UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DANA CORPORATION, (Respondent Employer), and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO (Respondent Union) and GARY SMELTZER, JOSEPH MONTAGUE, & KENNETH GRAY, (Employee Charging Parties)	)	Case Nos. 7-CA-46965, 7-CA-47078, 7-CA-47079, 7-CB-14083, 7-CB-14119, 7-CB-14120.

BRIEF OF *AMICUS CURIAE*
ASSOCIATED BUILDERS AND CONTRACTORS, INC.
IN SUPPORT OF GENERAL COUNSEL AND CHARGING PARTIES

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INTEREST OF THE AMICUS

Associated Builders and Contractors, Inc. (ABC) is a national trade association of more than 23,000 construction contractors and related firms, including both unionized and non-union companies. ABC's members share the view that work should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC strongly supports the right of employees to choose freely whether to be exclusively represented by a labor organization, or to refrain from doing so.

ABC has been a frequent amicus participant in NLRB proceedings likely to have a significant impact on employers and employees generally, and the construction industry in particular. See, e.g., J.A. Croson Co., Inc., Case No. 9-CA-35163-1,-2 (pending); Dilling Mechanical Contractors, Inc., Case No. 25-CA-25094 (pending); FES, Division of Thermo Power, 331 NLRB No. 20 (May 11, 2000); Town & Country Electric, 309 NLRB 1250 (1992), affd, 516 U.S. 85 (1995). ABC previously filed an amicus brief in support of the petitioners in the related case of Dana Corp./Metaldyne Corp. , 8-RD-1976, 6-RD-1518 (pending), in which employee petitioners are seeking to decertify the union representative imposed upon them by the same coercive neutrality agreement that is at issue in the present case.

ABC is filing as an amicus in the present case because the decision of the Administrative Law Judge in dismissing the complaint threatens to undermine the fundamental protections of employee rights under the NLRA, to the detriment of both employees and employers. The Board should act now to enforce Section 8(a)(2)'s clear prohibition against pre-recognition bargaining between employers and minority unions.

ARGUMENT

1. Introduction

Neutrality and card check agreements between non-majority unions and employers are inherently coercive and sacrifice employee rights to free choice under the NLRA. In recent years, faced with lack of success in increasing their membership through the statutorily mandated process of independently organizing workers and obtaining representational rights through a secret ballot process, unions have turned to corporate campaigns, with the goal of coercing assistance from employers whose employees they do not represent, resulting in non-majority neutrality agreements. Such agreements, as exemplified by the agreement at issue in this case, commit the employer to refrain from exercising its "free speech" rights guaranteed under Section 8(c) of the Act, and further commit the employer to actively assist the union in its organizing campaign by various means, including the waiver of the secret ballot election process in favor of unreliable card check procedures. In the present case, the neutrality agreement goes so far as to impose terms and conditions of employment on the as-yet-unrepresented workforce, with the further proviso that the agreement is enforceable by arbitration and judicial enforcement under Section 301 of the LMRA.

Unquestionably, the type of pre-recognition neutrality agreement at issue here constitutes a violation of Section 8(a)(2) of the Act, which prohibits any employer from dominating or interfering with the formation or administration of any labor organization. Moreover, by creating an incentive for unions to resort to "top down" pressure tactics against employers and their customers in corporate campaigns, the recent proliferation of such neutrality agreements around the country is creating an intolerable environment of

coercion and secondary pressure having nothing to do with the desires of employees in the workforce to seek or refrain from union representation. Absent intervention by the NLRB to declare unlawful the type of agreement that is present in this case, the underlying goals of the Act will be perverted, with serious long-term consequences.

2. Pre-Recognition Neutrality Agreements Contravene The NLRA's Mandates Favoring Secret Ballot Elections And Prohibiting Employer Domination Or Assistance To Unions.

Since 1935, the Act has provided a clear statutory preference for employee majority representation based upon the secret ballot process administered by the Board. In 1947, the statutory preference became a mandate, when Congress declared through Section 9(a) of the Act that Board certification of unions as employee representatives would be restricted exclusively to Board-conducted secret ballot elections. The secret ballot process has long been referred to as the "crown jewel" of the Board's accomplishments, advancing workplace democracy and protecting employee rights to freedom of choice. The Board has repeatedly emphasized the importance of preserving "laboratory conditions" in the conduct of elections to assure that employees are fully protected and fairly informed prior to casting their secret ballots.

By contrast, throughout the Act's history, union authorization cards have been declared to be an inherently unreliable indicator of true employee sentiment. In NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) and Linden Lumber v. NLRB, 419 U.S. 301 (1974), the Court observed that secret ballot elections were "the most satisfactory, indeed the preferred method of determining employee free choice." Gissel, 393 U.S. at 602. The Court further noted: "The unreliability of the cards is not dependent on the possible use of threats …. It is inherent … in the absence of secrecy and the natural inclination of most

people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees." Id. at 602, n.20. See also NLRB v. Cayuga Crushed Stone, 474 F. 2d 1380, 1383 (2d Cir. 1973); NLRB v. Village IX, Inc., 723 F. 2d 1390 (7th Cir. 1983).

