UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DANA CORPORATION
Employer

and

Case No. 8-RD-1976

CLARICE K. ATHERHOLT
Petitioner

and

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

METALDYNE CORPORATION (METALDYNE SINTERED PRODUCTS)
Employer

and

Case No. 6-RD-1518
Case No. 6-RD-1519

ALAN P. KRUG AND JEFFREY A. SAMPLE
Petitioners

and

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

BRIEF ON REVIEW OF INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO ("UAW") AND AMICUS AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS ("AFL-CIO")

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The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (UAW), the incumbent Union in each of these cases, and the American Federation of Labor & Congress of Industrial Organizations (AFL-CIO), as Amicus, jointly submit this brief addressing the questions raised by the Board's Order Granting Review in Dana Corp., 8-RD-1976 Metaldyne Corp., 6-RD-1518 and 1519 (June 7, 2004).

INTRODUCTION

The question raised by these cases is whether, when an employer agrees to recognize a collective bargaining representative authorized to act as such by a majority of its employees, the bargaining mandated by the National Labor Relations Act should be given a reasonable period of time to bear fruit under conditions that permit the parties to honor their mutual obligations to bargain in good faith. Long-standing precedent answers this question in the affirmative.

The decision granting review cites three factors as justifying revisiting this venerable precedent: (1) "the increased usage of recognition agreements," (2) "the superiority of Board supervised secret-ballot elections," and (3) "the varying contexts in which a recognition agreement can be reached." 341 NLRB No. 150 at 1 (June 7, 2004). The decision further explains the last factor requires attention because, in the majority's view, prior precedent does not expressly decide "the issue of whether the recognition should be a bar . . . where . . . it follows a card-check agreement that was entered into when the union had no majority support." Id.

We examine each of these factors below and explain why none of them justifies the reversal of long-standing precedent and why elimination or alteration of the recognition bar would be bad labor relations policy – injurious to the interests of employees, employers and unions.

FACTS

Each of these cases involves an agreement between an employer and the Union to honor the choice of a majority of employees, registered by means of signed, dated cards authorizing the Union to serve as the employees' exclusive representative for purposes of collective bargaining.

On November 26, 2003, the Union notified Metaldyne Corporation that a majority of employees in the instant unit had so authorized the Union to represent them. The Union's claim was verified by a neutral third party, a mediator provided by the Federal Mediation and Conciliation Service. Metaldyne Corp., Cases 6-RD-1518 and 1519, Dismissal letter at 1 (January 21, 2004). Thereafter, on December 1, 2003, Metaldyne recognized the Union. Id. Three weeks later, on December 23, 2003, the first of the instant petitions was filed. Id.

In late November 2003, the Union notified Dana Corporation that a majority of employees in the instant unit had authorized the Union to represent them. Again, the Union's claim was verified by a neutral third party, a federal mediator. Dana Corp., Case No. 8-RD-1976, Dismissal letter at 1 (January 21, 2004). Thereafter, on December 4, 2003, Dana recognized the Union. Id. Four weeks later, on January 7, 2004, the second of the instant petitions was filed.

The Regional Directors dismissed the petitions under the rule articulated in Keller Plastics Eastern, Inc., 157 NLRB 583 (1966), holding that a "recognition bar" was in effect in each case because bargaining following initial recognition had not continued for a "reasonable period of time." Consistent with the practice in representation cases in which a bar applies, no evidentiary hearing was held. All parties agreed and the Regional Directors found that the Employers had voluntarily recognized the Union. However, there are no other factual findings in these cases concerning: prior dealings between the parties; the existence of agreements between

the parties (other than the agreements to recognize); the terms of any other agreements between the parties; whether the parties' honored those terms; or any other aspect of the parties' conduct prior to or after recognition.

No unfair labor practice charges have been filed against the Union or the Employers relating in any manner to their agreements, the collection of cards, or the recognition of the Union.

ARGUMENT

The proper starting point in addressing the issue identified by the Order Granting Review is with the reasons articulated by the Board for the present rule barring – for a reasonable period – challenges to the status of a newly recognized collective bargaining representative. As we develop in the first point below, the Board has insulated the representative's status for a reasonable period because of the serious impediments to good faith bargaining created by the possibility that the union's representative status might be revoked before bargaining has had a reasonable time to succeed. Indeed, as the Board has long recognized, bargaining of the sort contemplated by the National Labor Relations Act requires certainty as to the status of the employees' representative.

Against that background, the only possible ground for allowing challenges to the status of a voluntarily recognized union before a reasonable period of bargaining has elapsed is that, in terms of the duties and rights created by the Act, bargaining between an employer and a voluntarily recognized union is of an essentially different nature than bargaining between an employer and a union certified by the NLRB. Indeed, this is the sole argument advanced by the Petitioners in seeking review. It is, however, a completely untenable point. Since the passage of the Act, the Board and the courts have recognized that employees may demonstrate majority

support for a union by means other than a Board election and that if their employer agrees to recognize the majority's will, a duty to bargain attaches that has all the elements of the duty attaching upon certification. We address the Petitioners' argument that a voluntarily recognized union should be accorded second-class status in carrying out its collective bargaining duties in point 2 below.

Finally, in point 3 below, we address the suggestion made in the Order Granting Review that "recognition . . . follow[ing] a card-check agreement that was entered into when the union had no majority support," 341 NLRB No. 150 at 1, presents special circumstances in which the normal bar to challenge of the representative's status should not apply. In so doing, we show that there is no logical or practical reason for treating voluntary recognition pursuant to a preexisting agreement specifying criteria for establishing majority support differently than voluntary recognition pursuant to an employer's ad hoc and immediate acknowledgment of majority support.

I. The Recognition Bar Serves the Act's Twin Goals of Guaranteeing Both Industrial Peace and Employee Free Choice

In Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944), the Supreme Court recognized 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 705-06. Only "[a]fter such a reasonable period," the Court observed, should "the Board . . ., in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." Id. The bargaining relationship at issue in Franks Bros. was established by a bargaining order, but the principle underlying the Court's holding is not limited to such cases and is stated in general terms fully applicable here as

demonstrated below.

A. The Recognition Bar is an Integral Element of the Board's Bargaining Jurisprudence

There are three categories of cases in which the Board, with Court approval, requires a reasonable period of bargaining prior to any challenge to the status of a newly designated representative.

First, after a union is certified, the union is entitled to an unrebuttable presumption of majority support for a period of one year. See Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 37 (1987). An employer cannot withdraw recognition and no decertification petition can be filed during that period.

Second, when an employer is ordered to bargain under NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), the resulting bargaining must continue for a reasonable period of time prior to any withdrawal of recognition or the filing of any petition challenging the status of the bargaining representative. See Williams Enterprises, Inc., 312 NLRB 937, 938 (1993), enf'd, 50 F.3d 1280 (4th Cir. 1995) ("affirmative bargaining order in . . . Gissel [case]. . . carries with it a bar on decertification").[1]

Finally, it has long been Board law that when an employer voluntarily recognizes a union that has majority support, the bargaining relationship that is established is insulated from

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[1]This is also the case when an employer is ordered to bargain with an incumbent union, for example, in a successorship case. See Caterair International, 322 NLRB 64, 67 (1996). Indeed, even absent a bargaining order or adjudication of the charges, if the employer voluntarily enters into a settlement agreement resolving a § 8(a)(5) charge by agreeing to bargain, no question concerning representation can be raised for a reasonable period of time. See id.; Van Ben Industries, Inc., 285 NLRB 77, 78-79 (1987); Poole Foundry & Machine Co., 95 NLRB 34 (1951), enf'd, 192 F.2d 740 (4th Cir. 1951), cert. denied, 342 U.S. 954 (1952). This is the case whether the settlement is formal or informal. See Van Ben, 285 NLRB at 78-79; VIP Limousine, Inc., 276 NLRB 871, 876 (1985).

challenge for a reasonable period of time.

