

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

DANA CORPORATION,

Employer,

and

Case 8-RD-1976

CLARICE K. ATHERHOLT,

Petitioner,

METALDYNE CORPORATION
(Metaldyne Sintered Products),

Employer,

and

Cases 6-RD-1518
6-RD-1519

ALAN P. KRUG,
JEFFREY A. SAMPLE,

Petitioners.

**BRIEF TO THE NATIONAL LABOR RELATIONS BOARD
ON BEHALF OF AMICUS CURIAE
CENTER ON NATIONAL LABOR POLICY, INC.**

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**STATEMENT OF THE CASE AND
AMICUS CURIAE POSITION**

The above-captioned proceeding is before the National Labor Relations Board (“the Board”) on the Employers’ Request for Review. *Dana Corp, et al.*, 341 N.L.R.B. No. 150 (June 7, 2004). On June 14, 2004, the Board issued an Order inviting “the parties and additional interested amici” to file briefs.

The Center on National Labor Policy, Inc. is a national non-profit legal foundation concerned with protecting the individual rights of employers, employees, and consumers. Founded in 1975, the Center has a long and significant history of experience under the National Labor Relations Act, from defending employees in litigation, upholding employee Section 7 rights, enforcing Section 7 rights, protecting employer rights, and presenting the public interest. *E.g., Tradesmen International, Inc. v. NLRB*, 275 F.3d 1137 (7th Cir. 2002); *Colorado-Ute Electric Ass’n v. NLRB*, 939 F.2d 1392 (10th Cir. 1991); *NLRB v. Ensign Elec. Div. of Harvey Hubble, Inc.*, 767 F.2d 1100 (4th Cir. 1985); *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983); *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1983).

The Board has recognized the unique status of the Center in formulating policy under the Act and has always consented to the Center’s participation as *amicus curiae* in the public interest in federal cases. *See e.g., Sparkling Springs Water, Inc.*, 13-RC-20559 (Aug. 2, 2001).

It is the Center’s position in this case that the statutory provisions providing for employee fee choice and access to the Board’s electoral machinery should be the preferred mechanism for resolving questions concerning employee support for labor organizations. Resort to the rhetorical beneficent and paternal purposes of the Labor Act cannot substitute for Congress’ express statutory authorizations for registering levels of employee support for collective action.

This brief will be confined to the more difficult and theoretical questions of law and public policy regarding the need to ensure employee access to the Board's processes to register their sentiments on unionization.

PROCEDURAL BACKGROUND

On June 7, 2004, the Board issued an order granting the Petitioners' request for review of the Regional Directors' administrative dismissal of the decertification petitions filed in these cases. 341 N.L.R.B. No. 150, slip op. at 1. The Board declared that the petitions "raise substantial issues regarding whether the Employers' voluntary recognition of the Union bars a decertification petition for a reasonable period of time under the circumstances of these cases." *Id.* In the same order, the Board granted the Petitioners' motions to consolidate the above-captioned cases and to solicit amicus briefs on the issues presented. *Id.*

The Board identified four factors prompting its decision to grant review: "[1] the increased usage of recognition agreements, [2] the varying contexts in which a recognition agreement can be reached, [3] the superiority of Board supervised secret-ballot elections, and [4] the importance of Section 7 rights of employees." *Id.*

The Center's amicus brief will address primarily factors 3 and 4.

STATEMENT OF THE ISSUE

The issue is whether the Board should abandon its existing doctrine barring a decertification petition for a reasonable period of time after an employer voluntarily recognizes a union, *Sound Contractors Assn.*, 162 N.L.R.B. 364 (1966), following *Keller Plastics Eastern, Inc.*, 157 N.L.R.B. 583 (1966) or, alternatively, whether it should modify the doctrine, to create a 30 to 45 day "window period" allowing for the filing of such a petition after voluntary recognition.

STATEMENT OF THE CASE

A. Background Facts

In the *Metaldyne* case, the Employer and Union entered into a voluntary recognition and card check agreement in September 2002. 341 N.L.R.B. No. 150, *supra*, slip op at 3. (dissenting opinion). Following an organizing drive during which the union acquired authorization cards from a majority of the employees in the agreed upon production and maintenance unit, the Employer recognized the Union as the collective bargaining representative of the employees on December 1, 2003, based upon a card check by a neutral third party. *Id.* On December 23, two decertification petitions were filed by unit employees supported by the requisite 30% showing of interest. *Id.* Thereafter, on January 21, 2004, the Regional Director dismissed the petitions on the ground that, under prevailing Board precedent, a reasonable period of time for collective bargaining negotiations had not elapsed, citing, inter alia, *Keller Plastics Eastern*, *supra*; *Rockwell International Corp.*, 220 N.L.R.B. 1262, 1263 (1975) (decertification petition with more than 50% showing of interest filed 14 days after card majority recognition barred); *Seattle Mariners*, 335 N.L.R.B. 563 (2001) (decertification petition with 30% showing of interest filed 32 days after card majority recognition barred) (Regional Director's decision, pp. 1-3).

