UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DANA CORPORATION

Respondent Employer,

and

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

Respondent Union,

and

GARY L. SMELTZER, JR.	Cases 7-CA-46965 7-CB-14083
and	
JOSEPH MONTAGUE	Cases 7-CA-47078 7-CB-14119
and	
KENNETH A. GRAY	Cases 7-CA-47079 7-CB-14120

REQUEST TO PARTICIPATE AS AMICUS

COME NOW John Raudabaugh, Robert Brame and Dennis Devaney, attorneys for Members of the U.S. House of Representatives and respectfully request to file an Amicus Brief in this matter pursuant to the Board's Notice and Invitation to File Briefs, dated March 30, 2006.

Members of the United States House of Representatives have a substantial and critical interest in these proceedings since the matters at issue concern relationships between employers, labor organizations, and the National Labor Relations Act which are subjects within the jurisdiction of the House Committee on Education and the

Workforce and of interest to elected Members of the United States House of Representatives generally.

Amicus status and participation were previously granted to counsel on behalf of Members of the U.S. House of Representatives in *Dana Corporation*, 8-RD-1976 and *Metaldyne Corporation*, 6-RD-1518 et al. Eight copies of the Amicus Brief and a CD (*.pdf) copy of the document are attached for filing in accordance with the Board's Notice.

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case Nos. 7-CA-46965; 7-CB-14083; 7-CA-47078;
7-CB-14119; 7-CA-47079; 7-CB-14120

DANA CORPORATION (RESPONDENT EMPLOYER)

and

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

and

GARY L. SMELTZER, JR. (CHARGING PARTY)

and

JOSEPH MONTAGUE (CHARGING PARTY)

and

KENNETH A. GRAY (CHARGING PARTY)

BRIEF *AMICI CURIAE* OF MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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JOSEPH MONTAGUE (CHARGING PARTY)

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BRIEF OF THE *AMICI CURIAE*

INTRODUCTION

On April 11, 2005, the Administrative Law Judge Decision issued in these cases. By notice dated March 30, 2006, the National Labor Relations Board ("NLRB" or "Board") invited interested *amici* to file briefs on or before April 27, 2006. This brief addresses whether an employer and a union can lawfully negotiate and reach an agreement or "understanding" setting forth terms or conditions to be embodied in a future collective bargaining agreement, if and when a majority of employees designate or select the union to be their exclusive representative for the purpose of collective bargaining. It is the position of the *Amici* that such pre-majority/pre-recognition bargaining is unlawful under the National Labor Relations Act ("Act") 29 U.S.C. § 151 et seq., deleterious to federal labor policy, and unwise.

INTEREST OF THE AMICI CURIAE

Members of the United States House of Representatives have a substantial and critical interest in these proceedings since the matters at issue concern relationships between employers, labor organizations, and the National Labor Relations Act which are subjects within the jurisdiction of the House Committee on Education and the Workforce and of interest to elected Members of the United States House of Representatives generally.

STATEMENT OF THE CASE

The Act confers on employees the right to freely choose whether to be represented for the purpose of collective bargaining, to exercise their franchise in a free and informed manner. While it is widely recognized that a Board supervised

secret-ballot election is the preferred, indeed superior, method for ascertaining majority support, new strategies increasingly rely on the use of neutrality and/or card-check voluntary recognition agreements as well as bargaining terms or conditions of employment for a future collective bargaining agreement, all prior to the union's obtaining majority support – the necessary predicate under law to require collective bargaining by an employer and a labor organization.

Once majority status is achieved, the labor organization is charged with a duty of fair representation – a duty of care and loyalty similar to trustee or fiduciary to beneficiaries – to all employees in the appropriate collective bargaining unit. Pre-recognition bargaining regarding terms or conditions of employment to be applied prospectively to all employees, if and when a majority might be achieved, is unlawful, and runs counter to the labor organization's prospective, legally-imposed fiduciary duty of loyalty and care – likely compromising the value of a future agreement, once (if ever) the duty to bargain exists. Reaching agreement or an understanding on terms or conditions of employment in advance of a bargaining obligation mandated by an employee majority, even if salutary, compromises any future performance of the representative's fiduciary duty to the employees it seeks to represent.

