UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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 SINTERED PRODUCTS)
Employer

and Case 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

AMICUS BRIEF
JOHN M. O'DONNELL, ATTORNEY AT LAW

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Introduction

This brief is submitted per the Notice and Invitation to File Briefs issued by the Board in this matter and dated June 14, 2004.

Your amicus, John M. O'Donnell, is an attorney who has specialized in labor and employment law for approximately thirty years. In the course of that time, and most particularly during the period from 1995 to the present, I have been involved in representing employers who have been subjected to so-called "neutrality agreements" in a number of circumstances. I am personally familiar with the circumstances which lead to the signing of these agreements and have seen the consequences in practice following the entry of relationships between employers and unions in various circumstances.

My practice has had a concentration in the hospitality industry - hotels and restaurants. The union most actively involved in organizing in this industry is the Hotel Employees Restaurant Employees International Union, AFL-CIO ("H.E.R.E."). H.E.R.E. recently merged with the United Needleworkers, Industrial and Textile Employees ("UNITE"). The newly merged union is known as UNITE HERE.

Over th past several years, H.E.R.E. has virtually abandoned attempts to organize through secret ballot elections in favor of attempts to secure "neutrality agreements" with employers. These agreements typically provide, *inter alia*, that the employer agree to recognition through a "card check" process versus an NLRB conducted secret ballot election, that the employer provide the union with physical access to employees at the work site, that the employer provide the union with lists of names and home addresses of employees, and a commitment on the part of the employer to not oppose the organizing efforts. The agreements are sought to be signed before there are any

employees actually hired. So, at the time the parties sign the agreement, there are no employees to express either opposition or support for such a collaboration between the union and their employer.

The most typical scenario relative to H.E.R.E.'s attempts to secure a neutrality agreement is in the context of a new hotel development which may, or may not, involve tax incentives being secured from a local municipality or a related development authority. H.E.R.E. typically utilizes their relationships with local politicians to cause the politicians to exert pressure on the developer to enter into a neutrality agreement. Where tax incentives are involved, the politicians usually exert a covert "condition" that the employer enter into such an agreement in order to be selected for approval of the tax incentives. The reason that the condition is most frequently covert is that such a condition is a violation of federal labor law unless the municipality can demonstrate some actual "ownership" interest in the property being developed. See *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993); *Associated Builders & Contractors of Rhode Island, Inc. v. City of Providence*, 108 F.Supp.2d 73 (U.S.D.R.I., 2000); These cases are based on federal preemption principles enunciated in *San Diego Building & Trades Council v. Garmon*, 359 U.S. 236 (1959), and *International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). Tax incentives generally are insufficient to establish such a "proprietary" interest. *Camps Newfoundland/Owatanna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564 (1997); and *Chamber of Commerce of the United States v. Lockyer* (9th Cir., No. 03-55166, decided April 20, 2004)(". . . state regulation is preempted when it directly targets and substantially affects open employer discussion about unionization, even if such regulation comes in the form of a restriction on the use of state funds." at 5187).

In most cases, there is no business justification, or desire on the part of the employer, to enter

into a neutrality agreement with the union. There have been some limited exceptions where, due to the location of the hotel and union-related marketing exceptions or where the financing is secured from a union-controlled source,[1] an employer may decide it is desirable to enter into such an agreement with a union. These have generally been rare exceptions.

In virtually every organizing campaign waged under these agreements, employees are heard to complain of peer pressure, threats, intimidation, and coercion on the part of co-workers as well as union organizers. Because there is no "secrecy" related to the ultimate decision of the employee, there is no relenting until the organizers have secured the necessary "signature" on the card which equates to a "vote" for the union in the absence of an election.

ARGUMENT

[1]The "union controlled source" of funds is usually a union pension plan. Such financing is also usually conditioned by the pension plan trustees upon the employer agreeing to enter into a "neutrality agreement." The use of such pension plans as an organizing tool is, in fact, becoming a frequent occurrence. There is a significant question as to whether this practice constitutes a breach of fiduciary duty under federal law by plan trustees. However, that issue is beyond the scope of the issues presented in the instant case.

The reason that the Board should accept decertification petitions immediately following voluntary recognition pursuant to a "card check" is that there is virtually always "reasonable doubt" related to whether a majority of the bargaining unit actually support the union from day one.

The United States Supreme Court, in 1998, reviewed the historical approach of the Board to determinations of what evidence is necessary to establish a "good faith reasonable doubt" as to whether a union maintains majority support among a bargaining unit. *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998). The Court, in that case, made clear that it was not the veracity of information communicated to the employer that formed the basis for reasonable doubt, but, rather, it was simply whether the employer might have reasonably believed information that would create a doubt as to whether or not the union maintained majority status. "So long as the employer's interpretation is reasonable, and the evidence so interpreted tends to engender uncertainty as to whether the union still commands majority support, the evidence is probative and must be considered." *Tri-State Health Service, Inc. v. NLRB*, (5th Cir., No. 03-60498, June 21, 2004)

More recently, the Board decided the case of *Fessler & Bowman, Inc.* (Case 7-RC-22434, decided May 12, 2004), in which the Board set aside the results of an election because the union had solicited and "handled" ballots of voters in a secret ballot election which was conducted by the Board. In that case, there was no evidence that the union had tampered with, or changed, the ballots in any way.

In *Fessler & Bowman*, th Board stated:

> "Because of the fundamental importance of this process, the election environment must be one in which employees may freely and fairly express their views regarding representation. To this end, the Board has stated that election conditions must approach, as nearly as possible, ideal 'laboratory' conditions so as to facilitate expression of the uninhibited wishes of the employees. *General Shoe Corp.*, 77 NLRB 124, 127 (1948)." *Fessler & Bowman* at p. 2.