In the *Dana* case, the Employer and the Union entered into a voluntary recognition and card check agreement on August 6, 2003. 341 N.L.R.B. No. 150, slip op. at 3 (dissenting opinion). The Employer recognized the Union as the collective bargaining representative of employees in the agreed-upon unit on December 4, 2003, after examination of the authorization cards by a neutral third party. *Id.* On January 7, 2004, a decertification petition with the requisite showing of interest was filed. *Id.* Subsequently, as in the

Metaldyne case, the Regional Director, on January 21, 2004, dismissed the petition on the ground that a reasonable period of time for negotiations had not elapsed between the voluntary recognition and the time of the petition filing, citing *Keller Plastics Eastern, supra*, *MGM Grand Hotel, Inc.*, 329 N.L.R.B. No. 99 (1999), and *Seattle Mariners, supra*. (Regional Director's decision, p. 1)

B. Declaration Facts

Since petitions in both the *Metaldyne* and *Dana* cases were dismissed administratively, no additional facts were developed at a hearing. However, employees familiar with events occurring during both organizing drives made sworn statements.

Lori Yost, an employee who opposed the Union at Metaldyne and helped solicit employee signatures to support the decertification petition, revealed the following details.

- Metaldyne and the Union concealed the terms of the voluntary recognition agreement from the employees. (Yost Declaration, ¶ 3)
- Metaldyne forbade "local management" to reveal specific details about the agreement, with employees learning only that they would be deprived of a secret ballot election on unionization, and "that the union organizers would have access to employees and the plant." (Yost Declaration, ¶ 4).
- Union organizers were in fact given access to the plant, and Metaldyne held "a mandatory meeting and played a video of one of our owners telling us that we needed to accept the UAW into our plant, that it was a 'win-win situation for all of us.'" (Yost Declaration, ¶ 6)
- Union organizers pressured employees to sign authorization cards by harassing them at work and home and misleading them about "the purpose and finality of the cards." As a result, many employees signed cards just "to get the UAW organizers off their back." (Yost Declaration, ¶ 7)
- Yost and a vast majority of the employees were upset when Metaldyne announced its recognition of the Union on December 1, 2003, without giving employees the right to vote in a secret ballot election. (Yost Declaration, ¶ 8.)
- Metaldyne and the Union gerrymandered the unit composition based upon extent of Union organization, going so far as to subdivide departments. (Yost Declaration, ¶ ¶ 9-11).
- No bargaining between Metaldyne and the Union had begun at the time Yost signed her Declaration in late 2003). (Yost Declaration, ¶ 12)
- Within days of Metaldyne's recognition of the Union, more than 50% of the unit employees signed the showing of interest to support the decertification petition. (Yost Declaration, ¶ 13).

Clarice K. Atherholt, the decertification Petitioner at Dana, also filed a Declaration concerning events occurring at her plant. The facts reported by Ms. Atherholt include the following.

- Several months before her Declaration, Dana and the Union announced they had entered into a neutrality agreement, but concealed its terms from the employees. Only after Metaldyne recognized the Union was Atherholt permitted to read but not copy the agreement in the Human Resources department. (Atherholt Declaration, ¶ 3)
- Dana told employees a secret ballot election on unionization would not be permitted; that Union organizers would have access to employees in the plant and to personal employee information such as home addresses; that they should attend one of several meetings held by Dana and the Union on company time and featuring Dana and Union officials stating that the recognition agreement would assist Dana in “getting new business from the Big Three [automakers] into the plant.” (Atherholt Declaration, ¶ 4).
- Atherholt herself was discouraged from attending several of the Dana-Union meetings because she was considered “a threat and a distraction.” (Atherholt Declaration, ¶ 4)
- Union organizers entered the Dana plant and pressured employees to sign authorization cards, both at work and at home, misleading them concerning the “purpose and the finality of the cards,” and resulting in many employees signing only to get the Union “off their back.” (Atherholt Declaration, ¶ 5)
- Many employees were upset when Dana announced it had recognized the Union as the employees’ collective bargaining representative. (Atherholt Declaration, ¶ 6).
- As of the time of Atherholt’s Declaration in early 2004, negotiations had not begun between Dana and the Union. (Atherholt Declaration, ¶ 7).
- Within days of the Union’s recognition, more than 35% of the employees in the bargaining unit signed the showing of interest necessary to support the decertification petition. (Atherholt Declaration, ¶ 8).

