UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CLARICE K. ATHERHOLT,
(Petitioner),

DANA CORP.,
(Employer) **Case No. 8-RD-1976**

and

INTERNATIONAL UNION, UAW
(Union)

ALAN P. KRUG AND JEFFREY A. SAMPLE,
(Petitioners),

Case Nos. 6-RD-1518 and 6-RD-1519

METALDYNE CORPORATION
(METALDYNE SINTERED PRODUCTS),
(Employer)

and

INTERNATIONAL UNION, UAW,
(Union)

PETITIONERS' JOINT BRIEF ON THE MERITS

Glenn M. Taubman, Esq.
William L. Messenger, Esq.
c/o National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA. 22160
(703) 321-8510
Attorneys for Petitioners Alan Krug,
Clarice Atherholt and Jeffrey Sample

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On June 7, 2004, pursuant to NLRB Rules & Regulations 102.67(c), the Board granted Requests for Review in these two cases, Dana Corp. (Clarice Atherholt, Petitioner, and UAW), Case No. 8-RD-1976 ("the Dana case"), and Metaldyne Corporation (Alan P. Krug and Jeffrey A. Sample, Petitioners, and UAW), Case Nos. 6-RD-1518 and 6-RD-1519 ("the Metaldyne case"). The cases were consolidated and amicus briefs solicited because of the importance of the issues. Pursuant to the Board's scheduling order of June 15, 2004, and NLRB Rules & Regulations 102.67(g), Petitioners Clarice K. Atherholt, Alan P. Krug and Jeffrey A. Sample hereby file this Joint Brief, with two sworn Declarations attached.

I. INTRODUCTION:

In 1966, with virtually no reasoning or analysis, the Board planted the seeds of what has become known as the "voluntary recognition bar" with this simple, unreflective sentence.

> With respect to the present dispute which involves a bargaining status established as the result of voluntary recognition of a majority representative, we conclude that, like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining.

Keller Plastics Eastern, Inc., 157 N.L.R.B. 583, 587 (1966). From this rudimentary ruling mushroomed an unfair and undemocratic "recognition bar" that blocks employees from exercising their statutory right to a decertification election (or otherwise changing representatives) once an employer unilaterally bestows voluntary recognition on a particular union. See MGM Grand Hotel, Inc., 329 N.L.R.B. 464 (1999) (3-2 decision) (voluntary recognition bar can last for over eleven months); see also Seattle Mariners, 335 NLRB 563 (2001) (2-1 decision) (voluntary recognition bar prohibits decertification elections even if

employees signed a showing of interest prior to the employer recognition).

Employees enjoy a **statutory** right to petition for a decertification election under § 9(c)(1)(A)(ii) of the National Labor Relations Act ("NLRA" or "Act"). By contrast, the voluntary recognition bar–which frustrates employees' right to a decertification election–is not a creature of statute. It is a discretionary Board policy which should be reevaluated when industrial conditions warrant. See e.g., IBM Corp., 341 N.L.R.B. No. 148 (2004).

It is time for the Board to reassess entirely the underlying purpose of, and need for, a voluntary recognition bar. This is especially true given the growth of so-called "voluntary recognition agreements." In these agreements, unions and employers take deliberate advantage of the Board's "recognition bar" rule to erase the NLRB from the process in which employees choose (or reject) union representation. In an ironic way, the Board's electoral machinery is being driven to obsolescence by its current "recognition bar" policies.

Exclusion of the Board from the representational process leaves employee rights in the abusive hands of employers and unions, each of which is pursuing its own self-interests under these "voluntary recognition" agreements. Unions are desperately seeking additional members and dues revenues. Employers are (naturally) pursuing their business interests, such as avoiding coercive union corporate campaigns or obtaining a pre-negotiated "sweetheart deal" regarding future-organized employees' terms and conditions of employment. Neither entity has any interest in protecting employee rights to freely choose or reject union representation, the very rights the NLRB exists to protect.

Here, the employers' recognition of the UAW was preceded by the negotiation of

secret, pre-arranged "partnership agreements" that obligated the employers to assist their "partner" union with organizing their employees. Dana and Metaldyne, respectively, anointed a particular, hand-picked union (the UAW) with special privileges (e.g., captive audience speeches praising the new "partner" union, lists of employees' home addresses, gerrymandered bargaining units to weed out union opponents, and the waiver of secret ballot elections in favor of so-called "card checks"). The employers then turned a blind eye as the union harassed and misled employees into signing union authorization cards. (See Declarations of Clarice K. Atherholt and Lori Yost, attached hereto).

The Board should follow its own lead in cases such as Levitz Furniture Co., 333 N.L.R.B. 717 (2001), and In re MV Transportation, 337 N.L.R.B. 770 (2002), and completely reassess – and eliminate – the "voluntary recognition bar," since this bar places too much unchecked power in the hands of an interested employer and its chosen "partner" union. Employee free choice should not, and under the text of the Act cannot, be subject to the vagaries of self-interested unions and employers. See MGM Grand Hotel, 329 N.L.R.B. at 469-75 (Member Brame, dissenting).[1]

Abolition of the "voluntary recognition bar" is needed to reestablish the Board's proper role in the representational process, and thereby protect **employee** rights to freely

[1] The Board need look no further than its recent decision in Duane Reade, Inc., 338 N.L.R.B. No. 140 (2003), enforced, No. 03-1156, 2004 WL 1238336 (D.C. Cir. June 10, 2004), to see this union and employer self-interest at work. There, in blatant disregard of employees' § 7 rights to freely choose or reject a union, the employer unlawfully assisted its hand-picked union in coercing employees to sign union authorization cards so that "voluntary recognition" could be bestowed. This type of incestuous relationship is not worthy of a "bar" against electoral challenges, as currently exists under Board policy.

choose or reject union representation. Petitioners urge the Board to correct its policies to protect the true touchstone of the Act–employees' paramount right of free choice under § 7. See Pattern Makers League v. NLRB, 473 U.S. 95 (1985) (paramount policy of the NLRA is "voluntary unionism"); Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms, thus, the NLRA confers rights only on *employees,* not on unions or their nonemployee organizers. . . ."); see also Bloom v. NLRB, 153 F.3d 844, 849-50 (8th Cir. 1998) ("Enlisting in a union is a wholly voluntary commitment; it is an option that may be freely undertaken or freely rejected. . . ."), vacated & remanded on other grounds sub nom. OPEIU Local 12 v. Bloom, 525 U.S. 1133 (1999).

Alternatively, even if the Board will not eliminate the "voluntary recognition bar" in its entirety, it should create a "window period" that would allow employees to file for decertification within a reasonable time (at least 45 days) after the voluntary recognition is publicly announced. Such a "45-day window period rule" proposed by the Petitioners as an *alternative* ground to reverse the Regional Directors' decisions will at the very least provide the Board and employees with an opportunity to determine if an employer-selected union actually enjoys the uncoerced support of a majority of employees.[2]

[2] Moreover, a 45-day window period would in no way interfere with collective bargaining negotiations between the parties. In these cases, negotiations had not even begun at the time the election petitions were filed. (See Declarations of Clarice K. Atherholt and Lori Yost).

II. STATEMENT OF THE ISSUES:

1) Notwithstanding that an employer's voluntary recognition of a union may be lawful under the NLRA, should such voluntary recognition be given "bar quality" so as to prohibit employees from exercising their rights under §§ 7 and 9(c)(1)(A)(ii) of the Act to reject the union that their employer chose?

2) Where self-interested employers (Dana Corp. and Metalydyne, respectively) first sign secret "voluntary recognition agreements" with a favored union (the UAW) and *thereafter* voluntarily recognize that union without permitting the employees the benefit of a Board-supervised secret ballot election, should the Board reconsider and abandon its voluntary recognition bar rule and allow the employees to exercise their statutory right to an election under § 9(c)(1)(A)(ii)?

3) If the Board will not abandon the voluntary recognition bar rule in its entirety, should the Board at least create a "window period" under which employees can file for a decertification election to determine if the employer-recognized union actually enjoys the uncoerced support of a majority of the employees?

III. STATEMENT OF THE FACTS:

A) <u>Dana</u>: The background facts of this case are fully set forth in the accompanying Declaration of Clarice K. Atherholt (which was also submitted to the Regional Director in support of the decertification petition). In brief, they are as follows:

Dana and the UAW became parties to a secret "partnership agreement" in August 2003. Although Dana employees are the targets of the agreement, the terms of the agreement

were kept secret from them prior to Dana's declaration of voluntary recognition.[3] (See Declaration of Clarice K. Atherholt and Ex. 2 thereto). Local management at Dana Upper Sandusky was "gagged," and not allowed to inform employees about the details of the partnership agreement.

Pursuant to the agreement, UAW organizers arrived in force at the Dana Upper Sandusky plant of Petitioner Clarice K. Atherholt, and stayed there until voluntary recognition was bestowed upon them by their "partner" Dana. The joint UAW/Dana "card check" drive was the antithesis of an NLRB supervised secret-ballot election. UAW organizers pressured employees to sign union authorization cards. (Declaration of Clarice K. Atherholt). The UAW hounded some employees to sign cards by having union organizers pursue them at work, and repeatedly call and visit them at home. (Id.). UAW organizers also misled employees as to the purpose and finality of the cards. (Id.). Overall, many employees signed the cards just to "get the UAW organizers off their back." (Id.). This is hardly conduct that would be allowed during an NLRB secret-ballot election, which requires "laboratory conditions." General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

Dana management also held a series of company-paid captive audience meetings at the plant, praising its new "partner," the UAW. At these meetings, high level officials from

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[3] See http://www.dana.com/news/pressreleases/prpage.asp?page=1295. On August 13, 2003, Dana Corporation and the UAW announced a neutrality and card check agreement which they termed a "partnership," except that the "terms of the agreement were not disclosed by agreement of the parties." But cf. Merk v. Jewel Food Stores Div. of Jewel Cos., Inc., 945 F.2d 889, 893-96 (7th Cir. 1991) (secret agreements violate federal labor policy); Aguinaga v. UFCW, 993 F.2d 1463, 1470-71 (10th Cir. 1993) (same).