For these reasons, it is the position of the *Amici* that pre-recognition bargaining, as evidenced in this case, is unlawful under the Act and any terms and conditions of employment agreed-upon in advance of majority status are void.

SUMMARY OF CURRENT LAW REGARDING PRE-RECOGNITION BARGAINING

A. The Act's Explicit Guarantee and Protection of Employees' Right of Free Choice.

The much quoted words of Section 7 of the Act declare our national policy on the right of employees to self-organization:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall have the right to refrain from any and all of such activities.... 29 U.S.C. § 157.

To guard against employer encroachment, Congress included Sections 8(a)(1), and 8(a)(2) of the Act: "It shall be an unfair labor practice for an employer – to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7....[and] to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

In 1947 Congress added Section 8(b)(1)(A), declaring: "It shall be an unfair labor practice for a labor organization or its agents – to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7." The language of Section 7 indisputably propounds an *employee's* right. It is the fundamental right of *employees* to choose or not to choose a collective bargaining representative, a right underscored by the prohibitory language of Sections 8(a)(1) and 8(b)(1)(A) recognizing unlawful overreaching by employers and unions.

The United States Supreme Court has underscored the unique rights of employees protected by Section 7 and has repeatedly distinguished between employee and non-employee rights (including union agents). For example, while recognizing that employers could not generally prohibit employees from distributing literature on

company property, the Supreme Court rebuffed the NLRB's attempt to grant to non-employees an employee's Section 7 rights. *NLRB v. Babcock & Wilcox Company*, 351 U.S. 105 (1956) (holding that the employee/non-employee distinction "is one of substance"). When the Board again granted non-employee organizers similar access rights as employees to company property in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992), the Court reaffirmed and extended its *Babcock* holding: "[B]y its plain terms, thus, the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers." (Italics in original).

Under the Act, only employees – not employers or labor organizations – enjoy the rights and privileges extended. Among them is the protected right to choose whether to be represented exclusively by a labor organization for purposes of collective bargaining regarding wages, hours of work, or other conditions of employment. Representation is exclusive covering all employees in the unit, provided a majority of employees in that unit designate, select, or elect a particular labor organization as their representative. Once a majority of employees in an appropriate unit designate, select or elect an exclusive representative, it is an unfair labor practice under the Act for an employer or a labor organization to refuse to bargain collectively upon request. 29 U.S.C. §§ 158(a)(5), (b)(3).

B. Pre-Recognition Bargaining of Agreements or "Understandings" Compromise Employees' Rights and Contorts Federal Labor Policy.

The Act, Section 1, sets forth national labor policy – (1) the reasons for the policy, (2) the goals to be achieved, and (3) the process:

(1). Reasons "The denial by some employers of the right of employees to organize and the refusal by some employers to

accept the procedure of collective bargaining lead to strikes and other forms of industrial strife and unrest, which have the intent or the necessary effect of burdening or obstructing commerce...."

(2). Goals "[T]o eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred...."

(3). Process "[B]y encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

The Act, Section 1, contemplates "bargaining power," or the absence thereof, as a composite of "freedom of association" and "actual liberty of contract." 29 U.S.C. § 151. Rather than mandating employee associations and/or union representation, despite Section 1's assertion that organization and bargaining safeguard commerce, Section 7, leaves the matter of collective representation to individual, employee free choice. The Act encourages the salutary process of collective bargaining as a means, not an end, to the "friendly adjustment of industrial disputes" *provided* "the majority of the employees in a unit appropriate"..."designated or selected"..."[r]epresentatives"...to be the "exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other

conditions of employment...." 29 U.S.C. § 159. Once chosen, the legal obligation to bargain attaches to *both* the exclusive representative and to the employer.