ARGUMENT

THE BOARD’S VOLUNTARY RECOGNITION BAR DOCTRINE SHOULD BE ABANDONED OR MODIFIED BECAUSE SECRET BALLOT ELECTIONS BEST SAFEGUARD EMPLOYEES’ § 7 RIGHTS

The centerpiece of the National Labor Relations Act is § 7, which confers upon employees “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 mutual aid or protection,” as well as “the right to refrain from any or all such activities.” 29 U.S.C. § 157.

At the same time, under Section 9(a), 29 U.S.C. § 159(a), where a majority of

employees in an appropriate unit have “designated or selected” a collective-bargaining representative, the rights of both consenting and nonconsenting employees are sharply curtailed because that representative becomes “the exclusive representative 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.”

The Supreme Court has declared that the “Act guarantees employees freedom of choice and majority rule.” *International Ladies’ Garment Wkrs. Union v. NLRB (Bernhard-Altman Texas Corp.)*, 366 U.S. 731, 738 (1944). The D.C. Circuit has also recognized that “[F]reedom of choice and majority rule in employee selection of representatives” are indeed “[t]he Act’s twin pillars.” *Conair Corp. v. NLRB*, 721 F.2d 1355, 1381 (1983), *cert. denied sub.nom, Local 22, Intern Ladies’ Garment Workers’ Union*, 467 U.S. 1241 (1984). Because employee selection of a collective-bargaining representative means surrendering the individual ability to affect the terms and conditions of working life, it is vitally necessary that employee freedom of choice in making that decision be scrupulously protected by the Board.

The significance of this right in the instant case cannot be minimized. Under the national principle of exclusive representation, bargaining and grievance representation by a certified or “temporarily protected” union is mandatory. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). Bargaining by individual employees is strictly prohibited and dissatisfied employees who circumvent their exclusive representative are not only subject to legal action, but are unprotected as to their concerted activities and may be fired without recourse. *Emporium Capwell Co. v. Western Addition Comm. Org.*, 420 U.S. 50, 72; *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 192 (1967).¹ The statute empowers the Board to conduct elections to

¹In addition, it is almost certain that all employees will incur a heavy mandatory financial (continued...)

determine employee sentiment regarding unionization under § 9 of the Act. Elections may be sought by employees or labor organizations acting on their behalf, Section 9(c)(1)(A), 29 U.S.C. § 159(c)(1)(A), either for certification or decertification, as well as by employers for decertification under proper circumstances, Section 9(c)(1)(B), 29 U.S.C. §159(c)(1)(B).

Early on, the Supreme Court observed that, “Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 328 (1944). In the exercise of this discretion, the Board created the “laboratory conditions” doctrine to evaluate the conduct of parties to a Board conducted election. *General Shoe Corp.*, 77 N.L.R.B. 124 (1948). The Board reasoned that, “An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammelled choice for or against a bargaining representative.” *Id.* at 126. Amplifying the point, the Board said, “[I]t is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled.” *Id.* at 127. Under the “laboratory conditions” doctrine, “Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice.” *Id.* at 126. The Board has underlined this point: “[I]t is also important to again emphasize what we have done before—that the test of conduct which may interfere with the ‘laboratory conditions’ for an election is *considerably more restrictive*

(...continued)

obligation as a result of dues payments required under a union security clause pursuant to Section 8(a)(3) of the Act, 29 U.S.C. § 8(a)(3).

than the test of conduct amounting to interference, restraint, or coercion which violates Section 8(a)(1).” An Outline of Law and Procedure in Representation Cases § 24-320 (Washington, D.C. 2002) (emphasis supplied). As a result, any party to a Board representation election may file with the Regional Director “objections to the conduct of the election or objections to conduct affecting the results of the election.” § 102.69(a) N.L.R.B. Rules and Regulations (Washington D.C. 2002).

To illustrate the stringency of the “laboratory conditions” doctrine, it is useful to recapitulate some of the conduct that the Board has found objectionable in representation proceedings: (a) forged documents that employees cannot recognize as such, *Mt. Carmel Medical Center*, 306 N.L.R.B. 1060 (1992); (b) alteration of Board documents to imply a Board endorsement of a party, *Allied Electric Products*, 109 N.L.R.B. 1270 (1954); appeals to racial prejudice, *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962); (c) “captive audience” speeches by either party to massed assemblies of employees within 24 hours of an election, *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1954); (d) waiver of union initiation fees if limited to employees who sign cards before an election, *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973); (e) coercive conduct by supervisors on behalf of a union, *Sutter Roseville Medical Center*, 324 N.L.R.B. 218 (1997); (f) electioneering at or near the polls, *Alliance Ware, Inc.*, 92 N.L.R.B. 55 (1950); (g) prolonged conversation regardless of content between parties and voters waiting in line to vote. *Milchem, Inc.*, 170 N.L.R.B. 362 (1968); and (h) keeping an unofficial list of employees who have voted, *International Stamping Co.*, 97 N.L.R.B. 921 (1951).

