JD–24-05
St. Johns, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DANA CORPORATION
Respondent Employer

and

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

and

GARY L. SMELTZER, JR., An Individual — Cases 7-CA-46965, 7-CB-14083
Charging Party

and

JOSEPH MONTAGUE, An Individual — Cases 7-CA-47078, 7-CB-14119
Charging Party

and

KENNETH A. GRAY, An Individual — Cases 7-CA-47079, 7-CB-14120

Sarah Pring Karpinen, Esq.,
for the General Counsel.
Stanley J. Brown and *Emily J. Christiansen, Esqs., (Hogan & Hartson, LLP),* of McLean, Virginia,
for Respondent Dana.
Betsey A. Engel and *Blair Simmons, Esqs.,*
of Detroit, Michigan, for Respondent UAW.
William A. Messenger, Esqs., (National Right to Work Legal Defense Foundation), of Springfield,
Virginia, for the Charging Parties.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Detroit, Michigan, on February 8, 2005. The charges were filed against Dana Corporation (Dana) and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (the UAW) by Gary L. Smeltzer, Jr., Joseph Montague, and Kenneth A. Gray (the Charging Parties) on December 16, 2003, January 22, 2004, and January 22, 2004 respectively. The complaint that issued on September 30, 2004 alleges that on August 6, 2003[1] Dana and the UAW entered into and maintained a Letter of Agreement that set forth the terms and conditions of employment to be negotiated in a collective-bargaining agreement should the UAW obtain majority status as the exclusive collective-bargaining representative of certain of Dana's employees, including those at its facility located in St. Johns, Michigan. The complaint further alleges that the Respondents entered into the Letter of Agreement at a time when the UAW was not the majority collective bargaining representative at the St. Johns facility. By such conduct, the complaint alleges, Dana violated Section 8(a)(2) and (1) of the Act and the UAW violated Section 8(b)(1)(A). It is noteworthy that the complaint does NOT allege that Dana recognized the UAW as the exclusive collective bargaining representative for the employees at the St. John facility.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Parties, Dana, and the UAW[2], I make the following

Finding of Fact

I. Jurisdiction

Dana, a corporation with several facilities located throughout the United States, including a facility located in St. Johns, Michigan, is engaged in the manufacture and non-retail sale for the automobile industry. During the calendar year 2003 Dana, in conducting its operations described above, purchased and received goods and supplies at its Michigan facility valued in excess of $50,000 from points located outside the state of Michigan. Respondents admit, and I find that Dana is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and the UAW is a labor organization within the meaning of Section 2(5).

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[1] All dates are in 2003 unless otherwise indicated.

[2] Dana and the UAW each filed a motion to strike exhibits 1 and 2 that are attached to the charging parties' brief. The Charging Parties filed a response defending the attachment of a complaint to its brief. The Charging Parties correctly argue that they are free to cite precedent in their brief and to attach copies as a courtesy to the judge. But a complaint has no precedential value and I therefore grant the motion to strike.

II. Alleged Unfair Labor Practices

Dana makes automotive parts and light and heavy duty components for industrial and off highway vehicles. Its three biggest products are frames, axles, and drive shafts. It has about 90 facilities located throughout the United States and Canada and 25-30 in foreign countries. About 300 non-supervisory employees work at the St. John facility. The UAW has been conducting an organizing campaign there since early 2002, but as of the date of the hearing it had not yet claimed to represent a majority of the employees.

Dana and the UAW have a long standing collective-bargaining relationship that has resulted in a master agreement that covers three units at two locations and six other contracts covering about 2200-2300 employees. Dana has not and does not recognize the UAW as the collective bargaining representative for any of the employees at the St. John facility.