> With respect to . . . 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. Such negotiations can succeed . . . and the policies of the Act can thereby be effectuated, only if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time. [Keller Plastics Eastern, Inc., 157 NLRB 583, 587 (1966)]

See also Seattle Mariners, 335 NLRB 563 (2001); MGM Grand Hotel, Inc., 329 NLRB 464 (1999); Ford Center for the Performing Arts, 328 NLRB 1, 1 (1999); Smith's Food & Drug Centers, Inc., 320 NLRB 844 (1996); Brown & Connolly, Inc., 237 NLRB 271, 275 (1978), enf'd, 593 F.2d 1373 (1st Cir. 1979); Gogin Trucking, 229 NLRB 529 (1977), enf'd, 575 F.2d 596 (7th Cir. 1978); Rockwell International Corp., 220 NLRB 1262, 1263 (1975); Wavecrest Home for Adults, 217 NLRB 227, 230-31 (1975); Ridge Care, Inc., 209 NLRB 873, 874 (1974); Timbalier Towing Co., 208 NLRB 613, 613-14 (1974); Toltec Metals, Inc., 201 NLRB 952, 954 (1973), enf'd, 490 F.2d 1122, 1125-26 (3d Cir. 1974); Broad Street Hospital and Medical Center, 182 NLRB 302, 306 (1970), enf'd, 452 F.2d 302 (3d Cir. 1971); Dale's Super Valu, Inc., 181 NLRB 698, 698-99 (1970); Blue Valley Machine & Mfg. Co., 180 NLRB 298, 304 (1969), enf'd in rel. part, 436 F.2d 649 (8th Cir. 1971); San Clemente Publishing Corp., 167 NLRB 6, 8-9 (1967), enf'd, 408 F.2d 367 (9th Cir. 1969); Montgomery Ward & Co.,. 162 NLRB 294 (1966), enf'd, 399 F.2d 409 (7th Cir. 1968); Kimbrough Trucking Co., 160 NLRB 954 (1966); Universal Gear Service Corp., 157 NLRB 1169 (1966), enf'd, 394 F.2d 396 (6th Cir. 1968). The Board has not departed from this rule or questioned its validity since its announcement almost 40 years ago. This rule has also been universally enforced in the courts of appeal as shown above.

These three categories of cases form a consistent and coherent jurisprudence. As the

Board has held, "Once [voluntary] recognition is . . . validly accorded the union, the Board has held that, as in the case of certifications, refusal-to-bargain orders, and settlement agreements, the parties are entitled to a reasonable time to negotiate a collective-bargaining agreement, regardless of an interim loss of majority or an intervening representation claim of another union." Broad Street Hospital, 182 NLRB at 306. The Second Circuit has recognized that these cases articulate a "general Board policy of protecting valid[ly] established bargaining relationships during their embryonic stages." NLRB v. Cayuga Crushed Stone, Inc., 474 F.2d 1380, 1384 n. 5 (2d Cir. 1973).

B. The Recognition Bar Respects the Majority Authorization of Collective Bargaining and Permits the Employer to Honor its Duty to Bargain

The rationale for this consistent body of jurisprudence was stated by the Supreme Court in Ray Brooks v. NLRB, 348 U.S. 96 (1954): "A union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hot-house results or be turned out." Id. at 100. This rationale fully applies here.

By its nature, voluntary recognition occurs only when the parties do not have a preexisting bargaining relationship in the relevant unit. Particularly in this context – the negotiation of a first contract -- it takes time for collective bargaining to bear fruit for employees. "In particular, where the parties are negotiating a first contract, the Board recognizes the attendant problems of establishing initial procedures, rights, wage scales, and benefits." Ford Center, 328 NLRB at 1. In other words, everything is on the table in first contract negotiations. At the most basic level, the parties have no existing language to work from. See N.J. MacDonald & Sons, Inc., 155 NLRB 67, 71-72 (1965) ("negotiations for an initial contract . . . usually involve special problems such as in the formulation of contract language"). They have no history

of bargaining to help them resolve disputes. See Blue Valley Machine, 180 NLRB at 304 ("no common experience to draw upon for the expeditious resolution of their differences"). The courts have recognized that "it is precisely under such conditions that the dangers of instability . . . are most severe. Thus, . . . the employer's bona fide recognition of a union's majority status . . . must be binding [for a reasonable period of time because] . . . the inability of all parties to the collective bargaining process to rely on such recognition would produce an uncertainty potentially generative of strife and discord in industrial relations." Broad Street Hospital, 452 F.2d at 305. The Board has found, "Such negotiations can succeed . . . and the policies of the Act can thereby be effectuated, only if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time." D & F Supermarket, 208 NLRB 891, 898 (1974). The recognition bar thus recognizes the facts that collective bargaining, particularly for a first contract, takes time[2] and requires both commitment and compromise; and the rule insures that the majority's desire for collective bargaining is respected for a period of time that gives the parties a reasonable opportunity to reach agreement.

Eliminating the bar would adversely effect the bargaining behavior of both employers and unions contrary to the expressed desire of the majority of employees. The possibility of a decertification petition would lead some employers to delay or otherwise seek to frustrate the bargaining process in the hope of provoking employee disaffection. The bar "remove[s] any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees" and provoke a petition.

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[2]Here, the petitions were filed within four weeks of recognition, while the Board has found that the average time required to concluded negotiation of a first contract is almost one year. See Lee Lumber and Building Material Corp., 334 NLRB 399, 403 n. 40 (2001), enf'd. 310 F.3d 209 (D.C.Cir. 2002).

Fall River Dyeing, 482 U.S. at 38. Eliminating the bar would cause other employers to not seriously engage in the process for fear that their efforts would come to naught if a petition was filed. "It is scarcely conducive to bargaining in good faith for the employer to know that . . . if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent." Ray Brooks, 348 U.S. at 100.

Eliminating the bar might lead some unions to refuse to compromise out of concern that they might be accused of "selling out" during an election campaign. Alternatively, it might lead some unions to compromise too much in order to quickly show results or obtain the protection of the contract bar prior to the filing of a petition. The bar "enable[s] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support." Fall River, 488 U.S. at 38.

In all of these situations, the majority's authorization of collective bargaining is dishonored and the employer's duty to bargain in good faith is complicated. Even if no petition is filed, the possibility of such a filing distorts the process of bargaining. And even if the union prevails in a non-barred decertification election, "the election nevertheless would have the deleterious consequence of 'disrupting the nascent relationship' between the employer and union pending the outcome of the election and any subsequent proceedings." Seattle Mariners, 335 NLRB at 565. The existing recognition bar "permit[s] unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace." Fall River, 488 U.S. at 39.