Thus, the Board has maintained the sanctity of its election process by hedging it with the most careful safeguards.

In addition, the Board takes certain prophylactic measures to ensure a fair and free ballot, including requiring the posting of election notices at least three days beforehand, furnishing a Board Agent to conduct the election, count the ballots, accept challenges to ballots, and issue a tally, and permitting observers from both parties to participate in the process. *See generally* §§ 11300-11350, *N.L.R.B. Casehandling Manual, Part Two Representation Proceedings* (Washington, D.C.).

As noted by the Supreme Court, “The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969); accord: *Linden Lumber Div. v. NLRB*, 419 U.S. 301, 304 (1974). (*Gissel* recognized “acknowledged superiority” of elections “in ascertaining whether a union has majority support”). The Board recently reaffirmed this principle, stating, “[E]lections are the preferred means of testing employees’ support.” *Levitz Furniture Co. of the Pacific, Inc.*, 333 N.L.R.B. 717, 725-26 (2001).

Gissel and the cases it has spawned require some discussion antecedent to consideration of the voluntary recognition bar doctrine. In *Gissel*, the Court observed that, notwithstanding the superiority of an election, a union could achieve representation by acquiring authorization cards from a majority of the employees in the appropriate unit, inasmuch as Section 9(a) of the Act, 29 U.S.C. § 159(a), refers to representatives “‘designated or selected’ by a majority of the employees without specifying precisely how that representative is to be chosen.” *Id.* at 596. However, the central question in *Gissel* was whether such cards “though admittedly inferior to the election process, can adequately reflect employee sentiment when that process *has been impeded* [by the employer].” *Id.* at 603

(emphasis supplied). The Court ruled that the Board could issue an order requiring an employer to bargain without an election only in two limited circumstances: (1) “‘exceptional cases marked by ‘outrageous’ and ‘pervasive’ unfair labor practices,” *id.* at 613, and in (2) “less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes,”² *id.* at 614. In other words, only where an employer has engaged in serious misconduct tainting the election process, and where a card majority has been obtained without misrepresentation or coercion, *id.* at 591, can the Board deprive employees of the right to vote by secret ballot on unionization.

The courts of appeal have emphasized how rarely employer misconduct may justify the remedy of bargaining without an election and reliance on admittedly less reliable authorization cards to establish a unit majority. The D.C. Circuit has referred to a bargaining order as an “extreme” or “extraordinary” remedy. *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1065 (2001); *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1170 (1996); *Charlotte Amphitheater v. NLRB*, 82 F.3d 1074, 1077 (1996). Other circuits concur.³

²In such cases,

“[T]he Board can properly take into consideration the extensiveness of an employer’s unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment, once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.”

Gissel, 395 U.S. at 614-15.

³A bargaining order is an “extreme remedy.” *NLRB v. Matonk Industries, Inc.*, 582 F.2d 125, 130 (1st Cir. 1978) “[T]he Supreme Court in [Gissel] made it clear that an election remains the preferred method to determine a bargaining unit’s representative and that a bargaining order should be enforced only when an election is not feasible.” *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110, 120 (1st

(continued...)

Nevertheless, the Board and the courts have permitted employers voluntarily to recognize labor organizations based upon evidence of an uncoerced card majority in an appropriate unit. See, for example, *NLRB v. Lyon & Ryan Ford*, 647 F.2d 745, 750-51 (7th

(...continued)