On August 6 Dana and the UAW entered into a letter of agreement. The agreement is 17 pages plus attachments. It sets forth its purpose as:

> The Company and the Union recognize that dramatic changes in the domestic automotive market has (sic) created new quality, productivity, and competitiveness challenges for the automotive component supplier. Both parties believe these challenges will be more effectively met through a partnership that is more positive, non-adversarial and with constructive attitudes towards each other. The Company and the Union also recognize the significant contribution of the skills and loyalty of the workforce to the success of the Company and the importance of the investment in the skills of the workers. The parties believe that job flexibility is a positive learning experience not a negative assignment. Each recognizes the significant role that the other must play in the success of the Company. To these ends, the Company and the Union hereby pledge renewed energies and commitment to increase productivity, efficiency, and quality of operations and to maximize the competitive capability of the Company achieving a desirable balance of a fair day's work for a fair day's pay.
>
> The Union, the Company and its employees will work together in a spirit of teamwork, cooperation and mutual understanding to improve product quality, productivity, improve working conditions, enhance the opportunities of the work force; and grow the business to increase job security and shareholder value. Both the Company and the Union are committed to increase investment opportunities, increase return on investment and grow the facilities that are competitive and profitable. The Company and the Union believe in the interdependent relationship of quality, operating efficiency and empowerment of people to job security. The Dana Style of management has for many years adhered to these axioms. They are essential to the future of Dana and our workforce.
>
> The Company's recognition of the changing automotive component industry prompted a change in our approach to UAW representation. The Company is optimistic that a partnership with the UAW may assist Dana in achieving new business with our Big 3 customers, which would benefit Dana and its employees.

> Employee's freedom of choice is a paramount concern of Dana as well as the UAW. We both believe that membership in a union is a matter of personal choice and acknowledge that if a majority of employees wish to be represented by a union, Dana will recognize that choice. The Union and the Company will not allow anyone to be intimidated or coerced into a decision on this important matter. The parties are also committed to an expeditious procedure for determining majority status.
>
> If a Dana employee chooses to be or not to be represented by the UAW, there will be no reprisals by the UAW or the Company due to their choice.
>
> These mutually beneficial commitments are the basis for a renewed partnership between the Company and the Union. The Company and the Union are individually and collectively committed to the implementation of these fundamentally sound principles and if achieved, the Company, the Union and the employees will benefit.

The letter of agreement provides that Dana will adopt a position of neutrality in the event that the UAW sought to represent employees at the facilities covered by the agreement. Respondents pledged not to say anything negative about each other. Among other things, Dana pledged not to do or say anything that implied opposition to unionization. It promised to inform employees, among other things, that it is neutral on the issue of representation by the UAW and that it has a constructive relationship with the UAW

In the letter of agreement Dana also indicated that it would provide the UAW, upon request, with a list of employees and home addresses, among other things. Dana promised to provide access to the UAW to employees during the workday in non-work areas and to meet with employees on the premises during work time.

The letter of agreement spelled out a procedure for determining the majority status of the UAW. Once the UAW's majority status was established, Dana agreed to recognize it and bargain on an expedited schedule. The letter of agreement also provides:

> The Union and the Company recognize that the cost of quality healthcare for employees has become a national crisis that jeopardizes the Company's ability to compete in the global markets that Dana serves. Until a national solution to this problem is achieved, the Union and the Company agree that the current situation demands affirmative actions to mitigate the dire affects that the cost of healthcare for the Company's employees and the Union's members has on the Company's ability to compete and make a reasonable return on its investment. Therefore the Union commits that in no event will bargaining between the parties erode current solutions and concepts already in place or scheduled to be implemented January 1, 2004 at Dana's operation which include premium sharing, deductibles, and out of pocket maximums. The parties are further committed to finding workable solutions to reduce these ever-increasing healthcare costs and mutually agree to further explore other avenues, including legislative initiatives, in the healthcare care arena that could lead to a reduction of these costs for the Company and its employees.

The parties agreed that any collective bargaining agreements would last for at least four years. The letter of agreement contained procedures for the parties to use if they were unable to reach a contract on their own; it culminates in interest arbitration.

They agreed:

> [T]hat in labor agreements bargained pursuant to this Letter, the following conditions must be included for the facility to have a reasonable chance to succeed and grow.
>
> > Healthcare costs that reflect the competitive reality of the supplier industry and products(s) involved.
> > Minimum classifications.
> > Team-based approaches.
> > The importance of attendance to productivity and quality.
> > Dana's idea program (two ideas per person per month and 80% implementation.
> > Continuous improvement.
> > Flexible Compensation.
> > Mandatory overtime when necessary (after qualified volunteers) to support the customer.

