engineers & Scientists Guild (Lockheed-California Co.), 268 N.L.R.B. 311 (1983) ("the mere maintenance of such a constitutional provision restrains and coerces employees . . . from exercising their Section 7 rights"); Auto Workers v. NLRB, 865 F.2d 791, 796-97 (6th Cir. 1989) (ordering expunction of term in union constitution restricting resignation, reasoning that "these restrictions serve no legitimate purpose; they only make it difficult for a member to exercise the right to withdraw from the union").

Jurisprudence regarding unlawful terms in a union constitution or by-law is applicable to this case. In terms of its effect on employee rights, there is no distinction between an unlawful clause contained in a union constitution and one contained in an agreement with an employer. Both are binding on a union and govern its conduct.

2. Remedies for Violations of § 8(a)(2) Require Expungement of the Letter of Agreement. The remedies imposed for violations of § 8(a)(2) similarly mandate that the Letter of Agreement be expunged as part of any cease and desist order. In cases in which an employer has "interfere[d] with the . . . administration of any labor organization," the Board orders the employer to cease its interference. *See* Jeffrey Mfg. Co., 208 N.L.R.B. 75, 75-76 (1974).

As discussed above, Dana "interfere[s]" in the internal administration of the UAW under § 8(a)(2) by virtue of the authority the Letter of Agreement grants Dana over the UAW's conduct as the representative of newly organized employees. *See* pp. 17-19, *supra*. Unless and until the Letter of Agreement is expunged, Dana's interference with the administration of the UAW will continue unabated and the § 8(a)(2) violation will remain unremedied.

Moreover, in cases involving unlawful employer recognition of a minority union in violation of § 8(a)(2), a common remedy is for respondents to cease giving effect to any collective bargaining agreement which they have entered. *See* Windsor Castle Health Care Facilities, 310 N.L.R.B. 579 (1993), *enforced as modified*, 12 F.3d 619 (2nd Cir. 1994). Here, the Letter of Agreement is the contract governing employee terms and condition of employment that Dana has negotiated with a union that lacks majority employee support. It is as invalid as any collective bargaining agreement entered into between an employer and minority union.

3. Failing to Expunge the Letter of Agreement as Part of a Cease and Desist Order Is Inconsistent With the Board's Remedial Purposes. A remedy requiring only that Respondents not enforce their unlawful written policies against Charging Parties at the St. John's facility is inconsistent with the Board's statutory duty to protect employee rights and "*prevent* any person from engaging in any unfair labor practice." 29 U.S.C. § 160(a) (emphasis added). The inadequate remedy leaves all employees except Charging Parties exposed to Respondents' systematic campaign of foisting a non-majority union onto unwilling employees.

Moreover, separately adjudicating each unlawful application of the Letter of Agreement is an injudicious use of scarce government resources. It is obviously more efficient to strike at the underlying policy rather than to continuously deal with its deleterious consequences. The NLRB should not have to re-litigate this action each and every time the UAW decides to organize another Dana facility. Instead, the conduct at issue in this case should be conclusively stamped out with a cease and desist order that includes the expunction of the Letter of Agreement from all Dana facilities not yet organized by the UAW.

II. A "Broad" Cease and Desist Order Requiring Respondents to Cease and Desist from Recognizing the UAW as the Exclusive Bargaining Representative at Any Facility Organized Pursuant to the Letter of Agreement Is Appropriate.

An employer unlawfully assisting a union in violation of § 8(a)(2) taints the union's claim to the support of a majority of employees, thereby rendering any resulting collective bargaining relationship unlawful. *See* Famous Castings, Corp., 301 N.L.R.B. 404, 408 (1991); NLRB v. Windsor Castle Healthcare Facility, 13 F.3d 619, 623 (2nd Cir. 1994). The remedy for an employer's recognition of a union that lacks the uncoerced support of a majority of employees due to the employer's violation of § 8(a)(2) is for the employer to not recognize the union unless

and until it is certified by the NLRB in a secret ballot election. *See* Chicago Rawhide Mfg. Co., 105 N.L.R.B. 727, 737 (1953), *enforcement denied on other grounds*, 221 F.2d 165 (7th Cir. 1955); *see also* Duane Reade, Inc., 338 N.L.R.B. No. 140 (2003).