Moreover, it would not simply be employees' initial choice that would not be fully respected by elimination of the bar, permitting employees to revisit their choice in the middle of first contract negotiations would produce results that would not reflect employees' true

sentiments or long-term interests. This is demonstrated conclusively by survey data. Petitioners suggest that the recognition bar prevents employees from registering their disaffection with their representative. But survey data reveals that very few employees feel such disaffection when collective bargaining is given a reasonable period of time to succeed. Among employees currently represented by unions, nearly 90% say they would vote for the union if an election were held tomorrow while just 8% say they would vote against the union. Richard B. Freeman & Joel Rogers, What Workers Want 69 (1999). This contrasts with results for unrepresented workers, only 32% of whom said they would vote for a union. Id. Thus, among employees who have had actual experience with collective bargaining, there is a very high level of satisfaction. Only 5% of such employees described their experience as bad. Id. at 70. Petitioners assert they are seeking to insure an accurate gauge of employee sentiments, but what they are actually seeking is to prevent employees – who have already expressed a desire for collective bargaining – from ever experiencing meaningful bargaining so that when they are required to confirm their initial choice, their decision will be uninformed and highly unlikely to reflect the choice they would make after collective bargaining is given a reasonable opportunity to succeed.

The bar thus honors the will of the majority and facilitates good faith bargaining.

C. The Recognition Bar Provides Ample Opportunity for Employees to Change Their Minds

A central policy underlying the Act is employee choice. In order to fully respect employee choice, the Board has ruled in innumerable cases both that a considered choice must be respected for an appropriate period of time and that employee choice must take place under conditions likely to produce an accurate measure of employees' true sentiments. Thus, the Board has never accepted a conception of employee free choice in which employees are continuously

called upon to reconfirm their previous decision regarding collective bargaining. Rather, as detailed above, the Board has held that no matter how a bargaining relationship is lawfully established, so long as it is based on freely expressed majority support, bargaining should be allowed to continue for at least a reasonable period of time before employees decide whether to alter or end it. The Supreme Court has held that such limits on when employees can exercise their right to choose are consistent with the Act. "Contrary to petitioner's suggestion, this . . . does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship." Franks Bros., 321 U.S. at 705.

The rule that applies to these cases bars the petitions at issue for only a "reasonable period of time." In Lee Lumber, the Board held that "a reasonable time for bargaining before the union's majority status can be challenged will be no less than 6 months, but no more than 1 year" in the context of an unlawful refusal to bargain with an incumbent union. 334 NLRB at 399.[3] Even if the parties enter into a collective bargaining agreement during the initial insulated period, the contract bar rule (which is not at issue in this case and potentially applies after all the insulated periods described above) applies to bar a challenge to the representative for a maximum of three years. Suggestions that these rules for ordering the process of employee choice are inconsistent with employee free choice are misplaced because, if they are taken to their logical conclusion, they would undermine an entire complex of Board jurisprudence endorsed by the courts of appeal and the Supreme Court.

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[3]Although these boundaries on a reasonable period of time were expressly not extended beyond refusal to bargain with incumbent union cases. See id. n. 7.

II. Bargaining Authorized by a Majority of Employees is Not Entitled to Less Protection Simply Because the Employer has Voluntarily Recognized the Employees' Chosen Representative

While the Board's Order granting review acknowledges that "no party here challenges the legality of voluntary recognition," 341 NLRB No. 150 at 1, the central foundation of the Petitioners' argument that the protection the law has long accorded bargaining relationships so created should be weakened is the suggestion that voluntary recognition is somehow illegitimate and novel. These suggestions are both factually and legally incorrect.

A. Voluntary Recognition is a Central and Long-Standing Pillar of Federal Labor Policy

In an unbroken line of precedent extending back to 1935, the Board and the Supreme Court have held that an employer may recognize a union upon proof of majority support other than a Board-supervised election. Indeed, the Court has recognized that this outcome is mandated by the terms of the Act. "Section 9(a), which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen. . . . It does not make it a condition that the representative . . . shall be certified by the Board." United Mine Workers v. Arkansas Flooring Co., 351 U.S. 62, 71-72 (1956). "Section 7 recognizes the right of the instant employees 'to bargain collectively through representatives of their own choosing' and leaves open the manner of choosing such representatives when certification does not apply. The employees have exercised that right through the action of substantially more than a majority of them authorizing the instant union to represent them." Id. at 74. Thus, "[a]lmost from the inception of the Act, . . . it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means . . . ; it could establish majority status . . . [for example] by possession of cards signed by a majority of the employees authorizing the union to represent them." Gissel, 395 U.S. at 596-97.

"A Board election is not the only method by which an employer may satisfy itself as to the union's majority status." Arkansas Flooring Co., 351 U.S. at 72 n. 8. "If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate . . .[,] he can readily ascertain their validity and obviate a Board election." International Ladies' Garment Workers Union v. NLRB, 366 U.S. 731, 739 (1961). The Supreme Court has approved, for example, "cross checking . . . well-analyzed employer records with union listings or authorization cards." Id. at 739-40.

The Board has explained, "It has been the Board's longstanding policy that employees are not limited only to a Board election in the selection of their bargaining representatives." MGM Grand, 329 NLRB at 466 n. 7. An employer's agreement to a card check is "one long accepted and sanctioned by the Board." Rockwell, 220 NLRB at 1263. The Supreme Court has announced, "We have consistently accepted this interpretation of the Wagner Act and the present Act, particularly as to the use of authorization cards." Gissell, 395 U.S. at 597.

Voluntary recognition has not simply been recognized as lawful by the Board and Supreme Court, it has been held to be consistent with the central policy of the Act in favor of the contractual resolution of disputes between labor and management. "Voluntary recognition is a favored element of national labor policy." NLRB v. Broadmoor Lumber Co., 578 F.2d 238, 241 (9th Cir. 1978). "Voluntary recognition by employers of bargaining units would be discouraged, and the objectives of our national labor policy thwarted if recognition were to be limited to Board-certified elections." NLRB v. Broad Street Hospital & Medical Center, 452 F.2d 302, 305 (3d Cir. 1971). "It is a long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations." MGM Grand, 329 NLRB at 466. "'National labor

policy favors the honoring of voluntary agreements reached between employers and labor organizations.' . . . including agreements that explicitly address matters involving union representation." Verizon Info. Systems, 335 NLRB 558, 559 (2001). The Act embodies a "policy to promote voluntary recognition." Seattle Mariners, 335 NLRB at 564-65.

Voluntary recognition is not only lawful and, in fact, encouraged under the Act, the reliance on evidence other than a Board-supervised election to demonstrate majority support for a union has a long pedigree. Indeed, the original Wagner Act permitted the Board to certify a union based on such evidence and it regularly did so between 1935 and 1939. See, e.g., Woodville Lime Prod. Co., 7 NLRB 396, 399 (1938) (affidavits); Combustion Eng'g Co., 5 NLRB 344, 349 (1938) (participation in strike); News Syndicate Co., 4 NLRB 1071, 1075-76 (1938) (applications); Wilmington Transp. Co., 4 NLRB 750, 753-54 (1937) (employees' testimony); Shell Chem. Co., 4 NLRB 259, 264 (1937) (petition); Seas Shipping Co., 2 NLRB 398, 401 (1937) (signed cards); Richards-Wilcox Mfg. Co., 2 NLRB 97, 100 (1936) (union membership rolls); see also James A. Gross, The Reshaping of the National Labor Relations Board 20 (1981) (citing other NLRB decisions relying on indicia of majority will other than election results). Even after the Board altered this practice in representation cases and the change was codified in the Taft-Hartley amendments, the Board continued to hold that it was an unfair labor practice for an employer to refuse to recognize a union that presented evidence of majority support unless the employer had a good faith doubt about the validity of such evidence. See, e.g., Snow & Sons, 134 NLRB 709 (1961), enf'd, 308 F.2d 687 (9th Cir. 1962) (employer checked cards).