The Act does not address bargaining by a union and an employer *prior to* designation, selection or election by an employee majority in an appropriate unit because the bargaining *process*, as a means to a desired policy end, necessarily is *contingent* on a proclaimed and proven appropriate employee majority. Bargaining – whether to agreement, tentative agreement, or "wink and nod" – in advance of and/or in anticipation of a future declaration of an appropriate employee majority is unlawful under the Act regardless of whether pre-recognition bargaining in all cases, some cases, or in theory might be salutary. Section 7 is clear – employees have the right to bargain collectively *through* representatives of *their* own *choosing*. There is no Section 1 "liberty of contract" by inverting the process – placing the negotiated deal before the legitimizing of the representative, to bargain for a result which may or may not be in the third-party beneficiaries'/employees' best interests.

The Supreme Court has repeatedly referred to the "Act's goal of protecting employee choice." While the Act seeks to ensure "industrial stability," the Court has made clear that industrial stability may not be achieved at the expense of employee rights. "Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so." *International Ladies' Garment Workers' Union, AFL-CIO, (Bernhard-Altmann Texas Corporation) v. NLRB*, 366 U.S. 731, 740 (1961); *Majestic Weaving Co.*, 147 NLRB 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2^{d} Cir. 1966).

C. The Exclusive Representative's Duty of Care and Loyalty.

The Supreme Court has recognized that a duty of "fair representation" was a necessary corollary to a representative's exclusive Section 9(a) status. "[U]nder this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all...to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

Importantly, the Supreme Court acknowledged that "federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining...[which] of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Id.* at 182.

The Supreme Court again addressed a union's duty of fair representation in *Teamsters v. Terry*, 494 U.S. 558 (1990). The Court, citing its decision in *Vaca*, noted that "[a] union must discharge its duty [of fair representation] both in bargaining with the employer and in its enforcement of the resulting collective-bargaining agreement." *Id.* at 563. Moreover, "[j]ust as a trustee must act in the best interests of the beneficiaries,...a union, as the exclusive representative of the workers, must exercise its power to act on behalf of the employees in good faith." *Id.* at 567.

A labor organization's representational exclusivity and correlative duty of fair representation as a result of designation, selection, or election by an employee majority in an appropriate unit "is thus akin to the duty owed by other fiduciaries to their beneficiaries...the duty a trustee owes to other trust beneficiaries...[or] the relationship

between union and employee [is like] that between attorney and client. The fair representation duty also parallels the responsibilities of corporate officers and directors toward shareholders." *Air Line Pilots v. O'Neill*, 499 U.S. 65, 74-75 (1991).

D. Necessarily Included in the Exclusive Representative's Duty of Good Faith and Honesty in Negotiating and Administering the Collective Bargaining Agreement is Avoiding Pre-Recognition Entanglements That Could Compromise That Duty.

As the Board and courts explored implications of the duty of fair representation, it became apparent that the imposition of the duty was not sufficient and that the fiduciary obligation must be re-enforced by the removal and disclosure of compromising situations. Section 302 of the Taft Hartley Act makes it a crime "for any employer to...deliver...or agree to...deliver, any...thing of value to any labor organization...which represents *or seeks to represent*...any of the employees of such employer...." (Emphasis added). 29 U.S.C. § 186(a).

Congress also recognized that "[t]he officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group." 29 U.S.C. § 501(a). It imposed on these agents, labor organizations, and employers detailed disclosure and reporting requirements of financial arrangements which might tend to compromise that trust. 29 U.S.C. § 431 et. seq.

The Board and courts similarly recognize the subtle effects of premature recognition, that is, an employer's extending Section 9(a) recognition to a labor organization which has not established majority support. The Board has recognized that such an act would enhance the stature of the organization and is so likely to induce employees to accept it that it voids the legitimacy of subsequently obtained majority

support. *International Ladies' Garment Workers' Union, AFL-CIO, (Bernhard-Altmann Texas Corporation) v. NLRB*, 366 U.S. 731 (1961). The Board also recognized that a collective bargaining agreement with a non-majority union to cover all employees in a unit likewise voids an after-acquired majority status. *Majestic Weaving, supra*. In both cases, the Board directed full disclosure and severing of relationship before a new, uncoerced relationship could be established.