Cir. 1978); *NLRB v. Cott Corp.*, 578 F.2d 892, 894-95 (1st Cir. 1978) (same). “[A] bargaining order is an extraordinary and drastic remedy, is not favored, and should only be applied in unusual cases.” *NLRB v. J. Coty Messenger Service, Inc.*, 763 F.2d 92, 99 (2nd Cir. 1985); *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1331 (2nd Cir. 1996) (quoting same and stating bargaining order “warranted only when it is clearly established that traditional remedies cannot eliminate the effects of the employer’s past unfair labor practices”); *J.L.M. Inc. v. NLRB*, 31 F.3d 79, 83 (2nd Cir. 1994) (quoting same). “A new election, not a bargaining order, is the preferred remedy for employer misconduct which taints a union election.” *HarperCollins San Francisco*, 79 F.3d at 1331; accord: *J. Coty Messenger Service*, 763 F.2d at 99; *NLRB v. Pace Oldsmobile, Inc.*, 739 F.2d 108, 110 (2nd Cir. 1984) (*Pace II*); *NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 230 (2nd Cir. 1983); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212 (2nd Cir. 1980). “The bargaining order is an extraordinary remedy and, because it operates to disenfranchise the workers in the choice of their representative, it is appropriate only when the harmful effects of that disenfranchisement are outweighed by the positive advancement of the policies underlying federal labor law.” *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460, 470 (3d Cir. 1981). Elections are the “superior and preferred means of determining employee sentiment.” *Rapid Mfg. Co. v. NLRB*, 612 F.2d 144, 151 (3d Cir. 1979); accord: *NLRB v. Armcor Industries, Inc.*, 535 F.2d 239, 246 (3d Cir. 1976), *on appeal after remand*, 585 F.2d 821 (1978) (table). A bargaining order is an “extraordinary and drastic remedy,” appropriate only in the most “unusual cases.” *Be-Lo Stores v. NLRB*, 126 F.3d 268, 273 (4th Cir. 1997) (citation omitted); *Overnite Transportation Co. v. NLRB*, 280 F.2d 417, 436 (4th Cir. 2002) (en banc) (same). “An election, not a bargaining order, remains the traditional, as well as the preferred method for determining the bargaining agent for employees.” *Overnite Transportation*, 280 F.3d. at 436, quoting *NLRB v. Apple Tree Chevrolet, Inc.*, 608 F.3d 988, 996 (4th Cir. 1979) (*Apple Tree I*), *on appeal after remand*, 671 F.2d 838 (1982) (*Apple Tree II*); *Be-Lo Stores*, 126 F.2d at 273 (identical). A bargaining order is “an extraordinary remedy available to the Board to overcome the polluting effects of the employer’s unfair labor practices on the electoral atmosphere.” *NLRB v. American Cable Systems, Inc.*, 427 F.2d 446, 448 (5th Cir. 1970), *cert. denied*, 400 U.S. 957 (1970) (*American Cable II*); accord: *NLRB v. U.S.A. Polymer Corp.*, 272 F.3d 289, 297 (5th Cir. 2001), *cert. denied*, 536 U.S. 939 (2002). “A bargaining order . . . is an extraordinary remedy that we scrutinize very closely when imposed by the Board without a new election.” *NLRB v. Taylor Mach. Products*, 136 F.3d 507, 519 (6th Cir. 1998) (internal quotation marks omitted); accord: *Exchange Bank v. NLRB*, 732 F.2d 60, 63 (6th Cir. 1984). “A bargaining order is strong medicine . . . to be implemented with the utmost care.” *Intersweet v. NLRB*, 125 F.3d 1064, 1068 (7th Cir. 1997) (internal quotation marks omitted); *America’s Best Quality Coatings*, 44 F.3d 516, 520 (7th Cir. 1995), *cert. denied*, 515 U.S. 1158 (1995) (identical); *NLRB v. Q-1 Motor Express, Inc.*, 25 F.3d 473, 481 (7th Cir. 1994), *cert. denied*, 513 U.S. 1080 (1995) (same). “A bargaining order is an ‘extreme remedy’ authorized ‘where an employer’s conduct during an election campaign is so disruptive as to taint any ‘re-rerun’ election.” *Gardner Mechanical Services, Inc. v. NLRB*, 115 F.3d 636, 642 (9th Cir. 1997), quoting *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1368 (9th Cir. 1981).

Cir. 1981), *cert. denied*, 454 U.S. 894 (1981); *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978); *Jerr-Dan Corp.*, 237 N.L.R.B. 302, 303 (1978), *enfd.* 601 F.2d 575 (3d Cir. 1979 (table)). Indeed, referencing, as noted above, the “designated or selected” language found in § 9(a) in *Gissel*, 395 U.S. at 596-597, the Court declared that,

Almost from the inception of the Act . . . it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provisions of § 8(a)(5)—by showing convincing support, for instance . . . by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.

Thus, the legality of voluntary recognition based upon evidence of majority status in the form of authorization cards is not at issue in this case. What is in controversy is the Board doctrine barring access to a Board-supervised election in the face of mass employee dissatisfaction with the employer’s award to a third party of the right to co-determine their wages, hours, and conditions of employment. In *Keller Plastics Eastern*, *supra*, 157 N.L.R.B. 583, the Board ruled for the first time that an employer did not violate Section 8(a)(2) and (1) of the Act by executing a contract about three weeks after voluntary recognition of the union, although by that time the union had lost majority status through no fault of the employer’s. The Board decided that a union needs a “reasonable period of time” to engage in collective bargaining. *Id.* at 587. In *Somnd Contractors Assn.*, *supra*, 162 N.L.R.B. 364, 365, the Board indicated that valid voluntary recognition would similarly bar a decertification petition, although the facts in *Somnd* did not show legitimate recognition.