Importantly, when Congress amended the Act in 1947 to limit the basis of certification to elections, it considered but rejected an amendment that would have required an employer to

bargain only with a union certified after an election or voluntarily recognized by the employer.[4] Congress thereby indicated that it viewed the duty to bargain arising from voluntary recognition to be on par with that based on certification. This status of voluntary recognition was not questioned by the Taft-Hartley Congress. Again, even after the Board departed from the rule requiring employers to have a good faith doubt about a union's claimed majority support, see Aaron Bros. Co., 158 NLRB 1077 (1966), the Board continued to enforce employer's voluntary recognition of unions and, indeed, hold employers to their findings if they acknowledged majority support or independently verified such support. See, e.g., Without Reservation, 280 NLRB 1408 (1986); L & B Cooling, Inc., 267 NLRB 1, 1-2 (1983), enf'd, 757 F.2d 236 (10th Cir. 1985); CAM Industries, Inc., 251 NLRB 11 (1980), enf'd, 666 F.2d 411 (9th Cir. 1982); Jerr-Dan Corp., 237 NLRB 302, 303 (1978), enf'd, 601 F.2d 575 (3d Cir. 1979); Sullivan Elec. Co., 199 NLRB 809, 810 (1972), enf'd, 479 F.2d 1270 (6th Cir. 1973); Nationwide Plastics Co., 197 NLRB 996, 996 (1972). In sum, throughout the period from the passage of the Wagner Act until today, the Board has honored and attached a duty to bargain to employers' voluntary recognition of a union that enjoys majority support. Thus, not only has there been no change in the law in this area, Petitioners offer no evidence of any change in industrial facts. Voluntary recognition has always been common, see cases cited supra and infra at 31-32, and there is no

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[4]See H.R. 3020, 80th Cong., 1st Sess. section 8(a)(5) (1947), reprinted in 1 LMRA Legislative History at 51, 51-52. The House Conference Report explicitly stated that section 8(a)(5) was intended to follow the provisions of "existing law." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41 (1947), reprinted in 1 LMRA Legislative History at 505, 545, and in 1947 U.S.C.C.A.N. 1135, 1147. A similar proposal had also been rejected during the debate over the Wagner Act. See 1934 Senate Hearings at 652-53 (statement of L.L. Balleisen, Secretary, Industrial Division, Brooklyn Chamber of Commerce), reprinted in 1 NLRA Legislative History at 27, 690-91. Again in 1977 and 1978, several proposals of this nature were unsuccessfully introduced in Congress. See Rosen, "Labor Law Reform: Dead or Alive?," 57 U. Det. J. Urb. L. 1, 33-34 (1979).

evidence that it is increasing.

At its base, Petitioners' argument rests on their express assertion that "only an election is the proper means for the Board to determine the true representational desires of the employees." Dana Petition at 10-11 (emphasis added). But acceptance of this proposition would require the Board to ignore decades of its own and Supreme Court precedent. It would require the Board to change federal labor law in a manner that Congress expressly declined to do in 1947. In other words, the Petitioners' argument rests on a premise that cannot be accepted by the Board.

B. Voluntary Recognition Serves the Interests of Employers, Employees and Unions

Voluntary recognition is often in the interest of employees, employers and unions for several reasons. Indeed, this is almost self-evident as all three parties – a majority of employees, their employer, and their chosen representative – must freely agree to or authorize voluntarily recognition.

First, the process of voluntary recognition is typically far more expeditious than obtaining Board certification. While the General Counsel has worked to expedite the representation case process, private parties will always be able to design and agree to a more expeditious process, tailored to their unique situation, than one that applies in all contexts and requires government supervision. This is clearly reflected in the numbers. Despite the General Counsel's efforts, the median lag between petition and election is 40 days. Office of the General Counsel, NLRB, Summary of Operations (Fiscal Year 2003) at 5 (2003). Elections may be followed by challenge or objections proceedings, further extending the time until certification. If certification is challenged through a technical refusal to bargain, it often takes years to obtain an enforceable

order to bargain in the courts of appeals.

A more expeditious process serves the statutory interest in effectuating employee choice. It also serves employers and unions by limiting legal expenses and minimizing the duration of campaigning in the workplace, which enhances productivity and customer service.

Second, when labor and management negotiate concerning the process through which the will of the majority will be registered, they have an opportunity to establish rules of conduct that supplement Board rules. Two prominent scholars of this process, who have conducted extensive interviews of parties to recognition agreements, conclude, "Our research finds that . . . organizing [under a card-check agreement] has advantages for employers as well as for workers and unions. [A card check agreement] lets an employer shape the organizing campaign by bargaining limitations on the union." Eaton & Kriesky,[5] "No More Stacked Deck: Evaluating the Case Against Card-Check Recognition,"7 Perspective on Work 19, 21 (2003). The same scholars found that over three-fourths of one sample of recognition agreements contained restrictions on union conduct. Eaton & Kriesky, "Union Organizing Under Neutrality and Card Check Agreements," 55 Indus. & Lab. Rel. Rev. 42, 48 (2001). Thus, in recognition agreements, "[e]ach [party] g[ives] up rights under the Act . . . . in an effort to make the union recognition process less burdensome for both." Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 566 (2d Cir. 1993).

Such negotiated, bilateral limits on campaign conduct are not only important during the organizing process, but also often have a lasting, positive impact on labor-management relations.

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[5]The authors, Adrienne E. Eaton and Jill Kriesky, are, respectively, Professor, Labor Studies and Employment Relations, Rutgers University and Associate Professor, Institute for Labor Studies and Research, West Virginia University.

This is because, despite the Board's efforts to regulate the process, representation elections are often marred by unlawful conduct and "bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions." Linn v. United Plant Guard Workers of America, 383 U.S. 53, 58 (1966). As a result, if an election results in certification, "[i]t is not unusual for [initial bargaining] to take place in an atmosphere of hard feeling left over from an acrimonious organizing campaign." Lee Lumber, 334 NLRB at 403. For example, current Board law allows the parties to personally attack each other and, indeed, to lie about each other. Management may justifiably prefer an organizing process where the parties agree to eschew such conduct. Through recognition agreements, employers gain "an organizing process that is clearly less disruptive of workplace activities than the traditional National Labor Relations Board (NLRB) election process." Eaton & Kriesky, "No More Stacked Deck," at 20. The Second Circuit has recognized that such agreements' "underlying aim" is "to resolve peacefully those tensions inevitably flowing from a union organizing effort." J.P.Morgan, 996 F.2d at 566.

The Board's jurisprudence recognizes this as a motive for employer entry into recognition agreements. For example, in Rockwell, the Board found that "[i]n light of the economic conditions at [the plant the Employer] decided [to enter into a recognition agreement] to avoid the possibly disruptive effect of an election. Its choice of a card check was . . . reasonable." 220 NLRB at 1263. Courts of Appeal have similarly found that voluntary recognition is often "more practical and convenient and more conducive to amicable industrial relations." NLRB v. San Clemente Publishing Corp., 408 F.2d 367, 368 (9th Cir. 1969). That major employers with extensive experience with both Board elections and voluntary recognition, including General Motors, Ford, Daimler-Chrysler, Kaiser Permanente, and Liz Claiborne, have filed briefs in these

cases opposing a change in the law reflects the fact that voluntary recognition and the resulting bar often serve employers' legitimate interests.

