UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

DANA CORPORATION	)	
Employer	)	
and	)	**Case 8-RD-1976**
	)	
CLARICE K. ATHERHOLT	)	
Petitioner	)	
and	)	
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO	)	
Union	)	
	)	
METALDYNE CORPORATION (METALDYNE SINTERERD PRODUCTS)	)	
Employer	)	
and	)	**Cases 6-RD-1518**
	)	**6-RD-1519**
ALAN P. KRUG AND JEFFREY A. SAMPLE	)	
Petitioners	)	
and	)	
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO	)	
Union	)	
	)	

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITIONERS

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I. Introduction

It is the position of the undersigned Amici, the Chamber of Commerce of the United States of America ("the Chamber") and the Council on Labor Law Equality ("COLLE"), that a recognition bar should not be applied when a union is recognized pursuant to a neutrality/card check agreement. There are two basic reasons for this position. First, it is universally recognized – not just by employers, but by unions, the Board, and the Supreme Court – that an NLRB-supervised secret ballot election is the most accurate method of determining employees' support for a union. A neutrality/card check agreement, although lawful, is an inferior barometer, and therefore should not supplant the Board's election process.

Neutrality/card check agreements have become priority number one for unions today. They come in a variety of forms, but their common purpose is to facilitate unions' efforts to organize currently unrepresented groups of employees. In general terms, the "neutrality" portion of the agreement mandates that the employer refrain from engaging in any speech which is critical of the union, and typically guarantees the union access to the employer's facility in order to meet with employees and distribute literature. The "card check" portion of the agreement mandates that the union be recognized without a Board-supervised secret ballot election, and instead by a mere majority showing of authorization cards. Not surprisingly, unions are quite successful in organizing groups of employees under these agreements.

The price of a neutrality/card check agreement is that it stifles debate and prevents employees from exercising their right to vote for or against union representation in the reliable and preferred method of a Board-conducted secret ballot election. Indeed, the record in the cases presently before the Board indicate that some employees were in fact intimidated or coerced into signing an authorization card for the union. As a result, the outcome of a card check is a

particularly unreliable measure of employees' true desires concerning union representation. Lingering doubts as to a recognized union's majority status would make it difficult for the union to negotiate on the employees' behalf, and may otherwise foster tension and unrest within the bargaining unit. This problem is manifest in the present cases. In both cases, a substantial percentage – in *Dana Corp.*, a majority – of employees were sufficiently dissatisfied with the result of the card check that they filed a decertification petition within a matter of weeks after the card check was completed and recognition was extended to the union. The question now before the Board is whether the union's majority status should be put to the test of a secret ballot election, so that the electorate may decide the matter for itself. The Chamber and COLLE submit that it should.

The second reason for the Chamber and COLLE's position is that, as a result of a series of Board decisions over the past decade, a quite disturbing pattern has emerged: it has become virtually impossible for any party (the employees, the employer, or a rival union) to challenge a union's majority status once recognition has been granted. Because it has become so difficult to challenge an incumbent union, recognition on the front end should not be given "bar quality" when it is granted pursuant to a neutrality/card check agreement. If a substantial percentage of employees believe that the union does not, in fact, have majority support at the time recognition is granted or shortly thereafter, and before a contract is reached, the representation question should be put to the immediate test of an NLRB election. Denying employees a secret ballot election does not foster industrial stability, particularly if the union does not actually have majority support. Denying employees a secret ballot election only causes the underlying instability to fester and persist. Instead, the representation question should be resolved definitively under the safeguards of an NLRB election.

These points will be explained and argued more thoroughly below, but the essential point is this: it is clear that the Act's twin goals of protecting employee free choice and promoting industrial stability are not well-served by denying employees a secret ballot election.

II. Interest of the Amici

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents a membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in cases addressing issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in dozens of cases before the National Labor Relations Board.

The Council on Labor Law Equality is a national association of employers formed to comment on, and assist in, the interpretation of the law under the National Labor Relations Act. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach in the formulation and interpretation of national labor policy on issues which affect a broad cross-section of American industry.

III. Card Check Recognition Pursuant to a Neutrality Agreement Should Not Be Accorded the Same Deference under Board Policy As a Secret Ballot Election.

The cases under review demonstrate the inherent unreliability of neutrality/card check recognition agreements, and the superiority of NLRB conducted elections, for assuring employee free choice in matters of union representation. Neutrality agreements combined with card check recognition accentuate the denial of the supervisory guarantees of Board secret ballot elections, as well as the free choice accorded employees through the "laboratory conditions" under which Board elections are held. These agreements are even less acceptable than ordinary card check

recognition following a contested campaign. A neutrality/card check agreement silences any meaningful debate about the value of union representation, and waives employees' right to vote in the statutorily-favored forum of an NLRB secret ballot election.