In the *Metaldyne* and *Dana* cases, the facts persuasively show why the Board should not permit an authorization card majority to cut off employees’ right to an election. In both cases, the employees rebelled against their employers’ recognition of the Union by gathering

within days sufficient support to hold a decertification election, 50% of the employees in *Metaldyne* and more than 35% in *Dana*. Moreover, employees with knowledge of the Union campaign at each plant reported such conduct as Union pressure and harassment for employees to sign cards at home and at work, misleading statements about the purpose and finality of the cards offered for signature, and concealment from the employees of the terms of the recognition agreement. Manipulation of the scope of the unit based on extent of organization was reported at *Metaldyne*. In fact, that would be contrary to the explicit statutory terms that “[i]n determining whether a unit is appropriate...the extent to which the employees have organized shall not be controlling.” 29 U.S.C. § 159(c)(5).

If only extremely severe employer misconduct can operate to require bargaining based on less reliable cards and eliminate access to the Board’s election machinery, how can the Board justify removing employees’ right to an election where there has been no anti-union misconduct, where there is evidence of union misconduct, and where the employees themselves demand the exercise of their § 7 rights by secret ballot? The dissenters from the grant of review here, 341 N.L.R.B. at slip op. 2, assert that “industrial peace” is the “overriding policy of the Act.”⁴ They quote *NLRB v. American National Insurance Co.*, 343 N.L.R.B. 96, 103 (1954), for the proposition that, “The [NLRA] is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers.” slip op. 2. The dissenters also affirm, at slip op. 2-3, the legitimacy of voluntary recognition, which is not disputed, and declare that the Board must “promot[e] voluntarily recognition and protect[] the stability of collective-bargaining relationships,” citing *Ford Center for the Performing Arts*, 328 N.L.R.B. 1 (1999). They

⁴Citing *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 38 (1987); *Brooks v. NLRB*, 348 N.L.R.B. 96, 103 (1954)

further argue, at slip op. 3, that, “negotiations can succeed . . . and the policies of the Act can thereby be effectuated, only if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time,” quoting *Keller Plastics, supra*, 157 N.L.R.B. at 587. They further quote, at slip op. 3, *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705-706, to the effect that “a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.”⁵ The dissenters also argue that employee rights are protected because they can file charges that the employer violated Section 8(a)(2) of the Act by “recogniz[ing] a union that lacked uncoerced majority support,” since such recognition, if established, and even if done in good faith, would result in an order to withdraw recognition from the labor organization. slip op. 4-5. Finally, they contend that eliminating the voluntary recognition bar, or limiting it to 30 or 45 days following recognition, would vitiate the concept of voluntary recognition and discourage employers from entering into such agreements. slip op. 5.

Unfortunately for the dissenters, the “Act is wholly neutral when it comes to that basic choice” on the question of representation.” *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973). The flaw in their line of reasoning is that only where there is a reasonable certainty that the employees desire union representation in the first place, in the form of exercise of their statutory rights under § 7, can *policy* considerations be taken into account by the Board.

⁵*Franks Bros.* is very different from the issue and facts before the Board in this case. In *Franks*, the employer was guilty of an unlawful refusal to bargain after valid recognition, there was no sign of employee disaffection, and the employer’s defense rested solely upon its contention that normal turnover in the unit should undo its bargaining obligation. Under such circumstances, requiring bargaining for a reasonable period of time is not illogical. Here, however, there was no unlawful refusal to bargain by either Metaldyne or Dana, and there was affirmative evidence of employee resistance to the recognition in the form of showings of interest exceeding one half or third of the units.

See Shelton v. Tucker, 364 U.S. 479 (1960) (right not to join equally as important as the right to join a labor organization).

In *Metaldyne* and *Dana*, where more than one-half and one-third, respectively, of the unit employees demand an election *within days* of recognition, there can be no such reasonable certainty and the Board must use its election machinery to determine the employees' true desires. After all, in *Ladies Garment Wrkrs. Union*, *supra*, 566 U.S. 731, 737, the Court found unlawful a grant and acceptance of recognition involving a minority union, even assuming the parties' good faith, declaring, "There could be no clearer abridgment of § 7 of the Act, assuring employees of the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity." [footnote omitted]