Empirical data supports employers' understanding that voluntary recognition through a card check or similar process is often more conducive to positive labor relations and thus productivity than an election. For example, four scholars compared the impact on shareholder returns of certification granted after a vote in the United States with the impact of certification based on cards in Canada as well as the impact of certifications granted with and without a vote in Canada. Martinello, Hanrahan, Kushner, & Masse, "Certification Outcomes and Returns to Shareholders in Canada, 10 New Research on Labor Relations and the Performance of University HR/IR Programs 115 (David Lewin & Bruce Kaufman, eds, 2001). They found that Canadian "certifications granted without a representation vote have no effect on shareholder returns and, therefore, the expected profitability of the firm." This "contrasts sharply" with the effects of union certification after an election in the U.S. Id. at 116-17. In Canada, the scholars also found that representation votes had a larger impact on expected profits than nonelection certifications. Id. at 117. Based on existing knowledge of industrial relations, the authors explain their findings as follows:

> [T]he industrial relations literature . . . argues overwhelmingly that representation votes lengthen the certification process, provide management with the opportunity and incentive to oppose the application, and yield a more contentious process. Second, another large literature argues that the industrial relations climate or the quality of the employer-union relationship affects the performance of the firm. . . . Thus it seems reasonable that the more contentious environment brought by the extended election campaign and the representation vote can account for the difference in shareholder returns. [Id. at 131.]

As an expeditious, noncontentious and negotiated process for registering employees' desires, voluntary recognition serves all parties' interests

C. Current Law Prevents Both Collusion and Coercion in the Process of Voluntary Recognition

The Petitioners argue that the process of demonstrating majority support for a union outside a Board-supervised election should not be accorded the protection of the recognition bar because it is marred by unlawful pressure. However, existing law provides a fully adequate remedy for such unlawful conduct and there is no evidence suggesting that the gathering of cards is marked by more unlawful conduct than occurs in the course of election campaigns. In fact, the evidence suggests the opposite.

The Board has found that "voluntary recognition by the employer of [a] union upon a demonstration of its majority status only serves to effectuate employee free choice." Seattle Mariners, 335 NLRB at 565. In cases involving voluntary recognition after verification of majority support, the Board has found, "there is no basis for concern regarding the rights of the employees involved inasmuch as the . . . employees have had an opportunity to express their preference for a collective bargaining representative . . . when a clear majority of them designated the Union as their representative by executing authorization cards prior to the card check." S.B. Rest of Framingham, Inc., 221 NLRB 506, 507 (1975). There is "no basis for concern" because the law at it now stands fully safeguards both the principle of majority rule and employee free choice. The Supreme Court has stated approvingly that the Acts "prohibitions . . . go far to assure freedom of choice and majority rule in employee selection of representatives." ILGWU, 366 U.S. at 739.

1. Current Law Insures the Existence of Majority Support

An employer violates the Act if it recognizes a union that does not enjoy majority support. If an employer does so, it will be ordered to withdraw recognition. It is no defense that the employer believed in good faith that the union had such support. ILGWU, 366 U.S. at 738-

40. Nor is it a defense that the union gained such support subsequent to recognition. Id. at 736. No finding of animus or other unlawful motive is required. See, e.g., Duane Reade, Inc., 338 NLRB No. 140 at 8 (2003). A union that accepts recognition when it lacks majority support also violates section 8(b)(1)(A). Bernhard-Altman Texas Corp., 122 NLRB 1289, 1292-93 (1959).[6]

Significant sanctions attach to such unlawful recognition. Most importantly, the parties are prospectively deprived of their right to enter into what would otherwise have been a lawful bargaining relationship absent an election. This is because the standard remedy in such cases bars recognition absent certification. See, e.g., Duane Reade, 338 NLRB No. 140 at 3, 8; Crest Container Corp., 223 NLRB 739, 742 (1976); Wickes Corp., 197 NLRB 860, 863 (1972).

Moreover, if the parties to a recognition agreement that was not based on actual majority support subsequently enter into an agreement which contains a union security clause, they violate §§ 8(a)(3) and 8(b)(2). If the employer withholds dues under such a clause and sends them to the union, the Board will direct the parties to reimburse employees for all money withheld, plus interest. See, e.g., Alliant Foodservice, Inc., 335 NLRB 695, 697 (2001); Planned Building Services, Inc., 330 NLRB 791, 794 (2000); Keystone Shipping Co., 327 NLRB 892, 896 (1999). If the employer terminates a worker under such a clause, the parties are jointly and severally liable for backpay. Western Exterminator Co., 223 NLRB 1270, 1271 (1976), enf'd in rel. part, 565 F.2d 1114 (9th Cir. 1977).

Importantly, the majority support that current law so jealously insures is enjoyed by a

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[6]Petitioner in Dana makes unsupported allegations that the recognition agreement in that case "anointed a particular, hand-picked union (the UAW) with special privileges." Dana Petition at 3. But if an employer, in fact, grants "privileges," such as access to its property or to lists of employees, to one union and not another, it violates § 8(a)(2). See , e.g., Jolog Sportswear, Inc., 128 NLRB 886, 889 (1960).

union prior to the conferral of voluntary recognition is also a firmer majority than that required for certification. In order to be recognized based on authorization cards, a union must collect cards from an absolute majority of the total number of employees in the unit. In an election, by contrast, the union must receive only a majority of votes cast. See Community Hospital, Inc., 251 NLRB 1080, 1080-81 (1980); R.C.A. Manufacturing Co., 2 NLRB 159, 173-79 (1936); NLRB v. Standard Lime & Stone Co., 149 F.2d 435, 437 (4th Cir.), cert. denied, 326 U.S. 723 (1945).

Finally, most recognition agreements, including both of those at issue here, themselves insure the integrity of the verification process and the fact of majority support by requiring that a neutral third party review the evidence and certify the existence of a majority. See, e.g., Bruckner Nursing Home, 262 NLRB 955, 955 (1982) ("card count conducted . . . by an extension specialist of the New York State School of Industrial and Labor Relations"); Rockwell, 220 NLRB at 1263 (employer agreed to a "formal card check before a neutral third party"); Viejas Casino, 1999 NLRB GCM LEXIS 21 at *13 (1999) ("private election administered by a neutral third party"). In fact, recognition agreements have empowered third parties such as arbitrators to review and rule on allegations of coercion in the collection of cards. See, e.g., J.P. Morgan, 996 F.2d at 563-64.[7]

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[7]The Petitioners argue that majority support in cases of voluntary recognition is questionable because employers and unions "gerrymander" the units. But the Board will inquire into any improper exclusions or inclusions during the verification process in an unfair labor practice proceeding. See, e.g., Windsor Castle Health Care Facilities, Inc., 310 NLRB 579, 592 (1993), enf'd, 13 F.3d 619 (2d Cir. 1994). Moreover, the same criticism could be made of stipulated election agreements because the Board has long held that "in the absence of any violation of law or policy, the Board customarily finds stipulated or agreed-upon units appropriate." Bernhard-Altman Texas Corp., 122 NLRB 1289, 1291 n. 4 (1959). See also The Eavey Company, 115 NLRB 1779, 1780 (1956). Finally, a refusal to bargain charge filed after recognition will not be upheld unless the unit is an appropriate one (which is the only standard

2. Current Law Prevents Abuse in the Collection of Evidence of Majority Support

Current law also prevents abuses in the collection of evidence of majority support. The Board has ample power to safeguard employee free choice in the voluntary recognition process through its authority to prevent unfair labor practices.