Dana corporate offices in Toledo told the employees that the partnership with its favored union would be beneficial to the plant by getting new business from the "Big Three" automakers. With a wink and a nod, it was implied that Dana Upper Sandusky would lose work opportunities or jobs if employees did not sign cards and bring in the UAW. (Declaration of Clarice K. Atherholt).

On or about December 4, 2003, Dana announced that the UAW was chosen as exclusive representative of the Upper Sandusky employees, based upon a private count of signed authorization cards. There was no vote and no secret ballot election.

Approximately 33 days later, on January 7, 2004, Petitioner Clarice K. Atherholt filed a decertification petition with NLRB Region 8, supported by over 35% of her fellow employees at Dana Upper Sandusky. (Id.). At the time that the decertification petition was filed, Dana and the UAW had yet to engage in any negotiations or bargaining sessions. (Id).[4] On January 21, 2004, Regional Director Frederick Calatrello dismissed without hearing the petition for a decertification election, based solely upon the Board's voluntary recognition bar doctrine. To this date, the NLRB has never determined whether a majority of employees truly wished UAW representation.

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[4] However, the Dana-UAW "partnership agreement" includes a provision that both parties will submit to binding arbitration if a contract is not signed within six months of recognition. See http://www.uaw.org/news/newsarticle.cfm?ArtId=204 (UAW announces the "partnership" with Dana and proclaims that "Dana and the UAW also agreed to binding arbitration if a first contract is not reached within six months").

B) Metaldyne: The background facts of this case are fully set forth in the accompanying Declaration of Lori Yost (which was also submitted to the Regional Director in support of the decertification Petition). Those facts show that Metaldyne, not the employees, chose the UAW as the exclusive bargaining representative of its employees in St. Marys, Pennsylvania.

Metaldyne signed a secret "partnership agreement" with the UAW covering its employees. (Declaration of Lori Yost). In this agreement, Metaldyne agreed to assist its "partner" with organizing its facilities in exchange for, *quid pro quo*, UAW commitments regarding how it would conduct itself as a bargaining representative after it took over the plant.

Metaldyne and the UAW then launched a joint organizing drive against St. Mary's employees. Metaldyne management held a mandatory meeting with the employees and played a video informing them that they should accept the UAW in the plant as it was a "win-win situation for all of us." (Id.). UAW organizers were granted wide access to the St. Marys facility and to personal information about employees in order to facilitate the signing of UAW authorization cards. (Id.).

On December 1, 2003, Metaldyne formally announced to its employees that it had designated the UAW as their bargaining representative. However, Metaldyne did so only after working with the UAW to manipulate the scope of the bargaining unit to exclude clusters of employees who did not support the union, thereby ensuring that its "partner" could take over the plant. (Id.).

Employees at Metaldyne St. Marys were never permitted an NLRB-supervised election to determine if they actually wanted UAW representation. The NLRB has never evaluated–much less determined–whether a majority of Metaldyne St. Marys employees freely support or oppose UAW representation. Instead, Metaldyne and the UAW privately agreed that the union would represent St. Marys employees pursuant to their secret "partnership agreement."

Within days after Metaldyne designated the UAW as the exclusive representative of St. Marys employees, **over 50% of these employees** signed a showing of interest for a decertification election. (Id.). On December 23, 2003, Petitioners Sample and Krug filed petitions with NLRB Region 6 requesting that the NLRB conduct an election to determine whether the UAW had the uncoerced support of a majority of employees. On January 21, 2004, Regional Director Gerald Kobell dismissed without hearing the petitions for a decertification election, based solely upon the Board's voluntary recognition bar doctrine.

IV. ARGUMENT:

In granting the Requests for Review, the Board identified four criteria that provide compelling reasons to reconsider the "voluntary recognition bar" and the extent, if any, to which an employer's voluntary recognition of a union should be of "bar quality." Those four criteria are: 1) the increased use 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 employees' § 7 rights. 341 N.L.R.B. No. 150, at 1. Petitioners will address those criteria in order, as well as other criteria thereafter.

A.) THE INCREASED USE OF "VOLUNTARY RECOGNITION AGREEMENTS" COUNSELS IN FAVOR OF THE BOARD STRICTLY SCRUTINIZING THEM.

There are few issues more critical in modern labor law than neutrality and card check agreements, and the manner in which they are obtained and enforced. See, e.g., Charles I. Cohen, Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?, The Labor Lawyer, (Fall 2000); Roger C. Hartley, Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement, 22 Berkeley J. Emp. & Lab. L. 369 (2001); see also Andrew Strom, Rethinking the NLRB's Approach to Union Recognition Agreements, 15 Berkeley J. Emp. & Lab. L. 50 (1994). This is because their use has grown exponentially over the past decade, and the reasons are not surprising. Unions have faced a steady decline in the number of employees choosing union representation when given a free choice in a secret-ballot election. Financial self-interest has driven them to search for another way to acquire new dues paying members.[5] Many unions

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[5] The facts are well known: most unions are desperate for new dues paying members. In 2003, 12.9 % of wage and salary workers were union members, down from 13.3 % in 2002, according to the U.S. Department of Labor's Bureau of Labor Statistics. http://www.bls.gov/news.release/union2.nr0.htm (Jan. 21, 2004). The number of persons belonging to a union fell by 369,000 in 2003, to a total of 15.8 million. The union membership rate has steadily declined from a high of 20.1 % in 1983, the first year for which comparable union data is available. For example, in 1982, the Steelworkers union claimed 1.2 million members, but by 2002 the number was 588,000. In 1982 the UAW claimed 1.14 million members, by 2002 only 700,000. As of today, only 8.2% of the private sector workforce is unionized, and the other 91.8% do not appear to be flocking to join. IBM Corp., 341 N.L.R.B. No. 148, at 19 n.9 (2004). In UFCW Local 951 (Meijer, Inc.), 329 N.L.R.B. 730 (1999), Texas A & M labor economist Morgan O. Reynolds testified that the single largest factor hindering union organizing is *employee* resistance. According to Prof. Reynolds, polling data commissioned by the AFL-CIO indicates that 2/3 of employees are not favorably disposed towards unions. (Hearing Transcript, pp. 1382-83).

are attempting to increase their ranks by signing "voluntary recognition agreements" with employers and thereby eliminate employees' opportunity for a secret-ballot election.

The AFL-CIO's General Counsel has written that unions should "use strategic campaigns to secure recognition . . . outside the traditional representation processes." Jonathan P. Hiatt and Lee W. Jackson, Union Survival Strategies for the Twenty-First Century, Lab. L. J., Summer/Fall 1996, at 176. By design, there are fewer protections of employee rights "outside the traditional representation processes," and thus little possibility of employees exercising their rights to resist union organizing campaigns targeting them.

1. **Pre-negotiated Voluntary Recognition Agreements Threaten Employee Rights to Free Choice.**

A basic theory of the NLRA is that organizing is to occur "from the shop floor up." The Act envisions that unions will secure authorization cards from consenting employees, and either present those cards to the Board for an "RC" certification election, or, if a showing of interest by a majority is achieved, present them to the employer with a post-collection request for voluntary recognition. If the employer refuses (as is its legal right under Linden Lumber Division, Summer & Co. v. NLRB, 419 U.S. 301 (1974)), the union's proper course is to submit to an NLRB supervised secret-ballot election held under "laboratory conditions." General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

By contrast, union organizing under voluntary recognition agreements and "outside the traditional representation processes" occurs from the "top down." Unions organize *employers*, not employees, by coercing or coaxing the employers to agree in advance which particular union is to represent employees. The employer and its anointed union then work

together to achieve that result, irrespective of the employees' actual preference. For example, in the instant cases, both Dana and Metaldyne made an advance written selection of the UAW via their "partnership" agreements, and provided that favored union with significant assistance and advantages–**prior** to the union's solicitation of authorization cards.

Top-down organizing is repulsive to the central purposes of the Act. See Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 632 (1975) ("One of the major aims of the 1959 Act[6] was to limit 'top-down' organizing campaigns"); Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 663 n.8 (1982) ("It is undoubtedly true that one of the central aims of the 1959 amendments to the Act was to restrict the ability of unions to engage in top-down organizing campaigns.") (citations omitted). Top-down organizing tactics, such as the pre-negotiation of voluntary recognition agreements, create the potential for severe abuse of employees' § 7 rights. There is a long history of cases in which employers and unions have cut "back room deals" over recognition, and then pressured employees to "vote" for the favored union by signing authorization cards. See, e.g., Duane Reade, Inc., 338 N.L.R.B. No. 140 (2003), enforced, No. 03-1156, 2004 WL 1238336 (D.C. Cir. June 10, 2004) (employer unlawfully assisted UNITE and unlawfully granted recognition).[7] A common thread running through the many "improper recognition" cases

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[6] The "1959 Act" is the Labor Management Reporting and Disclosure Act of 1959.

[7] The cases where an employer conspired with its favored union to secure "recognition" of that union are legion. See, e.g., Fountain View Care Center, 317 N.L.R.B. 1286 (1995), enforced, 88 F.3d 1278 (D.C. Cir. 1996) (supervisors and other agents of the employer actively encouraged employees to support the union); NLRB v. Windsor Castle Healthcare Facility, 13 F.3d 619 (2d Cir. 1994), enforcing 310 N.L.R.B. 579 (1993) (employer provided sham

(continued...)

compiled in note 7, supra, is that the favored union did not first obtain an uncoerced showing of interest from employees and thereafter ask for voluntary recognition from the employer. The explosive growth of voluntary recognition agreements thereby makes Board scrutiny and reversal of the "voluntary recognition bar" necessary.

2. The Board's Voluntary Recognition Bar Policy Threatens to Render the NLRA's Representational Procedures Irrelevant and Unusable in the Current Age of Voluntary Recognition Agreements.