All Dana facilities organized by the UAW under the Letter of Agreement have been unlawfully organized. All UAW authorization cards collected at a Dana facility subject to the Letter of Agreement are tainted and invalid due to Dana's unlawful assistance to UAW in violation of § 8(a)(2).[39] The UAW inherently lacks the uncoerced support of a majority of employees at each of the facilities it has organized under the Letter of Agreement.

Accordingly, a "broad" remedy requiring that Dana cease and desist from recognizing the UAW, until such time as the Union wins an NLRB conducted secret-ballot election, should be extended to all Dana facilities organized by the UAW under the Letter of Agreement.

The Complaint's focus on the Letter of Agreement as concerns the St. John's facility does not render this "broad" order inappropriate.

> There is no requirement that employees adversely affected by a union's or an employer's unfair labor practices be specifically named in the complaint in order for those employees to be afforded a remedy when violations are found, so long as they are part of an easily identifiable class.

Al-Hilal Corp., d/b/a Flint Iceland Arenas, 325 N.L.R.B. 318, 320 (1998), *citing,* Operating Engineers Local 12 (Reynolds Electrical), 298 N.L.R.B. 44 (1990) and NLRB v. Midwest Transfer Co., 287 F.2d 443, 446 (3d Cir. 1961), and cases cited therein.

The class here is easily identifiable: all Dana facilities organized by the UAW under the Letter of Agreement. The Letter of Agreement provides a list of the facilities covered.

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[39] The General Counsel requests a remedy in which the UAW is ordered to "[r]eturn to St. John's employees any authorization cards dated on or after August 6, 2003."

Moreover, since it is known that the UAW has not organized any facilities outside of "Level 1, Phase 1" facilities under the Agreement, the number of facilities this remedy could apply to is narrowed down to the "Level 1, Phase 1" facilities listed at § 1.3.1 of the Agreement.[40]

A broad cease and desist order is appropriate "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." Hickmott Foods, 242 N.L.R.B. 1357 (1979). As discussed below, both factors are present here.

1. Respondents Have a Proclivity to Violate the Act Because Their Written Agreement Requires an Unlawful Course of Conduct. Respondents' proclivity to violate the Act is inherent in the systematic nature of their unlawful conduct. This is not a case involving a random series of *ad hoc* labor law violations. Instead, Respondents are engaged in a campaign of coercing employees into a union under the partial control of Dana, pursuant to a written contract between the entities (the Letter of Agreement).

The Agreement lists both Dana facilities targeted for unionization, and the order in which the UAW is to organize the facilities. *See* Letter of Agreement, §§ 9 and 13. The Agreement further delineates the manner in which the facilities are to be organized, id. at §§ 2 and 3, and governs how the UAW can act as the bargaining representative of employees upon employer recognition. Id. at §§ 4 and 9. It is difficult to conceive of a greater "proclivity to violate the

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[40] Section 1.3.6 of the Agreement states that the UAW cannot organize facilities other than "Level 1, Phase 1" facilities under the Agreement until the UAW organizes and executes a collective bargaining agreement at all "Level 1, Phase 1" facilities. The St. John's facility is a "Level 1, Phase 1" facility. The UAW has not organized that facility. Accordingly, the UAW could not have moved beyond those facilities listed at "Level 1, Phase 1" under the strictures of the Agreement.

Act" than when Respondents are following a script calling for a course of illegal conduct.