The Board cited *Tidelands Marine Services*, 116 NLRB 1222 (1956), wherein the Board set aside an election where one of the parties to a Board conducted election had access to a ballot box *in the presence of the Board agent conducting the election*. Again, there were no allegations of improper conduct or tampering, but the Board said that mere access to the ballot box "constituted such a serious irregularity in the conduct of the election as to raise doubts as to its integrity and secrecy." *Tidelands* at 1224.

Again, in *Fessler & Bowman*, the Board stated:

> "Where such procedures are not followed, and the mail ballots come into the possession of a party to the election, the secrecy of the ballot and the integrity of the election process are called into question." *Fessler & Bowman* at p. 2
>
> "We agree with the proposition that the secrecy of balloting – be it manual or mail ballot – is a hallmark of our election procedures. Where mail-ballot collection by a party occurs, we find that it casts doubt on the integrity of the election process and undermines election secrecy." *Id.* at p. 3.
>
> "Our colleagues would find solicitation objectionable because it forces an employee to either decline the solicitation and therefore be viewed as disfavoring the solicitor, or comply with the solicitation and therefore worry about the secrecy of his or her ballot. Only the second option in this purported Hobson's choice identifies a legitimate threat to election integrity, and that threat is dissipated by the rule against ballot solicitation." *Id.*

The last quoted sentence above refers to the dissent wherein Chairman Battista and Member Schaumber stated:

> "In our view, *the integrity of the electoral process demands that the employee control his ballot at all times*. Any effort to interfere with that process, whether successful or not, undermines the integrity of the process, and is therefore objectionable." *Id.* at p. 4.

In the case of a card-check conducted pursuant to an agreement entered into between an

employer and a union, the *entire procedure* is conducted by the ***party*** with the greatest interest in the outcome. The union solicits the cards. Any number of union organizers and/or co-workers may be present when the cards are signed. It is the union, not the employee, who "always has control" of the ballot in this procedure. It is the union alone that solicits, processes, and ultimately submits allegedly valid signatures to some third party for "counting." The employee signing a card, or refusing to sign a card, may be subject to intense pressure and their ultimate decision is made publicly by definition. It is the union alone that knows how much pressure was exerted on the employee to secure each signature. In short, in the case of a "card-check," the employee is forced into the "Hobson's choice" with no means of escape.

The entire card-check process is conducted with none of controls related to a secret ballot election. In a card-check process, the union organizers may go to the homes of employees as many times as it takes to get an employee to sign a card. They may approach employees anywhere, any time, seeking to get them to sign cards. They always know who has signed a card, and who has not. There is no secrecy. There is no "integrity to the process." Given these facts, there must always be "reasonable doubt" as to what constitutes the "uninhibited wishes" of employees? There must always be a reasonable doubt as to whether the union really represents a majority of employee in a bargaining unit. For this reason, the results of a card check do not support any form of "presumption" that they represent the true wishes of a majority.

CONCLUSION

The immediate issue in this case is whether the Board should accept a decertification petition prior to the expiration of a "reasonable period," or "recognition bar" period, where recognition is

voluntary and based on a card-check versus a secret-ballot election, particularly in the case of an agreement entered into between an employer and a union before any authorization cards have been collected.

Stated another way, the question is whether recognition based on a "card-check" should raise a *conclusive* presumption of majority support on the part of a group of employees in a bargaining unit for some period of time.

The Board has consistently taken the position that a party's physical access to an employee's ballot in a secret ballot election is sufficient cause to invalidate the entire election. The recent decisions quoted above support the premise that a union's mere "handling" of a ballot, at any time, in the course of an NLRB election procedure is sufficient to question the integrity of the process.

It seems impossible to reconcile the "card-check" process with any sincere concern for the integrity of the process of determining the "uninhibited wishes of employees." The secret ballot election is the foundation of democracy. Not because it is a "nice tradition." Rather, because the history of the world is replete with tyrants who imposed their wills upon populations denied the opportunity to vote freely, and in secret, to oust such regimes. Whether applied to national elections in the United States, Iraq, the Soviet Union, China, or wherever, the *truly* secret-ballot is the only procedure that assures that uninhibited expression of a voter's wishes. The principle is no different whether the election is for President of the United States or for union representation.

We do not allow our political parties to force citizens to publicly declare their political preferences. Currently, we *do* allow unions to force employees to declare their support as a means of obtaining legal recognition. This is what a card check procedure is, a waiver of the right to make such an expression in secret, free of any restraints by either a union or an employer. And, the

"waiver" is not made by the employee. It is made by agreement between the union and the employer. Logic would question why recognition based on a card-check, based on an agreement between an employer and a union is given any credence whatsoever. Clearly it is at odds with the history of the Board indicating its concern for the "integrity" of the process. It is at odds with the democratic process we hold dear as a fundamental basis of our freedom. At a minimum, the "reasonable doubt" attached to the results of the collection process should attach immediately, and such a process should not be the basis for any "conclusive presumption" as to what employees really want.

It simply makes no sense to state that the mere "solicitation" and "handling" of ballots, even if done in the presence of a Board agent, and even when there is clearly no evidence of tampering, is sufficient to destroy the integrity of a secret-ballot election process, but that a process that has all of these problems, and more, and none of the safeguards, should be deemed to have any degree of integrity attached to it. There really should be no presumption of validity, conclusive or otherwise, attached to this method of recognition.

Respectfully submitted this _____ day of July, 2004.

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CERTIFICATE OF SERVICE

The undersigned, John M. O'Donnell, hereby certifies that a true and correct copy of the foregoing Amicus Brief was served upon the following individuals by depositing same with the United States Postal Service, postage prepaid, on the _____ day of July, 2004.

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