Nor can there be "industrial stability," if the relationship between the employer and the union goes forward from the outset in the face of sufficient employee disaffection – even majority disaffection in the case of *Metaldyne* – to support a question concerning representation. As the Board recognized in *Gourmet Foods, Inc.*, 270 N.L.R.B. 578, 584 (1984), holding impermissible nonmajority bargaining orders, "[I]t is the culmination of choice *by a majority of employees* that leads to the process of collective bargaining: the choice by a majority gives legitimacy and effectiveness to a union's role as exclusive bargaining representative and correlatively gives rise to an employer's obligation to deal exclusively with that representative." (emphasis in original) In the same decision, the Board quoted the author of the Act, Senator Wagner, as saying, "[C]ollective bargaining can be really effective only when workers are sufficiently solidified in their interests to make one agreement covering all. This is possible only by means of majority rule."⁶ *Id.* The Board

⁶Citing "Hearings on S. 1958 before the Senate Comm. on Education and Labor, 74th Cong., 1st (continued...)"

further quoted the Senator, “Workers find it easier to approach their employers in a spirit of good will if they are not torn by internal dissent.”⁷ *Id.* The Supreme Court itself has declared that, “In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored.” *Linden Lumber Div, supra*, 419 U.S. 302, 307. Based on the substantial showings of interest for a decertification election in both cases, the fact that cards are considered inherently less reliable than elections, and the declaration facts throwing grave doubts on how these cards were actually solicited, there can be little question that the Metaldyne and Dana workforces are “torn by internal dissent,” and that a stable collective bargaining relationship leading to “industrial peace” can only be the product of a Board-conducted election at each plant.

Utilizing the Board’s unfair labor practice mechanism is no substitute for a Board election. In the first place, as pointed out above, the Board demands a much higher standard of conduct in elections than in unfair labor practice proceedings. In representation proceedings, the Board insists upon maintaining “laboratory conditions,” and will overturn an election, based upon proper objections, where those conditions have not been obtained, even in the absence of unfair labor practices. As we have seen, conduct involving forged documents, alteration of Board documents to imply Board endorsement, racial appeals, captive audience speeches within 24 hours of an election, waivers of union initiation fees if contingent upon union support, coercive supervisory conduct on behalf of the union, electioneering at or near the polls, prolonged conversation between a party and employees waiting in line to vote, and unofficial list keeping, runs afoul of the laboratory conditions

(...continued)

Sess. (1935), reprinted in 1 Leg. Hist. of the National Labor Relations Act, 1935, at 1419 (1949).”

⁷Citing, “79 Cong. Rec. 7565 (1935), reprinted in 2 Leg. Hist. of the National Labor Relations Act, 1935, at 2336 (1949).”

ideal but does not merit action as unfair labor practices. As noted, the Board also takes prophylactic steps to ensure the validity of the ballot, including use of election notices, impartial Board Agents, observers from both sides, etc.

Furthermore, unfair labor practices proceedings are much lengthier than a Board election. The Supreme Court emphasized this in *Linden Lumber Div.*, *supra*, 419 U.S. 302, 306, when it noted that, “The Board’s experience indicates that the median time in a contested [unfair labor practice] case is 388 days [citation omitted]. On the other hand, the median time for an election and the decision of the Regional Director is about 45 days.” [footnote citation omitted]⁸ By FY 2003, the median time for processing an unfair labor practice case from filing of the charge to Board decision had risen to 647 days. Table 23, *Sixty-Eighth Annual Report of the National Labor Relations Board for Fiscal Year 2003* (Washington, D.C. 2004).

Finally, the employees themselves have chosen to resolve this matter by exercising their statutory right to an election, rather than set off an extended unfair labor practices proceeding that could leave their plants in turmoil for years. They want swift, affirmative evidence of the desires of their fellow employees, not years of protracted litigation that in any case would not reach “objectionable” as opposed to “unlawful” conduct.

Nor can there be anything to the dissenters’ contention that lifting the voluntary recognition bar would remove the incentive to enter into voluntary recognition agreements.⁹ The Board should provide no incentive for an employer to recognize a minority union because

⁸The Court also observed that the time between N.L.R.B. and the Board’s ruling in the two consolidated cases at hand in *Linden* was four and a half years and six and a half years. *Id.* at 306.

⁹It is the burden of the party alleging the existence of a 9(a) relationship in the construction industry to prove its existence. *Casale Ind.*, 311 N.L.R.B. 951, 952 (1993); *J & R Tile, Inc.*, 291 N.L.R.B. 1034, 1035 (1988). This is the uninterrupted position of the Board since the seminal case of *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375, 1385 (1987): “In light of the legislative history and the traditional prevailing practice in the construction industry, we will require the party asserting the existence of a 9(a) relationship to prove it.”

doing so is specifically illegal under Section 8(a)(2). *Ladies Garment Wrks. Union, supra*.