Given these fundamental restrictions on employee rights, it follows that Board-created policies should not further erode employee free choice by applying a recognition bar that denies employees the opportunity to vote in a decertification election. As is discussed more thoroughly in Section IV below, employees are confronted with a host of artificial procedural and administrative barriers erected by the Board in recent years which deny them the opportunity to test an incumbent union's majority status in a secret ballot election. These "back end" barriers to challenging an incumbent union should not be compounded by foreclosing employees from seeking an election on the "front end," when the union is recognized pursuant to a neutrality/card check agreement.

A. There Is a Clear Preference for NLRB-Conducted Secret Ballot Elections under the Act.

The recognition bar is not mandated by the terms of the Act. Rather, it is solely a creature of Board policy which has been justified as promoting the policy of industrial stability even though infringing on the policy of employee free choice. Secret ballot elections, however, are firmly rooted in the Act and its legislative history as a basic tenet of national labor policy.

The Act expressly grants the right to petition the NLRB for an election under a variety of circumstances, pursuant to Section 8(b)(7)(C) and Sections 9(c)(1) and (e). In fact, the only statutory exception is confined to the construction industry in Section 8(f). Even then, the Act recognizes the right of construction workers subject to Section 8(f) agreements to petition the Board for a secret ballot decertification election.

Section 9(c)(1)(A)(ii) specifically confers the right of employees to petition for a decertification election by asserting that "the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative." The only limitation on such petitions being held is when, within "the preceding twelve month-period, a valid **election** shall have been held." This language shows that Congress thereby chose not to enact a similar one-year bar against decertification elections where unions have gained representation status based solely on voluntary recognition. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 598-99 (1969) (observing that "[a] certified union has the benefit of numerous special privileges which are not accorded unions recognized voluntarily or under a bargaining order … and which should not be dispensed unless a union has survived the crucible of a secret ballot election.").

Board policies regarding recognition of unions without an election have evolved over the history of the National Labor Relations Act. Under the Wagner Act, which was enacted in 1935, a union at first could be certified as the employees' exclusive bargaining representative either through the election process or through recognition – presumably based on a card check – but employers were not permitted to communicate their views to their employees regarding questions of union representation. Then, in 1939, still under the Wagner Act, the Board announced that as a matter of Board policy it would no longer accept union authorization cards as a "suitable method" of determining employee sentiment, stating in *Cudahy Packing Co.*, 13 NLRB 526 (1939), that it was acting "[I]n the interest of investing…certifications with more certainty and prestige by basing them on free and secret elections conducted under the Board's auspices." *Id.* at 531-32. *See also Joe Hearin Lumber*, 66 NLRB 1276, 1283 (1946) (where the

Board stated that it did "not feel…that a card check reflects employees' true desires with the same degree of certainty" as a secret ballot election).[1]

In subsequent years, the Board and the federal courts, including the U.S. Supreme Court, have consistently endorsed the "solemnity" of a secret ballot election as the "crown jewel" of Board procedures. *See Ray Brooks v. NLRB*, 348 U.S. 96, 99 (1954). The Court in *Gissel* emphasized that "secret ballot elections are generally the most satisfactory, indeed the preferred method of ascertaining whether a union has majority support." *Gissel*, 395 U.S. at 602. In fact, the Court went further, noting the "inherent" unreliability of union authorization cards:

> The unreliability of the cards is not dependent on the possible use of threats…. It is inherent as we have noted, in the absence of secrecy and the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees.

Id. at 602 n.20 (citing with approval *NLRB v. S.S. Logan Packing Company*, 386 F.2d. 562, 566 (4th Cir. 1967)). The Court reaffirmed the latter view in *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301 (1974), stating that "the policy of encouraging secret ballot elections under the Act is favored." *Id.* at 307.[2]

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[1] For a number of years, the Board followed its holding in *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *modified and enforced*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951), and created an exception to its insistence on secret ballot elections. The employer was ordered by the Board to bargain with the union in the absence of a secret ballot election where the employer, lacking a "good faith doubt" as to a union's majority status, took unlawful actions to dissipate union support.

[2] The Second Circuit has expressed the view that "there is no doubt that an election … conducted secretly … after the employees have had the opportunity for thoughtful consideration, provides a more reliable basis for determining employee sentiment than an informal card designation procedure where group pressures may induce an otherwise recalcitrant employee to go along with his fellow workers." *NLRB v. Cayuga Crushed Stone*, 474 F.2d 1380, 1383 (2d Cir. 1973). *See also Struksnes Construction Co.*, 165 NLRB 1062 (1967) (employer polls raising similar concerns).