The letter of agreement provides for a procedure to alleged violations of the agreement. It contains no strike – no lockout commitments by the UAW and Dana that are triggered when the UAW requests the list of employees described above.

The letter of agreement call for the creation of a national partnership steering committee composed of three members from both parties. The committee is to meet as needed:

> [T]o review and discuss the labor agreements being bargained by the parties with the goal of ensuring that the labor costs of those agreements are not materially harming the financial performance of the facilities that they cover.

It provided that when the phase 1, level 1[3], facilities were organized the committee would meet to review and discuss the overall impact of the labor agreements on these facilities. In order for the UAW to commence organizing the phase 2, level 1, facilities a majority of the committee had to concur that the overall impact of the labor agreements must not have materially harmed the

[3] The letter of agreement places Dana's facilities into three levels. Level 1 facilities are generally those which manufactured products for the Big 3 automobile manufacturers; 27 facilities are placed at this level. Level 2 are generally those facilities that did not manufacture products for the Big 3; 39 facilities are listed at this level. Finally, level 3 were generally those facilities that manufactured or assembled products sold to non-union foreign owned assembly facilities; four facilities are in this category. Level 1 facilities were further divided into two phases. Fourteen facilities were placed in phase 1 and the rest were left for phase 2. The letter of agreement, for the most part, applies only to level 1 facilities.

financial performance of those labor agreements; if the committee deadlocks the matter is sent to a neutral third-party for resolution. The Union also agreed not to conduct organizing campaigns at more than seven level 1 facilities at any one time absent mutual agreement.

On August 13 Dana issued a press release announcing the agreement with the UAW. The release, however, did not describe the details of the agreement as it noted that the terms of the agreement were not disclosed by agreement of the parties. In December 2003 the UAW requested a list of employees for the St. John facility, thereby triggering its no-strike obligations in the letter of agreement as described above.

III. Analysis

A. Procedural Dismissal

As indicated above, the complaint does NOT allege that Dana has unlawfully recognized the UAW. Dana, in its brief, states:

> [T]he narrow issue presented in this case is whether the Letter of Agreement entered into by Dana and the [UAW] on August 6, 2003 constitutes an unlawful *pre-recognition* contract in violation of the [Act] (emphasis added).

I agree that the complaint raises only that narrow issue. Yet in his brief the General Counsel, apparently recognizing the need in this case to establish unlawful recognition in order to prevail, argues that Dana's actions amounted to recognition of the UAW. It is important to note that the General Counsel does not argue that the neutrality and assistance provisions of the letter of agreement violate the Act. Rather, the General Counsel argues that Dana and the UAW:

> [N]egotiated substantive terms and conditions of employment, most of which were concessionary in nature, in exchange for card check and neutrality provisions that would expedite the recognition process at the plant. Dana's *granting of exclusive bargaining status* to the UAW when it did not represent a majority of employees at the St. Johns plant constituted interference with its employees' Section 7 rights and unlawful support of the union in violation of Section 8(a)(1) and (2) of the Act. The UAW's conduct *in accepting recognition* violated Section 8(b)(1)(A) (emphasis added.)

Section 102.15 of the Board's Rules and Regulations requires that the General Counsel issue a complaint that contains "a clear and concise description of the acts which are claimed to constitute unfair labor practices …" The General Counsel did not plead the "act" of recognition as unlawful. The General Counsel has failed to comply with the Board's Rules by failing to plead unlawful recognition in the complaint. It follows that the complaint be dismissed because the General Counsel makes no argument that a violation of the Act has occurred in the absence of unlawful recognition.

B. Dismissal on the merits

In the alternative I shall address the contentions made the General Counsel in his brief in the event that the Board might find that useful. As the General Counsel correctly points out, it is well-settled that an employer violates Section 8(a)(2) and (1) of the Act when it grants

recognition to a union at a time when the union does not represent a majority of employees in the recognized unit and a union violates Section 8(b)(1)(A) when it accepts recognition under those circumstances. *International Ladies' Garment Workers Union v. NLRB*, 366 U.S. 731 (1961). There is no evidence in this case that Dana verbally or in writing recognized the UAW as the bargaining representative for the St. Johns employees; to the contrary the letter of agreement explicitly states that recognition has not been granted and the Respondents have confirmed that throughout these proceedings.