The continued viability of the Board's representation machinery is **directly** at issue in these cases. Unions and employers are taking advantage of the Board's current voluntary recognition bar policy by entering into voluntary recognition agreements that render it virtually impossible for the NLRB to conduct secret-ballot elections. The NLRB must not permit self-interested employers and unions to render the representation procedures of § 9 unusable and irrelevant, and deny the Board its supervisory role in the union selection (or

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[7](...continued)
employment to union organizers and assisted their recruitment efforts); Kosher Plaza Super Market, 313 N.L.R.B. 74, 84 (1993); Brooklyn Hospital Center, 309 N.L.R.B. 1163 (1992), aff'd sub nom. Hotel, Hosp., Nursing Home & Allied Servs., Local 144 v. NLRB, 9 F.3d 218 (2nd Cir. 1993) (employer permitted local union, which it had already recognized as an exclusive bargaining representative, to meet on its premises for the purpose of soliciting union membership); Famous Casting Corp., 301 N.L.R.B. 404, 407 (1991) (employer actions unlawfully supported union and coerced the employees into signing authorization cards); Systems Mgmt, Inc., 292 N.L.R.B. 1075, 1097-98 (1989), remanded on other grounds, 901 F.2d 297 (3d Cir. 1990); Anaheim Town & Country Inn, 282 N.L.R.B. 224 (1986) (employer actively participated in the union organizational drive from start to finish); Meyer's Cafe & Konditorei, 282 N.L.R.B. 1 (1986) (employer invited union it favored to attend hiring meeting with employees); Denver Lamb Co., 269 N.L.R.B. 508 (1984); Banner Tire Co., 260 N.L.R.B. 682, 685 (1982); Price Crusher Food Warehouse, 249 N.L.R.B. 433, 438-49 (1980) (employer created conditions in which the employees were led to believe that management expected them to sign union cards); Vernitron Elec. Components, 221 N.L.R.B. 464 (1975), enforced, 548 F.2d 24 (1st Cir. 1977); Pittsburgh Metal Lithographing Co., 158 N.L.R.B. 1126 (1966).

rejection) process.

Two provisions of these secret "partnership" agreements operate to preclude the use of the Board's procedures. First, Dana and Metaldyne are required to "voluntarily" recognize the UAW on the basis of authorization cards, without an NLRB election. This automatically waives both the employer's and union's right to request a Board-supervised election. See Central Parking, 335 N.L.R.B. 390 (2001); Verizon Info. Sys., 335 N.L.R.B. 558 (2001). Employer recognition also blocks employee petitions under the "recognition bar."

Second, the UAW's "partnership" agreements establish a "binding interest arbitration" procedure that imposes a collective bargaining agreement if an agreement is not reached after six months.[8] This provision effectively ensures that a contract will be signed during the period of the voluntary recognition bar, at least as currently constituted. See e.g., MGM Grand Hotel, Inc., 329 N.L.R.B. 464 (1999) (bar can last one year or more). After this contract is signed, the Board's "contract bar" rules then apply to preclude an election for another three years. See Waste Mgmt., 338 N.L.R.B. No. 155 (2003).

Thus, under current Board policy, the UAW's "partnership" agreements with Dana and Metaldyne block election petitions because (1) employer recognition triggers the voluntary recognition bar; (2) the "binding interest arbitration" procedures ensure that a collective bargaining agreement is signed before the voluntary recognition bar expires; and (3) the signing of the collective bargaining agreement triggers the "contract bar," which bars

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[8] See http://www.uaw.org/news/newsarticle.cfm?ArtId=204, the UAW's press release announcing the Dana "partnership" agreement and stating that "Dana and the UAW also agreed to binding arbitration if a first contract is not reached within six months."

petitions for another three years. Under this regime, it is **impossible** for any party (employee, union or employer) to obtain a secret-ballot election for close to four years. Unless the Board changes current policy, its representational machinery is unusable and irrelevant.[9]

Voluntary recognition agreements cut the Board out of other aspects of the union selection process. For example, the agreements allow the union to gerrymander the unit to include union supporters and exclude union opponents, thereby removing the Board from the unit determination process. (See Declaration of Lori Yost).

Finally, voluntary recognition agreements often preclude the Board from determining whether particular organizing conduct is lawful or not, as most such agreements forbid any post-selection disputes to be brought to the Board.[10] The result is that important challenges and objections concerning the conduct of the "card check elections" (as the UAW

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[9] This is hardly a "temporary" bar to employees' free choice rights, as asserted by the dissenting NLRB members in Dana, 341 N.L.R.B. No. 150, at 2.

[10] Despite their requests, the Petitioners have never been given a copy of the secret "neutrality" agreements negotiated between the UAW and their respective employers. (See Declarations of Clarice Atherholt and Lori Yost). However, the UAW's "model" neutrality agreement, which can be accessed at http://www.nrtw.org/d/uawna.pdf, contains the following clause:

> K. Any alleged violations of this agreement, including any disputes such as conduct during an organizing campaign, voter eligibility, definition of the appropriate unit, etc., will be resolved by a decision of the arbitrator on an expedited basis rendered not later than twenty-one (21) days after the party's demand for arbitration. Both parties agree to request an immediate hearing and a bench decision as to any alleged violation of this agreement. The designated arbitrator shall have complete authority to remedy any violations of this agreement, including the authority to certify the results of any card-check or election and to order _____ to immediately recognize and bargain with the Union at the Union's request based on authorization cards or election petition signatures showing that a majority of _____ employees in the relevant bargaining unit have selected the UAW as their collective bargaining representative. The arbitrator's decision shall be final and binding on the parties.

euphemistically calls them) are not heard by the Board, no matter how coercive the conduct. This leads to incongruous results such as that demonstrated in Service Employees International Union v. St. Vincent Medical Center, 344 F.3d 977 (9th Cir. 2003). There, a union lost an NLRB supervised secret-ballot election, but was nevertheless able to force an employer to "arbitrate" before a private arbitrator over purported objectionable election conduct. The purported "objections" of the SEIU union could have been–and clearly should have been–filed with the Board under its Rules and Regulations. Instead, the Board was cut out of post-elections proceedings **in a Board supervised election**!

Such results show the insidious nature of many "voluntary recognition agreements." In effect, private parties can now repeal, at their mutual discretion, all of the Board's Rules and Regulations related to elections and post-election challenges and objections. The Board has no role in any of this, and, apparently, neither do the individual employees whose rights are at stake whenever a union is being selected.

The union strategy of eliminating the NLRB from its proper role in determining representational issues through use of voluntary recognition agreements is having its intended effect. The Board is increasingly cast aside and prevented from making labor law policy and overseeing private sector labor relations. The number of representation elections held by the NLRB in 2003 decreased to 2,333 from 2,723 in 2002, continuing a sharp decline in NLRB elections since 1996, when about 3,300 were conducted. See Daily Labor Reporter Online, Union Representation Elections, June 8, 2004. The number of eligible voters in representation elections fell to 148,903 in 2003 from 191,319 in 2002. (Id.).

The Board should not (and cannot) abdicate its statutory duties to the self-interested desires of unions and employers. Congress empowered **the NLRB** to administer the NLRA and decide representational matters. See 29 U.S.C. §§ 153, 154, 159-161. The Board is thereby charged with the responsibility of protecting employee rights under § 7 of the Act, see, e.g., Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992), and with administering § 9 of the Act. See 29 U.S.C. § 159.

> In election proceedings, it 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.

General Shoe Corp., 77 N.L.R.B. at 127 (emphasis added); see also NLRB v. Sanitary Laundry, 441 F.2d 1368, 1369 (10th Cir. 1971) (Section 9 of the Act imposes on the Board "the broad duty of providing election procedures and safeguards"). The NLRB must not sit passively on the sidelines and allow its representational processes to become irrelevant. See e.g., Charles I. Cohen, Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?, The Labor Lawyer (Fall 2000).

In short, the increased usage of "recognition agreements" permits employers and unions to strip employees of their § 7 rights and their statutory right to a decertification election, and erases the Board from the process of employees selecting (or rejecting) a union. These practices must be halted.

B.) THE VARYING CONTEXTS IN WHICH A RECOGNITION AGREEMENT CAN BE REACHED COUNSEL IN FAVOR OF THE BOARD STRICTLY SCRUTINIZING THEM.

Employer recognition of a union pursuant to a voluntary recognition agreement is not an "arm's length" determination that necessarily reflects the free choice of employees. Instead, it reflects the intersection of the employer and union self-interests. As such, employer recognition of a union pursuant to a voluntary recognition agreement should not be considered of "bar quality." Employees and the NLRB must retain the ability to test such recognition through a secret-ballot election.

Unions seek voluntary recognition agreements to satisfy their self-interest in acquiring more dues paying employees to replenish their rapidly diminishing ranks. See note 5, supra. Every newly organized facility brings more members into the union, more money into union coffers through compulsory dues payments, and places more power in the hands of union officials.[11]

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[11] In UFCW Local 951 (Meijer, Inc.), 329 N.L.R.B. 730, 732, 734-35 (1999), the UFCW unions and the Board majority relied upon the expert testimony of a labor economist, Professor Paula Voos. Professor Voos has written that unions seek to organize for a whole host of reasons, including union leaders' desire for political aggrandizement and power; monetary self-interest of union leaders to keep and enhance their own jobs and wages; and the perceived "social idealism" and "ideological gains" brought about by union organizing. *See* Paula Voos, Union Organizing Costs and Benefits, 36 Indus. & Lab. Rel. Rev. 576, 577 (July 1983). Professor Voos also wrote that organizing is a profit-making venture for many unions. Id. & n.5. For example, she recognized that unions often organize larger units precisely because that is "where the money is!" Id. at 578 n.8.

Unions obtain voluntary recognition agreements from employers with a combination of the "stick" and the "carrot." The "stick" often includes "corporate campaigns" against the employer,[12] the use of secondary pressure,[13] and the enlistment of state or local governments to force private employers to sign voluntary recognition agreements with a favored union as a condition of doing business with the governmental entity.[14] The "carrot" includes pre-

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[12] It is well documented that these corporate campaigns include, inter alia, baseless lawsuits, unfavorable publicity to cast the employer in an evil light and pressure by so-called "community activists." See Daniel Yager and Joseph LoBue, Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century, 24 Employee Rel. L. J. 21 (Spring 1999); Symposium: Corporate Campaigns, 17 J. of Lab. Res., No. 3 (Summer 1996); Herbert R. Northrup & Charles H. Steen, Union 'Corporate Campaigns' as Blackmail: the RICO Battle at Bayou Steel, 22 Harv. J. L. & Pub. Policy 771 (1999).