The same sentiments have been echoed consistently by the Board. *See, e.g., Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 723 (2001) ("we emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions"); *Underground Services Alert of Southern California*, 315 NLRB 958, 960-61 (1994) (quoting with approval Member Oviatt's separate opinion in *W.A. Krueger Co.*, 299 NLRB 914, 931 (1990) ("The election, typically, also is a more reliable indicator of employee wishes [than card checks] because employees have time to consider their options, to ascertain critical facts, and to hear and discuss their own and competing views. A period of reflection and an opportunity to investigate both sides….")).

Since 1947, following enactment of Section 8(c) of the Act, employees have had the right to make an informed choice based on information and the lawful expression of views, argument, or opinion from both employers and unions. Neutrality/card check agreements abridge these rights. In effect, employers and unions deal at high levels to foist unionization on employees by relative fiat aptly described as "top-down organizing."

The Chamber and COLLE urge the Board to hold true to the principles of industrial democracy, by protecting employees' right to vote in a secret ballot election to determine their own workplace destiny. It is worthy of note that the NLRB guaranteed voting rights to employees long before the 1964 Civil Rights Act and 1965 Voting Rights Act, at a time when

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And in *NLRB v. Village IX, Inc.*, 723 F.2d 1360 (1983), the Seventh Circuit observed that: "Although the union in this case had a card majority, by itself this has little significance. Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election)." *Id.* at 1371.

many citizens had never before been permitted to vote in any election – federal, state or local. And it was the NLRB that protected employees' exercise of free choice by striving for federally-supervised "laboratory conditions" surrounding the conduct of an election to assure that employees were fully and fairly informed prior to casting their secret ballots. If an employer or union engages in objectionable conduct, the administrative machinery is in place to require a rerun election in due course or, in egregious cases of employer misconduct, the imposition of a bargaining order without an election.

The Board should not permit neutrality/card check agreements to supplant the secret ballot election process which is the central feature of the Act. Yet, if the recognition bar is applied in these cases, employees in many industries and workplaces will be forced to determine the important question of union representation without meaningful debate and without the opportunity to vote under the safeguards of an NLRB-supervised secret ballot election.

B. The Unions' Strategic Advantage under Neutrality/Card Check Agreements Should Not Be Compounded by Application of the Recognition Bar.

There are, of course, numerous reasons why neutrality/card check agreements confer a strategic advantage on unions seeking to represent unorganized groups of employees:

- They mandate that the employer recognize the union without an NLRB-conducted secret ballot election, based only on a majority showing of authorization cards;
- They impose limitations on employer communications to employees about the union, usually including a "gag order" on any information which is critical of the union;
- They typically require the employer to provide the union with a list of the names and addresses of employees in the agreed-upon bargaining unit;
- They typically guarantee the union access to the employer's facilities to distribute literature and meet with employees; and

- They may include an agreement to start contract negotiations for the newly-organized unit within a specified (and short) time frame, and to submit open issues to binding interest arbitration if no agreement is reached within that time frame.

There are practical reasons why an employer may agree, or be leveraged by a union into agreeing, to the provisions of a neutrality/card check agreement. Employers typically accept neutrality/card check agreements during negotiations with the union in an established bargaining unit, or as a result of union-supported pressure from customers, suppliers and other important business and financial interests. Other reasons may include political or regulatory pressures resulting from so-called "corporate campaigns." Such agreements, however, rarely (if ever) are the result of employee pressures or wishes at the facility concerned. The hallmark of such agreements is "labor peace" or union bargaining concessions needed by employers in other, established bargaining units. Ignored by both employers and unions in these situations are the employees' interests, the only interests the NLRB is obligated to protect in a fully-informed, uncoerced secret ballot election.

Ironically, unions traditionally have been the strongest advocates of secret ballot elections. Even more ironically, unions have previously acknowledged the flaws inherent in the process of collecting union authorization cards. For example, the 1961 AFL-CIO Guidebook for Union Organizers stated, at a time when government statistics reflected that unions were successful in 56 percent of traditional NLRB secret ballot elections:

> NLRB pledge cards are at best a signif[ication] of intention at a given moment. Sometimes they are signed to "get the union off my back." …Whatever the reason, there is no guarantee of anything in a signed NLRB pledge card except that it will count toward an NLRB election.

Woodrow J. Sandler, "Another Worry for Employers," *U.S. News and World Report* (March 15, 1965).