The General Counsel and Charging Parties argue that the UAW and Dana went beyond discussing tentative contract proposals in the letter of agreement and made substantive agreements on the terms and conditions of employment of employees. The General Counsel argues that by virtue of this conduct Dana recognized and bargained with the UAW. Thus the question becomes whether Dana granted recognition to the UAW by entering into the letter of agreement notwithstanding the disclaimers to the contrary. The letter of agreement does indeed touch upon terms and conditions of employment. In some ways the letter of agreement is quite specific. For example, as set forth above in more detail, the letter of agreement commits the parties to negotiate a 4-year collective bargaining agreement and to use interest arbitration to reach a contract if they are unable to do so.[4] The General Counsel and the Charging Parties argue that the letter of agreement also limits the employees' right to strike from the date the UAW requests a list of employees at the plant. But this provision by its terms waives only the UAW's right to call a strike; the employees' Section 7 right to concertedly strike remains intact. Moreover, because I conclude below that the UAW has not been recognized and is not the bargaining representative of the employees it cannot by operation of law waive any rights of the employees. In other ways the letter of agreement sets forth general principles that the parties recognize, such as the UAW's commitment that bargaining would not "erode current solutions and concepts" concerning health insurance such as premium sharing, deductibles, and out of pocket expenses and that labor agreements bargained pursuant to the letter of agreement must include healthcare costs that reflect the competitive reality of the supplier industry and products(s) involved, minimum classifications, team-based approaches, the importance of attendance to productivity and quality, Dana's idea program (two ideas per person per month and 80% implementation, continuous improvement, flexible compensation, and mandatory overtime when necessary (after qualified volunteers) to support the customer for the facility to have a reasonable chance to succeed and grow.

But other typical and essential elements of recognition are entirely absent from the letter of agreement and the facts of this case. There is no evidence that Dana deals with the UAW concerning employee grievances. Importantly, Dana remains free to make changes in terms and conditions of employees without first notifying and on request bargaining with the UAW. This is utterly at odds with the notion that Dana has recognized the UAW. There is no concept of partial recognition in labor law; there is either recognition or there is not. Nor can it be said that the letter of agreement constitutes a collective bargaining agreement from which recognition can be inferred. The letter of agreement does not deal with significant matters such as wages, pensions, grievances and arbitration, vacations, union security, etc. Moreover, in the complaint

[4] AS the UAW points out, interest arbitration is not considered a mandatory subject of bargaining. *Sheet Metal Workers' Local 59 (Employer Ass'n)*, 227 NLRB 520 (1976).

the General Counsel describes the letter of agreement as setting forth terms and conditions "to be negotiated in a collective-bargaining agreement…."

The General Counsel and the Charging Parties rely heavily on *Majestic Weaving Co.*, 147 NLRB 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2d Cir. 1966). In that case the Board held that the employer violated the Act by recognizing and negotiating a tentative contract with a union when the union did not have majority support of the employees. The contract was conditioned upon the union there gaining majority support from the employees. But I conclude that *Majestic Weaving* is not controlling for at least two reasons. First, the Board there concluded that the employer had recognized the union apart from negotiating a contract; that is the very element missing in this case. Second, the collective-bargaining contract there was complete and whole; the letter of agreement in this case is a far cry from a collective-bargaining agreement. The General Counsel notes that in *American Bakeries Co.*, 280 NLRB 1373 1374, fn. 5 (1986), the Board affirmed the judge's decision that included a footnote stating that in *Majestic Weaving*:

> The Board has even held that bargaining prior to the achievement of the union's majority status is violative despite the fact that the contract is not enforced or is conditioned upon the union's ability to demonstrate majority standing at some later time.

But *American Bakeries* involved allegations of unlawful recognition and bargaining and the judge's remarks are classic dicta. Likewise in *SMI of Worcester, Inc.*, 271 NLRB 1508 (1984), the Board found violations based upon recognition and negotiation of a complete collective bargaining agreement at a time when the union did not represent a majority of the employees. The Board specifically found it unnecessary to consider the judge's analysis of any pre-recognition bargaining, an analysis that included reference to *Majestic Weaving*, because no such violation was alleged in the complaint. Thus, *SMI* contributes little to the resolution of the issues in this case.