Indeed, the only evidence cited by the Petitioners to the contrary are Board cases barring and sanctioning improper conduct. The Petitioners argue that "employers and unions have a propensity to impose union representation on employees," Dana Petition at 15,[8] but the only evidence cited by the Petitioners for this assertion are cases in which the Board found violations of § 8(a)(2) and other sections of the Act and, in every instance, ordered the employer to withdraw recognition from the union. In Duane Reade, for example, a case cited by the Petitioners, the Board held that the company violated §§ 8(a)(2) and (1) by providing unlawful assistance and recognition and that the union violated §§ 8(b)(1)(A) and (2) by accepting the same. The Board ordered the company to withdraw recognition unless and until the union was duly certified and ordered both parties to jointly and severally reimburse employees for dues and initiation fees. 338 NLRB No. 140 at 2-5. Thus, what the Petitioners' evidence actually demonstrates is that the Act's unfair labor practice process enables the Board to vigorously police the integrity of the voluntary recognition process. If a union uses threatening or

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the Board would have applied had the relationship been founded on an election) and thus unions are unlikely to seek recognition in inappropriate units.

[8]Much of this argument actually only applies to a subset of types of voluntary recognition. Voluntary recognition based on the parties' agreement to honor the results of an election conducted by a neutral third party other than the Board is not even arguably subject to many of the forms of coercion posited by the Petitioners.

intimidating conduct to solicit authorization cards, it violates § 8(b)(1)(A) and the Board will not allow the cards to be used to establish majority support. See, e.g., Planned Building Services, Inc., 318 NLRB 1049, 1063 (1995). If a union makes misleading statements while obtaining signatures on cards, they too will not count towards a majority. See, e.g., Brookland, Inc., 221 NLRB 35, 36 (1975). Moreover, "in order to void a recognition agreement . . . , 'the General Counsel need not prove with mathematical certainty that the union lacked majority support at the time of recognition where there is evidence that the employer unlawfully assisted a union's organizing campaign.'" Duane Reade, 338 NLRB No. 140 at 8.

Petitioners resort to blatant misstatement of the law in an effort to convince the Board to ignore it own precedents. Petitioners state, "The voluntary recognition bar applies 'blindly,' without concern for whether the employer-recognized union has the uncoerced support of employees." Dana Petition at 18. This statement simply ignores the fact that if the union does not enjoy majority support or such support was procured through coercion, and a charge is filed, the recognition will be declared unlawful and ordered withdrawn and no bar will apply. As the Supreme Court explained in Gissel, "As for . . . alleged irregularity in the solicitation of cards, the proper course is to apply the Board's customary standards . . . and rule that there was no majority if the standards were not satisfied." 395 U.S. at 602-03.

While Petitioners' argue that the laboratory conditions standard is a higher standard than that which applies in unfair labor practice cases, this is not correct in important respects. While the parties are free to misrepresent the facts and the law in election campaigns, including the effect of a yes vote, see Midland National Life Ins. Co., 263 NLRB 127 (1982), misrepresentations about the purpose or effect of signing a card may lead to its invalidation in an unfair labor practice case. See, e.g., Brookland, 221 NLRB at 36. Furthermore, while employers

can deploy supervisors to campaign against the union prior to and during an election, the Board rejects authorization cards solicited by supervisors. See , e.g., Glomac Plastics, Inc., 194 NLRB 406, 409-10 (1971).

Importantly, all the above described means of preventing and remedying coercion in the collection of cards can be invoked by individual employees under § 10. In other words, the integrity of the voluntary recognition process is guaranteed by the affected employees themselves - any one of whom can trigger review by filing a charge. In contrast, the objections procedure described by Petitioners can only be invoked by the parties to the representation process, which do not include individual employees in a RC or RM case.

In the instant cases, the Petitioners make several unfounded allegations, including allegations of union and employer coercion in the collection of cards, employer assistance with the collection of cards, misstatements about the effects of signing cards, the negotiation of terms and conditions of employment prior to the demonstration of majority support, and manipulation of the employee list to inaccurately reflect majority support in the card check. Dana Petition at 3, 14, 16-17. But the Petitioners did not file unfair labor practice charges concerning any of these allegations. In those proceedings, the allegations could have been investigated and a determination made as to their veracity. If the Petitioners' allegations were found to have merit, the employers would have been ordered to withdraw recognition and there would thus have been no need for the present petitions.

All this should not be read to suggest that there is any empirical evidence of significant abuse of the sort alluded to by Petitioners. Petitioners rely instead on inaccurate stereotypes from a bygone era. This expert agency must rely on more accurate evidence – all of which refutes Petitioners' suggestions. Scholars have reported, "Our research finds that other types of union

misconduct involving cards – such as forgery and thus use of threats to get employees to sign cards – are extremely rare." Eaton & Kriesky, "No More Stacked Deck," at 20. Indeed, the same scholars have found "strong evidence that card check agreements reduced . . . the use of illegal tactics such as discharges and promises of benefits." Eaton & Kriesky, "Union Organizing," 55 Indus. & Lab. Rel. Rev. at 42, 57.[9] A recent comprehensive review of this literature conducted for the British government concluded, "Employer groups argue that [card check] enables unions to place undue pressure on employees, while unions argue that it lessens the likelihood of employer coercion . . . .[T]he available evidence appears to provide greater support for the union position." Godard,[10] "Trade Union Recognition: Statutory Unfair Labour Practice Regimes in the USA and Canada," Department of Trade and Industry, Employment Relations Research Series, No. 29 at ix (March 2004). Professor Godard specifically found, "There is little evidence that card certification has been abused by unions, and considerable evidence the employers often abuse the opportunities provided for by a ballot and by employer speech rights." Id. at 46. Directly responding to the type of "evidence" cited by Petitioners,

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[9]This evidence that recognition agreements reduce employer unfair labor practices is important in light of compelling evidence that such employer misconduct has increased markedly in recent years. The bipartisan Dunlop Commission found a 14-fold increase in employer discrimination during organizing drives between the 1950s and the 1980s. Commission of the Future of Worker-Management Relations, Fact Finding Report 70 (May 1994). Professor Paul Weiler also charted this increase in employer unfair labor practices, finding that by the early 1980s, the odds were about one in 20 that a union supporter would be fired for exercising his or her rights. Weiler, "Promises to Keep: Securing Workers' Rights Under the NLRA," 96 Harv. L. Rev. 1769, 1781 (1983). Based on Board records, Professor Charles Morris has estimated that in the mid-1990s, one of every 18 employees involved in an election was illegally terminated or subject to other forms of discrimination. Human Rights Watch, Unfair Advantage: Workers Freedom of Association in the United States and International Human Rights Standards 71 (2000).

[10]The author John Godard is a Professor at the Asper School of Management of the University of Manitoba.