More recently, in a brief filed with the NLRB in *Chelsea Industries* and *Levitz Furniture Company of the Pacific, Inc*. (7-CA-36846, 7-CA-37016, and 20-CA-26596), the United Automobile, Aerospace and Agricultural Implement Workers of America, the United Food and Commercial Workers Union, and the AFL-CIO acknowledged that:

> [A] representation election is a solemn …occasion, conducted under safeguards to voluntary choice …other means of decision-making are "not comparable to the privacy and independence of the voting booth," and [the secret ballot] election system provides the surest means of avoiding decisions which are the result of group pressures and not individual decision[s]. In addition … less formal means of registering majority support …are not sufficiently reliable indicia of employee desires on the question of union representation to serve as a basis for requiring union recognition. [quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) and *Brooks v. NLRB*, 348 U.S. 96, 98, 100 (1954).]

Yet, these same unions are now seeking to use their economic clout with employers to extract neutrality/card check agreements for their own strategic advantage. The contradiction of unions wanting to avoid secret ballot elections to gain initial recognition, while at the same time extolling the solemnity, privacy and reliability of NLRB-supervised secret ballot elections in the decertification context, demonstrates that the unions' approach is strategic rather than philosophical.

The Chamber and COLLE submit that Board policies should not be crafted on the basis of providing a strategic advantage either to employers or to unions. For, by statute the Board is charged with the responsibility of protecting employee rights, not the rights of unions. *See, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) (by "its plain terms…the NLRA confers rights only on employees, not on unions…."). "Voluntary unionism" through employee free choice is the "core principle" of the Act. *Pattern Makers League of North America AFL-CIO v. NLRB*, 473 U.S. 95, 102-03 (1985); *Skyline Distributors v. NLRB*, 99 F.3d 403, 411 (D.C. Cir. 1996).

IV. The Board Should Reverse Its Recent Trend of Restricting Employee Free Choice once a Union Has Been Recognized.

The cases now before the Board must be viewed in a broader context. In a series of decisions over the past decade, the Board has consistently restricted employees' ability to challenge a union's majority status once recognition has been granted. As the preceding section explains, there can be no dispute that a Board-supervised secret ballot election is the best method for determining whether a union has majority support among a group of employees. Yet, recent Board decisions have erected hurdle after hurdle that collectively make it nearly impossible for employees, employers, and rival unions to invoke the Board's secret ballot election process or to otherwise challenge the recognized union's majority status. We urge the Board, in the subject cases, to eliminate one hurdle and allow employee free choice to have an opportunity to be tested.

A. The Blocking Charge Trilogy

1. Douglas-Randall

The Board's recent assault on employee free choice began with its decision in *Douglas-Randall, Inc.*, 320 NLRB 431 (1995). In that case, the Board held that a decertification or other petition challenging an incumbent union's majority status will be dismissed – without provision for reinstatement – if the Board, the employer, and the incumbent union settle an outstanding Section 8(a)(5) charge filed by the incumbent union. Thus, there would be no secret ballot election to determine whether the union continued to have majority status.

As Member Cohen noted in his dissenting opinion, however, a settlement agreement does not constitute a finding that unlawful conduct occurred or that the decertification petition was, in fact, tainted. *Id.* at 435-36. Nor is the decertification petitioner party to the settlement agreement. Nonetheless, the Board in *Douglas-Randall* reversed prior precedent and held that a

decertification petition should be dismissed, without provision for reinstatement, based on such a settlement agreement.

The Board in *Douglas-Randall* recognized "the possibility that a union may raise dubious claims of employer violations in order to reach a settlement …thereby avoiding a decertification proceeding and assuring the union continued representational rights without its having to prove its majority support." *Id.* at 435. The Board also acknowledged the possibility of collusion between an employer and an incumbent union "in order to rid themselves of a petitioner (either decertification or a rival union) and maintain their current relationship." *Id.* Indeed, the Board even acknowledged that if, after entering into the settlement agreement, the employer and the incumbent union negotiate a new collective bargaining agreement, the petitioner will be barred from filing a new petition for up to three years: "When the parties reach a collective-bargaining agreement during bargaining pursuant to a settlement agreement, that contract will, of course, serve as a further bar to the petition under the Board's normal contract bar rules." *Id.*

Thus, the Board's decision in *Douglas-Randall* offers unions a powerful tool for defeating challenges to their majority status, whether that challenge is brought by employees in a decertification petition or a rival union. Simply by filing, and then settling, a blocking charge alleging that the petition was tainted by the employer's unlawful conduct, the incumbent union and the employer can precipitate the dismissal of the petition without the petitioner's involvement or consent. The remedial bargaining which then occurs pursuant to the settlement agreement may result in a new collective bargaining agreement that bars the petitioner from filing a new petition for up to three years.