[13] See e.g., Pittsburgh Fulton Renaissance Hotel, No. 6-CE-46, at 5 (N.L.R.B. G.C. Feb. 7, 2002) (Division of Advice finds that provision of neutrality agreement that "does not permit the Employer to lease, contract or subcontract its operations . . . to any person unless that person agrees to neutrality, access, voluntary recognition, card-check, no-strike/no-lockout, etc. provisions of the neutrality agreement" violates § 8(e), but advises against issuing a complaint because it is time-barred under § 10(b)); International Union UAW, 7-CE-1786 et al. (case pending before General Counsel alleging that the UAW has § 8(e) agreement with auto manufacturers to not do business with automobile parts suppliers that do not sign voluntary recognition agreements with UAW); Heartland Indust. Partners (USWA), 8-CE-84 (case pending before General Counsel alleging that the USWA has § 8(e) agreement with an investment company that requires the company to not do certain business with employers that refuse to sign the USWA neutrality agreement).

[14] See Aeroground, Inc. v. City & County of San Francisco, 170 F. Supp. 2d 950 (N.D. Cal. 2001) (San Francisco Airport Authority mandate that private concessionaires who wished to lease space at the airport had to first sign a neutrality agreement preempted); Chamber of Commerce v. Lockyer, 364 F.3d 1154 (9th Cir. 2004) (California statute that forbids employers who receive state grants or funds from using such funds to advocate against or in favor of union organizing is preempted); H.E.R.E. Local 57 v. Sage Hospitality Resources LLC, 299 F. Supp. 2d 461 (W.D. Pa. 2003), appeal pending, No. 03-4168 (3d Cir.) (City of Pittsburgh pressured hotel operator to sign a neutrality and card check agreement as a condition of approving the public financing necessary to complete its project, even directing the hotel operator to contact specific HERE officials to negotiate this mandatory arrangement).

negotiating terms and conditions of employment favorable to the employer that will come into effect with the union's successful organizing of employees. See Majestic Weaving Co., 147 N.L.R.B. 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2d Cir. 1966).[15]

Employers similarly have a wide variety of self-interested business reasons to enter into voluntary recognition agreements. This primarily includes avoiding the "stick" of union pressure tactics, and/or obtaining the "carrot" of favorable future collective bargaining agreements, as discussed above. Other reasons for which employers have assisted union organizing drives include: (1) the desire to cut off the organizing drive of a less favored union, see Price Crusher Food Warehouse, 249 N.L.R.B. 433 (1980); (2) the existence of a favorable bargaining relationship with the union at another facility, see Brooklyn Hosp. Center, 309 N.L.R.B. 1163 (1992), aff'd sub nom. Hotel, Hosp., Nursing Home & Allied Servs., Local 144 v. NLRB, 9 F.3d 218 (2d Cir. 1993); or (3) a bargaining chip during

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[15] Here, for example, by agreeing to binding interest arbitration in the agreements, the UAW sacrificed the right of Dana and Metaldyne employees to strike or engage in work actions to support bargaining demands. This is a major concession at the expense of employees, as it destroys employee bargaining leverage to obtain favorable terms and conditions of employment. "The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms." NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967); see also Pattern Makers League v. NLRB, 473 U.S. 95, 129 (1985) ("The strike or the threat to strike is the workers' **most effective** means of pressuring employers, and so lies at the center of the collective activity protected by the Act.") (emphasis added).

Indeed, most "neutrality and card check" arrangements are thinly disguised "bargaining to organize" schemes, wherein union officials commit to act in a manner favorable to management interests in exchange for employer assistance with gaining and maintaining control over employees. The media has noted the UAW's proclivity to make wage and benefit concessions in exchange for employer assistance with organizing more employees via "neutrality agreements." "UAW Trades Pay Cuts for Neutrality," http//www.labornotes.org/archives/2003/07/c.html and http//www.labornotes.org/archives/2003/10/b.html.

negotiations regarding other bargaining units, see Kroger Co., 219 N.L.R.B. 388 (1975).

As is self-evident, none of these union or employer motivations for entering into voluntary recognition agreement takes into account the employees' § 7 interests. Unions and employers seek and enter into these agreements to satisfy their own self-interests, not to facilitate the free and unfettered exercise of employee free choice.

For this reason, the Board cannot blindly defer to employer and union determinations regarding employees' representational preferences under a voluntary recognition agreement by attributing "bar quality" to such recognition.

> The Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one. There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom.

Auciello Iron Works v. NLRB, 517 U.S. 781, 790 (1996)[16]; see also Levitz Furniture Co., 333 N.L.R.B. 717 (2001) (employer determinations as to employee support or opposition to union representation disfavored); Underground Service Alert, 315 N.L.R.B. 958, 960-61 (1994) (same). As the Supreme Court long ago recognized, deferring to even a "good-faith" employer determination that a union has majority employee support "would place in **permissibly careless employer and union hands** the power to completely frustrate employee realization of the premise of the Act--that its prohibitions will go far to assure

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[16] Note that the UAW is not the Petitioners' "certified union," see Brooks v. NLRB, 348 U.S. 96, 101 (1954) ("certification could only be granted as the result of an election"), but Petitioners are nevertheless barred from filing a "decertification petition" because of the Board's current voluntary recognition bar.

freedom of choice and majority rule in employee selection of representatives." International Ladies Garment Workers v. NLRB, 366 U.S. 731, 738-39 (1961) (emphasis added).

This lesson was recently reiterated in Nova Plumbing, Inc. v. NLRB, 330 F.3d 531 (D.C. Cir. 2003). There, the Board deferred to a contractual agreement between an employer and union stating that the union had majority employee support, without independently verifying the truth of that assertion. The D.C. Circuit reversed, holding that "[b]y focusing exclusively on employer and union intent, the Board has neglected its fundamental duty to protect employee section 7 rights, opening the door to even more egregious violations than the good faith mistakes at issue in International Ladies Garment Workers." Id. at 537.

The Board's current "voluntary recognition bar" policy – which dismisses employee election petitions whenever an employer and union aver that the recognition was based on majority employee support – repeats the folly identified in International Ladies Garment Workers and Nova Plumbing. The Board's failure to conduct a secret-ballot election and determine for itself whether the employer-recognized union actually commands the support of a majority of employees places fundamental employee rights in "permissibly careless employer and union hands." International Ladies Garment Workers, 366 U.S. at 738-39.

Here, employees' § 7 interests were simply not a part of the calculation of the UAW, Dana and Metaldyne in reaching and executing their "partnership agreements." Petitioners and their fellow employees were not asked if they wanted a "card-check" instead of a secret-ballot election, if they approved of their names and addresses being turned over to UAW organizers, if they wished to waive their right to strike, if they desired a binding interest

arbitration procedure, or if they wanted their employers gagged. See Declarations of Clarice Atherholt and Lori Yost. Instead, these decisions were made for them by Respondents, who were each pursuing its own selfish agenda.

In short, the varying contexts in which "voluntary recognition agreements" are reached–often in a secret "back room" and without regard to employee interests–counsel strongly in favor of strict Board scrutiny.

C.) THE SUPERIORITY OF BOARD SUPERVISED SECRET-BALLOT ELECTIONS IS BEYOND DISPUTE.

1. Secret Ballot Elections Are the Act's Preferred Method for Determining the Representational Preferences of Employees.

Congress created the NLRA's statutory representation procedures to determine whether employees support or oppose representation by a particular union. Accordingly, the Supreme Court has long recognized that Board supervised secret-ballot elections are the preferred method for gauging whether employees desire union representation. See Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 304, 307 (1974); NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969) ("secret elections are generally the most satisfactory--indeed the preferred--method of ascertaining whether a union has majority support"); Brooks v. NLRB, 348 U.S. 96 (1954) ("an election is a solemn and costly occasion, conducted under safeguards to voluntary choice"). The Board and the lower courts similarly "emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions." Levitz Furniture, 333 N.L.R.B. at 723, citing Gissel, 395 U.S. at 602; Underground Serv. Alert, 315 N.L.R.B. at 960; NLRB v. Cornerstone Blders., Inc., 963 F.2d

1075, 1078 (8th Cir. 1992).

Because NLRB-conducted secret-ballot elections are the best means to effectuate employee free choice as to union representation, it is imperative that the Board favor and encourage this option. After all, it is employee free choice that must be granted the greatest weight in any analysis, as the fundamental and overriding principle of the Act is "voluntary unionism." Pattern Makers League v. NLRB, 473 U.S. 95, 104-07 (1985); see also Rollins Transp. Sys., 296 N.L.R.B. 793, 793 (1989) (emphasis added) ("The **paramount concern** . . . must be the employees' right to select among two or more unions, or indeed to choose none.") (emphasis added).

Even the UAW and its allies admit that NLRB supervised secret-ballot elections are superior to "card checks" in establishing the true choice of the uncoerced majority. For example, the AFL-CIO recently argued to this Board that employee petitions and cards advocating decertification "are not sufficiently reliable indicia of the employees' desires," and that employees and employers should only be able to remove a union pursuant to a secret-ballot election. See Brief of the AFL-CIO to the NLRB in Chelsea Industries & Levitz Furniture Co., No. 7-CA-36846, at 13 (May 18, 1998).[17]

Fully recognizing this principle, the Board has held that non-electoral evidence of employee support–even if untainted by any unfair labor practices–is not as reliable as an

[17] Clearly, labor union officials are not advocating employer determinations based on cards or petitions because these officials sincerely believe that this method reflects employee sentiment more reliably than a Board supervised secret-ballot election. Rather, they advocate the "card check recognition" process solely to advance their self-serving interests.

election in gauging employee support for a union. In Underground Service Alert, 315 N.L.R.B. 958 (1994), the Board was confronted with a situation where a majority of employees voted for union representation in a decertification election. However, well before the election results were known, a solid majority of employees delivered a signed petition to their employer making clear that they did not support union representation. The employer withdrew recognition. Even though the investigation revealed no "impropriety, taint, factual insufficiency, or unfair labor practice of any type with respect to this employee petition," id. at 959, the Board held that the employer violated § 8(a)(5) of the Act because the election results were a far superior indication of employee wishes. The employee petition was considered a "less-preferred indicator of employee sentiment," particularly as compared to "the more formal and considered majority employee preference for union representation which was demonstrated by the preferred method–the Board-conducted secret-ballot election." Id. at 961.[18]

> One of the attributes of Board-conducted elections that make them a more reliable indicator of employee choice is that they provide, through the objection and challenge procedures, an orderly and fair method for presentation and reasoned resolution of questions concerning the fairness of the process and whether particular individuals are eligible to have their preferences on union representation counted.