ARGUMENT

A. Dana Corporation and the UAW Unlawfully Agreed on Terms and Conditions of Employment Contingent on a Future Employee Majority.

Bargaining with a minority union – with or without recognizing the union and/or making the negotiated terms contingent on the union achieving majority status – renders unlawful support and interferes with employees' Section 7 rights. *Majestic Weaving Co.*, 147 NLRB 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2^{d} Cir. 1966), citing *International Ladies' Garment Workers' Union, AFL-CIO, (Bernhard-Altmann Texas Corporation) v. NLRB*, 366 U.S. 731 (1961) and overruling *Julius Resnick, Inc.*, 86 NLRB 38 (1949). Dana's pre-recognition bargaining renders support to the UAW in violation of Section 8(a)(2). Dana's pre-recognition negotiating and resulting agreement with the UAW interfere with employees' Section 7 rights to choose, thereby violating Sections 8(a)(1) and 8(b)(1)(A) of the Act.

As outlined by the Administrative Law Judge, the Letter of Agreement negotiated by Dana Corporation ("Dana") and the International Union ("UAW") provided access to the employer's premises to enable the UAW to meet with Dana's employees, spelled out a procedure for determining majority status, obtained Dana's agreement to reorganize the UAW provided majority status was achieved, and committed Dana to not

say or do anything implying opposition to unionization. *Dana Corporation*, ALJD-24-05. In addition, however, the Letter of Agreement provided for, among other things:

- maintaining healthcare benefits and premium sharing, deductibles, and out-of-pocket maximums;
- any collective bargaining agreement would last at least four (4) years;
- interest arbitration;
- minimum classifications;
- flexible compensation;
- mandatory overtime;
- dispute resolution;
- no-strike, no-lockout commitments.

Because the Letter of Agreement set terms and conditions of employment prior to and/or without proof of majority status by Dana's employees in an appropriate unit, the Letter of Agreement is void and the actions by both Dana and the UAW are unlawful.

Quite apart from agreeing to a non-Board process to legitimize an alleged employee majority (card-check) and/or to waive an institutional right of speech to assist informed choice regarding a party's perspective to a particular, potential representative (neutrality agreement) (both card-check and neutrality agreements should be found unlawful, see Section D, *infra*), the negotiation of substantive contract terms prior to achieving majority status goes too far. Moreover, because the union's duty of fair representation attaches only upon achieving majority status, there is no check on pre-recognition deal-making even assuming the terms are publicized. *Teamsters v.*

Terry, supra. What terms might be made public to assist in obtaining an employee majority would be, rationally, only those that induce subscription, necessarily interfering with employee choice. *NLRB v. Exchange Parts,* 375 U.S. 405, 409 (1964).

With an employee designated majority comes the labor organization's fiduciary duty of loyalty/fair representation followed by recognition by the employer and *then* the joint obligation of labor and management to bargain. In a different order, not only is federal labor policy violated, but the economic valuation of collective bargaining for all interested parties becomes compromised, as demonstrated by potential results:

- up front favorable terms to one or both institutional parties without insuring the interests of a yet to be identified employee majority;
- economic uncertainty that negotiated terms may become less valuable with the passage of time until majority status is achieved; and
- unforeseen limitations/rigidities regarding other terms or conditions not yet negotiated during future contract negotiations once exclusive majority status demonstrated.

Thus, agreement by an employer and a labor organization on terms or conditions of employment to be applied (or effectively denied) to a group of employees not yet identified or who have not designated, selected, or elected the labor organization as their exclusive majority representative violates Sections 8(a)(1), 8(b)(1)(A), and 8(a)(2) of the Act. The Administrative Law Judge's efforts to distinguish *Majestic Weaving* fail in light of the core facts. Dana and the Union negotiated and reached agreement on

terms and conditions of employment to be included in a future contract at a time when the Union did not possess majority support.

B. Concern for the Fiduciary Duties Owed by a Labor Organization to All Employee Members of the Unit Requires Outlawing Any Agreements or "Understandings" Between a Target Employer and a Labor Organization Prior to the Establishment of Section 9(a) Exclusive Majority Status.