2. Liberty Fabrics

Douglas-Randall was extended twice in the next five years. In *Liberty Fabrics, Inc.*, 327 NLRB 38 (1998), the Board extended *Douglas-Randall* to situations where the Board is not even party to the settlement agreement resolving the incumbent union's blocking charge. *Liberty Fabrics* involved a decertification petition that was filed during the window period prior to the expiration of the existing collective bargaining agreement. The incumbent union then filed unfair labor practice charges concerning Section 8(a)(5) violations which allegedly occurred before the decertification petition was filed. Processing of the petition was blocked by these charges. While the petition was blocked, the employer and the union entered into a new collective bargaining agreement which provided for withdrawal of the pending charges. The union and the employer notified the Regional Director of this agreement, and the union requested withdrawal of the charges. After the charges were withdrawn, the union moved for dismissal of the decertification petition based on the non-Board settlement and the contract bar doctrine. The Regional Director denied the union's motion, but the Board reversed based on its earlier holding in *Douglas-Randall*.

The Board in *Liberty Fabrics* found that the only difference between the case before it and *Douglas-Randall* was that "the parties resolved their dispute by means of a non-Board settlement agreement rather than a Board settlement agreement." *Id.* at 38. The Board concluded that the non-Board settlement should be given the same effect as a Board settlement, and therefore dismissed the decertification petition – over the objection of the petitioner and the employer – based on the non-Board settlement of the incumbent union's unfair labor practice charges.

In dissent, Member Hurtgen took issue with the notion that the conduct alleged in the unfair labor practice charges should be presumed to have tainted the decertification petition even though the charges were withdrawn pursuant to a private settlement agreement:

> I do not understand how conduct that is not shown to be unlawful can result in the tainting of a decertification petition…. A non-Board settlement does not establish that unlawful conduct has been committed, any more than does a Board settlement.

Id. at 39. In the absence of a finding that the employer engaged in unlawful conduct which tainted the petition, Member Hurtgen stated that the employees' Section 7 right to vote against union representation should have been honored by processing the decertification petition.

3. Supershuttle of Orange County

Most recently, the Board yet again extended *Douglas-Randall* in a case involving a rival union election petition. In *Supershuttle of Orange County, Inc.*, 330 NLRB 1016 (2000), the employer and the incumbent union were negotiating a first contract when, 20 months after the union had been certified, a rival union filed a petition to represent the employees. The petition was blocked by unfair labor practice charges that had been filed by the incumbent union prior to the petition. One month after the petition was filed, the employer and the incumbent union reached agreement on their first contract. The Acting Regional Director found that the employer and the incumbent union intended this contract to settle the union's outstanding unfair labor practice charges. Applying *Douglas-Randall* and *Liberty Fabrics*, the Board dismissed the rival union's election petition based on the Acting Regional Director's finding that the contract settled the blocking charges:

> The key to both *Douglas-Randall* and *Liberty Fabrics* is that the parties have resolved outstanding unfair labor practice allegations. The result in neither case was dependent on the method the parties used to resolve those allegations.

Id. at 1017. Therefore, the Board found that the "reasoning and holding of *Douglas-Randall* and *Liberty Fabrics* squarely apply, and the petition must be dismissed." *Id.*

In dissent, Member Hurtgen again expressed his view that application of the *Douglas-Randall* rule could lead to collusion between an employer and an incumbent union to "freeze out" a rival union:

> That is, the incumbent union would file a charge, and the employer and incumbent union would then reach a contract. As if by magic, the rival petition would go away by dismissal.

Id. at 1018. By applying the *Douglas-Randall* rule to a non-Board settlement in a rival union context, Member Hurtgen opined that "the error of *Douglas-Randall* has now been twice extended." *Id.* at 1019. "The result is that employees are again deprived of their Section 7 right to choose, reject, or change a bargaining representative." *Id.*

B. The Recognition Bar Is Placed on Par with the Election Bar – *MGM Grand*

In *MGM Grand Hotel, Inc.*, 329 NLRB 464 (1999), the Board affirmed the dismissal of a decertification petition that was filed 356 days (*i.e.*, nine days less than a year) after the union was recognized by card check. This was the third decertification petition filed by employees in the twelve months following the employer's recognition of the union. The Board agreed with the Regional Director that "a reasonable time to bargain had not yet passed by the time each of the three petitions was filed." *Id.* at 466. Although the Board said that the recognition bar "is not measured by the number of days or months spent in bargaining," *see id.*, the effect of the Board's decision in *MGM Grand* was to bar an election for at least the same period of time – one year – as if the union had been certified by the Board following a secret ballot election.