Godard found, "employer groups in the USA have tended to point to individual cases where workers have felt undue pressure or in intimidation or have signed a card based on false information. But the number of cases they have been able to identify have been limited, averaging only a few per year." Id. at 42.[11]

Indeed the Supreme Court has long ago addressed the central arguments raised by the Petitioners in this case:

> The objections to the use of cards voiced by the employers . . . boil down to two contentions: (1) that, as contrasted with the election procedure, the cards cannot accurately reflect an employee's wishes, either because an employer has not had a chance to present his views and thus a chance to insure that the employee choice was an informed one, or because the choice was the result of group pressures and not individual decision made in the privacy of a voting booth; and (2) that quite apart from the election comparison, the cards are too often obtained through misrepresentation and coercion which compound the cards' inherent inferiority to the election process. Neither contention is persuasive. [Gissel, 395 U.S. at 602 (emphasis added).[12]]

The Courts of Appeal have similarly rejected these contentions: [T]here is nothing suspect in the

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[11]Godard notes that Yager, Bartl, and LoBue in Employee Free Choice: It's Not in the Cards (Labor Policy Association 1998), are "able to identify only slightly over 100 cases since the passage of the NLRA." Godard, "Trade Union Recognition," at 79 n. 195. This is actually an average of only slightly more than 1.5 cases per year. And each of these isolated instances of misconduct was fully remedied by the Board under existing law as explained above.

[12]The second contention is fully addressed above. The Court dismissed the latter, reasoning:

> the employers argue that without a secret ballot an employee may, in a card drive, succumb to group pressures or sign simply to get the union 'off his back' and then be unable to change his mind as he would be free to do once inside a voting booth. But the same pressures are likely to be equally present in an election, for election cases arise most often with small bargaining units where virtually every voter's sentiments can be carefully and individually canvassed. And no voter, of course, can change his mind after casting a ballot in an election even though he may think better of his choice shortly thereafter. [Id. at 603-04.]

agreements which were freely chosen by the parties who voluntarily rejected the formal election proceedings." NLRB v. Cayuga Crushed Stone, Inc., 474 F.2d 1380, 1384 (2d Cir. 1973).

Existing law fully insures that voluntary recognition is not granted absent majority support and that the majority support is not the product of coercion or misinformation.

D. Elimination of the Recognition Bar Will Discourage Voluntary Recognition

Stripping voluntary recognition of the long-attached bar would not render voluntary recognition unlawful, but it would discourage this form of desirable private ordering. As one Court of Appeals observed, "To hold that only a Board-conducted election is binding for a reasonable time would place a premium on the Board-conducted election and would hinder the use of less formal procedures that, in certain situations, may be more practical and convenient and more conducive to amicable industrial relations." NLRB v. San Clemente Publishing Corp., 408 F.2d 367, 368 (9th Cir. 1969). Similarly, the Board recently observed that allowing petitions after voluntary recognition "unnecessarily discourages employers from voluntarily recognizing labor organizations." Smith's Food & Drug Centers, Inc., 320 NLRB 844, 845 (1996).

Thus, eliminating or creating an exception to the recognition bar would both discourage voluntary recognition and, even where it is granted, disrupt and delay the expeditious effectuation of the majority's will. Discouraging employers from voluntarily recognizing a representative designated by a majority of employees is surely contrary to the Act's express purposes of "encouraging the practice . . . of collective bargaining" and "protecting the . . . designation [by workers] of representatives of their own choosing." 29 U.S.C. § 151.

III. Application of the Bar Does Not and Cannot Depend on Whether Recognition Was Pursuant to a Preexisting Agreement Between the Union and Employer

In granting review in this case, the Board majority suggests that the existence of

agreements providing that the Employers would recognize the Union upon proof of majority support prior to existence of such support somehow distinguishes these cases from earlier cases according voluntary recognition protection from challenge for a reasonable period of time.[13] However, such agreements have never in any way been used to distinguish among bargaining relationships founded on voluntary recognition or otherwise cast doubt on the legitimacy of such recognition. The Board majority does not suggest why this factual difference should be relevant. Indeed, the Petitioners themselves do not in any way argue that voluntary recognition obtained pursuant to a preexisting agreement should be treated differently than voluntary recognition granted immediately upon request.[14] No argument has been advanced for this proposition because none exist.

Both the Supreme Court and the Board have long recognized that an employer and a union can agree in advance that the employer will recognize the union upon proof of majority support. In Linden Lumber Division, Summer & Co. v. NLRB, 419 U.S. 301 (1974), for example, the Supreme Court distinguished the facts in that case, where the Court upheld an employer's refusal to recognize a union that claimed majority support based on cards, from one

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[13]No other terms of the agreements can be at issue in this case for three reasons. First, there are no factual findings concerning the contents of any other terms. Second, there are no factual findings or evidence of any sort concerning whether the parties formally altered these terms after the initial agreements or abided by these terms in practice. Finally, any other terms in such agreements can lawfully be and sometimes are elements of agreements entered into before Board-supervised elections. See, e.g., Service Employees International Union v. St. Vincent Med. Ctr., 344 F.3d 977 (9th Cir. 2003), cert. denied, 124 S.Ct. 1878 (2004); New York Health and Human Service Union, 1199/SEIU, AFL-CIO v. NYU Hospitals Center, 343 F.3d 117 (2d Cir. 2003) (both enforcing agreement to arbitrate disputes arising under agreements that restricted parties' conduct prior to Board-supervised election).

[14]The Union has thus been placed in the untenable position of responding to an argument that has been alluded to but not made.

in which "the employer breaches his agreement to permit majority status to be determined by means other than a Board election." Id. at 310 n. 10. In the same case, the Board also pointed out that the parties "never voluntarily agreed upon any mutually acceptable and legally permissible means, other than a Board-conducted election, for resolving the issue of union majority status." 190 NLRB 718, 721 (1971). Both holdings recognize that an employer's agreement to recognize a union upon proof of majority support is "legally permissible."

Indeed, the Board and the federal courts have routinely enforced such agreements under sections 8(a)(5) and 301 respectively. See, e.g., Raley's, 336 NLRB 374 (2001); Central Parking System, Inc., 335 NLRB 390 (2001); Goodless Electric Co., 332 NLRB 1035 (2000), enf. denied on other grounds, 285 F.3d 102 (1st Cir. 2002); Pall Biomedical Products Corp., 331 NLRB 1674 (2000), enf. denied, 275 F.3d 116 (D.C.Cir. 2002);[15] MJS Garage Management Corp., 314 NLRB 172 (1994); Goldsmith-Louison Cadillac Corp., 299 NLRB 520 (1990); Alpha Beta Co., 294 NLRB 228 (1989); Jerry's United Super, 289 NLRB 125, 138 (1988); L&B Cooling, Inc., 267 NLRB 1, 1-2 (1983), enf'd, 757 F.2d 236 (10th Cir. 1985); CAM Industries, 251 NLRB 11 (1980), enf'd, 666 F.2d 411, 412-14 (9th Cir. 1982); United Mine Workers of American (Lone Star Steel Co.), 231 NLRB 573 (1977), enf. denied, 639 F.2d 545 (10th Cir. 1980), cert. denied, 450 U.S. 911 (1981);[16] S.B.Rest of Framingham, Inc., 221 NLRB 506 (1975); Houston Division, Kroger Co., 219 NLRB 388 (1975); Eltra Corp., 205 NLRB 1035 (1973); White Front Stores,

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[15]While the Court denied enforcement in Pall, its decision in no way suggested that this form of agreement is suspect or unenforceable. Rather, the Court merely held that, under the particular facts of that case, the interest of employees in an existing unit in obtaining such an agreement, applicable in another unit, was too remote to be the basis of a duty to bargain concerning the subject.

[16]Enforcement was denied in this case for reasons that parallel those in Pall.