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[18] The Board in Underground Service Alert quoted with approval Member Oviatt's accurate observation that:

> The election, typically, also is a more reliable indicator of employee wishes 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 will not necessarily be available to an employee confronted with a request to sign a petition rejecting the union. No one disputes that a Board-conducted election is much less subject to tampering than are petitions and letters.

Id. at 960, quoting W.A. Krueger Co., 299 N.L.R.B. 914, 931 (1990) (Member Oviatt, concurring in part and dissenting in part).

Id. at 960.

That the superiority of secret-ballot elections could require extended argument is itself remarkable. Every American understands instinctively that such elections are the cornerstone of any system that purports to be democratic. Accordingly, any claim by the UAW or its amici that unions are "saving industrial democracy" by eliminating the secret-ballot election should be greeted with the incredulity such a proposition deserves.

2. Conduct That Would be Considered Objectionable and Coercive in a Secret Ballot Election Is Inherent in a "Card Check" Campaign.

In secret-ballot elections, the Board provides a "laboratory" in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. See General Shoe Corp., 77 N.L.R.B. 124, 127 (1948); see also NLRB v. Sanitary Laundry, 441 F.2d 1368, 1369 (10th Cir. 1971); Gissel Packing, 395 U.S. at 601-02. In contrast, the fundamental purpose and effect of a "voluntary recognition agreement" is to **eliminate** Board-supervised "laboratory conditions" protecting employee free choice, and to substitute a system in which unions and employers have far greater leeway to pressure employees to accept union representation.

The contrast between the rules governing a Board supervised secret-ballot election and the "rule of the jungle" governing "card checks" could not be more stark. In an NLRB-supervised secret-ballot election, certain conduct that does not rise to the level of an unfair labor practice has been found to violate employee free choice and warrant overturning an election. General Shoe, 77 N.L.R.B. at 127. Yet, a union engaging in the same conduct can lawfully attain the status of exclusive bargaining representative in a "card check" campaign

under current Board policy.[19] Worse still, some conduct that is objectionable in a secret-ballot election is inherent to any card check!

For example, in an NLRB-supervised secret-ballot election, the following conduct has been held to upset the laboratory conditions necessary to guarantee employee free choice, thus requiring the invalidation of the election: (a) electioneering activities, or even prolonged conversations with prospective voters, at or near the polling place;[20] (b) speechmaking by a union or employer to massed groups or captive audiences within 24 hours of the election;[21] and (c) a union or employer keeping a list of employees who vote as they enter the polling place (other than the official eligibility list).[22]

Yet, this conduct occurs in almost **every** "card check campaign." When an employee signs (or refuses to sign) a union authorization card, he is not likely to be alone. To the contrary, it is likely that this decision is made in the presence of one or more union organizers

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[19] Because employees' § 7 rights to choose a union or refrain are put to the test in **both** Board elections and card check recognition situations, the safeguards in both should be equal. Petitioners urge the Board to change existing policy and require that any employer recognition of a union outside of Board processes must be done pursuant to "laboratory conditions," or be invalid upon challenge.

[20] See Alliance Ware, Inc., 92 N.L.R.B. 55 (1950) (electioneering activities at the polling place); Claussen Baking Co., 134 N.L.R.B. 111 (1961) (same); Bio-Medical Applications, 269 N.L.R.B. 827 (1984) (electioneering among the lines of employees waiting to vote); Pepsi Bottling Co., 291 N.L.R.B. 578 (1988) (same).

[21] Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

[22] Piggly-Wiggly, 168 N.L.R.B. 792 (1967).

soliciting the employee to sign a card, and thereby "vote" for the union.[23] This solicitation could occur during or immediately after a union mass meeting or a company-paid captive audience speech. In all cases the employee's decision is not secret, as in an election, because the union clearly has a list of who has signed a card and who has not. (See Declarations of Clarice K. Atherholt and Lori Yost).

Indeed, once an employee has made the decision "yea or nay" by voting in a secret ballot election, the process is at an end. By contrast, a choice against signing a union authorization card does not end the decision-making process for an employee in the maw of a "card check drive," but often represents only the beginning of harassment and intimidation for that employee. (See Declaration of Clarice Atherholt, ¶ 5, stating that "many employees signed the cards just to get the UAW organizers off their back, not because they really wanted the UAW to represent them").

A very recent Board decision demonstrates that conduct inherent in all card check drives would be objectionable and coercive if done during a secret-ballot election. In Fessler & Bowman, Inc., 341 N.L.R.B. No. 122 (May 12, 2004), the Board announced a prophylactic rule that prohibits union officials from performing the ministerial task of handling a sealed

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[23] The Board's justification for prohibiting solicitation immediately prior to employee voting in a secret-ballot election is fully applicable to the situation of an employees making a determination as to union representation in a card check drive.

> The final minutes before an employee casts his vote should be his own, as free from interference as possible. Furthermore, the standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter.

Milchem, Inc., 170 N.L.R.B. 362, 362 (1968). Union soliciting and cajoling employees to sign authorization cards is incompatible with this rationale.

secret ballot–even absent a showing of tampering–because, where "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." 341 N.L.R.B. No. 122, at 2.

In the UAW's "card checks," the union officials do much more than merely handle a sealed secret ballot as a matter of convenience to one or more of the employees. In these cases, UAW officials directly solicit the employees to sign an authorization card (and thereby cast their "vote"), stand over them as they "vote," know with certainty **how** each individual employee "voted," and then physically collect, handle and tabulate these purported "votes." (Declarations of Clarice K. Atherholt and Lori Yost). The coercion inherent in this conduct is infinitely more real than the theoretical taint found to exist in Fessler & Bowman.

Accordingly, even a card-check drive devoid of conduct that may constitute an unfair labor practice does not approach the "laboratory conditions" guaranteed in a Board-conducted election.[24] The superiority of Board supervised secret-ballot elections for protecting employee free choice is beyond dispute. It is, therefore, incongruous for the Board to apply the unyielding voluntary recognition bar to card check recognitions, because the lack of integrity inherent in such card checks would surely taint a Board election held under similar circumstances.

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[24] The Board knows well that many "card check drives" are fraught with union coercion, intimidation and misrepresentations that do not necessarily amount to unfair labor practices. See HCF Inc., 321 N.L.R.B. 1320 (1996) (union "not responsible" for threats to employee by authorization card solicitor that "the union would come and get her children and it would also slash her tires"); Levi Strauss & Co., 172 N.L.R.B. 732, 733 (1968) (employer was ordered to recognize the union even though the Board had evidence of union misrepresentations to employees as to the purpose and effect of signing authorization cards).

D.) EMPLOYEES' § 7 RIGHTS ARE PARAMOUNT UNDER THE ACT.

Employee free choice under § 7 is the paramount interest of the NLRA. See Pattern Makers League v. NLRB, 473 U.S. 95 (1985); Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992); Lee Lumber & Bldg. Material Corp. v. NLRB, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (employee free choice is the "core principle of the Act") (citations omitted). An NLRB conducted secret-ballot election is the preferred forum for employees to exercise their right of free choice. See Levitz Furniture Co., 333 N.L.R.B. 717, 725 (2001) ("We agree with the General Counsel and the unions that Board elections are the preferred means of testing employees' support.").

Any notion that the fundamental purpose of the NLRA is to increase the membership ranks of labor organizations is false. The Act exists to enable employees to freely *choose* union representation, or freely *reject* union representation. It does not favor one choice over the other.[25] As Member Brame has cogently stated, the Board must be mindful that "unions exist at the pleasure of the employees they represent. Unions **represent** employees; employees do not exist to ensure the survival or success of unions." MGM Grand Hotel, Inc.,

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[25] Section 7 of the Act could not be more clear: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the *right to refrain from any or all such activities.*" (emphasis added). Similarly, § 8(a)(3) precludes "discrimination in regard to hire or tenure of employment or any term or condition of employment to *encourage or discourage* membership in any labor organization." (emphasis added). With regard to representational proceedings, § 9 grants employees the right to file an election petition "alleging that a substantial number of employees (i) wish to be represented for collective bargaining . . . *or* (ii) assert 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 as defined in section 9(a)." 29 U.S.C. § 159(c) (emphasis added).

Id. at 772 (citations omitted) (emphasis added).[26] The Board further "observe[d] that the fundamental statutory policy of employee free choice has paramount value, even in times of economic change." Id. at 775.

That collective bargaining is predicated on the exercise of employee free choice is proven by the fact that the Act does **not** favor "collective bargaining" between an employer and a union that **lacks** the majority support. See International Ladies Garment Workers v. NLRB, 366 U.S. 731, 737 (1961) ("There could be no clearer abridgment of § 7 of the Act" than for a union and employer to enter a collective bargaining relationship when a majority of employees do not support union representation); Majestic Weaving Co., 147 N.L.R.B. 859, 860-61 (1964) (employer negotiating with minority union unlawful even if conditioned upon union obtaining majority support in the future).

Since collective bargaining is predicated on employee free choice, the Act's policy of promoting stable collective bargaining relationships favors secret-ballot elections to determine the free choice of employees. Unless and until the NLRB holds an election to determine whether employees truly support or oppose union representation, the interest of "encouraging the practice and procedure of collective bargaining" cannot be fulfilled, since the employer-recognized union may in fact lack majority employee support.[27]

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[26] Moreover, MV Transportation recognized that if there is a conflict, Petitioners' statutory rights under §§ 7 and 9(c)(1)(A)(ii) must take precedence over lesser policies of "stable collective bargaining." Id. at 772.