Ironically, the UAW and AFL-CIO themselves, when it has suited their interests, have declared that employee decision-making other than by secret ballot elections is "not comparable to the privacy and independence of the voting booth." See Brief filed with the NLRB in Levitz Furniture Co. of the Pacific, Inc. (20-CA-26596) on behalf of UAW, UFCW and AFL-CIO. In the Levitz case, the unions advocated that employers be denied the right to withdraw recognition from previously certified unions in the absence of a secret ballot election. The unions stated: "Less formal means of registering majority support … are not sufficiently reliable indicia of employee desires on the question of union representation to serve as a basis for requiring union recognition." Id.

An equally longstanding tradition under the Act surrounds the prohibition against company dominated or assisted unions. Section 8(a)(2) was enacted expressly to prevent unions from being "supported, in whole or in part, by the employer." 79 Cong. Rec. 7483 (March 15, 1935 (Sen. Wagner), reprinted in 2 Leg. History of the NLRA 1935, at 2334. The Supreme Court held in Ladies Garment Workers v. NLRB, 366 U.S. 731 (1961), that "there could be no clearer abridgement of Section 7 of the Act" than for the employer to engage in bargaining with an agent selected by a minority of employees, "thereby impressing that agent upon the non-consenting majority." Id. at 737.

Subsequently, the Board held in Majestic Weaving Co., 147 NLRB 859 (1964), *enf. den. on other grounds*, 355 F. 2d 854, at 860 (2d Cir. 1966), that "the Respondent's contract negotiation with a nonmajority union constituted unlawful support within the

meaning of Section 8(a)(2) of the Act." The Board thereby overruled Julius Resnick, Inc.,. 86 NLRB 38 (19__), which had improperly permitted minority union bargaining "so long as the union has majority representation when the contract is executed." 147 NLRB 860, n.3. See also American Bakeries Co., 280 NLRB 1373 (1986).

The sole recognized exception to pre-recognition bargaining under the Act, prior to the present case, has been limited to Section 8(f), which uniquely permits employers in the construction industry to recognize unions as employee bargaining agents without any indication of actual majority status. In accordance with this narrow statutory exception, the Board has refused to allow employers outside the construction industry to enter into pre-majority bargaining agreements with unions under the guise of 8(f) or otherwise, at least until now. Columbus Bldg. & Const. Trades Council (Kroger Co.), 149 NLRB 1224, 1225-6 (1964). See also John Deklewa & Sons, 282 NLRB 1375 (1987).

3. Upholding Dana-Style Neutrality Agreements Will Encourage Unions To Engage in Coercive Corporate Campaigns Against Employers And Will Discourage Reliance On Democratic Organizing Processes.

In recent years, having failed to achieve their organizational objectives via the democratic process of secret ballot elections conducted independently of any employer assistance under Sections 9(a) and 8(a)(2), unions have adopted a fundamentally anti-democratic strategy. This strategy has centered on the use of corporate campaigns to coerce employers into providing unlawful assistance to unions via neutrality agreements that improperly grant bargaining rights to unions who do not represent the employers' employees.

The pernicious tactics and effects of corporate campaigns have been widely documented. The AFL-CIO itself has described them as attacking employer

vulnerabilities "in all of the company's political and economic relationships – with other unions, shareholders, customers, creditors and government agencies – to achieve union goals." Industrial Union Dept., AFL-CIO, "Developing New Tactics: Winning with Coordinated Corporate Campaigns," at 1 (1985). Others have pointed out that corporate campaigns have little to do with fulfilling the desires of employer workforces for union representation, but that such campaigns focus instead on bringing *outside* pressure to bear on employers for the purpose of imposing a union on units of workers *regardless* of the wishes of the employees themselves. *See* Jarol Manheim, "The Death of a Thousand Cuts: Corporate Campaigns and the Attack on the Corporation," (Lawrence Erlbaum Assoc., 2001). *See also,* Yager and LoBue, "Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century," 24 *Employee Relations Law Journal* 4 (1999); Herbert R. Northrup, "Union Corporate Campaigns and Inside Games as a Strike Form," 19 *Employee Relations Law Journal* 507 (1994); Herbert R. Northrup, "Corporate Campaigns: The Perversion of the Regulatory Process," 17 *Journal of Labor Research* 345 (1996); Charles R. Perry, "Union Corporate Campaigns" (Wharton School, Industrial Research Unit, 1987), Food Lion v. United Food & Commercial Workers Int'l Union, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997) *cert. denied,* 118 S. Ct. 1299 (1998) (generally discussing union corporate campaign tactics).

The primary objective of a corporate campaign, as has also been well documented, is a neutrality agreement of the sort exemplified by the present case. Cohen, "Neutrality Agreements: Will The NLRB Sanction Its Own Obsolescence?" The Labor Lawyer (Fall 2000). Once an employer can be compelled to capitulate to union corporate campaign coercion, such a neutrality agreement can be negotiated with the employer that

ensures the union's imposition in the workplace, without the involvement, consent, or even knowledge of the employees to be organized.

