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 L. SMELTZER, JOSEPH MONTAGUE, and KENNETH GRAY (Employee Charging Parties).	)	Judge William G. Kocol Case Nos. 7-CA-46965, 7-CA-47078, 7-CA-47079, 7-CB-14083, 7-CB-14119, and 7-CB-14120

AMICUS BRIEF ON BEHALF OF AMERICAN MARITIME ASSOCIATION

Dated: New York, New York
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PRELIMINARY STATEMENT

This amicus brief is filed on behalf of the American Maritime Association ("AMA"). AMA is an employer trade association whose nine members own and/or operate U.S.-flag vessels, both on the oceans and the Great Lakes.[1] AMA member companies collectively operate the majority of ocean-going vessels now operating under the U.S.-flag.

As bargaining agent for its members, AMA negotiates and is party to four "standard" industry agreements with the Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District/NMU, AFL-CIO ("SIU") covering the unlicensed personnel employed on deep sea and Great Lakes tankers and dry cargo vessels.[2] AMA is filing this amicus brief because it believes that the experience of its member companies in situations analogous to Dana Corporation's ("Dana") serve to illustrate the practical and operational benefits that pre-recognition discussions and/or agreements can have for companies, unions and employees and conversely, the burdens -- which are sometimes onerous -- that confront the labor-management community if pre-recognition contracts are significantly limited. AMA believes that a relaxation of the restrictions on pre-recognition discussions will, with appropriate protections for employee choice, mutually benefit labor, management, and the affected employees.

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[1] The member companies of AMA are: Alaska Tanker Company, LLC; American Steamship Company; Great Lakes Fleet/Key Lakes, Inc.; Hannah Marine Ship Management; Horizon Lines, LLC; Interocean American Shipping Corp.; Intrepid Personnel & Provisioning, Inc.; Maersk Line, Limited; and OSG Ship Management, Inc.

[2] With limited exceptions, the licensed deck and engine officers employed on those vessels (who have traditionally, but not always been treated as statutory supervisors) are also unionized and represented by other maritime unions.

I. THE PRE-RECOGNITION DISCUSSIONS AND AGREEMENTS BETWEEN DANA AND THE UAW DID NOT VIOLATE SECTION 8(A)(2) AND (1).

A. The Board Has Broad Statutory Authority to Strike an Appropriate Balance Between Competing Interests.

The days when increased cost of unionization could largely be neutralized by imposing that cost on an entire industry or market have dissipated with globalization and non-union competition. Many companies today might be willing to rethink their traditional opposition toward unions if they believed that an adversarial relationship could be replaced with a form of "value-added" unionization, *i.e.*, a collaborative and mutual recognition that enhancement of employee rights and benefits must be harmonized with the company's need for efficient and cost-effective management. If a company had assurances that unionization would not make it uncompetitive, many companies -- particularly in industries where unionized personnel provide a ready source of skilled labor and the union itself could prove to be a valuable legislative and regulatory ally -- might approach unionization with a different mindset. Unfortunately, the current law under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(2), inhibits such contacts and forces companies into adversarial situations that might otherwise be avoided. See NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2).

Underlying the briefs of the parties in this case is a disagreement over the reconciliation of competing interests and statutory objectives: Labor relations stability and the statutory policy of "encouraging the practice and procedure of collective bargaining." NLRA § 1, 29 U.S.C. § 151, are counterbalanced against concerns that pre-recognition discussions infringe Section 7 rights and restrict employee free choice.

Effectuating national labor policy by striking the "difficult and delicate" balance between competing interests is a responsibility that lies within the special province of this Board. Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 410 (1982). When this Board

strikes such a balance, its decision is entitled to deference and limited judicial review; it will be upheld "as long as it is rational and consistent with the Act." NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 787 (1990); see also NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957). Moreover, the Board's decision will be upheld even if it represents a departure from prior policy. See NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265-266 (1975) ("The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision-making.").

This case presents an unusual opportunity for the Board to exercise its expertise to fashion a labor relations policy that reconciles competing interests and statutory objectives in the context of the needs and realities of 21st Century labor relations.