[27] It is for this reason that the interest in "encouraging . . . collective bargaining" cannot support the Board's current voluntary recognition bar policy, as the bar prevents the Board from determining if the employer-selected union has majority employee support. Without such a

(continued...)

This was demonstrated in Rollins Transportation System, 296 N.L.R.B. 793 (1989), where an employer recognized a particular union even though there was conflicting evidence as to whether employees truly supported that union.[28] The Board recognized that the overriding interest at issue was "employees' Section 7 rights to decide **whether** and by whom to be represented." Id. at 794 (emphasis added). Accordingly, the Board wisely declined to defer to the employer's determination as to whether and by whom the employees should be represented, as that would "impose a collective bargaining representative on the employees on the basis of the employer's action rather than the employees' free choice." Id. Instead, the Rollins Board recognized that "[a] Board election is the arena for exercise of the employee's right to free choice, a right closely guarded by the Act," and ordered that an election be held. Id. at 793.

Similarly here, where over 30% of the employees signed a showing of interest supporting a decertification election after their employer selected a particular union as the exclusive bargaining representative, the Board should conduct a secret-ballot election to protect and facilitate the Act's paramount interest in employee free choice.

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[27](...continued)
determination, there is no interest in preserving the stability of a union-employer bargaining relationship that may be unlawful.

[28] The same is true here. Shortly after recognition over 50% of the employees in the Metaldyne case signed a petition against UAW representation, and over 35% of employees signed such a petition in the Dana case.

V. RESPONSE TO THE DISSENT:

The dissenting opinion of Members Liebman and Walsh, opposing the Order Granting Review, suffers at least two fatal flaws. First, the dissent's argument is rooted in the assumption that an employer designating a particular union as the representative of its employees automatically means that an uncoerced majority of employees actually supported union representation at the time of employer recognition. Not only is this assumption unwarranted, it is an assumption regarding the ultimate question at issue: does the employer-recognized union, the UAW, actually have the uncoerced support of a majority of employees? An election is necessary to answer this question.

Second, in an unintended acknowledgment that its initial assumption is false, the dissent recognizes that an employer-recognized union's claim to uncoerced majority support can be tested through unfair labor practice proceedings. But this merely begs the question: if the existence of uncoerced majority support for an employer-selected union can be tested through unfair labor practice proceedings, why can't employees and the NLRB test the same question through representational proceedings? After all, electoral procedures are the Act's preferred method for evaluating employee support (or lack thereof) for union representation.

A.) DESPITE THE "VOLUNTARY RECOGNITIONS" THAT WERE GRANTED IN THESE CASES, THE BOARD DOES NOT KNOW THE ACTUAL REPRESENTATIONAL PREFERENCES OF THE DANA AND METALDYNE EMPLOYEES.

The dissent of Members Liebman and Walsh begins with the assertion that an employer may voluntarily recognize a union. See 341 N.L.R.B. No. 150, at 2-3; see also id.

at 4 ("voluntary recognition of **a majority union** is not only permissible but encouraged") (emphasis added). The dissent then jumps to the proposition that the voluntary recognition bar is proper because an employer and a union that enjoys majority employee support should be permitted a reasonable time to bargain. "The recognition bar doctrine is consistent with the long-settled principle 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. . . .'" Id. at 3 (emphasis added), quoting Franks Bros. Co. v. NLRB, 321 N.L.R.B. 702, 705-06 (1944).

The dissent's underlying assumption (and the underlying assumption of the voluntary recognition bar) is that the employer-recognized union **actually** had the support of an uncoerced majority of employees at the time of recognition. In seeking to apply the voluntary recognition bar in this case, the dissent simply accepts as a matter of faith that the UAW is a "majority union," and that the bargaining relationship was "rightfully established." This unwarranted assumption is the fatal flaw in both the dissent's argument, and the voluntary recognition bar itself.

The overarching question in this case is **whether** the employer-recognized union, the UAW, actually has the uncoerced support of a majority of employees. Petitioners request an election to answer precisely this question. The dissent's contention that elections are inappropriate based on the assumption that the UAW enjoys the uncoerced support of a majority of employees is logically untenable, as it assumes the answer to the very question posed.

The dissent's assumption is also wholly unwarranted. When the Board imposes the "voluntary recognition bar," it does not know if the employer-recognized union truly has the uncoerced support of a majority employees. Here, **the NLRB** has never determined whether a majority of employees at Dana and Metaldyne desire representation by the UAW. **The NLRB** has never investigated the circumstances under which Dana and Metaldyne hand-picked and then recognized the UAW, to determine if rights guaranteed to employees by the NLRA were trampled, or if employees were permitted to make their choices under "laboratory conditions." **The NLRB** simply has no idea of the uncoerced desires of the majority of Dana and Metaldyne employees with regard to UAW representation.

The most that can be said is that an employer (e.g., Dana or Metaldyne) designated a particular union (the UAW) as the representative of its employees pursuant to a "partnership agreement" and based upon what it avers was a showing of majority support. However, "[t]he fact that an employer bargains with a union does not tell us whether the employees wish to be represented by the union." Levitz Furniture, 333 N.L.R.B. at 567, n.2 (Member Hurtgen, concurring); see also International Ladies Garment Workers, 366 U.S. at 731 (employer negotiated with minority union based on erroneous good faith belief that union had majority support of employees).

The Board cannot blindly trust self-interested determinations made by employers and unions as to the wishes of employees, particularly when such determinations are made pursuant to pre-arranged "partnership agreements." See "Argument," Section IV (B), infra at pp. 19-24. Indeed, the fact that even a "card check" campaign unmarred by unfair labor

practices still falls far short of the "laboratory conditions" necessary to guarantee employee free choice in a secret-ballot election further counsels against the Board simply assuming that an employer's recognition of a union automatically proves that a majority of employees desire union representation. See "Argument," Section IV(C)(2), infra at pp. 27-30 (citing reasons and authorities).

In fact, the Board would not be faithful to its statutory duties under the Act if it blindly deferred to employer and union determinations as to the representational preferences of employees. Congress empowered **the NLRB** to administer the Act and decide representational matters. See 29 U.S.C. §§ 153-154, 159-161. The Board is charged with the responsibility of protecting employee rights under § 7 of the Act, see, e.g., Lechmere, 502 U.S. at 532, and with determining and ensuring that employees' representational wishes are realized under § 9 of the Act. See 29 U.S.C. § 159; General Shoe Corp., 77 N.L.R.B. 124, 127 (1948); see also "Argument," Section IV(A)(2), infra at pp. 14-18. The Board cannot delegate this duty to self-interested employers who anoint favored unions with special privileges and secret agreements.

Inadvertently, the dissent recognized the fallibility of employer determinations regarding employee representational preferences by noting that "the Act provides recourse for employees who believe their employer recognized a union that lacks uncoerced majority support" in the form of unfair labor practice charges under § 8(a)(2). 341 N.L.R.B. No. 150 at 4. The dissent thereby recognizes, as it must, that an employer may voluntarily recognize a **minority** union. See, e.g., Duane Reade, Inc., 338 N.L.R.B. No. 140 (2003), enforced, No.

03-1156, 2004 WL 1238336 (D.C. Cir. June 10, 2004). It is inconsistent for the dissent to discount this possibility when arguing for the voluntary recognition bar, and then simply assume that employer recognition automatically reflects actual employee free choice.

Here, the Board could not reasonably assume that Metaldyne and Dana's designations of the UAW as the representative of their employees necessarily reflects employee free choice. The employers and the UAW declared themselves to be "partners" well before employees had any say in the matter. An organizing campaign was conducted against these employees under conditions that fell far short of election "laboratory conditions." (See Declarations of Clarice K. Atherholt and Lori Yost). The employers' recognition of their "partner" union as the representative of employees at the culmination of these campaigns was quickly followed by petitions for decertification elections signed by a **majority** of Metaldyne employees and by over 30% of Dana employees. Given these circumstances, the representational desires of the Dana and Metaldyne employees is, at best, unclear. It is for this reason that an election should be held.

Deprived of the false premise that an employer-recognized union of necessity enjoys the uncoerced support of a majority of employees, the dissent's argument for the voluntary recognition bar crumbles. The dissent primarily relies on the interest in "stabilizing" collective bargaining relationships to support the voluntary recognition bar policy. See 341 N.L.R.B. No. 150, at 3-4.[29] This interest cannot be imputed to a bargaining relationship

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[29] The Act's fundamental interest in employee free choice under § 7–which always weighed against the voluntary recognition bar in any event–supports the abolition of the bar. See (continued...)

unless and until it is known that the relationship is based upon the free and uncoerced choice of employees. See "Argument," Section IV(D), infra at pp. 31-34. Until an election is conducted, the NLRB does not know if a bargaining relationship between an employer and employer-selected union is based on the uncoerced support of a majority of employees.[30]

For example, the dissent claims that "[t]he very purpose of the recognition bar [is] to allow the parties time to establish their relationship and to bargain for an initial agreement." 341 N.L.R.B. No. 150, at 5, and that the bar is necessary because "employees need the opportunity to determine if the union can represent them effectively." Id. at 4. However, it is indisputable that there is no legitimate interest in permitting a union that **lacked** the uncoerced support of a majority of employees at the time of recognition to establish a collective bargaining relationship, to bargain for an initial agreement, or to represent employees for any amount of time. See International Ladies Garment Workers, 366 U.S. at 737 ("There could be no clearer abridgment of § 7 of the Act..."); id. at 738 (granting recognition to minority union unlawful "because the union so favored is given 'a marked advantage over any other in securing the adherence of employees'") (citation omitted).

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[29](...continued)
"Argument," Section IV(D), infra at pp. 31-34. Moreover, the highly dubious notion that this interest could support an election bar–on the grounds that it protects the choice of the majority that originally chose union representation–is inapplicable here because the NLRB does not know if the union designated by the employer actually possesses majority support. Compare Seattle Mariners, 335 N.L.R.B. 563, 565 (2001) and id. at 566-67 (Chairman Hurtgen, dissenting).