Members Hurtgen and Brame dissented from the decision in *MGM Grand*. They each argued that the Board's application of the recognition bar unduly restricted employees' Section 7

rights in the name of industrial stability. Member Hurtgen explained that, in balancing these two competing policy goals, greater weight should be given to employees' Section 7 right to reject or retain their bargaining representative:

> This case, and others like it, require a balance between (1) giving the employer and union a reasonable opportunity to reach a collective-bargaining agreement and (2) protecting the Section 7 rights of employees to reject or retain the union as their representative. While the first factor represents a policy choice, the latter one is expressly in the Act, and indeed lies at the heart of the Act. Thus, while I agree that balancing is required … the Act compels me to be especially sensitive to the second factor.

Id. at 468. Member Brame expressed the same view in his dissenting opinion: "Employees' Section 7 rights comprise the core of the Act and, in applying the balancing process, the Board must show special sensitivity toward employees' rights." *Id.* at 472.

C. The Recognition Bar Is Applied Despite a Contemporaneous Showing of Disinterest in the Union – *Seattle Mariners*

The Board in *Seattle Mariners*, 335 NLRB 563 (2001), held that the recognition bar applied even when, at the time the union was recognized by card check, a substantial minority (more than 30%) of employees had signed a petition to demonstrate that they did not want to be represented by the union. The employees sent this petition to the arbitrator who was presiding over the card check. Although the petition was sent two days before the card check, the arbitrator did not receive the petition until after he had completed the card check and certified that the union had majority support.[3] When the employees then filed a decertification petition, the Board held that the recognition bar applied and dismissed the petition.

[3] The union's majority was a bare one. Of the 453 employees in the unit, 229 had signed authorization cards – only two more than necessary to achieve a majority.

In dismissing the decertification petition in *Seattle Mariners*, the Board distinguished its decision in *Smith's Food & Drug Centers, Inc.*, 320 NLRB 844 (1996). In *Smith's Food*, the Board held that an employer's voluntary recognition of a union does not bar a petition filed by a rival union that had the support of 30% of unit employees at the time recognition was granted. Surprisingly, the Board in *Seattle Mariners* held that a 30% showing of interest by a rival union is fundamentally different than a 30% showing of interest in no union representation:

> [W]hen, like here, only one union is organizing the employees and, upon demonstration of the union's majority status, the employer voluntarily recognizes the union, an exception to the recognition bar is not warranted. That is, in contrast to the rival union organizing situation presented in *Smith's Food*, where only one union is engaged in organizing an employer's employees, voluntary recognition by the employer of that union upon a demonstration of its majority status only serves to effectuate employee free choice.

Seattle Mariners, 335 NLRB at 565 (emphasis added).

Chairman Hurtgen dissented, and disagreed with the majority's distinction between employees' right to choose between rival unions and employees' right to choose between a union and no union. Chairman Hurtgen noted that the "very rationale in *Smith's Food* … 'to guarantee employees an opportunity to express their genuine desires in selecting their bargaining representative' – is equally as applicable to the instant case." *Id.* at 566. Therefore, Chairman Hurtgen urged that when a substantial minority (30% or more) of employees have expressed a contrary view at the time recognition is granted, the recognition bar should not preclude those employees from testing the union's majority support through a Board-administered secret ballot election.

The majority, of course, rejected this approach, stating that: "we believe that by dismissing the instant petition, we are both promoting voluntary recognition and effectuating the free choice of the majority of the unit employees." *Id.* at 565. Thus, the Board majority readily

admitted that it was denying employees the right to a Board-conducted secret ballot election in order to promote voluntary recognition.

D. The Standard for Withdrawal of Recognition Is Raised – *Levitz Furniture*

Showing a total lack of consistency, the Board, in a decision issued the same year, demonstrated its clear preference for Board-conducted secret ballot elections when an employer believes that an incumbent union has *lost* majority support. The Board, in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), overruled fifty years of precedent holding that an employer may withdraw recognition from a union if it has a good-faith doubt as to the union's continuing majority status. The Board in *Levitz* held that an employer may withdraw recognition from a union only if it can demonstrate that the union has *actually* lost majority support.[4]

The Board's decision in *Levitz* embraced the position of the unions – in that case, the United Food and Commercial Workers, supported by the AFL-CIO as amicus curiae – that an incumbent union should have the right to insist on a Board-supervised secret ballot election if its majority status is called into question:

> The General Counsel and the unions note that Board elections are the preferred means of establishing whether a union has the support of a majority of the employees in a bargaining unit. They argue, therefore, that an incumbent union whose majority status is

[4] At the same time, the Board purported to adopt a more lenient standard for processing RM petitions. But, as Member Hurtgen noted in his concurring opinion, the Board in *Levitz Furniture* did not actually lower the standard for processing an RM petition. Rather, the Board merely acknowledged that the existing standard must comply with the Supreme Court's decision in *Allentown Mack Sales and Service, Inc. v. NLRB,* 522 U.S. 359 (1998). In Member Hurtgen's words: "My colleagues say that they have lowered the bar for RM petition[s]. In truth, the bar had been articulated in terms of 'doubt', and the Supreme Court has said that 'doubt' means 'uncertainty.'" *Id.* at 732 n.5. Ironically, the Board reasoned that adopting this standard would "enable employers who seek to test a union's majority status to use the Board's election procedures – in our view the most reliable measure of union support…." *Id.* at 717 (emphasis added).

> under challenge should be able to insist that the issue be resolved in a Board election before the employer may withdraw recognition.

Id. at 719 (emphasis added). The Board "agree[d] with the General Counsel and the unions that Board elections are the preferred means of testing employees' support" and concluded that its decision would provide sufficient incentive for employers to seek an RM election rather than act unilaterally. *Id.* 725.

As Member Hurtgen explained in his dissent, however, the RM election process may not be an effective method for testing an incumbent union's majority status. *See id.* at 732. The main reason is that the incumbent union may file blocking charges to forestall an election for weeks, months, or even years. As discussed previously, blocking charges are a powerful tool for an incumbent union to frustrate efforts to hold an election, whether the effort is brought by the employer, employees, or a rival union.

E. The Short-Lived "Successor Bar" – *St. Elizabeth's Manor*

In *St. Elizabeth's Manor, Inc.*, 329 NLRB 341 (1999), the Board extended the recognition bar to successorship situations, despite a quarter-century of precedent to the contrary. Even though successorship cases by definition involve an established union relationship, the Board in *St. Elizabeth's Manor* determined that an established union is "entitled to a reasonable period of bargaining without challenge to its majority status through a decertification petition, employer petition, or a rival petition." *Id.* at 344 (footnote omitted). Calling this bar the "successor bar," the Board effectively held that an incumbent union in a successorship situation is entitled to be treated as if it were a newly-recognized union in an initial organizing situation, so that employees could not have an election to test the union's majority status.

Fortunately, the "successor bar" doctrine, created out of whole cloth, was short-lived. The Board reversed its decision in *St. Elizabeth's Manor* and restored prior precedent in *MV*

Transportation, 337 NLRB 770 (2002). In reversing *St. Elizabeth's Manor*, the Board in *MV Transportation* questioned the basic policy choice underlying the "successor bar" rule. That policy choice was to suppress "for a reasonable period of time" employees' Section 7 right to choose or reject their collective bargaining representative, in order to preserve the stability of the existing bargaining relationship. Yet, as the Board held in *MV Transportation*, denying employees their Section 7 rights does not foster stability; it only masks any existing instability:

> In reality, if a large percentage (or majority) of the employees support a petition to decertify or change the bargaining representative, the situation has reached maximum instability, and to fail to resolve the issue with a Board-conducted election simply aggravates the instability further. Instability is, in fact, preserved and increased rather than relieved.

MV Transportation, 337 NLRB at 774.

Thus, the Board concluded that the two fundamental purposes of the Act – employee free choice in the selection of their bargaining representative, and industrial stability – are both best served by honoring employees' right to vote in a Board-supervised secret ballot election. As Members Hurtgen and Brame expressed in their dissenting opinion in *St. Elizabeth's Manor*, "[c]ollective bargaining… should flow from employee free choice and not drive it." *St. Elizabeth's Manor*, 329 NLRB at 349. That sound and basic notion applies equally in the cases now before the Board.

F. Conclusion – The Board Should Take This Case as an Opportunity to Restore the Balance in Favor of Employees' Section 7 Rights.

The cases presently before the Board are an opportune vehicle for restoring at least a measure of balance between industrial stability and employees' Section 7 right to choose or reject their bargaining representative. The Chamber and COLLE represent many of the nation's largest employers, who appreciate the value of industrial stability. Nonetheless, the Chamber and COLLE support the Petitioners' position in this case because, as the Board recognized in *MV*

Transportation, a policy of forced stability does not result in true stability. When a substantial minority – and a potential majority – of employees oppose the employer's recognition of a particular union, the goal of industrial stability is better served by definitively resolving the representation question in a Board-supervised secret ballot election.