B. The Existing Precedents Provide Broad Leeway to the Board in Fashioning an Appropriate Labor Relations Policy.

The cases cited in the parties' brief cover a wide variety of situations. At one extreme are the cases like ILGWU v. NLRB (Bernhard Altmann), 366 U.S. 731 (1961) and Majestic Weaving Co., Inc. of New York, 147 N.L.R.B. 859 (1964), in which the employer granted exclusive recognition to the union without any demonstration of majority status and then proceeded to negotiate a full collective bargaining agreement before majority status had been established. As the Board noted in Majestic Weaving, both of these cases involved situations in which an agent with "exclusive representational status" was "impressed" on a non-consenting majority. Majestic Weaving, 147 N.L.R.B. at 860. In this case, in contrast, there was no grant of Section 9(a) recognition, *i.e.*, the "recognition" granted by Dana did not serve as a contract bar, and it was specifically conditioned on a subsequent showing of majority status.

In contrast to cases like Bernhard Altmann and Majestic Weaving are a wide variety of cases and General Counsel rulings which upheld discussions and/or agreements between a company and the union before the union's majority status had been demonstrated. A good example is Houston Division of Kroeger Co., 219 N.L.R.B. 388 (1975), which involved an "after-acquired" shop clause recognizing the union as the bargaining representative at all stores operated by the employer in Texas. The Board found that employees in a newly-opened store -- which the Board treated as a separate bargaining unit -- could lawfully be covered by the pre-existing, multi-store contract if a card check established the union's majority status in the new store, *i.e.*, the Board upheld recognition of the union in a new bargaining unit even though the agreement that would apply to that unit was fully negotiated before the union attained majority status at the new store.

Other Board decisions and General Counsel rulings strike a similar balance between the interests of labor relations stability and Section 7 rights. The 1981 Advice Memorandum in St. Louis Post Dispatch, 1981 WL 25940 (N.L.R.B.G.C.) -- which has served as a *de facto* guide to labor and management in subsequent successor situations -- allows the buyer of the assets of a business to negotiate a full collective bargaining agreement with the seller's union before the assets have been acquired, subject to a demonstration of majority status after the seller hires the employees for the acquired facility. Similarly, Harte and Co., Inc., 278 N.L.R.B. 947 (1986), addressed the issue of whether the union at a closed plant was entitled to recognition at a relocated facility. In that case, the employer relocated its plant from Brooklyn to New Jersey and extended the collective bargaining agreement at the Brooklyn plant to the New Jersey facility. Noting the line of cases which held that an existing contract will apply at a relocated plant if the employees from the closed plant represent a "substantial percentage -- approximately 40% or

more" of the new plant's employees the Board held that because a "substantial percentage" of the employees in the New Jersey plant (but not a majority) came from the Brooklyn plant, the Brooklyn contract lawfully applied to the New Jersey plant. Id. at 948. The Board recognized the need for "balancing the newly hired employees' interest in choosing whether or not to have union representation against the transferees' interest in retaining the fruits of their collective activity." Id. at 950. Among the considerations which the Board cited to support its balancing of interest were the good faith of the parties, the absence of representational claims from other unions at the New Jersey facility, and "the national labor policy" which favors "industrial stability achieved through collective bargaining." Id. Significantly, Harte and Co. was decided by then-Chairman Dotson and Members Dennis and Johansen -- hardly a "liberal" panel. See also General Motors Corp., Saturn Corp., 1986 WL 620213 (N.L.R.B.G.C.) (recognition of UAW at the new Saturn plant upheld based on a card check conducted after certain terms and conditions were negotiated and justified on the theory that the agreement was part of the effects bargaining for UAW employees at other locations); Eltra Corp., 205 N.L.R.B. 1035, 1040 (1973) (Section 8(a)(2) not violated when a national agreement was extended to cover a new unit that had voted to unionize).