[30] For this reason it is untenable for the Board to accord the identical presumption of majority status to employer-recognized unions as to NLRB-certified unions. MGM Grand Hotel, 329 N.L.R.B. 464, 469-75 (1999) (Member Brame, dissenting).

It is therefore illogical and wrongheaded for the Board to deprive employees of their statutory right to an election under § 9(c)(1)(A)(ii) to determine the true representational preferences of the bargaining unit, based on the assumption that the employer-recognized union reflects the true representational preference of the bargaining unit's majority.

B.) SECRET BALLOT ELECTIONS ARE SUPERIOR TO UNFAIR LABOR PRACTICES CHARGES TO DETERMINE THE REPRESENTATIONAL PREFERENCES OF EMPLOYEES.

In their dissents, Members Liebman and Walsh imply that Petitioners' "proper" course, if they doubt that the UAW lacks the support of an uncoerced majority of employees, is to file unfair labor practice ("ULP") charges.

> [T]he Act provides recourse for employees who believe their employer recognized a union that lacks uncoerced majority support. An employers recognition of a union, even if done in good faith, violates Section 8(a)(2). The standard remedy for such a violation is to order the employer to cease and desist from recognizing and bargaining with the union until the union has been certified by the Board.

341 N.L.R.B. No. 150 at 4-5. The dissent then points out that Petitioners have not filed ULP charges. Id. at 5.

This assertion entirely misses the point. What Petitioners desire is not to "punish" Dana, Metaldyne and the UAW for their statutory offenses, or to seek a remedy after a General Counsel's prosecution. Clearly Petitioners could have filed unfair labor practice charges, but chose not to. Instead, they and over 50% (Metaldyne) and 35% (Dana) of their fellow employees seek an opportunity for a prompt and timely vote on whether the UAW should be their representative. They want a quick election, not a lengthy ULP prosecution.

The dissent's assertion also begs the critical question: if employees can test whether

an employer-recognized union enjoys the uncoerced support of a majority of employees through ULP charges, why should employees be barred from testing the same proposition through a secret-ballot election? After all, elections are the preferred method for making such determinations. See Section IV(C)(1), infra at pp. 24-27.

Indeed, the issue in this case can be restated as, **how** – or through what procedural mechanism – will the NLRB determine if an employer-recognized union actually has the uncoerced support of a majority of employees? There are two possible methods: (1) ULP proceedings, or (2) representational proceedings. The Board's voluntary recognition bar policy permits only the former method. However, the latter method (secret ballot elections) is far superior to ULP charges for determining whether and by whom employees wish to be exclusively represented.

Unfair labor practice procedures are inadequate to determine whether employees support or oppose union representation, because that is not what the procedures were designed by Congress to accomplish. Sections 10 and 11 of the Act empower the Board to prevent and remedy violations of the Act. Sections 3(d) and 10 of the Act assign the General Counsel the responsibility of investigating unfair labor practice charges, issuing and prosecuting complaints, and seeking compliance with Board orders in Court. These sections were not designed to determine the representational wishes of employees. In contrast, Congress specifically enacted § 9 of the Act to gauge whether employees support or oppose union representation. Moreover, Congress empowered the Board alone to decide such representational issues. See 29 U.S.C. § 159.

ULP charges are filtered sparingly through the General Counsel's discretionary prosecutorial lens. See 29 U.S.C. § 153(d); NLRB v. UFCW, 484 U.S. 112 (1987) (General Counsel has unreviewable discretion to issue or not issue complaints in ULP cases). Allowing the General Counsel to resolve what are effectively representational issues–determining whether the union designated by an employer has the uncoerced support of a majority of employees–is contrary to the basic structure of the Act.

As a practical matter, an after-the-fact investigation of an unfair labor practice allegation does not affirmatively determine the representational desires of employees. It merely hunts for unfair labor practices. It is impossible for the General Counsel, after-the-fact, to divine the true wishes of employees by trying to piece together all the myriad events and circumstances that occurred in a "card check" drive.

Perhaps most important, a higher standard for union and employer conduct is required in representational proceedings than unfair labor practice proceedings. As shown above, conduct that does not rise to the level of an unfair labor practice can still be found to violate employee free choice under the "laboratory conditions" standard for representation proceedings. See Section IV(C)(2), infra at pp. 27-31. Thus, a union can become an exclusive bargaining representative through a "card-check" procedure by engaging in conduct that would have precluded it from obtaining such status through a secret-ballot election, because such conduct may not necessarily amount to an unfair labor practice.

Moreover, representational proceedings are much faster than unfair labor practice proceedings. See NLRB Case Handling Manual, ¶ 11000 "Agency Objective" ("The

processing and resolution of petitions raising questions concerning representation, i.e., RC, RM, and RD petitions, are to be accorded the highest priority."). This is particularly true in the context of voluntary recognition bestowed pursuant to a "partnership agreement," as the cooperating "partners" are unlikely to file blocking charges against each other to delay an otherwise expeditious election.

Finally, representational proceedings are more decisive than ULP adjudications, as an election is a one-time occurrence that definitively decides the issue. By contrast, ULP proceedings generate multiple preliminary decisions as the charge proceeds from the General Counsel, to trial before an Administrative Law Judge, to the Board itself, and then to an appellate court. Long and drawn out ULP proceedings are equivalent to holding a decade-long "sword of Damocles" over a potential collective bargaining relationship.

Thus, representational proceedings are far superior to ULP proceedings for stabilizing lawful collective bargaining relationships, as they settle the issue of whether the employer-recognized union enjoys uncoerced majority support quickly and in "one fell swoop." Ironically, while the dissent repeatedly claims that the voluntary recognition bar effectuates the Act's interest in the "stability of labor-management relations," 341 N.L.R.B. No. 150, at 4, the reality is that by forcing employees to turn to long and drawn-out ULP proceedings to protect their representational rights, that interest is grievously harmed.

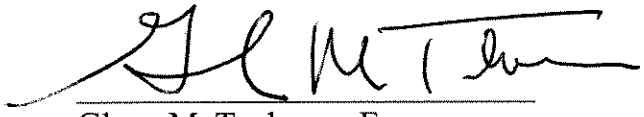
In short, Board policy strongly favors secret-ballot elections, not unfair labor practice proceedings, to determine employees' true representational preferences. This is true when a union seeks to become the exclusive representative of employees, NLRB v. Gissel Packing

Co., 395 U.S. 575, 602 (1969), and when an employer seeks to remove a union as the exclusive representative of employees, Levitz Furniture, 333 N.L.R.B. at 723. The Act should be interpreted consistently, so that **employees** also have the right to an election when a self-interested employer unilaterally designates a self-interested union as the exclusive bargaining representative.

VI. CONCLUSION:

The Regional Directors' dismissals of the petitions should be reversed, and the "voluntary recognition bar" abolished or restricted. Immediate elections should be ordered.

Respectfully submitted,



Glenn M. Taubman, Esq.
William L. Messenger, Esq.
c/o National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA. 22160
(703) 321-8510

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief on the Merits was deposited in the U.S. Mail, first class postage prepaid, addressed to :

James M. Stone, Esq. and David E. Weisblatt, Esq.
McDonald Hopkins Co., LPA
2100 Bank One Center
600 Superior Avenue
Cleveland, OH 44114-2653

Counsel for Metaldyne

Stanley J. Brown, Esq.
Susanne Harris Carnell, Esq.
Hogan & Hartson
8300 Greensboro Drive
McLean, VA 22012

Counsel for Dana

Gary M. Golden, Esq.
Dana Corporation Law Department
4500 Dorr Street
Toledo, OH 43615

Counsel for Dana

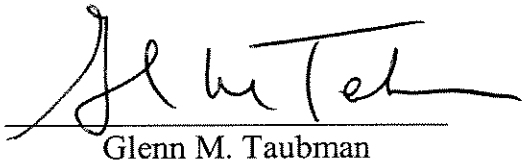
Betsy A. Engel, Esq.
Legal Department
International Union, UAW
8000 Jefferson Avenue
Detroit, MI 48214

Counsel for UAW

Gerald Kobell, Regional Director
National Labor Relations Board, Region 6
William S. Moorehead Federal Building, Room 1501
1000 Liberty Avenue
Pittsburgh, PA 15222-4173

Frederick J. Calatrello, Regional Director
National Labor Relations Board, Region 8
Anthony J. Celebreeze Federal Building
1240 East 9th Street, Room 1695
Cleveland, OH 44199-2086

this 14th day of July, 2004



Glenn M. Taubman

NATIONAL LABOR RELATIONS BOARD
REGION 8

Clarice K. Atherholt,
(Petitioner)

Dana Corp.,
(Employer) Case No. 8-RD-1976

and

International Union, United Automobile Aerospace and Agricultural Implement Workers of America, AFL-CIO ("UAW")
(Union)

DECLARATION OF CLARICE K. ATHERHOLT IN SUPPORT OF HER DECERTIFICATION PETITION

I, Clarice K. Atherholt, pursuant to Section 1746 of the Judicial Code, 28 U.S.C. § 1746, declare as follows:

1. My name is Clarice K. Atherholt. I have first hand knowledge of all of the facts set forth herein, and if called to testify could do so competently. I live at 302 S. Fifth Street, Upper Sandusky, OH. 43351. I am employed by Dana Corporation ("Dana") at its facility in Upper Sandusky, OH. ("Dana Upper Sandusky").

2. I am the Petitioner in this case, and circulated on non-work time the showing of interest against the UAW union that accompanied the filing of the Petition. I am part of a bargaining unit of approximately 180 employees at Dana Upper Sandusky.

3. Several months ago Dana and the UAW announced that they had become parties to some sort of "neutrality agreement." Although the employees at Dana Upper Sandusky (among others) are the targets of the agreement, the agreement was initially kept secret from us, although some of the union's organizers had their own copies. Only after I and many other employees complained, and only after the UAW was recognized by Dana at Upper Sandusky, was I told that I could go to Human Resources and read a copy of this agreement, but could not make any copies and could not take a copy away in

order to consult with an independent legal advisor. (Attached as Exhibits 1 and 2 are true and correct copies of letters exchanged between me and Dana related to this subject). As a result of the secrecy, employees at Dana Upper Sandusky know very little of what is contained in the "neutrality agreements" the UAW signed with Dana.