There is no reason to suspect that Respondents will halt their campaign, as each party is benefitting under the Letter of Agreement. The UAW's ability to organize large numbers of employees is facilitated, while Dana is assured that the union "representing" its employees is subservient to Dana's business interests. As long as the Letter of Agreement remains in force, Respondents' unlawful conduct will continue.

Moreover, the UAW's affinity for "bargaining to organize" schemes extends beyond Dana. The UAW was a party to a agreement with Freightliner LLC in which the UAW agreed to bargaining concessions at the expense of employees in exchange for, *quid pro quo*, Freightliner's commitments to assist UAW organizing campaigns. The General Counsel issued a Complaint against the UAW for engaging in this unlawful conduct. *See* Thomas Built Buses, Inc. a subsidiary of Freightliner LLC (UAW), Case Nos. 11-CB-3455-1, 11-CA-20338.[41]

In summary, the UAW (with Dana's complicity) is pursuing a systematic strategy of engaging in pre-recognition bargaining in exchange for employer assistance with organizing employees. This strategy is firmly established in a written agreement between the parties. Respondents have followed this strategy on in the past, and all indications are that they will continue to follow it in the future. Respondents have a clear proclivity to violate the Act.

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[41] Charging Parties except to the ALJ striking the Complaint in the Freightliner case which Charging Parties' attached to their Brief on the Merits. *See* Exception 5; ALJD, p. 2 lns. 42-48. As the ALJ acknowledges, a party is permitted to cite to NLRB documents, and can attach those documents to its brief when they are not readily available. *See* In re Glendale Associates, Ltd., 335 NLRB 27, 34 (2001). Contrary to the ALJ, the Complaint is relevant because it demonstrates the UAW's proclivity to engage in "bargaining to organize" schemes.

2. Respondents' Conduct Is Egregious and Demonstrates a Callous Disregard to the Rights of Employees. In the Letter of Agreement, the UAW agreed to concessions at the expense of Dana employees in exchange for something that the union desired: employer assistance with cajoling Dana employees into UAW representation. It is difficult to conceive of conduct more repugnant to the Act than a union "selling out" employees in exchange for an employer's assistance with organizing those very employees.

Respondents' conduct in the Letter of Agreement is contrary to the fundamental precepts of American labor relations. A broad remedial order requiring Dana to withdraw its recognition of the UAW at all facilities organized by Respondents under their unlawful "bargaining to organize" scheme is justified. The UAW should not be permitted to profit from its wrongdoing.

3. Teamsters Local 705 Supports the Remedy Sought by Charging Parties. A "broad" remedy in this case is fully supported by Teamsters Local 705 (Gasoline Retailers Ass'n), 210 N.L.R.B. 210 (1974). In that case, the Teamsters engaged in a widespread practice of forcing employers (gas stations) to recognize and enter into contracts with the union without regard to the representational desires of employees. The Board found that, in addition to the employers expressly mentioned in the complaint, "perhaps as many as 300 or more additional instances of improper conduct toward other gasoline dealers could be presented within the compass of the general allegations of the complaint." Id. at 211. The following remedy was approved: "a cease-and-desist provision withholding recognition of Respondent as a bargaining agent *at all Metropolitan Chicago gasoline stations* except through secret-ballot Board elections for a period of 5 years." Id. at 211. So too here, Dana must be required to withdraw and withhold recognition of the UAW at all facilities the Union has organized under the Letter of Agreement.

CONCLUSION

For the foregoing reasons, Respondents' conduct is in violation of §§ 8(a)(2), 8(a)(1), and 8(b)(1) of the National Labor Relations Act. Charging Parties' exceptions should be granted in full, the ALJ's decision should be reversed, and a full and proper remedy ordered.

Respectfully submitted this 6th day of June, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Charging Parties' Exceptions and Brief in Support of Exception was hand delivered to the NLRB on June 6, 2005, that the foregoing parties were informed by telephone of this delivery on June 6, 2005, and that the parties were served via Federal Express on the parties on June 6, 2005:

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