In *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003), the Court recently ruled that support for a minority union in violation of Section 8(a)(2) cannot be accomplished even in good faith. The Court found that the resulting contract bar rule to employee petitions “creates an opportunity for construction companies and unions to circumvent both section 8(f) protections and *Garment Workers'* holding by colluding at the expense of employees and rival unions.” *Id.* at 537. By doing so there, the Board “neglected its fundamental obligation to protect employee section 7 rights.” *Id.* If, however, the voluntary recognition bar does not exist, an employer wishing to accommodate a union as well as protect its employees’ rights, can simply enter into the agreement, recognize the union based on cards, and abide by the results of an election if employees seek one upon a proper showing of interest.

The Board should build upon its recent decision to place more trust in elections than unilateral action. In *Levitz Furniture, supra*, 333 N.L.R.B. 717, the Board abandoned its half century old policy of permitting employers to withdraw recognition based only upon a “good faith doubt” of a union’s majority status, and at the same time made it easier for employers to file for elections by redefining the good-faith reasonable doubt necessary to support a petition as “uncertainty” concerning a union’s majority status, rather than “disbelief” of its continued majority. In *Levitz, id.* at 725-26, the Board rejected the unions’ position that an election should always be held before an employer withdrawal of recognition, deciding that an employer could still withdraw recognition based upon actual evidence of loss of majority status, such as a petition signed by an employee majority (the facts in *Levitz* itself). There is no inconsistency between permitting employer withdrawal of recognition based upon an employee petition, and directing an election in the circumstances of *Metaldyne* and *Dana*,

because there is substantial conflicting evidence concerning the Unions' majority status in these cases, authorization cards versus showings of interest exceeding 50% and 35% of the workforce respectively. In fact, the logic of *Levitz* dictates that elections be held here, since the Board noted that "[C]onflicting evidence would tend to produce good-faith uncertainty," *Id.* at 730. In other words, if good-faith uncertainty is sufficient to obtain an election based upon an employer petition, surely it must be adequate to support an election petition filed by employees.

In short, it is high time that the Board abandoned its voluntary recognition bar doctrine, or at least withhold its application until 30 or 45 days after recognition has been extended. Freedom of choice and majority rule, the inextricable "twin pillars" of the Act are both denied when the Board bars access to its election processes by giving conclusive effect to "voluntary recognition" agreements that may serve employer and union but not employee interests. As we have seen, the Supreme Court has declared that authorization cards as a means of determining employee sentiment, and are less reliable than elections.¹⁰ The courts of appeals approve the use of cards in lieu of an election only where extraordinary employer misconduct has tainted the atmosphere.¹¹ And much conduct that can infect the atmosphere of an election is objectionable but not unlawful, making it impossible to use the Board's unfair labor practice machinery after the fact.

In *Levitz, supra*, 333 N.L.R.B. 717, the Board ruled that where employer election petitions are supported by mere "uncertainty," of the union's majority status, rather than "disbelief," an election must be held. Inarguably, the prompt filing of decertification petitions

¹⁰*Gissel*, 395 U.S. at 603.

¹¹See n. 3, *supra*, and accompanying text.

by Metaldyne and Dana employees with more than 50% and 35% support, taken in tandem with the allegations of union misconduct in securing the authorization cards upon which recognition was based, raises at least the same level of uncertainty the Board identified in *Levitz*. Indeed, in the case of *Metaldyne*, since the petition was backed more than half the unit employees, withdrawal of recognition without even holding an election would be justified were it not for the voluntary recognition bar.

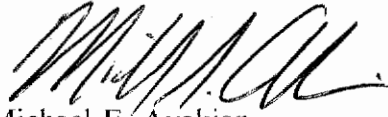
Nor may credence be given to arguments that policy choices in favor of “industrial stability” support retaining the bar. Policy choices in favor of collectivization cannot override employees’ statutory right to refrain from unionization. Indeed, the Board relying heavily on Senator Wagner, in *Gourmet Foods, supra*, 270 N.L.R.B. 578, 584 emphasized that collective bargaining cannot be effective without the legitimacy conferred by majority status – a status that is at least far from clear and at worst absent in the instant cases. Apart from not reaching all the conduct that can interfere without an election, resort to unfair labor practice charges is a lengthy process that cannot positively ascertain the employees’ will. Removing the voluntary recognition bar will not discourage employers from entering into recognition agreements except where they seriously doubt their own employees’ will support unionization by fiat.

Therefore, because every good reason based upon statutory rights as well as practical considerations support eliminating the voluntary recognition bar, and no persuasive arguments can be adduced against it, we urge the Board to take the requested action without delay.

CONCLUSION

WHEREFORE, *amicus curiae* Center on National Labor Policy, Inc. respectfully requests that the Board reverse the decision of the Regional Director in this case.

Respectfully submitted,



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