Reasonable people may have differing views about how the Board balanced the competing interests in each of these cases. What is most significant is not the particular resolution reached in a specific case but that these decisions collectively reflect both the process that this Board has employed in striking the "difficult and delicate" balance between competing interests and the flexibility that the Board has demonstrated in striking that balance. All of the factors considered in these cases-- protecting employee choice; labor relations stability; good faith of the parties; absence of competing representational claims -- are factors which the Board

can collectively weigh in this case to strike an appropriate balance -- which, we submit, supports the alternative recommendation of the ALJ to dismiss the complaint. As noted above, these cases illustrate the broad leeway that is available to this Board in reconciling the conflicting interests and policies at play in this case.

1. As To Section 7 Rights:

Among the issues that will undoubtedly be considered in striking the appropriate balance in this case is whether the card check approval required by the Dana-UAW agreement sufficiently protects the Section 7 rights of the employees. In evaluating the issue of free choice, we urge the Board not to underestimate the ability of employees to make an informed choice and resist unionization if they choose to do so, particularly in situations like this which will typically be categorized by the absence of threats and intimidating behavior. The fact that the Dana employees in this case chose not to approve the UAW contract illustrates this fact.

It will, of course, be argued that the ability of employees to make a free choice is impaired when the employer deals with a minority union, thereby conferring a "deceptive cloak of authority" on it. Bernhard Altmann, 366 U.S. at 736. But, as noted above, in this case, unlike Bernhard Altmann, there was no Section 9(a) recognition by the employer. Moreover, as Professor Estreicher has noted, the concern about free choice is hard to reconcile with the law's tolerance of voluntary recognition, see Samuel Estreicher, "Freedom of Contract and Labor Law Reform; Opening Up the Possibility for Value-Added Unionism," 71 N.Y.U. L. Rev. 827, 837 (1996), and, we would add, with this Board's recognition since 1982 that employer misrepresentations, even when made on the eve of an election, do not impair laboratory conditions or free choice. See Midland Nat'l Life Ins. Co. v. Local 304A, United Food & Commercial Workers, 263 N.L.R.B. 127 (1982). Additionally, if this Board approved pre-

recognition discussions or agreements, it will still have the ability based on its reservoir of experience to discern in particular cases whether statements and conduct by the employer and/or the union had an improper influence on employee choice. In fact, employees are more likely to make an informed choice about unionization if, as here, they have a reasoned basis for understanding what the union can and cannot actually deliver through collective bargaining than they do in a typical organizing campaign where employees are caught in the crossfire between union promises and employer assertions that "everything is negotiable." Finally, while we contend that the card check recognition provided for in the Dana-UAW agreement properly protects the employees' interest, as it did in cases like Kroeger, the Board has the option in this case to determine what measure of protection is needed in this and similar cases to protect Section 7 rights. Compare Professor Estreicher's recommendation for a Board-conducted election with the Dunlop Commission's recommendations for approval following a card check. See Estreicher, 71 N.Y.U. L. Rev. at 838.

C. With Appropriate Protections, Pre-Recognition Discussions and Agreements Further the Interests of Labor, Management and Employees.

Pragmatic considerations strongly support an interpretation of Section 8(a)(2) which facilitates the kind of discussions and agreements that occurred in this case.

Employers often resist unionization because of their uncertainty about the impact that unionization will actually have on their businesses. If an employer knew the cost parameters of a potential union contract or that the union would accept certain key employer proposals, such as flexible work rules or employee participation arrangements or medical cost sharing, the concerns that typically motivate employer resistance to unionization might be ameliorated. Similarly, when a unionized employer builds a new plant, it might be willing to recognize the union at that facility if it could learn in advance what the contract for that plant would actually look like.

Without pre-recognition discussions or negotiations, this opportunity for what Professor Estreicher called "value-added unionism" is significantly diminished.

The experiences of companies in the maritime industry illustrate not only the value, but in some instances the practical necessity, for pre-recognition discussions. The U.S.-flag maritime industry is heavily unionized. One reason for that is that the unions provide the pool of skilled employees required for vessel operations. If a new company enters the U.S.-flag shipping industry, it will typically begin by operating one or a limited number of vessels. It is very difficult -- some say impossible -- for a small company to maintain a pool of reserve personnel large enough to cover shipboard vacancies caused by vacations, illnesses and unexpected departures by crew members. The pool of skilled personnel provided by maritime labor is an answer to this problem. But, if a new company is not permitted to meet with a union before its first ship begins to operate, then that company, which reasonably expects ultimately to be unionized, does not know its labor costs before it begins operations and does not know until after it commences operations whether it will be able to obtain a labor contract which accommodates its particular type of ship.