4. Our local management was not allowed to inform any of us about the specific details of the neutrality agreement. We were told that employees would not be permitted to vote in a secret ballot election and that the union organizers would have access to employees' personal information (like home addresses), and access to employees in the plant. Also, we were strongly encouraged "for our own benefit" to attend one of several "captive audience" speeches while on paid company time. At these meetings, officials from Dana Corporation in Toledo and UAW officials from Detroit told us that the UAW and Dana had entered into a "partnership," and that this partnership would be beneficial to us in getting new business from the Big Three into the plant. The implication was that our plant would lose work opportunities or jobs if we did not sign cards and bring in the UAW. I was an outspoken critic of the UAW at this time, and I tried to attend several of the scheduled meetings. The UAW apparently told Dana Human Resources that they did not want me to attend all of these meetings, that my presence was a threat and a distraction, and that the UAW would turn out more supporters if I attended other sessions. I attended two sessions in total, one on my own time and one while on paid company time.

5. Apparently pursuant to the neutrality agreement, UAW organizers came into our plant and stayed there until the "voluntary recognition" was achieved. But the UAW's "card check" drive was nothing like a secret ballot election. UAW organizers did everything they could to make people sign union cards. The UAW put constant pressure on some employees to sign cards by having union organizers bother them while on break time at work, and visit them at home. I believe that the UAW organizers also misled many employees as to the purpose and the finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back, not because they really wanted the UAW to represent them.

6. On or about December 4, 2003, Dana suddenly announced that the UAW was our union representative. There was no vote. Many of my co-workers and I were very upset that this union could be thrust upon us without a chance to vote in a secret ballot election. I don't understand how Dana and the UAW can sign away my rights to an election and bring in a union without giving employees the right to vote.

7. I am not aware, as of the date of this Declaration, of Dana and the UAW engaging in any negotiations or bargaining sessions for a collective bargaining agreement since the

Mr. Dave Warders
1480 Ford St.
Maumee, Oh. 43537-1718

302 S. Fifth Street
Upper Sandusky, Oh. 43351
November 20, 2003

Mr. Bob King
8000 E. Jefferson St.
Detroit, Mi. 48214

Dear Mr. Warders & Mr. King,

Have you ever been on "my" side of a neutrality agreement? If not, you should try it. I don't think you would like it.

The UAW has been campaigning in my area for nearly 6 months now. We sat through a captive audience speech and now we are blessed with having UAW organizers at break and lunch times. And still you don't have enough cards signed to be representative of employees. Now, you bring in other organizers(or whatever you call them) from the Lima, Ohio plant. What gives?

I should think that by now the UAW would get the hint. Just because of a few disgruntled employees doesn't mean our whole plant should be subjected to what some are considering harassment. The anti-union people do not appreciate being disturbed during "their" time.

When I applied for my job(at then Continental Hose), I went there specifically because there was NO union. And like many of us continue to enjoy working in a non-union environment. Admittedly, we are not a perfect plant, there are some problems, but none that joining a union will solve.

Mr. Warders, you made an excellent point about quality Friday and that actually turned a couple people to be AGAINST the union. THANK YOU for that.

Mr. King, I'm not sure that you gained any momentum from your comments.

I believe that you both were in agreement that the neutrality agreement was not to have been shown by the UAW reps and that you would be discussing that this week. I am requesting that you BOTH please send me a copy so that I can read it myself. I am asking both, that way I will hopefully be assured of getting at least one.

Thank you for your time.

Clarice K. Atherholt

Exhibit 1

DANA INDUSTRIAL RELATIONS

CHRIS BUETER
MANAGER, INDUSTRIAL RELATIONS

December 9, 2003

Ms. Clarice K. Atherholt
302 S. Fifth Street
Upper Sandusky, Ohio 43351

Ms. Atherholt:

Your letter addressed to both Dave Warders and Bob King and dated November 20, 2003 has been forwarded to my attention for response by Mr. Warders.

As you know, the matter of union representation in Upper Sandusky was resolved on Thursday December 4, 2003 when the employees of Upper Sandusky, by a majority of signed employee representation forms, selected the UAW as its bargaining representative in conformance with the Dana – UAW Partnership Agreement representation process that was explained to all of you in plant meetings on November 14, 2003.

Notwithstanding this plant decision, we have forwarded to Allison Miller under separate cover a single copy of the Dana – UAW Partnership Agreement. This single copy will remain in Human Resources where you may review it at your leisure at any time other than your scheduled work time. You must schedule in advance with Ms. Miller if you wish to review this document and you will not be afforded the opportunity to copy this document.

It is sincerely hoped that any questions you may have regarding this Agreement will be answered once you review this document in its entirety, however should you have further questions after your review, you should forward those questions to Allison Miller and she can address those matters for you. I hope that with this correspondence Dana has adequately addressed your request dated November 20, 2003.

Sincerely,

Chris Bueter
Manager, Labor Relations

c: Dave Warders
Bob King
Allison Miller
Dan Schueren
Mark Roseman

Exhibit 2

NATIONAL LABOR RELATIONS BOARD
REGION 6

Jeffrey A Sample and Alan P. Krug,
(Petitioners)

Metaldyne Corp. (Metaldyne Sintered Pro.)
(Employer)

Case Nos. 6-RD-1518 and
6-RD-1519

International Union, United Automobile Aerospace and Agricultural Implement Workers of America, AFL-CIO
(Union)

DECLARATION OF LORI YOST

I, Lori Yost, pursuant to Section 1746 of the Judicial Code, 28 U.S.C. § 1746, declare as follows:

I have first hand knowledge of all of the facts set forth herein, and if called to testify could do so competently.

1. My name is Lori Yost. I live at 331 Bunker Hill, St. Marys, Pennsylvania 15857. My phone number is (814) 781-1386. I am employed by Metaldyne Corp. (Metaldyne Sintered Pro.) ("Metaldyne") at its facility in St. Marys, Pennsylvania ("Metaldyne St. Marys").
2. I am one of the main employees at Metaldyne St. Marys who was involved in initiating a petition for a decertification election and circulating the accompanying showing of interest against the UAW union in our plant.
3. Metaldyne and the UAW are parties to some sort of "neutrality agreement." However, even though we employees are the targets of the agreement, it has been kept secret from us. Employees at Metaldyne St. Marys know very little of what is contained in the "neutrality agreements" the UAW signing with Metaldyne.
4. Our local management was not allowed to inform any of us about the specific details of the neutrality agreement. We were only told that the union organizers would have access to employees and the plant.
5. I have grave concerns about what deal the UAW cut in exchange for Metaldyne giving it a "neutrality agreement." Certainly, Metaldyne would not hand over one of its plants to the UAW for nothing. I am deeply concerned that the UAW may have made advance

concessions or agreed in advance to sell out the interests of future-organized employees in exchange for Metaldyne assistance with taking over non-union plants.

6. Apparently pursuant to the neutrality agreement, UAW organizers came into our plant and have stayed there. Metaldyne management had 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"

7. The UAW's "card check" drive was nothing like an election. UAW organizers did everything they could to make people sign union cards. The UAW put constant pressure on some employees to sign cards by having union organizers bother them at work, visit them repeatedly at their homes, and call them at home. I believe that the UAW organizers also misled many employees as to the purpose and the finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back.

8. On or about December 2, 2003, Metaldyne suddenly announced that the UAW was our Union representative. There was no vote. Myself and the vast majority of my co-workers were very upset that this union could be thrust upon us without a chance to vote in a secret ballot election. I don't understand how Metaldyne and the UAW can sign away my rights to an election and bring in a union without giving employees the right to vote. This is a largely union based town to begin with and most of the employees here have parents, friends or other relatives who belong to local unions. They were all under the belief and understanding that the card check was just a step towards our right to a vote for or against the UAW. Everyone was shocked when they found out there wasn't going to be a vote.

9. Metaldnye and the UAW spliced the bargaining unit so as to ensure that the UAW would prevail in a card count. They split up departments–before the card check count was even held–based upon whether employees supported or did not support the union.

10. For example, Metaldyne and the UAW split up the quality department based on the degree of union support. The quality depart is supervised by Ron Morelli and is made up of the final audit department, the molding quality technicians, quality engineering technicians, tool inspection analysts, metrology, material testing and myself (tool engineer /cmm programmer). I am also included in the tool inspection department. To my knowledge, no one in the quality department signed a union card. We were very much against UAW representation. The only exceptions were two people in the metrology section of the quality department who were union supporters. Guess what? Only the metrology section of the quality department is part of the bargaining unit. The rest of the quality department is not.

11. Another example is the tooling machine shop. Mike Glatt is the supervisor of this department. It is made up of several small departments, one of which is called the "tool room." This area includes people who transfer the tooling and cut orders for where the

tooling goes to be worked on in the shop. To my knowledge, not one of the people in the "tool room" signed a card for the UAW. Yet, I know that some employees in the tooling machine shop in general signed union cards. Guess what? The tooling machine shop is part of the bargaining unit, except for everyone in the tool room.

12. I am not aware, as of the date of this Declaration, of Metaldyne and the UAW engaging in any negotiations or bargaining sessions for a collective bargaining agreement since the UAW was recognized on or about December 2, 2003.

13. I strongly believe that is wrong that management declared that the UAW was our representative without our vote. Judging by the fact that over 50% of employees in the plant signed a decertification within days after recognition, I am not alone.

14. I fail to see how the UAW union can properly be considered our representative without our vote. If the UAW really believes that they have the support of over 50% of employees, then they have nothing to fear by giving employees a chance to vote. If we vote and the union wins, then by all means they are our representatives as stated and we move forward... But, if the UAW loses then they and Metaldyne must concede to the fact and they must leave as per our request.

15. Metaldyne employees at my plant want an election. There was incredibly strong support for the decertification petition amongst employees. Over 50% signed the showing of interest. This support came just days after Metaldyne declared that we were under UAW control.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 2, 2004

Lori Yost