For centuries our jurisprudence has recognized that a person occupying a position of trust and responsibility to another must generally favor the interest of the beneficiary over its own and avoid compromising situations. Fratcher, W., *Scott on Trusts*, Section 2.5 at p. 43 (4th Ed. 1987).

A trust holder clearly must not compromise its duty of loyalty to the principal by accepting a gift from a person with whom it is transacting business on behalf of the principal, but the same concerns would extend to the arrangement between a would-be trust holder and a party with whom he or she *will* negotiate on behalf of a prospective principal. When the third-party becomes instrumental in assisting the agent's obtaining a coveted agency arrangement, the same temptations appear. Thus, an undisclosed prior relationship between an agent and a person with whom that agent will later deal adversely on behalf of the principal should be grounds for dissolving the fiduciary relationship and returning all proceeds and benefits to the principal.

In light of a union's obligation to "exercise" its discretion in complete "good faith and honesty" and to "serve the interests of all" of the beneficiaries, it must avoid any pre-recognition agreements or understandings regarding the substantive terms of the prospective collective bargaining agreement. *Vaca v. Sipes*, at 177.

Studies show that unions spend an average of a thousand dollars per new member in organizing expenses. Moberg, D., "The Lay of Labor's New Land," *In These*

Times, October 26, 2005. Obviously, representative status is desired. Under the Act, that status can be conferred only by the employees, either directly through a secret ballot election or indirectly by the employer voluntarily recognizing the majority representative. As literature defending neutrality clauses make clear, the choice by an employer to exercise its right to oppose the union or to remain neutral is a significant factor in the labor organization's success in obtaining employee support. Eaton, A. and Kriesky, J., "Union Organizing and Card Check Agreements," 55 Ind. & Lab. Rel. Rev. 42 (2001); AFL-CIO, "Bargaining to Organize" Manual. It is axiomatic that an employer's outright support for union representation is even better than neutrality. In pre-recognition settings, a union has a strong self-interest in currying favor of the employer of the employees it hopes to represent.

In the collective bargaining process, there is an understandable tension between the interests of the employer and the interests of the union as the employees' representative. Our process assumes that this natural tension drives the dynamics and lessens the concern of disloyalty of the union representative to its employee unit members. *NLRB v. Katz*, 369 U.S. 736 (1962) (wide discretion given the collective bargaining agent in resolving intra-membership conflicts during the bargaining process).

In a pre-recognition setting, however, the interests of the union and those of the employees are not necessarily parallel, much less known. The employer holds valuable incentives to enhance the union's chances of obtaining majority status – access to employees, neutrality, and even the willingness to agree to voluntary recognition. At this point the union does not yet have an explicit relationship with the employees and, absent majority status, no fiduciary duty of care and loyalty. There is a strong

temptation on the parts of the union and of the employer to seek an understanding or agreement favorable to their mutual interests. The employer's interest is obtaining favorable terms for a prospective contract. The union's interest is reducing or eliminating employer opposition in order to gain or ensure representative majority status. The immediate welfare of yet to be solicited employees is secondary to the mutual interests of the parties – reaching understandings serving their self-interests, namely, contractual terms or conditions and recognition.

The Board should continue to insist that a current, exclusive representative owes a duty of care and loyalty and fair representation to current unit members. But the Board should prohibit any understandings regarding prospective contract terms prior to majority representation when no duty of care is present.

C. Negotiation and/or Application of an After-Acquired Clause to Extend an Existing Contract to a New Facility Contingent on Proof of Majority Status is Unlawful Pre-Recognition Bargaining.

In *Kroger Co.*, 219 NLRB 388 (1975), the Board held lawful a negotiated provision in a collective bargaining agreement that would extend the terms of the entire agreement to a new facility provided majority status at the new unit is achieved. The Board was concerned only with evidence of the union's majority at the new location.