The uncertainty for a new company is compounded by the fact that companies frequently decide to go into the U.S.-flag shipping business because they have business opportunities for the vessel before it is placed into service -- for example, a potential customer who seeks a long-term charter that will provide the revenue to support the vessel. But if the entering company cannot talk to a union before hiring its crew, then the company must fix the long-term charter rate with its customer without knowing its labor costs -- which on a U.S.-flag vessel typically exceed $10,000 per day. If so, it must go into business without knowing whether it will be able to obtain

a labor contract that is consistent with the revenues generated by the charter and with the operating requirements of the covered vessels.

A shipping company confronted by these issues faces a practical Hobsen's Choice: make an investment without necessary information or circumvent the existing law by clandestinely meeting with the union to obtain that information. These mutually-unacceptable alternatives are a deterrent to doing business.

A variation on this theme occurs when a company seeks to enter the U.S.-flag shipping business by bidding to operate a ship(s) under government contract. (Some 30-40% of U.S.-flag vessels are chartered to government agencies such as the Military Sealift Command). As an example: a company has the opportunity either to build, acquire or reflag ships which are well configured to carry tanks, ammunition and other military supplies. The government issues a request or proposal for six ships to be utilized for those purposes. The bidder must place a bid based on its operating costs. The government charter is for ten years, with provisions for annual adjustments in labor costs based on cost of living. If this particular company overestimates its labor costs in its bid, that bid may be uncompetitive. If it underestimates its labor costs, it has no practical way to recoup its losses. This company faces the same Hobsen's Choice described above.

The same kind of issues can arise when a company with existing union contracts is considering the acquisition or building of new ships or placing a bid to operate under a government contract. Again, the decision to build or purchase ships may be linked with the charter that justifies the investment, or, even without a charter, the company's decision to invest

will be based on its assessment of the profitability of that investment which, in turn, requires an assessment of its labor costs.[3]

The issues discussed above are not unique to the maritime industry. They arise in almost any industry when a company is considering building or relocating a plant or making an investment in a new business. Our point is that in a wide variety of circumstances, pre-recognition negotiations are not only helpful, but necessary to intelligent company decision-making. There are, of course, companies which will decline the opportunity for such discussions and seek to operate non-union. The policy that we advocate in this brief would not affect those companies since the decision to participate in pre-recognition discussions would be voluntary. For those companies who either need that option or choose to exercise it for other reasons, such an opportunity would effectively promote important company interests, promote collaborative labor relations, enhance union representational objectives, possibly avoid the typical labor-management confrontation, and, with appropriate protections of Section 7 rights, further the interests of the affected employees.

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[3] In the maritime industry, these issues are frequently ameliorated for unionized companies because collective bargaining is usually fleet-wide. See Moore-McCormack Lines, Inc., 139 N.L.R.B. 796 (1962); see also National Maritime Union, 174 N.L.R.B. 216, 223 (1969), *i.e.*, because a newly-acquired vessel accretes into the pre-existing fleet, there is a legitimate basis for a pre-hire discussion with the union that represents all ships in that fleet. But if a company seeks to operate the new ships as a separate fleet, the justification for pre-recognition discussions with the existing union is not present.

CONCLUSION

The kind of pre-recognition agreement negotiated between Dana and the UAW does not violate Section 8(a)(2) or (1). To the contrary, the pre-recognition agreement in this case furthers the interest of the Company, UAW and the affected employees.

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Respectfully submitted,

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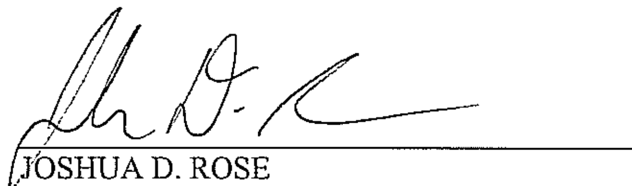

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