192 NLRB 240 (1971); Redmond Plastics, Inc., 187 NLRB 487 (1970); National Container Corp., 87 NLRB 1065, 1065-66 (1949); UAW v. Dana Corp., 278 F.3d 548 (6th Cir. 2002); United Steelworkers of America v. AK Steel Corp., 163 F.3d 403 (6th Cir. 1998); Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561 (2d Cir. 1993); Hotel Employees, Restaurant Employees, Local 2 v. Marriott Corp., 961 F.2d 1464 (9th Cir. 1992); Georgetown Hotel v. NLRB, 835 F.2d 1467, 1470-71 (D.C.Cir. 1987); Mo-Can Teamsters Pension Fund v. Creason, 716 F.2d 772, 775 (10th Cir. 1983), cert. denied, 464 U.S. 1045 (1984).

The Ninth Circuit has observed, "The NLRB can and does enforce employers' agreements to waive their rights to the NLRB's regular election and certification procedures and substitute alternative procedures." Marriott Corp., 961 F.2d at 1469 n. 8. The D.C.Circuit has stated, "The law regarding voluntary recognition is straightforward. . . . [V]oluntary recognition has been found to have occurred when an employer agrees to recognize a union through a card check or some other procedure *and* subsequently confirms the union's majority status through that procedure." Georgetown Hotel, 835 F.2d at 1470-71 (second emphasis added). "Such a contract," the Second Circuit held, "which bypasses Board-conducted elections, provides an alternative method for employees to accept or decline union representation." J.P. Morgan, 996 F.2d at 566. Such a contract is "not an impermissible attempt to bypass Board election procedures. The jurisdiction of the NLRB over representation matters does not preclude private agreements concerning the same issues, and a court may use its concurrent § 301 jurisdiction to enforce arbitration clauses appearing in such contracts." Id. at 568.

Only four years ago, the Board explained, "in the construction industry, as in other industries, agreements for future 9(a) recognition are permissible and do not depend for their

validity on showing of majority status at the time of the execution of the agreement." Goodless, 332 NLRB at 1038. The Board continued, "the Board has long held that an employer who agrees to have majority status determined by a means other than a Board election may not thereafter breach its agreement and refused to bargain." Id. A decade earlier, the Board explained, "an employer may agree in advance of a card count to recognize a union on the basis of a card majority and we can perceive of no reason why it may not contract with the union to do so in advance of the time the union has commenced organizing." Goldsmith-Louison, 299 NLRB at 522.

The Board has not only found agreements to recognize contingent on a showing of majority support to be valid and enforceable, it has found no policy reason whatsoever why this should not be so. In Kroger, the Board "concluded that these clauses are valid and constitute a waiver of the Employer's right to demand an election." Id., 219 NLRB at 389. The Board then considered the Court of Appeals' question on remand: "whether there exists any considerations of national labor policy which would require us to find these clauses illegal." Id. The Board answered, "We not only find that no such negative considerations exist, but agree with the suggestion in the court's opinion that national labor policy favors enforcing their validity." Id. (emphasis added). This is because federal policy favors enforcing agreements between labor and management. Id. "[T]here is no countervailing consideration[] of policy not to give effect to these agreements." Id (emphasis added). To the contrary, the Board has found that "'national labor policy' actually favors enforcing agreements by an employer to recognize a union in the future upon a showing of majority support." Goodless, 332 NLRB at 1038. The courts of appeal have agreed, finding employers' "agreement to accept the results of a card check in lieu of an NLRB election is consistent with federal labor policy." Marriott, 961 F.2d at 1468.

In fact, prior agreement insures a more open and orderly process. The employer is made aware of the union's interest in representing its employees and can thus communicate with the employees about both the merits of collective bargaining and the process that will be used to measure their sentiments. Employees are likely to understand that if a majority of them sign authorization cards their employer will (rather than might) recognize the union, thus making the consequence of signing a card more certain. And third parties, such as rival unions, are also likely to become aware of the agreed upon process and thus be more able to effectively participate in it. Finally, it appears indisputable that it is desirable for the form of evidence of majority support and process for assessing such evidence to be clearly spelled out in advance. There is thus no conceivable reason to accord voluntary recognition granted pursuant to such an agreement a lesser status than is accorded an employer's ad hoc and immediate acknowledgment of a union's claim to majority support.

Accordingly, the Board has uniformly applied the petition bar rule at issue here after voluntary recognition whether it resulted from a prior agreement or not. See, e.g., Seattle Mariners, 335 NLRB at 563 (parties "entered into a written neutrality/card check agreement"); MGM Grand, 329 NLRB at 469 (parties signed "memorandum [that] required the Employer to recognize the Union based on a valid card check").[17] No case applying the recognition bar rests on the fact that no such prior agreement existed. In other words, the long line of precedent applying the bar cannot be distinguished on this grounds.

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[17]Even the dissenters in MGM Grand would have dismissed the first and second petitions under the recognition bar rule despite the existence of the prior agreement. Id. at 468, 469.

Conclusion

For the above-stated reasons, the Board should sustain the Regional Directors' decisions.

Respectfully submitted,

Daniel W. Sherrick
General Counsel
Betsy Engel
Catherine Trafton
Associate General Counsel
International Union, UAW
8000 East Jefferson
Detroit, Michigan 48214
(313)926-5216

Counsel for the UAW

Jonathan P. Hiatt
General Counsel
James B. Coppess
Nancy Schiffer
Associate General Counsel
AFL-CIO
815 16th St., N.W.
Washington, D.C. 20006
(202)637-5053

Craig Becker
Associate General Counsel
25 E. Washington, Suite 1400
Chicago, Il. 60602
(312)236-4584

Counsel for the Amicus AFL-CIO

By: 

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief on Review of the UAW and Amicus AFL-CIO was served on the following parties via overnight mail on July 15, 2004, on the attached service list.

James B. Coppess
AFL-CIO
815 16th Street, N.W.
Washington, D.C. 20006
202-637-5337

Attachment

Service for Metaldyne Corporation, Case Nos. 6-RD-1518 and 1519

James M. Stone, Esq.
David E. Weisblatt, Esq.
McDonald Hopkins Co., LPA
2100 Bank One Center
600 Superior Avenue
Cleveland, OH 44114
216-348-5400

Glenn Taubman, Esq.
William Messenger, Esq.
National Right to Work Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA
703-321-8510

Daniel P. Sherrick, Esq.
Betsey A. Engel, Esq.
International Union, United Automobile, Aerospace and
Agricultural Implement Workers of America, AFL-CIO
8000 Jefferson Avenue
Detroit, MI 48214
313-926-5216

Gerald Kobell, Regional Director
National Labor Relations Board, Region 6
1000 Liberty Avenue
Pittsburgh, PA 15222-4173
412-395-6844

Service for Dana Corporation, Case No. 8-RD-1976

Stanley Brown, Esq.
Susanne Harris Carnell, Esq.
Hogan &Hartson
8300 Greensboro Drive, Suite 1100
McLean, VA 22102
703-610-6200

Glenn Taubman, Esq.
William Messenger, Esq.
National Right to Work Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
703-321-8510

Daniel P. Sherrick, Esq.
Betsey A. Engel, Esq.
International Union, United Automobile, Aerospace and
Agricultural Implement Workers of America, AFL-CIO
8000 Jefferson Avenue
Detroit, MI 48214
313-926-5216

Gary M. Golden, Esq.
Dana Law Department
4500 Dorr Street
Toledo, OH 43697
419-535-4847

Frederick J. Calatrello, Regional Director
National Labor Relations Board, Region 8
1240 East 9th Street, Room 1695
Cleveland, OH 44199-2086
216-522-3715