The General Counsel argues that the confidentiality provision in the letter of agreement "would have a tendency to further magnify the impression in the minds of employees that the UAW and Dana had a special insider relationship" and "would necessarily impress upon employees the idea that the UAW had already been recognized by Dana." However, the complaint does not allege that Dana and the UAW independently violated the Act by conveying the impression to employees of unlawful recognition so to that extent I need not resolve that matter. I do note, however, that it is not unlawful for an employer to indicate its preference for a union. *Coamo Knitting Mills*, 150 NLRB 579, 581,595 (1964).

Finally, the General Counsel and Charging Parties rely on offers of proof made at the hearing. I have again considered the offers and again conclude that proffered evidence is not relevant to the allegations of the complaint.

Because the evidence fails to show that Dana has recognized the UAW for employees at the St. Johns facility, I shall dismiss the complaint.

C. Alternative dismissal

Dana and the UAW rely on *Kroger Co.*, 219 NLRB 388 (1975) to argue that even if they bargained with each other in reaching the letter of agreement that conduct was lawful. In *Kroger* the Board found lawful provisions in a collective bargaining contract requiring an employer to recognize the union as the bargaining representative of employees at additional, future facilities, and apply the collective bargaining agreement to those employees. The Board made clear that the application of the contract was conditioned upon the union receiving majority support at the new facility. Citing *Pall Biomedical Products Corp.*, 331 NLRB 1674, 1675-76 (2000), enforcement denied on other grounds 275 F. 3d 116 (D.C. Cir. 2002), the General Counsel seeks to distinguish *Kroger* by limiting its holding to instances where an entire existing collective bargaining agreement is extended to a new unit of employees. There the Board found, among other things, that the employer violated Section 8(a)(5) by failing to adhere to a letter of agreement whereby the employer agreed to recognize the union under certain circumstances at another facility. That case has little bearing on this issue in this case. Here, the UAW and Dana have an existing collective bargaining relationship with several contracts covering over 2000 employees. The General Counsel concedes:

> If the UAW had turned instead to its represented Dana facilities and bargained with the employer to extend its master or other agreements to the St. Johns employees, its actions would have been lawful.

It seems to me that if Dana and the UAW are free to extend their existing agreements to cover the St. Johns employees they should be free to bargain for less than a full extension so as to allow greater employee participation in the terms and conditions of employment at the new facilities. I therefore conclude, in the alternative, that if the letter of agreement was the result of bargaining, then such bargaining was lawful under *Kroger* and this case should be dismissed.[5]

Finally, the General Counsel argues that if the letter of agreement is found lawful under *Kroger*:

> unions could just go to employers and offer up concessions at the expense of employees they do not and may never represent. Those negotiations could take place without the employees even knowing about it, and the agreements, as in this case, could be kept confidential. An employee might never know that the union made these concessions in order to win an expedited election or card check.

This, however, is not such a case. Dana and the UAW publicly announced the existence of the letter of agreement even if they did not reveal its precise terms. By now all employees who are interested will know of the specific terms of the letter of agreement. Employees are free make what they will of the letter of agreement in deciding whether or not to support union representation. And what the General Counsel calls concessions might be viewed by some

[5] The Charging Parties argue that if *Kroger* supersedes *Majestic Weaving* as it interprets the latter case, then *Kroger* should be overruled. I am without authority, of course, to overrule existing precedent.

employees as a mature recognition of existing economic realities in the automotive parts industry.

The Charging Parties make a number of arguments not encompassed by the complaint. For example, they argue that a pre-recognition agreement violates Section 7 because it "inherently constitutes a threat of reprisal or promise of benefit based on employee exercise of protected rights." They also argue that the UAW will violate its duty of fair representation if and when it is recognized by Dana. The General Counsel controls the complaint and he has made no such allegations. The Charging Parties also argue that "the UAW did not obtain, or even attempt to obtain, *any* benefits or improvement to employees' working conditions in the Letter of Agreement" (emphasis in original). But this argument is beside the point; the employees will decide whether they desire union representation and they will be free to assess letter of agreement in that process.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed.

Dated, Washington D.C., April 8, 2005.

William G. Kocol
Administrative Law Judge

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulation, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.