Preserving employees' right to seek a Board election is particularly important when the union has been recognized pursuant to a neutrality/card check agreement. As the Board noted in its Order Granting Review in these cases, a neutrality/card check agreement is typically negotiated before the union begins to collect authorization cards from the employees the union is seeking to organize. Moreover, as discussed in Section III *supra*, neutrality/card check agreements are often the product of external pressure on the employer, and are virtually never the product of employee desire at the location to be organized. Because neutrality/card check agreements are typically the product of external pressures on the employer – without the involvement or consent of the employees to be organized – the Board should be especially reluctant to permit a neutrality/card check agreement to operate as a waiver of the employees' right to seek a Board election.

The effect of applying the recognition bar in cases involving a neutrality/card check agreement can extend well beyond the one-year bar found in *MGM Grand*, and possibly as long as four years. If an initial collective bargaining agreement is reached before the recognition bar expires, the contract bar will block an election for up to three additional years. In many cases, the neutrality/card check agreement *ensures* that an agreement will be in place before the recognition bar expires, by mandating interest arbitration if the parties are unable to negotiate a first contract within a certain period of time after recognition has been granted. Therefore, if a recognition bar is applied in these cases, employees will be unable to challenge the union's

majority status for up to four years. *Cf. MV Transportation*, 337 NLRB at 773 ("It is possible, however, that the successor bar could preclude the employees' exercise of their Section 7 rights for as long as several years…." if a new agreement is reached during the bar period).

Thus, a neutrality/card check agreement is a uniquely powerful tool for a union to obtain the right to represent a group of employees:

- The agreement is negotiated before the union begins to collect authorization cards from the employees to be organized;
- The agreement is typically the result of external pressure on the employer, rather than a product of employee desire at the location to be organized;
- The agreement precludes any meaningful debate about the wisdom or value of union representation, by particularly prohibiting any employer speech critical of the union;
- The agreement replaces the Board's secret ballot election process with a privately administered card check procedure;
- In the negotiations to establish the neutrality/card check agreement, the union may further forfeit employee rights by, in effect, pre-negotiating terms and conditions less favorable than might otherwise result from arm's length collective bargaining in a traditional setting; and
- The agreement may provide for interest arbitration, so that a contract bar is guaranteed to be in place within several months after recognition is granted.

Because of these unique characteristics, recognition pursuant to a neutrality/card check agreement deserves special treatment under Board law. Applying the recognition bar in cases involving a neutrality/card check agreement would only give the union a greater advantage in a situation where its advantage is already great. At the same time, the union's advantages under a

neutrality/card check agreement increase the possibility that the outcome of the card check does not reflect employees' true desire. Therefore, if a sufficient percentage (at least 30%) of employees disagree with the outcome of the card check, the goal of industrial stability is not well served by denying employees the opportunity to test the union's majority status a Board-supervised secret ballot election. The decertification petition reflects that the relationship is already unstable and, as the Board held in *MV Transportation*, "fail[ing] to resolve the issue with a Board-conducted election simply aggravates the instability further." *MV Transportation*, 337 NLRB at 774.

The cost to the union of testing its majority support in a Board election should be minimal. If the union truly has the support of a majority of the employees in the bargaining unit, holding an election would only confirm the legitimacy of the union's representative status. Meanwhile, the employer's duty to bargain with the union would continue uninterrupted during the election process. The filing of a decertification petition would not relieve the employer of its duty to bargain based on the card check recognition. The duty to bargain would cease only if the Board determines that the union does not, in fact, have majority status.

In sum, the purposes of the Act are best served by not applying the recognition bar in cases involving a neutrality/card check agreement. The paramount goal of employee free choice is, of course, served by honoring employees' right to vote in a Board-supervised secret ballot election. The goal of industrial stability is also served by allowing employees to test the union's majority support in a Board election. Holding an election will either relieve an inherent instability in the bargaining unit, or it will engender stability by confirming the union's representative status. This is how it should be.

V. Conclusion

For all of the foregoing reasons, the Chamber and COLLE urge the Board to hold that the recognition bar does not apply when, as here, recognition was granted pursuant to a neutrality/card check agreement.

Respectfully submitted,

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Dated: July 15, 2004

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2004, I caused a true and accurate copy of the foregoing Brief of *Amici Curiae* the Chamber of Commerce of the United States of America and the Council on Labor Law Equality in Support of Petitioners to be served by overnight delivery on the following:

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