Recently, in *Shaw's Supermarkets*, 343 NLRB No. 105 (2004), the Board remanded for hearing the issue concerning employer waiver of the right to a Board election in a case involving a contractual "after-acquired" clause requiring the employer to recognize the union and to apply the existing contract at each additional facility when an employee majority authorizes union representation. While acknowledging *Kroger*

Co., the Board expressed interest in the clause's clarity regarding unit appropriateness and whether the employer clearly waived its right to a Board election.

Quite apart from whether voluntary recognition, card-check, and neutrality agreements are legal or wise, the issue of pre-recognition bargaining – the imposition of an existing contract or contract terms on a future, separate unit is clear – violates employees' Section 7 rights. Extending an extant contract on a yet to be validated employee majority in a separate unit undercuts the very purpose of the Act – to facilitate a process to *initiate* collective bargaining *only after* majority status has been demonstrated. And it ignores that the freedom of employees to choose a collective bargaining representative is for the purpose of having the chosen representative negotiate a contract according to the employees' interests.

Kroger confuses selecting a bargaining representative with the purpose of such selection – enabling employees "to bargain collectively through representatives of their own choosing." It is the bargaining, not the selection of a representative, that is the end. *Kroger* is inconsistent with the rationale of *Majestic Weaving* and should be overruled.

D. <u>If an Employer's Delivery or Agreement to Deliver a "Thing of Value" to a Union, and if the Receipt or Acceptance of Same are Each Misdemeanors Subject to Fines or Imprisonment, Pre-Recognition Bargaining Must Be an Unfair Labor Practice</u>.

Sections 302(a), (b) and (d) of the Labor Management Relations Act make it a misdemeanor subject to fine or imprisonment for any person to willfully deliver or receive or accept "money or other thing of value...[except as specifically excepted in subparagraph (c), e.g., wages paid for services rendered, satisfaction of a court judgment or arbitration settlement/decision, purchase/sale of an article/commodity at market price, dues check-off, payments to trust funds pursuant to collective

agreement]." 29 U.S.C. § 186(a), (b), (c), (d); *Butchers Union, Local No. 498 v. Mercy-Memorial*, 862 F.2d 606, 608 (6th Cir. 1988).

The negotiation and agreement by an employer and a labor organization regarding wages, hours of work, and/or terms and conditions of employment (as well as concessions relating to recognition such as neutrality and card-check) reflect direct and indirect economic costs and/or benefits – necessarily a "thing of value" or presumed benefit to the person/party receiving or accepting the economic "value" and a presumed cost to the person/party delivering or parting with the "value in exchange." The pre-negotiation of terms could be undertaken for a variety of reasons – avoiding an expensive corporate campaign, fending off competing unions, determining labor costs in advance, obtaining favorable terms for the prospective unit or elsewhere.

While Congress intended to provide independent remedies for like or similar conduct, surely it violates national labor policy were the Board to ignore that which is singled-out for harsh punishment. Although the Board's decision in *Kroger Co.* is wrong as previously discussed, the Board got right that which was/is really going on – trading things of value for concessions in other areas. *Kroger Co.* at 389.

CONCLUSION

For the reasons set forth above, the Board should reverse the ALJ and hold that pre-recognition bargaining and agreement on wages, hours and/or terms and conditions of employment *before* a majority of employees in an appropriate unit have designated, selected or elected their exclusive bargaining representative is unlawful, and overrule its decision in *Kroger Co.*

Respectfully submitted,

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Dated: April 27, 2006

APPENDIX A

AMICI MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES

The Honorable Howard P. "Buck" McKeon
Chairman
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Sam Johnson
Chairman
Subcommittee on Employer-Employee Relations
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Charlie Norwood
Chairman
Subcommittee on Workforce Protections
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Kenny Marchant
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Kevin Brady
Member of Congress
U.S. House of Representatives
Washington, DC 20515

The Honorable Steve King
Member of Congress
U.S. House of Representatives
Washington, DC 20515

The Honorable Gary G. Miller
Member of Congress
U.S. House of Representatives
Washington, DC 20515

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2006, a true and correct copy of the foregoing Brief *Amicus Curiae* of Members of the United States House of Representatives was served via Federal Express and U.S. Mail, addressed as follows:

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