Amicus ABC has become particularly familiar with union corporate campaigns in the construction industry, where the objective of the construction unions has been the coerced signature of project owners and contractors on union-only project labor agreements. At the same time, a disturbing trend has developed of project labor agreements being signed in conjunction with minority union neutrality agreements applying to non-construction workers. There is little to distinguish such neutrality agreements, which are not authorized by Section 8(f), from construction project agreements, whose sole authorization derives from the narrow statutory exemption.

The result of such corporate campaign activities, both in the construction industry and elsewhere, has been to interfere with interstate commerce and to undermine the Act's goals of labor democracy and labor stability. As one of many examples, the California Unions for Reliable Energy (CURE) has implemented corporate campaign tactics to compel the negotiation of both PLA's and neutrality agreements on power plants throughout that state while at the same time delaying much needed energy resources until union demands are met. See Remarks of California Building and Construction Trades Council President Robert Balgenorth at www.ibew.org. See also "When Unions Use Greenmail," San Jose Mercury News, Dec. 2, 2003 (Describing how unions use "greenmail, objecting to environmental permits and delaying approval of projects until the owners sign a union-only guarantee."). See also Herbert R. Northrup, "Corporate Campaigns: The Perversion of the Regulatory Process," 17 *Journal of Labor Research* 345 (1996).

As a matter of labor policy, the Board should recognize that allowing minority unions and employers to enter into neutrality agreements limiting the rights of both employers and employees creates a strong incentive for unions to pursue anti-democratic "top down" corporate campaigns in lieu of democratic, "bottom up" organizing via secret ballot elections. Indeed, without the perverse incentive of neutrality agreements, unions would have little reason to continue to conduct corporate campaigns, as employers would be unable lawfully to succumb to such outside pressure tactics at the expense of their employees. Instead, both unions and employers would necessarily return to the statutorily preferred procedures outlined in the Act.

In this regard, it must be recalled that the Act was not designed to protect the interests of either unions or employers, but was instead intended to protect the rights of *employees*. Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992). Employee interests are not at all served by secret neutrality agreements between unions and employers, with the latter frequently operating under duress or coercion, and in which non-employee agents conspire to dictate terms of employment to the workforce.[1]

4. Respondents' Policy Arguments In Support Of The Judge's Holding Are Unsound And Should Be Rejected By The Board.

The Administrative Law Judge in the present case adopted Respondents' arguments that their neutrality agreement was lawful under the Board's decision in Majestic Weaving because Dana did not explicitly recognize the Union as the

[1] The fact that the employer in the present case appears to have been a willing participant in the process of negotiating and implementing the neutrality agreement is irrelevant to the question of the agreement's legality. Motivations of employers who sign neutrality agreements vary widely and are frequently influenced by secondary union pressures that the Act, as amended, was intended to prevent. See Eaton and Kriesky, "Dancing With The Smoke Monster: Employers Motivations For Negotiating Neutrality and Card Check Agreements" (September 2002).

representative of its employees at the St. John's plant prior to negotiating with it. The Unions' Brief, at 14, has further asserted that there are "strong policy reasons" for not "extending" the holding in Majestic Weaving as sought by the General Counsel and the Charging Parties. To the contrary, the Judge erred in failing properly to apply Majestic Weaving and Section 8(a)(2) to the facts of this case, and national labor policy strongly compels reversal of the Judge's decision.

In particular, the Judge's decision, if upheld, would give protection to an utter fiction: it would allow an employer to violate the letter and spirit of Section 8(a)(2) by negotiating with a union and setting terms of employment that would otherwise be unlawful, merely by being careful not to utter any "magic words" of recognition to the union agents. Section 8(a)(2) by its terms does not condition its prohibition of domination or assistance on any actual recognition of a union. To read Majestic Weaving as imposing such a requirement would turn the statute on its head by encouraging employers to negotiate with minority unions, and even to reach agreements with them, without actually recognizing such unions as the representatives of the employees. One of the fundamental goals of the Act was to eliminate such practices and to require employers to negotiate only with unions who have been democratically selected as the majority representative of employees in an appropriate bargaining unit.

Thus, the arguments advanced by both the General Counsel and the Charging Parties on this point are correct. Either the act of negotiating the neutrality agreement with a union constitutes implicit and unlawful recognition of it, or the act of pre-recognition bargaining itself is an independent violation of Section 8(a)(2). Either way, no formalities of recognition are required in order to state a violation of the Act, and the

Judge's and Respondents' contrary views can only lead to nonsensical results. The Judge was wholly unjustified in dismissing the case due to the alleged omission from the Complaint of a claim of unlawful recognition, and the Judge's alternative grounds for finding no substantive violations under Majestic Weaving were equally erroneous.

Conclusion

For the reasons set forth above and in the briefs of the General Counsel and the Charging Parties, the Board should reverse the decision of the Administrative Law Judge and should find that the neutrality agreement at issue here violated Section 8(a)(2) of the Act.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing Amicus Brief was sent via first class mail postage prepaid, unless otherwise stated, to the following on April 27, 2006:

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